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CHAMBERS

# Fraud Practice Group Webinar

## – Handout

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### Failure to Prevent Fraud

The [Law Commission Options Paper on Corporate Criminal Liability](#), published 10 June 2022, proposed ten options for the reform of corporate criminal liability. Although one is to retain the ‘identification doctrine’ which typically must be satisfied for a company to be criminally liable, four hinge on the expansion of the ‘failure to prevent’ model first seen in s 7 of the Bribery Act 2010 and later expanded to include a failure to prevent tax evasion facilitation in ss 45 – 46 Criminal Finances Act 2017 –

1. An offence of failure to prevent fraud by an associated person. The offence would be committed by an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit another person to whom they provide services on behalf of the corporation.
2. An offence of failure to prevent human rights abuses.
3. An offence of failure to prevent ill-treatment or neglect.
4. An offence of failure to prevent computer use.

The options are now to be ‘taken forward’ by His Majesty’s Government but the newly re-appointed Justice Secretary has [previously expressed support](#) for expanding the failure to prevent model.

If introduced, the fraud-focused offence would be a gateway to further Deferred Prosecution Agreements and it is likely that it would apply to a company that is registered or does business in England & Wales. A company would be exposed to the “failure to prevent” offence if they did not have reasonable procedures in place to prevent a fraud of which they or a person to whom they provide services benefits. Currently, there is no suggestion that only companies of a certain turnover or type would be affected but the Law Commission has questioned the need for the offence to have the same extraterritorial reach as the equivalent bribery and tax evasion facilitation provisions.



The implications of the offence are potentially wide-ranging for corporates of all sizes. Guidance would be issued to assist companies in developing appropriate procedures which are likely to centre on the principles of proportionality, top-level commitment, risk assessment, due diligence, communication, monitoring and review which appear in similar guidance issued under the Bribery Act 2010 and the Criminal Finances Act 2017. Time to prepare will be afforded but there will be a need for a company assess their unique risk to fraud, document their considerations, develop anti-fraud controls, consider training and keep in mind the need to audit adherence.

## **The changing face of fraud post pandemic**

The global pandemic had a profound impact on all our lives. As the world emerges from the long shadow of Coronavirus, the UK, like many countries, is grappling with an upward trend in the commission of fraud offences.

The Justice Committee of the House of Commons has just reported on this issue and the findings are arresting: beyond the economic cost, fraud has become the most commonly experienced crime in England and Wales, now accounting for more than 40% of all recorded crime albeit only 2% of police funding is dedicated to tackling it. Levels of counter-fraud resourcing remain a huge concern during a time of ongoing economic uncertainty.

Over half of all frauds are now internet enabled; little surprise given the pandemic-driven acceleration of our dependence upon the internet. Increasingly, fraud is committed across borders as perpetrators constantly adapt their methods, leaving law enforcement agencies and prosecutors alike to play catch-up. There has been widespread clamour call for the prioritisation of tackling fraud offences and with a greater degree of sophistication. Little wonder then, that the CPS has launched the Serious Economic, Organised Crime and International Directorate and published its first ever Economic Crime Strategy.

The type of fraudulent behaviour now regularly encountered is of a different [kind](#) to that which we saw only a few years ago. Everyone recognises the enormous scale of the challenge we face in trying to reverse its upward trajectory.

## The Covid fraud net begins to close in

The UK has opened up following the pandemic but action to combat Covid-19 fraud continues. On 18 July 2022 HMRC published a [policy paper](#) setting out its approach so far to tackling error and fraud in Covid-19 support schemes. The paper sets out that since the commencement of the schemes HMRC has prevented more than £775 million from being lost through fraud and error, either through compliance activity or recovering overclaims. In terms of other striking figures, 26 arrests in connection with Covid-19 criminal fraud investigations have been made.

Cases involving underlying Covid-19 fraud investigations are also making their way into the High Court, Crown Court and Magistrates' Court. On [23 April 2022](#), following a fraud investigation carried out by the Insolvency Service, two companies were wound up in the High Court in the public interest. Investigators uncovered that multiple sham applications for local government business grants had been made by two companies, supported by bogus utility and bank statements. One of the companies had succeeded in receiving at least £85,000. The other had also dishonestly claimed a refund of business rates.

Corporate clients and individuals should be aware of the potential to be served with orders requiring the production of documents in the context of Covid-19 fraud investigations. Although historically the Insolvency Service has led few prosecutions, there are signs of this changing. In 2021/22 130 individuals faced criminal charges which, according to statistics released by the Insolvency Service on [22 April 2022](#), is higher than all previous years back to 2016. Under s 447 of the Insolvency Act 1985 the Insolvency Service can compel the company it is investigating or "any other person" to produce documents that it specifies. Orders for the production and disclosure of records can also be sought against accountants by HMRC and other authorities under Part 8 of the Proceeds of Crime Act 2002 when investigating criminal proceeds.

In the courtroom, the [first successful conviction of a bounce back loan fraud by the Insolvency Service](#)<sup>1</sup> was secured on 24 June 2022. The defendant was convicted in circumstances where less than two weeks after applying to dissolve his company he applied for a Bounce Back Loan of £20,000. The application for dissolution was not disclosed. Following a guilty plea, the defendant was sentenced to 24 months' imprisonment and disqualified from acting as a director for seven years. The case sets a precedent for further Bounce Back Loan prosecutions and marks out the Insolvency Service as a serious prosecutor following it also [securing convictions against tennis player Boris Becker](#) for

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<sup>1</sup> <https://www.gov.uk/government/news/bounce-back-loan-fraudster-jailed>

four bankruptcy offences relating to a failure to disclose information.

More recently a Local Councilor & Cabinet Member of Wolverhampton Council had his conviction for Covid-19 fraud overturned on appeal. The allegation had concerned an alleged fraudulent Covid-19 grant application for a business which it was claimed had been non-operational and never existed. Following an 8 day appeal against conviction, the court acquitted the defendant who had been represented by Michael Goodwin KC<sup>2</sup>.

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<sup>2</sup> <https://www.bbc.co.uk/news/uk-england-birmingham-63415676>



