UKELA'S Response to Law Commission Consultation Paper No 195: Criminal Liability in Regulatory Contexts

1. The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

2. UKELA's current priorities include helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level; not lower standards nor less regulation unless the same or better outcomes will be achieved.

3. UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

4. UKELA prepares its responses to consultations with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by the environmental litigation working party.

5. Given our aims, interests and expertise, we have focused on the implications of the proposals for environmental law and regulation.

The limits of criminalisation: Proposals 1, 2, 3 and 6

Are there too many offences?

6. We would not venture a view on whether in general there are too many offences. As the report acknowledges, a range of factors must be considered: numbers alone are a crude measure.

7. However, we recognise that there are circumstances where a proliferation of offences is inappropriate and problematic. The existence of a number of overlapping requirements and offences can be confusing and hard for businesses to understand. Offences can vary in their approach, causing uncertainty. The same business may well be regulated by two or three different bodies, applying legislation which takes quite different approaches to liability: it may be strict, it may be a duty subject to reasonableness or may be subject to a statutory defence. It is often difficult to find a principled or rational explanation for the different liabilities.

8. In such cases, the answer might be to simplify or rationalise the rules. The environmental permitting system is an example of an initiative to do just this: see http://ww2.defra.gov.uk/environment/quality/permitting/. A single permitting regime with one set of regulations and one core offence has replaced a proliferation of regimes, regulations and offences for different kinds of polluting activities.

9. We support this kind of better regulation initiative, as it makes the law more intelligible, consistent and less bureaucratic. It does not, however, amount to an exercise in de-criminalizing: regulatory breaches under environmental permitting still amount to an offence, albeit the rules are expressed in a more coherent way. We are not convinced that the answer to a proliferation of offences is necessarily to repeal 'low-level criminal offences' (see further below).

When is de-criminalisation appropriate?

10. We would distinguish between de-criminalising by repealing an offence, and by dealing with offending by means other than criminal prosecution.

11. We agree with the general conclusions of Professor Macrory and others, that prosecutions may be an inappropriate response to certain breaches of environmental regulation. In any given case, it may be more appropriate and environmentally desirable to require the polluter to deal with the source of the pollution, clean up, or penalise them by way of a (civil) fine.

12. This view has led to the creation of the scheme of civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 ('RES Act'). Those sanctions have been made available for a number of environmental offences this year, and will be used by the Environment Agency from January 2011. We have taken an active interest in the policy development in this area. We have commented on numerous consultations, had discussions with government officials and regulators, and held talks, debates and events on the subject.

13. RES Act civil sanctions have not replaced relevant environmental offences. Rather, they have been introduced as an alternative means of dealing with offending in appropriate cases.

14. The scheme under RES Act therefore is not an example of decriminalisation by repealing criminal offences and replacing them with civil sanctions. Rather it is an example of expanding regulators tools so that they can decide in any given case whether civil or criminal sanctions are appropriate. In effect, it allows

'decriminalisation' via regulatory response, if the regulator chooses to issue a civil sanction instead of prosecuting.

15. It seems to us that the Law Commission report has misunderstood this important aspect of RES Act. For example, paragraph 3.111 refers to the 'two-step approach … made possible by the Regulatory Enforcement and Sanctions Act 2008… [that] prioritises civil action to secure compliance over immediate criminalisation. It is only a subsequent failure to comply with the civil obligation that amounts to a criminal offence.' In fact, where RES Act civil sanctions are available, a regulator may nonetheless deal with non-compliance from the outset by prosecuting the offence.

16. We support regulators having an expanded regulatory toolkit so they can respond to a breach in the most appropriate way (whether by prosecution, civil sanction, warning etc). We agree that criminal prosecutions should be reserved for more serious cases. We consider this should be a central consideration in a regulator's enforcement policy.

17. However, we have misgivings about the prescriptiveness of the Law Commission's proposals on these issues, and in particular the general proposals for decriminalisation by repealing 'low-level criminal offences' completely, and reserving offences for certain categories of breaches.

18. A single offence may embrace a huge range of different factual scenarios of offending, from seemingly trivial to very serious. For example, an offence of breaching a permit condition may range from the minor to the very serious depending on the circumstances. A failure to supply a return of emissions information on time could be symptomatic of holiday or of a deliberate attempt to conceal serious breach of a permit causing significant pollution until the evidence of the breach can no longer be gathered. And what may seem trivial in isolation, such as a failure to service and maintain pumping equipment at a landfill on time, may be serious in context: for example when it combines with other failures such as to monitor leachate (liquid waste) levels and to employ suitably trained staff leading in turn to a serious pollution incident as the leachate eventually spills out into a watercourse.

19. Accordingly, it seems to us artificial to try to fit all offences and breaches into a hierarchy of seriousness. Many existing offences do not naturally fall into serious/non categories; and it could be tortuous to try to re-draft them so that they do (eg adding sub-clauses to specify that only certain types of breaches count as offences).

20. We would also point out that in the environmental field certain activities are required by the Environmental Crime Directive to be subject to criminal offences. Most of our domestic environmental legal requirements (whether or not covered by the Environmental Crime Directive), implement European legislation. Remedies for

breaches must therefore be effective, proportionate and dissuasive. The report suggests that the introduction of RES Act civil sanctions means regulators need no more rely on criminal offences to implement European law (see 3.111). However, for the reasons given above, this conclusion seems to be based on a misconception that RES Act civil sanctions replace criminal offences, when in fact they coexist as alternative enforcement tools.

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

21. Given our view that criminal offences can be an appropriate means of implementing certain European legislation, this seems administratively unworkable. Limits on parliamentary Bill time and the procedural uncertainties would make it highly unlikely that new European legislation could be implemented by the due date using (wholly or partly) primary legislation. This would give rise to breaches of our European and international obligations.

22. If the concern is that secondary legislation avoids due democratic processes, perhaps more use could be made of the affirmative resolution procedure.

A general defence of due diligence: Proposal 14

23. We recognise that there are a range of arguments in favour of and against this proposal which we do not see fleshed out in the Commission's proposals. We would point out that strict liability offences play a significant role in environmental law. Introducing the due diligence defence would represent a fundamental shift in approach. We recognise that the courts have also grappled with this issue within and outside of the environmental field.

24. Introducing the defence for certain offences might also fall foul of European requirements that remedies are effective, proportionate and dissuasive. This issue overlaps with the question of whether criminal offences are necessary, referred to above.

25. Given this context, we consider that evidence, further debate and legal consideration is needed before it can be concluded that the defence should be introduced for all environmental offences.

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