

## **Crown Prosecution Service– Written evidence (FDF0004)**

### **INTRODUCTION**

1. The Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS makes decisions independently of the police and government. It is the duty of the CPS to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible. The CPS:
  - Decides which cases should be prosecuted
  - Determines the appropriate charges in more serious or complex cases and advises the police during the early stages of investigations
  - Prepares cases and presents them at court
  - Provides information, assistance and support to victims and prosecution witnesses
2. Prosecutors must be independent, fair, and objective. When deciding whether to prosecute a criminal case, our lawyers must follow the Code for Crown Prosecutors. This means that to charge someone with a criminal offence, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and that prosecuting is in the public interest. The CPS works closely with the police, courts, the judiciary, and other partners to deliver justice.
3. Recognising the important role that the CPS has had and continues to have in tackling economic crime, the CPS develop its first ever CPS Economic Crime Strategy 2025 (“CPS Strategy”), published in March 2021. The CPS Strategy sets out our high-level ambition to help address the challenges in tackling economic crime and within it we affirm our commitment to improve criminal justice outcomes and support victims. It is purposely high-level, allowing us the flexibility to match our level of

ambition with the rest of the system, including government and law enforcement. The CPS written evidence to the Justice Select Committee Inquiry on Fraud and the Justice System, annexed to this submission (**Annex A**), set out our view on the challenges that need to be addressed through a whole system approach.

4. The nature of crime is changing, and the scale and complexity of organised crime groups is growing, driven by global movements of people and threats from new technologies. To tackle the ever-changing nature of crime, the CPS has decided to merge our specialist fraud, organised crime and international headquarter divisions into one new directorate called the Serious Economic, Organised Crime and International Directorate (SEOCID). The CPS Proceeds of Crime Division, whilst retaining its distinct remit, will also operate under the SEOCID umbrella. This new structure will enable us to ensure that we are making the most of the specialist knowledge that our staff have on serious, organised, and economic crime as well as increase flexibility in how we work, build resilience, and ensure that learning and experience is shared to improve our expertise.

### **EFFECTIVENESS OF THE FRAUD ACT 2006 ("the Act")**

5. Investigations into alleged criminal conduct are a matter for the relevant police force or law enforcement agency and the CPS therefore relies on matters to be referred by investigators before it can consider prosecutions. The Act is a useful tool for prosecutors, and in the year ending September 2021 the CPS started prosecutions in respect of 12,459 offences under this Act. In some cases, there will be other possible offences such as False Accounting (section 17 Theft Act 1968) or offences under the Computer Misuse Act 1990. When making a charging decision, prosecutors must decide which offence properly reflects the criminality concerned: see section 6 of the Code for Crown Prosecutors.
6. CPS has published guidance for prosecutors on charging under the Act<sup>1</sup>. This was updated in 2020, following the case of R. v Barton and Booth

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<sup>1</sup> CPS Fraud Act 2006, Legal Guidance, available at: <https://www.cps.gov.uk/legal-guidance/fraud-act-2006>

[2020] EWCA Crim 575<sup>2</sup> which changed the legal test for dishonesty from a subjective test to an objective one. This now means that juries must consider all the facts in the case, including the defendant's knowledge or belief in the facts, before deciding whether the defendant's behaviour is dishonest by the standards of ordinary reasonable people. Previously, to prove that someone had acted dishonestly in theft or fraud cases, a defendant was judged as to whether they knew or believed that their conduct was dishonest by the standards of ordinary reasonable people. The case, which was prosecuted by the CPS Specialist Fraud Division, corrected a 'wrong turn' in the criminal law 35 years ago and will influence the prosecution of cases concerning dishonesty including under the Act.

7. Whilst the Act itself is a useful tool, the CPS believe that more could be done to address the challenges in prosecuting corporate entities under the Act. Currently in order to attribute liability to a corporate entity under the Act, prosecutors have to rely on the 'Identification Doctrine', established in case law. Under the 'Identification Doctrine' a criminal act can only be attributed to a legal person (corporate) where the natural person (individual) committing the offence can be said to represent the "directing mind and will" of the legal person. In large companies with diffused decision-making responsibilities and structures, proving this is inevitably difficult. The CPS believes that the identification doctrine provides a challenge to prosecuting and convicting large companies, including some online service providers.
8. The CPS supports the expansion of the 'failure to prevent' model (as already exists for bribery and facilitation of tax evasion) to fraud, false accounting, and money laundering to tackle this issue. Current 'failure to prevent' offences are an important tool for prosecutors, but it is not simply about increasing the number of prosecutions, it is also about driving better corporate behaviours. This is evident from the relatively

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<sup>2</sup> R. v Barton and Booth [2020] EWCA Crim 575, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2020/575.html>

small number of Section 7, Bribery Act 2010 prosecutions, and the recognition, by the House of Lords Select Committee post-legislative scrutiny report of the Bribery Act in 2019, that this offence has incentivised good corporate governance.

9. The CPS provided some case examples, set out in appendix 1 of the Law Commission Discussion Paper<sup>3</sup>, to illustrate some of the areas where the restrictive nature of the Identification Doctrine provides challenges for attribution of fault to the corporate. However, there is an inherent difficulty in producing concrete case examples to a hypothetical question, as cases are currently progressed by law enforcement based on lines of inquiry under the current law and so there may well be cases that CPS have not seen as they did not progress at an early stage. Nevertheless, the case examples highlight a particular gap in enforcement (either regulatory or criminal) in the non-regulated sector, particularly for fraud. The full CPS response to the Law Commission consultation on Corporate Criminal Liability is annexed to this submission (**Annex B**).

### **ONLINE FRAUD**

10. Economic crime is increasingly enabled through the internet and the use of digital devices. We have seen cyber criminals exploiting the Covid-19 pandemic. Huge increases in the number of people working remotely means that significantly more people will be vulnerable to cyber-enabled fraud. It is likely that cyber-enabled fraud will increase. This includes more criminals trying to defraud people through phishing emails and messages or through fake websites. The CPS continues to work alongside government and law enforcement to provide a multi-agency response to combat this criminal activity.
11. The CPS welcomes the additional regulation under the Online Safety Bill, and the inclusion of fraud as a priority offence attracting a proactive duty of care on regulated internet service providers to tackle online fraud. We

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<sup>3</sup> Law Commission, Corporate Criminal Liability, Discussion Paper, available at: <https://www.lawcom.gov.uk/project/corporate-criminal-liability/>

also understand that the Bill requires that relevant internet service providers must operate the service using proportionate systems and processes designed to prevent individuals from encountering content consisting of fraudulent advertisements by means of the service. We welcome this as well as the criminal liability provisions relating to senior managers. The CPS believe that an extension of the 'Failure to Prevent' model to cover fraud, would complement these measures and help further drive compliance and prevent fraud as well as providing a useful additional tool for prosecutors to tackle this ever-growing crime.

## **ANNEX A**

### **Justice Select Committee – Call for Evidence Fraud and the Justice System**

#### **Crown Prosecution Service Written Evidence**

**17 January 2022**

#### **INTRODUCTION**

1. The Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS makes decisions independently of the police and government. It is the duty of the CPS to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible. The CPS:
  - Decides which cases should be prosecuted

- Determines the appropriate charges in more serious or complex cases and advises the police during the early stages of investigations
  - Prepares cases and presents them at court
  - Provides information, assistance and support to victims and prosecution witnesses
2. Prosecutors must be independent, fair, and objective. When deciding whether to prosecute a criminal case, our lawyers must follow the Code for Crown Prosecutors. This means that to charge someone with a criminal offence, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and that prosecuting is in the public interest. The CPS works closely with the police, courts, the judiciary, and other partners to deliver justice.
  3. The CPS has a Specialist Fraud Division (SFD) which provides a specialist prosecution and advisory service for serious and/or complex economic crime cases in England and Wales. SFD has around 170 staff dealing with around 700 cases at any one time. For further details on SFD referral criteria, including a detailed list of complexity considerations please see the 'Specialist Fraud Division' part of the CPS Referral of Cases Guidance <sup>4</sup>  
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  4. CPS Areas cover the vast majority of police-investigated fraud or volume fraud. In addition, in 2018 the CPS created three new Fraud Centres in

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<sup>4</sup> CPS Referral of Cases Guidance, available at: <https://www.cps.gov.uk/legal-guidance/referral-cases>

CPS Areas to increase our capability in dealing with volume fraud casework (mainly from DWP and HMRC) and provide additional resilience at a regional level, based in Merseyside, Wales and Wessex.

5. The CPS also has a dedicated national Proceeds of Crime Division (POCD). Its 150 staff are tasked with restraining and confiscating criminal assets both within England and Wales and internationally.
6. In addition, the CPS has a number of specialist prosecutors, who may be termed Criminal Justice Advisors or Liaison Prosecutors, based overseas in countries of importance to CPS casework and/or wider government strategies. These prosecutors work alongside law enforcement partners and other HMG departments to deliver improved criminal justice outcomes domestically, as well as interventions to tackle crime in source or transit countries to reduce harm and impact on the UK.
7. The CPS recognises the concerns and statistics set out in the Justice Select Committee's call for evidence. Fraud accounts for over a third of all crime in England and Wales, but despite this criminal justice statistics<sup>5</sup> for fraud demonstrate that over time, criminal justice outcomes have been on a downward trend.
8. In this submission we highlight a number of specific challenges which should continue to be addressed through a 'whole system approach' to tackle this problem. This includes, in particular, the need to ensure that:

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<sup>5</sup> Criminal Justice Statistics Quarterly, December 2020, available at: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020>

- i. the criminal justice system, has the **capacity** to investigate and prosecute economic crime, including fraud; and
  - ii. there is a clear focus on **supporting victims** of economic crime to get the redress they seek but also to raise awareness of the economic crime threat to help prevent people becoming victims.
9. Recognising the important role that the CPS has had and continues to have in tackling economic crime, we made economic crime one of our priority programmes within our Strategy and Policy Directorate, and set up a Serious Economic and Organised Crime Steering Group which ensures a senior focus on the issues and proactive action. One of these actions was to develop our first ever CPS Economic Crime Strategy 2025 (“CPS Strategy”), published in March 2021, which sets out clear strategic priorities.
10. The nature of crime is changing, and the scale and complexity of organised crime groups is growing, driven by global movements of people and threats from new technologies. To tackle the ever-changing nature of crime, the CPS has decided to merge our specialist fraud, organised crime and international headquarter divisions into one new directorate. This will be called the Serious Economic, Organised Crime and International Directorate (SEOCID) and will enable us to ensure that we are making the most of the specialist knowledge that our staff have on serious, organised, and economic crime. Putting this new structure in place will

increase flexibility in how we work, build resilience, and ensure that learning and experience is shared to improve our expertise.

### **PROGRESS UNDER THE CPS ECONOMIC CRIME STRATEGY**

11. The CPS Strategy sets out our high-level ambition to help address the challenges in tackling economic crime and within it we affirm our commitment to improve criminal justice outcomes and support victims. It is purposely high-level, allowing us the flexibility to match our level of ambition with the rest of the system, including government and law enforcement.

12. It is a multi-year strategy and we have already made some important progress in the first year:

a) **The CPS continues to bring fraudsters to justice, including those who have exploited the Covid-19 pandemic for their own gain.**

- In 2020/21, the CPS prosecuted over 6,511 defendants, where Fraud and Forgery were the principal offence. The Specialist Fraud Division prosecuted 222 of these defendants. In 2020/21, the Specialist Fraud Division conviction rate was 77.9% and in 2019/20 it was 67.3%. The overall CPS conviction rate for Fraud and Forgery category prosecutions is 85.6%.
- In August 2021, a text scammer was jailed for using fake digital messages that claimed to be from HMRC to trick victims into providing personal banking details by claiming they may be eligible

for a Covid-19 grant, thereby targeting those who may have suffered during the pandemic. In the same month, a fraudster was jailed for pretending to offer a 92-year-old victim a Covid vaccine in exchange for money.

- b) **Our Strategy commits to considering the diverse needs of victim and witnesses, so they are supported to give their best evidence.** The CPS is fully committed to taking all practicable steps to help victims through the experience of the criminal justice process. We have a statutory obligation to provide a service to victims of criminal conduct in accordance with the Code of Practice for Victims of Crime. In September 2021, CPS SFD produced, for the first time, guidance focussed solely on how our prosecutors engage with the victims of economic crime. It sets out how we will add real value to improving the experience for victims by ensuring that investigators and prosecutors work closely together to ensure communications are consistent and to put in place a joint victim and witness engagement strategy from the outset. This is vital in complex economic crime cases which can have multiple victims based in multiple jurisdictions.
- c) **Our Strategy commits to compensating victims where possible, and we also seek to recover the proceeds of crime which can assist in enabling victims to be compensated.** Between 2016/17 and 2020/21 the CPS recovered assets worth £568 million from criminals through confiscation orders. The CPS Proceeds of Crime Division assisted HMCTS in recovering £390 million of that amount, of

which nearly £126 million was returned to victims of crime by way of compensation.

- Recently, the CPS prosecuted a former solicitor who scammed victims through the investments that he suggested. He was arrested for theft and fraud offences and ultimately made subject to a confiscation order in the sum of over £700,000 with a significant number of compensation orders. The CPS embarked upon a realisation process, and a total of over £650,000 was realised without the appointment of a receiver, which meant that the full amount was made available as compensation for the victims of the fraud.

d) **Our Economic Crime Strategy committed to a proactive approach to help shape complex economic crime cases by providing early advice to investigators.** Prosecutors within SFD aim to work closely with investigators at a very early stage to give advice which will help shape cases to generate timely, effective, and manageable prosecutions. SFD have worked closely with investigators, such as NCA, HMRC and City of London Police with a view to developing a more effective response to the fraud threat. For instance, in December 2021, CPS SFD held, for the first time, a joint HMRC investigator and prosecutor virtual conference, which included prosecutors from Crown Office and Procurator Fiscal Service (Scotland) and Public Prosecution Service Northern Ireland. Through a series of presentations and talks on issues such as early

advice for investigators, handling of disclosure, asset recovery, international issues and corporate criminal liability, the conference brought together around 760 delegates and demonstrated the importance of working together in order to bring both individuals and corporates to justice in a timely manner.

e) **In our Economic Crime Strategy, we committed to ensuring that asset recovery (both criminal and civil) and ancillary orders are considered and pursued in all economic crime cases where possible.** To this end prosecutors seek to develop case strategies to maximise the use and opportunities for asset recovery, considering all possible powers at an early stage. For example:

- In October 2021, the CPS, City of London Police, and the private sector worked together, using specialist powers, to achieve the largest ever proceeds of crime forfeiture in the UK. Two corporates (a South African law firm operating from UK offices and a Cypriot registered company, which claimed ownership of the bulk of the funds) both agreed to forfeit the equivalent of £28.75m, to settle litigation alleging that the funds in two bank accounts were from unlawful conduct. By collaboratively working with partners from Europol, foreign law enforcement agencies and stakeholders from the private sector, the investigation identified overwhelming evidence that the monies were unlawfully obtained from international money laundering and layered through the UK banking system to present a veneer of legitimacy. This was the first time

that the CPS used powers under the Proceeds of Crime Act 2002 to appear in court on behalf of the police in relation to an Account Forfeiture Order. This case demonstrates that the CPS has the capability to use our specialist knowledge and experience to assist police forces to tackle international illicit finance.

- The CPS also continues to make use of arrangements in Regional Asset Recovery Teams (RARTs) where police investigate, and work with prosecutors based in the RARTs to identify and pursue civil recovery.

**f) In June 2021, the CPS reviewed its money laundering legal guidance** to make clear that it is possible to charge someone under section 330 of the Proceeds of Crime Act 2002, for failing to report a suspicious transaction in the regulated sector, even though it cannot be proved that money laundering was planned or undertaken. This revised guidance will provide clarity for prosecutors and law enforcement on charging offences under s.330 and remove the historical barriers to prosecuting this offence. We do not envisage that this will result in a large number of additional prosecutions. It is anticipated to be most relevant to cases involving failures to report financial arrangements for Politically Exposed Persons or multi-jurisdictional money-laundering “laundromat” schemes. CPS SFD have engaged with the regulated sector to highlight the change and emphasise the importance of vigilance and compliance within the regulated sector.

- g) **The Economic Crime Strategy states that our people will have the skills and tools they need to prosecute increasingly complex economic crime cases.** The CPS is developing a network of economic crime prosecutors across all CPS Areas which will be led by the Specialist Fraud Division with a view to enhancing skills and capabilities across the country. This network will draw on the existing expertise from central casework divisions and the CPS Area Fraud Centres to gather and disseminate best practice on prosecuting fraud and other economic crime. This is especially important in light of new and emerging threats, such as the use of cryptocurrencies by organised criminals, and the increase in cyber-enabled economic crime. The CPS aim to put the network of economic crime prosecutors in place this year.
- h) **The Economic Crime Strategy also commits to promoting the use of CVP (Cloud Video Platform) and remote hearings for victims and witnesses to give evidence in fraud cases where appropriate.** During the Pandemic, the CPS have considerably expanded the use of remote evidence, frequently using the HMCTS Cloud Video Platform (CVP) to allow victims and witnesses to give evidence from locations more convenient to them. Such as from more local courts, or witness home addresses by making use of tablet devices provided by the prosecution. We hope that the use of CVP becomes much more commonplace in the future, particularly for vulnerable and elderly witnesses. In May 2021, two fraudsters were

imprisoned for defrauding vulnerable victims out of £36 million in a 'boiler room' fraud operation. The total number of victims in the case was 112. Taking into account the needs of all victims, 23 victims gave evidence via CVP.

i) **In April 2021, the CPS hosted a Community Accountability Forum (CAF) on economic crime**, to hear insights from expert speakers and attendees about how to better support victims and witnesses. feedback received went on to inform the first annual action plan for the CPS Strategy and development of the SFD Victim and Witness Guidance.

13. This provides some of the highlights so far, however there is still a lot to do in the next three years to achieve the aims we set out in the CPS Strategy. Tackling economic crime requires a sophisticated multi-agency approach with the CPS playing a vital part in that response, including through the National Economic Crime Centre (NECC). It is only through a joined-up, coordinated approach with our domestic and international partners that we can effectively address the economic crime threat.

## **CHALLENGES**

14. The CPS continues to work with government, law enforcement and criminal justice agencies, and other partners to understand and address the challenges in pursuing economic criminals, be they individuals or corporates. Below we highlight some of the challenges within the 'whole system approach' for tackling economic crime.

## **Investigative capacity**

15. Investigations into alleged criminal conduct are a matter for the relevant police force or law enforcement agency and the CPS therefore relies on matters to be referred by investigators before it can consider prosecutions. According to the 2019 Report by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services entitled "Fraud: Time to Choose", while individuals are more likely to be victims of fraud than any other crime, particularly those who are elderly or vulnerable, fraud is unlikely to be investigated by police.<sup>6</sup> The recent revisit of that Report in 2021 found that "the investigation and prevention of fraud offences, by police forces, remain under-resourced and are not given enough priority"<sup>7</sup>. Ensuring that the police are properly resourced and give adequate priority to fraud investigation, is therefore vital to address some of the disparity between volume of fraud and criminal justice outcomes.
16. Some progress is being made. For example, the latest Spending Review made an investment of £400m over the three-year period, which will provide the NECC, NCA and policing with the investigative resources to deliver a step change in the response to fraud and economic crime. The CPS stand ready to take forward cases referred to us.

## **Court capacity**

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<sup>6</sup> Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, Fraud: Time to Choose – An Inspection of the Police Response to Fraud, April 2019, available at <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/fraud-time-to-choose-an-inspection-of-the-police-response-to-fraud.pdf>

<sup>7</sup> Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, A review of 'Fraud: Time to choose' – A revisit of the 2018 fraud inspection to assess progress of the recommendations and areas for improvement, August 2021, available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/a-review-of-fraud-time-to-choose.pdf>

17. The Covid-19 outbreak presented an unprecedented challenge for the criminal justice system, which has had a significant impact on delay and the backlog of cases, including for economic crime cases. While overall fraud and economic crime cases are not disproportionately affected according to MoJ data, CPS's caseload of the most complex frauds in the Crown Court has now increased by 56% since March 2020. The CPS supports the creation of the new City of London Law Courts planned for 2026, which will specialise in economic crime casework, but recognise this will not resolve the capacity issues in the system. The CPS is keen to explore options for dealing with this issue as part of the HMG efforts around court recovery. The CPS would support any plans for dedicated economic crime courts, incentivisation of early guilty pleas and use of virtual case management hearings at earliest stage. Nevertheless, the CPS continues to work with partner agencies to ensure that all cases are prosecuted fairly and expeditiously.

### **Responding to the changing nature of economic crime and new threats**

18. The economic crime threat is continuously growing and evolving, with criminal networks becoming increasingly resilient and adaptable, quickly exploiting advances in technologies, services, and products, such as cryptocurrency, and thereby being able to operate across multiple jurisdictions. It is therefore vital that investigators and prosecutors have the capability and agility to keep pace with the changing nature of crime.

19. For example, economic crime is increasingly enabled through the internet and the use of digital devices. We have seen cyber criminals exploiting the Covid-19 pandemic. Huge increases in the number of people working remotely mean that significantly more people will be vulnerable to cyber-enabled fraud. Raising public awareness of such threats is also important. The CPS is working with NECC partners on a more strategic approach to communications across the public and private sectors, which includes an aim of preventing people becoming victims of economic crime in the first place.

20. Understanding new and emerging threats and what they mean for the way in which we prosecute and/or provide early advice to investigators is an important part of the CPS Economic Crime Strategy. It is vital that we continue to engage with partners to build this understanding, including through engagement in relevant cross government and agency forums, such as the OP ETHERIN Threat Group (a multi-agency coordinated response to Covid-19 Fraud) and exploring joint training opportunities. For example, we are currently engaging with HM Revenue and Customs about providing a cryptocurrency foundation course to our prosecutors.

### **Role of Intelligence**

21. An effective intelligence picture can be invaluable when it comes to planning pursue options, and under the leadership of the NECC, agencies are working together in a more co-ordinated way to develop this. This is essential for focussing attention on criminality which poses the greatest

risk and harm, and on cases where prosecution will have the greatest impact on future behaviour and compliance, thereby having a prevent effect as well as a pursue one. Intelligence can also inform more proactive interventions earlier, to prevent individuals and groups causing more harm. This can generate an important message of public confidence for victims and witnesses. To this end, NECC with City of London Police, have established a proactive multi-agency cell to identify the highest harm fraudsters impacting the UK, so that they can be effectively targeted. It is only right that the intelligence picture continues to be developed to inform operational activity.

### **Complexity and Disclosure**

22. As the public prosecuting service, the CPS deals with disclosure in all its casework. Economic crime is amongst the most complex work that we undertake as prosecutors. This is most notable in the volume of digital material that any one case generates. The following example helps to illustrate the volume of material in a CPS SFD case:

- 175 digital media items (computers/phones/SIMS). As a result, 27,495,924 files were loaded on Relativity (a digital platform used for looking at digital disclosure).
- 100,912 electronic files on HMRC's internal files storage system (Controlled Access Folder). Some of those individual files run to over 300 pages each.

- 14,000 pages of hard copy material uplifted during house searches.
- 556 hours of covert audio probe recorded over 9 months.
- 5 months of video probe.
- 60 Production Orders obtained covering 319 bank accounts comprising of over 35,000 pages.

23. The capability and capacity to sort this material according to relevance, sensitivity, and the disclosure test is critical to the viability of any case. SFD casework is complex, with about half of it at the "Exceptional" or "High" complexity end of the scale. About 60% of SFD caseload is pre-charge advice, mainly the provision of early advice to investigators. The planning stage for investigations is of crucial importance, investigators must be clear about what material they are seeking to seize in the first place and have a strategy for managing the examination and search of that material. A digital strategy document, dealing with these issues, is something which will evolve during an investigation, alongside other tools, such as a disclosure management document. Early engagement between investigators and prosecutors is therefore vital to help develop such strategies and shape the case.

24. Early engagement with the defence will also be crucial in helping to identify reasonable lines of inquiry, as well as narrowing down the case issues. The CPS has sought to promote defence engagement through the regional and national disclosure forums. However, there is generally a real

reluctance on the part of the defence to engage with this aspect of the Attorney General's Guidelines on Disclosure. Potential reasons for that reluctance include the unresolved issues around remuneration. We note this is an issue that is being looked at by the MoJ consultation 'Criminal Legal Aid Review: Remuneration for pre-charge engagement'<sup>8</sup>. The CPS would welcome any further initiatives to improve the level of defence engagement in the disclosure process, particularly at pre-charge stage.

25. When considering the future of digital technology in the prosecution process, the CPS is also particularly interested in how new technologies such as artificial intelligence (AI) can make a difference in facilitating the process. In this regard, last year, the CPS submitted written evidence to The Justice and Home Affairs Committee inquiry into the use of new technologies in law enforcement<sup>9</sup>.

### **Asset Recovery and Victim Compensation**

26. The impact of economic crime on victims can be devastating, ranging from vulnerable people being targeted and exploited, left with unaffordable personal losses to impacting the viability of businesses. Victims can give a Victim Personal Statement setting out how the crime has affected them, including the financial impact. The impact on victims was highlighted by the Victim Commissioner's Report on 'Who Suffers Fraud? Understanding the Fraud Victim Landscape'<sup>10</sup>, October 2021,

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<sup>8</sup> MoJ consultation 'Criminal Legal Aid Review: Remuneration for pre-charge engagement', available at: <https://consult.justice.gov.uk/digital-communications/clar-remuneration-for-pre-charge-engagement/>

<sup>9</sup> CPS Written evidence to Justice and Home Affairs Committee Inquiry, available at: <https://committees.parliament.uk/writtenevidence/38677/pdf/>

<sup>10</sup> Victim Commissioner Report, Who Suffers Fraud? Understanding the Fraud Victim Landscape, October 2021, available

which states that '4.6 million people are affected by fraud each year and around 700,000 will go on to suffer profoundly as a result of their being defrauded'. We know victims will seek redress – and our prosecutors will always be ready to assist the court to reach the appropriate decision as to sentence, which includes drawing the court's attention to its obligation to consider compensation and inviting them to make such an order where appropriate.

27. The CPS also continues to be alive to the position and needs of victims in confiscation proceedings to ensure that compensation issues are fully recognised and supported where possible within the terms of the law. This point recognises that compensating victims is not the aim of the Proceeds of Crime Act as a piece of law, it is about removing the proceeds of crime; the two are different. We have engaged with the Law Commission on this as part of their ongoing review of confiscation law.

28. It is important to consider asset recovery and compensation from the outset of a case and have financial investigators working alongside fraud investigators to help build stronger cases. In many of our cases we build teams with both POCD and SFD lawyers providing early advice to investigators on asset recovery measures to help deprive criminals of the proceeds of crime and support victims get the compensation they seek.

## **Corporate Criminal Liability**

29. The CPS supports the expansion of the 'failure to prevent' offence (as already exists for bribery and facilitation of tax evasion) to fraud, false accounting, and money laundering. Under the 'Identification Doctrine' established in UK case law, a criminal act can only be attributed to a legal person where the natural person committing the offence can be said to represent the "directing mind and will" of the legal person. In large companies with diffused decision-making responsibilities and structures, proving this is inevitably difficult.
30. Current 'failure to prevent' offences are an important tool for prosecutors, but it is not simply about increasing the number of prosecutions, it's also about driving better corporate behaviours. This is evident from the relatively small number of Section 7, Bribery Act 2010 prosecutions, and the recognition by the House of Lords Select Committee post legislative scrutiny report of the Bribery Act in 2019, that this offence has incentivised good corporate governance.
31. The CPS provided some case examples, set out in appendix 1 of the Law Commission Discussion Paper<sup>11</sup>, to illustrate some of the areas where the restrictive nature of the Identification Doctrine provides challenges for attribution of fault to the corporate. Some of the case examples highlight a particular gap in enforcement in the non-regulated sector, particularly for fraud. However, there is also more that can be done to tackle the issues in the regulated sector.

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<sup>11</sup> Law Commission, Corporate Criminal Liability, Discussion Paper, available at: <https://www.lawcom.gov.uk/project/corporate-criminal-liability/>

32. The CPS is of the view that a corporate 'failure to prevent' offence, which covers the facilitation of money laundering, could complement our revised approach to s.330 (which is primarily focused on the culpability of individuals). For example, where there have been systemic failures to report because individuals were simply following the corporate process, the public interest may well indicate that the corporate should be held to account but the evidence may not be sufficient to attribute liability under the current law. The CPS has asked the Law Commission project on corporate criminal liability to consider such s.330 scenarios as a potential area where a new 'failure to prevent' offence could be beneficial and we continue to share our operational insights with the Law Commission and others to ensure a timely and lasting solution to the challenges that prosecutors face under the current law. The full CPS response to the Law Commission consultation on Corporate Criminal Liability is annexed to this submission (**Annex B**).

### **International challenges**

33. CPS casework increasingly has an international dimension, with investigations, evidence, suspects, witnesses, victims and/or assets located outside the UK. Economic Crime casework is no exception and has continued to become more complex and span multiple jurisdictions. We also know that organised crime groups operate across borders, exploiting technology to achieve their criminal aims and this is particularly relevant for economic crime.

34. Effective cooperation with our international partners is crucial – this means we build strong relationships with our counterparts overseas, but it also means we must understand each other’s criminal justice system, and be aware that whilst we use similar words or concepts, these will have different meaning in different jurisdictions.
35. There has been a relatively smooth transition to the new arrangements for international cooperation under the EU-UK Trade and Cooperation Agreement. In relation to freezing and confiscating assets, the arrangement between the UK and EU Member States has reverted back to a system of Mutual Legal Assistance (as exists between the UK and the rest of the world) rather than Mutual Recognition. Whilst there have been some teething problems as some EU countries introduce the necessary domestic law and thinking reverts to the old system of Mutual Legal Assistance, the relationships and expectations that were built up during the operation of EU law still continue.
36. The assertion by some EU Member States of a nationality bar, preventing or limiting the surrender of their own nationals, raises operational risk across our casework with the potential to impact our ability to deliver justice. Investigators and prosecutors alike are adapting their approach to impacted cases, including fraud cases, by developing an early case strategy and, where appropriate, considering alternatives to extradition.
37. The CPS continues to carefully monitor such issues and stands ready to address any difficulties that may arise, through our Liaison Prosecutors

and our national network of International Casework Leads in concert with other agencies, as well as through our work as chair of the cross-agency International Proceeds of Crime (IPOC) Group.

## **ANNEX B**

### **Law Commission Discussion Paper on Corporate Criminal Liability**

#### **The Crown Prosecution Service Response**

##### **Introduction**

1. The Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS is independent, and we make our decisions independently of the police and government.
2. The CPS duty is to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible.
3. The CPS:
  - decides which cases should be prosecuted;
  - determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
  - prepares cases and presents them at court; and
  - provides information, assistance and support to victims and prosecution witnesses.
4. Prosecutors must be fair, objective and independent. When deciding whether to prosecute a criminal case, our lawyers must follow the Code for Crown Prosecutors. This means that to charge someone with a criminal offence, prosecutors must be satisfied that there is sufficient

evidence to provide a realistic prospect of conviction, and that prosecuting is in the public interest.

5. The CPS works closely with the police, courts, the Judiciary, and other partners to deliver justice.

**Q1. What principles should govern the attribution of criminal liability to non-natural persons?**

6. The CPS believes that the key principles upon which corporate criminal liability for economic crime should be based are:

- a) To encourage better corporate governance and more robust compliance procedures.
- b) To provide enhanced deterrence through criminal law and removing incentives to commit crimes.
- c) To ensure that complex corporate structures cannot be used to prevent accountability where corporates have benefitted from the criminal conduct of their employees or agents.
- d) Consistency of accountability for corporate bodies, whether large or small.
- e) Equalise the landscape across corporate enforcement and providing consistency of approach across different economic crime types (bribery, tax evasion, fraud, and money-laundering).
- f) Greater consistency with international compliance regimes.
- g) Enhancing justice for victims.
- h) Enhancing public confidence in a criminal justice system which holds to account all those who have played a part in the wrongdoing (individuals and corporates).

7. The discussion paper rightly recognises that there is a wide scale of potential responses by the criminal justice system to corporate wrongdoing. For instance, a punitive regime may rely on vicarious

liability to set broad parameters for criminal liability of corporates; whereas a more-narrower approach is found by relying on the identification doctrine, which significantly limits the scope for imposing criminal sanctions on corporates. The CPS recognise that the criminal justice response to corporate wrongdoing needs to balance the needs of business with corporate compliance and criminal law.

8. The CPS therefore supports the expansion of the 'failure to prevent' offence (as already exists for bribery and facilitation of tax evasion), to fraud, false accounting, and money laundering, which would provide a proportionate and effective criminal justice response to corporate wrongdoing.

**Q2. Does the identification doctrine provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?**

The Identification Doctrine

9. Under the 'Identification Doctrine' established in UK case law, a criminal act can only be attributed to a legal person where the natural person committing the offence can be said to represent the "directing mind and will" of the legal person. **In large companies with diffused decision-making responsibilities and structures, proving this is inevitably difficult.** The CPS believes that the identification doctrine provides a challenge to prosecuting and convicting large companies. The Law Commission Discussion Paper ('The Discussion Paper') provides a concise overview of the limitations of the identification doctrine.
10. Reliance on the identification doctrine leads to the inequitable position that it is far easier to prosecute small, owner managed companies than large, multi-national corporations. The practical reality is that in

a multinational company, the few people who could embody the 'directing will and mind' of the company will not necessarily involve themselves in the company's operations in the same way as a director of a smaller enterprise. Therefore, and perversely, larger companies, which have the potential to cause greater harm, are less likely to be found criminally liable for their wrongful acts.

11. The difficulties with the identification doctrine will continue to resurface, following the 2018 **Barclays** case. This represents a significant development in the law and has confirmed a narrow application of the identification doctrine. Therefore, in all but the smallest firms, the identification doctrine is of very limited use.

12. The CPS is not advocating for a modification of the identification doctrine, as we do not consider that this alone will achieve the desired outcomes of better corporate compliance and enhanced prospects of conviction.

#### Failure to prevent offences

13. We propose that it is necessary to extend the "failure to prevent" model to other areas of economic crime.

14. Current 'failure to prevent' offences are an important tool for prosecutors – but it is not about increasing the number of prosecutions. A new offence would promote good corporate governance, as we have seen with the 'failure to prevent' bribery offence and drive better corporate behaviours.

15. An extension of the 'failure to prevent' offence is likely to encourage corporates to engage with investigators (and even self-report), to demonstrate effective compliance procedures and this would bring Deferred Prosecution Agreements (DPAs) into play. Currently, the lack of a realistic prospect of conviction for wider economic crime undermines the DPA regime.

16. A new 'failure to prevent' offence may also enable better coordination with international partners, such as the US, in cases which span multiple jurisdictions. Currently there is a public perception that where the UK cannot prosecute it outsources to the US (Corruption Watch Report, Corporate Crime Gap: How the UK Lags the US in Policing Corporate Financial Crime, March 2019).
17. Whilst it is expected that regulatory reforms in recent times, such as the Senior Manager's Regime, may have some positive effects, this does not address the issues of attribution under the identification doctrine. A 'failure to prevent' offence would complement rather than provide an alternative to individual accountability. It is important to ensure that the system serves the public interest and the public expectation, and that all those involved in committing or enabling economic crime should be held to account.

#### Fraud – failure to prevent

18. The case examples provided by the CPS in appendix 1 of the Discussion Paper illustrates some of the areas where the restrictive nature of the Identification Doctrine provides challenges for attribution of fault to the corporate. Some of the case examples highlight a particular gap in enforcement in the non-regulated sector, particularly for fraud.

#### Money laundering – failure to prevent

19. However, there is also more that can be done to tackle the issues in the regulated sector. The CPS recently revised its approach to section 330 standalone cases to make clear that it is possible to charge someone under **s.330 of the Proceeds of Crime Act 2002** even though it cannot be proven that money laundering was planned or undertaken. The CPS believe that an extension of the 'failure to prevent' model would complement this approach. For example, where there have been systemic failures to report because individuals were

simply following the corporate process, the public interest may well indicate that the corporate should be held to account but the evidence may not be sufficient to attribute liability under the current law.

20. In this regard we note that the Law Commission report on Anti-Money Laundering provisions in POCA has recognised that “there may be a case for abolishing the offence, or splitting the offence to allow for the maximum penalty to be reduced in cases of negligence.” The CPS believes that there is an argument for supplementing the individual offence under s.330(2)(a) and for either replacing or supplementing the negligence part of the offence under s.330(2)(b) with a corporate offence, in order to have real impact on corporate compliance. In terms of scope, as a starting point, a new ‘failure to prevent’ offence could look to cover the scenarios relevant to s.330 as follows:

- Failing to prevent facilitation of money laundering.
- Failing to prevent facilitation of a transaction, where their employee has reasonable grounds for knowing or suspecting that another person is engaged in money laundering.
- Failing to ensure that a suspicious transaction is reported by their employee, where their employee has reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

21. It may well be argued that there is a growing trend towards greater criminal liability of corporates for economic crime offences. For example, the 2018, 6<sup>th</sup> Money Laundering Directive required Member States to take the necessary measures to ensure that legal persons can be held liable for money laundering offences. It is also worth noting that the issues with regards to Corporate Criminal Liability in the UK were recognised internationally by the Financial Action Task Force (FATF) when the UK underwent a Mutual Evaluation in 2018.

The FATF report, 'Anti-money laundering and counter-terrorist financing measures United Kingdom Mutual Evaluation Report', noted:

“177. The nature of the UK’s threat and risk profile means that legal persons are often involved in ML cases. For example, **this may occur through the use of: shell companies to obscure beneficial ownership; complicit entities such as MSBs or freight companies to facilitate ML; or a corporation fostering a culture which encourages predicate offending, such as fraud or bribery, and the resulting ML.** Where legal persons are involved in offending, the UK will wind up shell or front companies and pursue prosecution of the natural persons or civil or regulatory actions.

178. Complicit legal persons are investigated as part of the broader investigation, but rarely convicted. **This is because the UK’s ability to prosecute large legal persons for criminal ML offences under POCA and notable predicates such as fraud remains limited due to difficulties in proving criminal intent.** Under the ‘Identification Doctrine’ established in UK case law, a criminal act can only be attributed to a legal person where the natural person committing the offence can be said to represent the “directing mind and will” of the legal person. In large companies with diffused decision-making responsibilities, proving this is extremely difficult, as was acknowledged by the NCA and the SFO. In response to this issue, the UK has made legislative changes to ease the intent requirements with respect to certain offences, including bribery and corruption and, with the enactment of the Criminal Finances Act 2017, tax evasion. The UK opened a call for evidence on making similar changes to corporate liability for economic crime offences in January 2017 and as at March 2018, was analysing the feedback.” (Emphasis added)

22. An extension of the 'failure to prevent' model to wider economic crime would help address the challenges faced by prosecutors in relation to economic crime.

**Q3. In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?**

23. A 'failure to prevent' offence would complement the already existing senior managers regime. The CPS does not think that the modification of the identification doctrine to attribute all acts of senior managers to the company would capture the situations where offences are committed by lower level employees, but this is only possible due to systemic failures, which indicate that the corporate is complicit either by turning a blind eye or implicitly encouraging such misconduct.

**Q4. In Australia, Commonwealth statute modifies the common law identification doctrine so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?**

24. The current 'failure to prevent' offences capture this kind of action. Therefore, further extending that model to wider economic crime would address the challenges prosecutors face in relation to these crimes.

**Q5. In the United States, through the principle of respondeat superior, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England**

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

25. The CPS is not advocating for a vicarious liability model of liability.
26. Such a model would not draw a distinction between companies with comprehensive compliance programmes and those without, and therefore might not provide such a strong incentive to develop such programmes.
27. Whereas vicarious liability may be relied on in other jurisdictions, such as the US, the 'failure to prevent' offence has worked well in our jurisdiction, in relation to the offences of bribery and facilitation of tax evasion. This offence presents a proportionate solution to the needs of business and criminal justice. An extension of this model to all economic crime would provide consistency of approach, whereas the introduction of the principle of respondeat superior would introduce unnecessary inconsistency.

**Q6. If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?**

28. An extension of the 'failure to prevent' model should inevitably extend the due diligence defence.
29. The 'reasonable in all the circumstances' approach in the Criminal Finances Act would be the CPS preference as it appears to provide more certainty as to what is required.
30. In support of this, the CPS notes in particular that, in considering the different wording of the defence in the Bribery Act as compared to the Criminal Finances Act, the House of Lords Select Committee on the Bribery Act 2010 report 'The Bribery Act 2010: post-legislative scrutiny' stated that "On the assumption, which we believe to be

correct, that there is no intended or actual difference in meaning between “adequate” procedures and procedures which are “reasonable in all the circumstances”, we believe the latter more clearly gives the intended meaning.”

**Q7. What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?**

31. The CPS is not advocating for a modification of identification doctrine as our focus is on the challenges in relation to economic crime, which we believe are best dealt with through the extension of the ‘failure to prevent’ model. See the response to question 9 below for discussion about the burdens in relation to further ‘failure to prevent’ offences.

**Q8. Should there be “failure to prevent” offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?**

32. Yes. The CPS believe that an extension of the ‘failure to prevent’ model to fraud, false accounting and money laundering would be unlikely to require companies to do more than what they would already be expected to do under the current law (which relies on the identification doctrine) but it would enable prosecutors to hold them to account more effectively where they fail to do so. This would enhance public confidence in the criminal justice system.

33. The starting point for specific offences to be covered in an extension of the ‘failure to prevent’ model could be the offences for which a Deferred Prosecution Agreement is possible, namely those offences listing **in Schedule 17, Part 2, Crime and Courts Act 2013**.

34. There is a relevant consideration as to whether it is indeed feasible to have a single new offence covering wider economic crime or whether a

series of individual offences would need to be designed due to the different nature of the types of offending.

35. As with Tax Evasion, any new offences would not radically alter what is criminal but would simply focus on who is held to account for acts contrary to the current criminal law. They would do this by focussing on the 'failure to prevent' the crimes of those who act for or on behalf of a corporation, rather than trying to attribute criminal acts to that corporation.
36. An extension of the 'failure to prevent' model for **fraud** could include either an intention to benefit the corporate, or actually benefitting the corporate as an element of the offence (similar to s.7 Bribery Act) in order to address some of the concerns around the scope of such an offence.
37. An extension of the 'failure to prevent' model for **money laundering** could be modelled on the Criminal Finances Act so that it would be aimed at holding corporates to account for 'failure to prevent' the facilitation of Money Laundering: see the answer to Q2 above for more detail.
38. The premise upon which the 'failure to prevent' facilitation of tax evasion offence was created can be applied to money laundering. That offence was created in part to deal with professional enablers of tax evasion, and the role professional enablers play in facilitating money laundering is well known. In the consultation document for the 'failure to prevent' facilitation of tax evasion it was recognised that: "In the same way that a professional who dishonestly assists a customer to evade tax is guilty of the tax offence in which he or she becomes complicit...the corporation which employs this professional and fails to take reasonable steps to prevent their offending should also face prosecution". The same logic would apply for facilitation of money laundering.

39. There will need to be a **due diligence defence** modelled on the existing 'failure to prevent' offences. As noted above in the answer to Q6, the CPS prefers the wording 'reasonable in all the circumstances'.

**Q9. What would be the economic and other consequences for companies of introducing new "failure to prevent" offences along the lines discussed in question (8)?**

40. The 'failure to prevent' Bribery Act offence has been in force for over 10 years and should be well known by companies. An extension of this model to wider economic crime would not require companies to do anything more than that what would be expected under the current law (which relies on the identification doctrine). However, where they fail to do as required, prosecutors would be better equipped to bring them to justice and companies are more likely to adopt better compliance processes.

41. Reasonable procedures for a relevant body to adopt would be assessed according to certain guiding principles, including proportionality – what is reasonable will depend on what is proportionate to the risk faced by any relevant body. This is one of the guiding principles set out in HMRC guidance 'Tackling tax evasion: Government guidance for the corporate offences of 'failure to prevent' the criminal facilitation of tax evasion.'

42. The CPS notes that the HMRC guidance states that 'The prevention procedures that are considered reasonable will change as time passes. What is reasonable on the day that the new offences come into force will not be the same as what is reasonable when the offence has been in effect for a number of years. The Government accepts that some procedures (such as training programmes and new IT systems) will take time to roll out, especially for large multi-national organisations. HMRC will therefore take into consideration the prevention procedures that were in place and planned at the time that the facilitation of tax evasion was committed' (page 11).

43. If such an approach is taken for an extension of the 'failure to prevent' model to wider economic crime, it could help companies to plan for any costs, and develop procedures and roll these out over time. Costs may well be minimised by companies building upon existing procedures for existing 'failure to prevent' offences. It is a model companies are familiar with and therefore, as was noted when the 'failure to prevent' facilitation of Tax Evasion offence was introduced, it will help to ensure consistency and minimise the burdens on corporations.

44. The CPS expects similar guidance to be produced to cover 'failure to prevent' offences for wider economic crime. There may also be a relevant consideration around consolidation of guidance to assist relevant bodies. However, to best understand the extent of burdens on companies, it may also help to consult on draft legislation.

45. As well as consideration of the costs to business, it is also worth assessing the benefits of reform for business and the economy more generally. For instance, since a 'failure to prevent' offence is likely to have the impact of driving greater compliance, and this may benefit the wider economy, particularly post EU-exit, in helping promote the UK as a "clean place" to do business.

**Q10. In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?**

46. Whilst some types of business activity are more regulated than others this does not and should not mean an accompanying immunity from the criminal law. The criminal law provides a real incentive to improve corporate governance, as is recognised under the Bribery Act. Whilst

the financial penalties following prosecution are not necessarily more severe than those that could be imposed by a Regulator, the potential for prosecution has a different impact. For example, conviction may mean that a company is barred from bidding for government contracts, and therefore potential prosecution provides a powerful deterrent for companies that rely on such contracts. Even outside of the context of government contracts, the stigma of a conviction has a powerful deterrent effect.

47. The harm caused by companies who commit economic crime can be devastating for individuals as well as the economy and society as a whole, which is why it is only right that they be held to account under the criminal law – if one were to say that corporates should not be subject to the criminal law this could have negative implications for public confidence in our criminal justice system.

48. There is no reason why regulatory and criminal action cannot be taken in respect of the same action, when appropriate, to add to that deterrent effect. The more pertinent point for the CPS is that a 'failure to prevent' model for wider economic crime would help address the challenges in proceeding with a prosecution against a corporate. This may well compliment any further enhancement of existing regulatory powers. Therefore, any new civil powers should also be considered alongside reform of the criminal law, not as an alternative.

#### Prosecutors Convention

49. In this context it is important to recognise that the CPS works with different agencies, regulators or prosecutors throughout the UK and overseas. A multi-agency approach is important to tackle the full scale of the threat posed by Economic Crime.

50. In this regard, the CPS, alongside the SFO and the FCA are signatories to the Prosecutors' Convention of 2009 under which authorities commit to:

- actively managing the interface with each other (and other agencies) from the earliest possible stage;
- working together in a co-ordinated manner to ensure that decisions in individual cases are taken promptly and that they serve the overall public interest, having regard to the nature and seriousness of the harm and offences alleged; and
- Enforcing the law in a fair and effective way.

### Civil Recovery

51. The CPS already consider the use of civil powers under the Proceeds of Crime Act. However, noting the greater deterrent effect of the criminal law, this should not be considered as an alternative to criminal prosecution, where criminal prosecution may be appropriate either alongside or separately from civil proceedings. The updated guidance issued by the Home Office and Attorney General in June 2021 provides clarity that civil recovery should be considered as an asset recovery option at all points of a case. This provides a clear legislative steer on the utility of civil recovery. In parallel with this development, there is an ongoing three-year project between the CPS and the National Police Chiefs Council to pursue civil recovery cases (currently in year two). The project supports the strategic priorities of the Government's Economic Crime Plan in that it strengthens the capabilities of law enforcement to deter and disrupt economic crime by making use of all available tools. The project also supports the four strategic pillars of the Asset Recovery Action Plan (ARAP), namely: strengthening the operational response, reviewing and embedding best practice and fostering innovation and collaborative working. This embedded service, means that the Regional Organised Crime Units have immediate access to essential legal advice. Therefore, the CPS plays an important role in assuring the effective recovery of assets obtained through Economic Crime.

## Serious Crime Prevention Orders (SCPOs)

52. Whilst Serious Crime Prevention Orders (SCPOs), could in theory be made against a corporate, there is no precedent of this sort that the CPS is aware of. However, we would need to consider the appropriateness of such an order in any particular case. In relation to serious economic crime it is difficult to envisage a scenario where a SCPO would be the sole action taken. We would like to draw particular attention to our SCPO guidance which states: "an application for a SCPO should generally only be made either following a conviction for a serious offence or following a decision that, applying the Code for Crown Prosecutors, the evidence available does not provide a realistic prospect of a conviction or a prosecution would not be in the public interest, for reasons other than the availability of a SCPO. It will usually be in the public interest to prosecute a defendant for a serious crime listed in the schedule to the Act." Therefore, non-conviction based SCPOs do not provide a realistic or effective alternative to prosecution of a corporate for serious economic crime.

## Deferred Prosecution Agreements (DPA)

53. The ultimate penalty in criminal law is a custodial sentence. Companies cannot go to prison. However, a Deferred Prosecution Agreement (DPA) can be burdensome, punitive, and rehabilitative in a way that other available penalties cannot. The DPA regime provides motivation for companies to act as good corporate citizens, and to self-report where they uncover wrongdoing.

54. They can only come into force once an indictment has been preferred by the prosecutor and suspended by the Court. Subsequent prosecution may or may not take place, depending on the level of compliance by the company with the DPA. A DPA may only be entered into if the two-stage test set out in the DPAs Code of Practice is satisfied, and it requires the company to admit to facts sufficient to support an indictment. DPAs only come into force once formally

approved by a Court, on consideration of the facts of the case and the relevant legal provisions.

55. The fact that a **criminal** prosecution can be reinstated if there has been a breach of the conditions set out in the agreement provides a strong incentive for companies to abide by the agreement. The DPA regime operates well with existing 'failure to prevent' offences, which provide a greater prospect of conviction, and thereby encourages corporates to self-report and cooperate with investigators and prosecutors.

**Q11. What principles should govern the sentencing of non-natural persons?**

56. The CPS has no comments to make in answer to this question.

**Q12. What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or connivance" or "consent, connivance or neglect" provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?**

57. Corporate accountability is not about exonerating the individual and therefore appropriate levels of accountability under the criminal law for individuals, including directors should complement any new 'failure to prevent' offences for the corporate.

58. As noted at paragraphs 8.10 and 8.11 of the Discussion Paper, "consent or connivance" goes further than encouragement and may impose liability where the general law of accessory liability would not.

59. However, for the directors to be liable on this basis for substantive offences committed by a company, it is first necessary for the company to be found liable for a substantive offence by the application of the identification doctrine. For example, under section 14 of the

Bribery Act, a director may be liable where a company is guilty of a substantive bribery offence (i.e. one under section 1, 2 or 6) and that offence is committed with their consent or connivance. However, for a company to be guilty of such an offence, the identification doctrine must apply. As noted above, there are serious difficulties with ascribing liability to the company on this basis.

60. Therefore, if it is sought to extend the personal liability of directors to situations where they would not be liable under the general law of accessory liability, it is suggested that an alternative approach should be taken.

61. Where a corporate may be prosecuted for a 'failure to prevent' offence, having a similar 'failure to prevent' offence for the director may well more accurately reflect the nature of the wrongdoing committed by the individual director. Such an approach could complement corporate liability reform (the extension of the 'failure to prevent' model to wider economic crime). However, it would be necessary to restrict the offences so that they only apply to directors who bear some personal responsibility – in large companies there will be a large number of directors, and they should not all bear responsibility for the company's failure. One possibility is to impose liability where the company's 'failure to prevent' was committed with the "consent or connivance" of a director ("consent, connivance or neglect" may well be too broad).

**Q13. Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?**

62. The CPS has no comments to make in answer to this question.

*31 March 2022*