JERSEY FINANCE

VOICE OF THE INTERNATIONAL FINANCE CENTRE

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12 August 2014

Dear Barry

JFSC Consultation Paper No. 2 2014 - Civil Penalties: Draft Primary Legislation

We refer to *JFSC Consultation Paper No. 2 2014 - Civil Penalties: Draft Primary Legislation* (the 'Consultation') published on 5 June 2014.

Jersey Finance Limited publicised the Consultation to its members by way of re-publication (together with a 'countdown clock') on the 'Consultations Page' of its website. We highlighted the Consultation as the first item on the "June Technical Update" (which was sent to 986 individual members) and as the second item on the "July Technical Update" (which was sent to 993 individual members). The Consultation was also brought to the attention of industry more generally at meetings of the Jersey Bankers Association (JBA), the Jersey Society of Chartered and Certified Accountants (JSCCA), the Jersey Association of Trust Companies (JATCo), the Jersey Funds Association (JFA) and the Financial and Commercial Sub-Committee of the Law Society.

The Consultation requested feedback summarised in one question, namely,

"Do you have any observations or concerns on any aspect of how the civil penalties framework would be implemented by the Amendment Law? If so, please state in detail what your observation or concern is and explain the reason for it."

Given the prior consultation, respondents were requested to restrict their comments to the detail of the proposed statutory provisions rather than focussing on the principles of a civil financial penalties framework.

Disregarding responses which were overtly also copied to the JFSC, Jersey Finance received a total of seven responses to the Consultation (from one law firm, three banks, one trust company business and two brokers). These responses are summarised below.

Respondent 1:

Section 4.3.33 details that the income generated from these penalties would be used by the Commission to reduce the annual licence fees. It is important for the Commission to continue to emphasise that the primary aim of the proposed legislation is to act as a deterrent to those who persistently or seriously contravene Codes of Practice. It is important to ensure that the driving motivation behind a civil penalty is not misinterpreted.

Section 4.3.43 states that the Commission will have the discretion to issue a public statement when it issues a registered person with a final notice to pay a financial penalty. In support of public statements [respondent 1] would also welcome continuing guidance through industry papers of examples of best practice and 'what good looks like'. This will assist FSB's in taking positive steps to avoid bad or unacceptable behaviours or practices.

Respondent 2:

We support the draft legislation provided in relation to civil penalties as this will further support the island's reputation as a well regulated jurisdiction. We do however, look forward to the consultation regarding the tariff as any future penalties imposed must remain commensurate with the income generated by firms locally.

Respondent 3:

We have two observations in relation to the proposals.

The law should require the body with the power to impose the fine to have regard to the likely impact upon the entity of the financial penalty. What we do not want to find is that a penalty is imposed which leads the entity to be unable to meet the ANLA requirement, with the likely consequence that it has to close. This would simply be a covert way of closing an entity. By analogy with court proceedings, a fine will not, generally, be imposed upon a person if he will not be able to pay it, for inevitably in that case he will be caught by the alternative of prison. If the court believes, after proper enquiry, that a person will not be able to pay a fine, it will not fine, but will find an alternative punishment, which may be prison. If the JFSC believes that the entity will not be able to pay a fine, it should not fine, or fine at the proposed level, but should find an alternative sanction.

What body should impose financial and other penalties? This may be a good opportunity to consider this point, for there is an unhappy, but not surprising, perception that, once the JFSC becomes involved, it controls the proceedings from initial investigation up to imposition of the sanctions. It would be better both for the perception of justice being done, and for the industry perception of the JFSC, if a different body, not being part of the JFSC, (i) made decisions on guilt etc. and (ii) decided sanctions, both based upon reports and recommendations of the JFSC. It would be easy to set up a panel, with a lawyer as chairman, to perform this function. We suggest a lawyer as chairman simply because lawyers are trained in the relevant principles, such as natural justice and sentencing.

Respondent 4:

Whilst we have a number of detailed comments noted below, our fundamental concern is that the effect of the Codes of Practice becoming "detailed requirements that must be complied with" as stated in 4.3.44.1 and making breach of the Codes of Practice a matter that will render a person liable to proceedings as in 4.3.45, acts to fundamentally alter their significance. As things stand today, the Codes have been developed in negotiation with industry via the accepted consultation process on the basis that they are principles supported by guidance as to their practical application, with room for individual firms to interpret them as appropriate for their own business. If they are now to be viewed as *de facto* rules, a breach of which opens a firm up to proceedings, then they should be reopened to consultation with industry on that basis and the language amended accordingly. The necessity for this is supported by the experience of examination reports that view the identification of a single instance of procedural inconsistency as evidencing a firm not meeting the requirements of the Codes. We would also feel it important to provide reassurance that no officer of the Commission will ever be given targets for generating financial penalties from identified Code breaches, when conducting regulatory visits, or have their performance assessment in any way linked to this.

An alternative approach would be to leave the Codes as they are and position the fines regime as only becoming applicable where any firm fails to follow directions issued by the Commission in respect of perceived contraventions of the Codes. Directions could then be used to enforce certain behaviours by firms that the Commission view as being expected under the Codes, following discussions and considered evaluation of how various aspects of the Codes ought to be applied and the subjective judgements being exercised by a firm, on a case by case basis. Failure by a firm to subsequently take remedial action directed could then lead to a fine and or further more serious directions by the Commission, including the possibility of licence revocation.

Our detailed comments on the consultation paper are as follows.

4.3.2 The use 'materially contravened a Code of Practice' is an inappropriate yardstick by which to assess whether a financial penalty may be imposed, as discussed above.

4.3.4 Rather than exempt an AIF which is its own AIFM perhaps any financial penalty should be targeted at the carry interest or bonus pool of the management responsible for the contravention.

4.3.10.1 Using 'seriousness of contravention' is a subjective and inappropriate criterion upon which to determine the level of any penalty. There is nothing in the list of considerations about whether or not the code in question is material to the business, its customer or shareholders. If a business does not have procedures or documentation in place about a particular part of the Codes, as it has determined that it is not relevant to its business or clients and documents it as such, is that to be viewed as a serious contravention where there is no risk to any third party?

A tariff needs to be developed in consultation with industry such that the level of 'offences' are known and understood.

4.3.10.2 Using 'ought to have known' is also subjective and felt inappropriate. If used, 'ought to have known', should be limited to where the Commission has published guidance that is clearly intended for that industry sector and that clearly reflects the circumstances of the subject incident. For example it should not be the case that information given in presentations by the JFSC at seminars should constitute 'ought to have known'.

4.3.10.5 Using 'likelihood of any further contravention' is also subjective and felt inappropriate. On what basis is it fair for somebody to be penalised for something they have not yet done?

4.3.10.6 The potential consequences should not be limited to financial and considerations should also include the impact on employees of the registered person.

4.3.10.7 The principle would be better phrased as 'not expect to retain excess profits attributable to contraventions of the Codes'.

4.3.11.1 By setting out subjective principles to which mitigating and aggravating factors can be applied, the Commission is putting itself in the position of legislator, policeman and judge with significant inherent conflicts. As the Codes themselves are very open to interpretation in a number of areas, this could involve the Commission in significant and lengthy disputes with firms. In addition, the Commission would need to ensure it has personnel with sufficient skill sets to act in a judicial capacity. A clear factually based tariff would avoid such difficulties.

4.3.14 It would be consistent for the Chief Minister's consultation to also include registered persons.

4.3.16.5 A period of 60 days would seem more reasonable given that individuals key to making any representation may not be available at the time the notice of intent is received.

4.3.17 Consideration of any representation would need to be made by minds independent of the initial assessment.

4.3.24 This would be difficult to pursue without a clear definition of what constitutes serious misconduct and what meeting the civil standard of proof entailed.

4.3.25 Would the 5% penalty be charged on a compound basis for successive months or still be based on the original amount of the penalty?

4.3.29 A period of 60 days would seem more reasonable within which to lodge an appeal.

4.3.36 Rather than return money to the States it would be more appropriate to retain it and use it to maintain lower fees in that sector over future years. Alternative uses might be to provide training for regulated businesses within that sector, undertake relevant research exercises or improve the tools available from the Commission that support the sector.

4.3.37 It is hard to envisage a circumstance where such an Order might be appropriate. Given that the Commission can already return surplus revenue to the States this seems unnecessary.

4.3.38 Consultation on such a matter by the Chief Minister should also take place with registered persons.

4.3.39 Without a clear indication of the intention it does not seem appropriate to include this power.

4.3.42 At what stage of the process would failure to pay a financial penalty become grounds to revoke a licence, considering the Commission will have the power to enforce the debt through the courts?

4.3.43 It would seem appropriate to only issue a public statement once a financial penalty has been paid and is therefore not subject to any appeal, especially considering the potential impact of a public statement on a subject business remaining a going concern.

Respondent 5:

4.2.3 In Jersey [Respondent 5] is Fund Manager to a number of Jersey Recognized Funds. In this respect we believe that for a Recognized Jersey Fund only sections 3 and 4 of the Alternative Investment Funds Codes of Practice applies. At present the CP does not define which sections of the Codes of Practice apply and it would be helpful to have this clarified.

4.3.16.5 This gives us only one month to make representations to the Commission following its issue of a "notice of intent" to impose a penalty.

4.3.19 Appeals must be lodged with the Commission within one month of receipt of the final notice.

How do these [two] timescales [noted above] compare to similar processes/timescales within the FCA regime?

Respondent 6:

We feel that any fines to be imposed need to be transparent and proportionate. And we would like to see some benchmarks showing examples of what level of fines could be imposed upon particular sized companies.

Section 4.3.8 sets out that the level of a penalty would be set by criteria such as a percentage of a 'registered persons' income. We feel that if such a percentage based criteria is to be applied then it should be a percentage of the income of a particular business line of a company, rather than the whole registered person's income. For example, we would not like to see our mortgage business penalised for corporate infringement.

Further to this, we would like to see fines capped at a certain level.

We would like to see the introduction of incentives for the early settlement of any fines imposed.

In the Amendment to the Law, section 21B(3), we would like to see a further point added, stating that if a registered person has been penalised in one jurisdiction, they will not be penalised for the same infringement in another jurisdiction. It would be good to see this point included in both a Set of Principles document, and, if possible, an understanding between the Crown Dependencies.

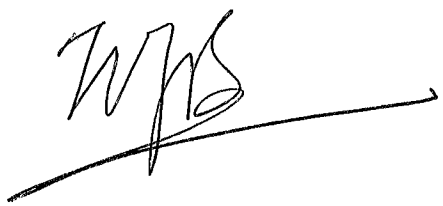
We have a concern as to whether, if in breaching the AML Handbook, we could be fined from both a criminal and civil perspective. This point is addressed in sections 4.3.23 and 4.3.24. Our specific concern would be around the statement that 'if a prosecution were unsuccessful *[in the courts]*, the Commission would have the discretion to impose a financial penalty in respect of the conduct that had been the subject of the prosecution'.

We believe that the FCA's current approach to fines is wrong, and breeds a culture of fining within business. We do not wish to see such a culture develop in Jersey. We accept the need to regulate, but the manner in which such regulation is conducted should be closely considered, so as not to adversely impact the industry in Jersey.

Respondent 7:

Given its length and detail, the response from Respondent 7 has (with permission) been reproduced in full in Appendix 1.

Yours sincerely



William Byrne
Head of Technical
Jersey Finance Ltd

Appendix 1

Consultation Paper No.2 2014 - Civil penalties: Draft Primary Legislation

Response from Bedell Cristin

Bedell Cristin

Jersey Guernsey London
Mauritius BVI Singapore

1 August 2014

W Byrne Esq
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St Helier
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Dear Mr Byrne

Consultation Paper No. 2 2014
Civil Penalties: Draft Primary Legislation

This response is divided into (A) points of substance having regard to a number of principles; and (B) detailed comments.

A. Points of Substance

1. It is important that the statutory duties of the Jersey Financial Services Commission (the "Commission") can be carried out fully, effectively and efficiently in the public interest and further that those duties are seen and perceived to be carried out in that way.

2. The principle of having an ability to impose a civil financial penalty or fine is a useful and appropriate sanction to have available in addition to those that exist at present. Indeed, it is usual for fines to be imposed for breaches of financial services regulations. The question is in whom is that power vested and how are the fines applied?

3. This power and this application must be seen in the light of the over-arching need to ensure that all laws are within the Rule of Law. For the sake of simplicity, I would describe this as follows. The Rule of Law is "A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards" - United Nations[1]

4. All laws must also, by virtue of the Human Rights (Jersey) Law 2000, be within the human rights specified by that particular legislation.

[1] UN Security Council. The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies Report of the Secretary General S/2004/616 August 23 2004.

5. In relation to the UN definition I would emphasise there are two aspects. First, the law, or at least good law, must be subject to such rule and, secondly, as an authority the Commission must also be subject to it. In particular, I emphasise the words:

   (1) "equally enforced"; and
   (2) "independently adjudicated".

6. In relation to the Schedule to the Human Rights Law, Schedule 6 states "In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal." None of the exceptions stated in Schedule 6 apply in the context of the proposal. Human rights apply to individuals and corporate entities.

7. In relation to both the Rule of Law and the Human Rights Law it is essential that justice is done and seen to be done for there to be appropriate confidence.

   In particular, I emphasise the words:

   "a fair hearing . . . by an independent and impartial tribunal."

8. Judicial decision-makers must be independent and impartial.

   "The constitution of a modern democracy governed by the Rule of Law must guarantee the independence of the judicial decision-makers, an expression I use to embrace all those making decisions in judicial character, whether they are judges (or jurors or magistrates) or not. Acceptance of this principle as a principle is widespread."[2]

   "A further essential element of the Rule of Law is the separation of powers, the separation of law makers (the legislature), those who interpret and apply the law (the judiciary) and those who have the power to enforce it (the executive) each from the other."[3]

   ". . . judges must be independent of ministers and the government. Does the principle require independence of anyone or anything other than the government? It does, It calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be. There would be an obvious threat to that independence if a decision-maker's salary or tenure of office were dependent on the acceptability of his judgments to those affected by them. A similar threat would arise if (as had happened in other countries but scarcely ever, in recent years, in the UK) a decision-maker's prospects of promotion could be blighted because his judgments were unwelcome to the powers that be.

   Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be."[4]

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[2] Lord Justice Bingham - The Rule of Law 2010 - page 91. See Appendix
[3] Francis Neate - The Rule of Law - pages 8 - 12. See Appendix
[4] Lord Justice Bingham - The Rule of Law 2010 - page 92. See Appendix.

"Closely allied to the requirement of independence is the requirement that a decision-maker be impartial. The European Convention requires a tribunal to be both independent and impartial. This means that the decision-maker, to the greatest extent possible, should approach the issues with an open mind, ready to respond to the legal and factual merits of the case. A decision-maker who is truly independent of all influences extraneous to the case to be decided is likely to be impartial, but may nonetheless be subject to personal predilections or prejudices which may pervert his judgment. Of course, since judges and other decision-makers are human beings and not robots, they are inevitably, to some extent, the product of their own upbringing, experience and background. The mind which they bring to the decision of issues cannot be a blank canvas. But they should seek to alert themselves to, and so neutralize, any extraneous considerations which might bias their judgment, and if they are conscious of bias, or of matters which might give rise to an appearance of bias, they must decline to make the decision in question. In all this, Sir Matthew Hale was ahead of his time." [5]

9. The Court of Appeal has confirmed this when in relation to a criminal matter it said:

"Procedural fairness has long been acknowledged to be an essential component of the rule of law. In the United Kingdom, recognition of it can be traced back to the Magna Carta. The Attorney General's acceptance of the importance of compliance with art. 6 of the Convention which provides that "in the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing," even in advance of the coming into force of the Human Rights (Jersey) Law 2000, serves to underscore the fact that the requirement of procedural fairness is and has been a cardinal principle of Jersey law."[6]

10. That passage would, I suggest, apply equally to a civil financial penalty as to any other criminal fine and perhaps even more so if a civil fine can be imposed where the onus of proof is only on a balance of probabilities.

11. Part of the Rule of Law principle is summarised as *audi alteram partem.* You cannot be judge and jury in your own cause. There are other Jersey judicial cases upholding the essential importance of the Rule of Law.

12. Furthermore, to speak of satisfying a burden of proof on a balance of probabilities where the judge making that decision is the investigator, policeman and prosecutor, is a hard act to perform if not, I suggest, an impossible one to perform fairly, independently and impartially. This places the Commission in an invidious and difficult position.

13. It is no answer to say there is an appeal. Justice should be right first time and not by default from a back footed position.

14. It is also no answer to say the Commission is composed of reasonable and reliable men and women of experience and sound judgment.

15. It is against this background that it is necessary to remind ourselves that the Commission would have the power to decide whether or not to:

    (1) register the Registered Person who may be fined;

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[5] Lord Justice Bingham - The Rule of Law 2010 - page 93. See Appendix

[6] Harrison v. Attorney General 2004 JLR 111

(2) make Codes of Practice and to establish their content;

(3) check, visit and inspect to see if the Codes are being followed;

(4) require remediation of any breaches;

(5) take existing enforcement measures; and

(6) in due course, and in addition to the above, consider Article 21C(1)(b) of this proposed legislation -

(a) to state it has "grounds for believing" that the registered person has contravened a Code of Practice;
(b) consider representations made; and
(c) if appropriate, issue its decision by way of final notice;

(7) enforce the payment of the fine; and

(8) keep the fine (subject only to possible partial, unspecified and uncertain future restrictions which may be made by Order of the Minister). In either event, if the Commission did not keep the fines, the government would do so.

16. In due course, further requirements will be included by the Commission in the Codes of Practice and fines will become payable for aspects not within the present contemplation of anyone today.

17. Further Codes of Practice are not drawn with the particularity and focus of criminal offences. They are often descriptive to aid understanding rather than restrictive and certain.

18. In brief, the perception and reality is that the Commission, in relation to Codes of Conduct and fines, will be:

(1) legislator
(2) policeman
(3) investigator
(4) prosecutor
(5) judge
(6) jury
(7) sentencer; and
(8) keeper of the fines.

19. The above process would not be normal and is contrary to the Rule of Law principle of the due separation of powers into the legislative, the executive and the judicial. This is part of the Rule of Law principle and a driving force reason and justification for the existence of the Human Rights (Jersey) Law.

20. The Commission cannot be independent or impartial. It will be judge in its own cause.

21. How can the Commission have reached a belief based upon grounds for guilt as will be required in accordance with Article 21(c)(1)(b) and then proceed impartially to decide the issue? Will the Commission have even shared its grounds of belief with the alleged offender? If the starting point of the hearing is based on the Commission's belief, how can the Commission come to the process with an open mind? How can the onus of proof be properly weighed?

22. The proposed protection against a wrongful fine is an appeal to the Royal Court under Article 21F. This may be by way of appeal or judicial review resulting in a higher burden. In either case, the Court is unlikely to substitute its own view and may well return it to the Commission with directions or recommendations. A virtuous circle is created. The aim should be to ensure a fine is correct and seen to be correct in the first place rather than to right it by an appeal. However, whether it is one or the other, it will, in any event, also be an unlikely path to take in most situations, partly as, unless the fine is huge, it will cost far more to appeal, whether the appeal was won or lost. It would also use up executive and management time of both the Commission itself and the regulated person. It would also result in a full public hearing. Accordingly, that route does not overcome the inherent danger. It is not a solution.

23. The solution is to have an "independent and impartial tribunal" so the matter can be "independently adjudicated" and with no interest in the outcome.

24. That should apply not only to fines, but also to all other sanctions such as withdrawing a licence or changing its terms and naming and shaming. There should be an ultimate appeal to the Royal Court for fines above a certain limit and for other sanctions and penalties.

25. Accordingly, under 21C(1)(a), a notice of intent could be provided; under 21C(2) representations could be made; and under 21C(3) the Commission could decide to refer it to the tribunal, or the registered person could accept the proposed fine without requiring further proof or other justification of the level of the fine.

26. The tribunal would need to conduct itself to the extent appropriate having regard to the sanction proposed to avoid disproportionate cost and expense so as to force a registered person to accept a fine. There could be power to award costs.

27. The tribunal could consist of one independent person (drawn from a panel) to oversee the process. It is not complex or expensive to engage. This route is even more important where the fines are to be kept by the Commission to provide for its needs and, if appropriate, to reduce the registration fees. Such an arrangement without an independent and impartial tribunal would give the appearance and lead to a temptation to fine or have a tendency to fine, to maintain or enhance remuneration, headcount, office and resource expenses and generally. It is wrong in principle, even if abuse did not occur in fact. Safeguards are required for the process to be above suspicion and in the interests of the long term credibility of the Commission.

28. It is no argument that regulatory bodies in other places operate as is now proposed. If the process is wrong in principle, a breach of the Rule of Law and of Human Rights, it should not be enacted. That others may have such procedures does not provide justification.

29. Some governments pay no attention to the Rule of Law; others do so and follow it; others apply it or disapply it arbitralily to suit particular purposes. Jersey should follow the correct and proper course. It is neither difficult nor impossible to do so. We understand the Securities and Exchange Commission of the USA no longer keeps its fines but they are paid to victims. There seems little political appetite in Jersey to do so.

DETAILED COMMENTS

Article 21A

30. This is headed "Civil financial penalties". The body of the article refers to imposing a "financial penalty" not a "civil financial penalty". "Penalty" means a penalty imposed by the Commission under Article 21A [see Article 1(2)(a)]. Civil financial penalty is not defined.

31. It is suggested the word "penalty" should be stated to be a "civil financial penalty" as indicated in the title imposed by the Commission. The body of the text should also refer to civil financial penalty.

32. The reason is:

    (1) it is clearer; and
    (2) it is important for policies including D&O, PI and insurance generally to make it clear this penalty is a civil financial penalty and further that it does not (without more) import "dishonesty".

Article 21B(1) and (2)

33. (1) The proposed order should be published and there should be consultation at this stage;
    (3) Minor provisions could have minor fixed penalties; more serious provisions should have maximum amounts. Without a maximum it is hard to assess the reasonableness of the amount. We understand Guernsey has a maximum of £200,000. It should be the same as Guernsey.

34. The devil can be in the detail. This detail in subordinate legislation should have been and needs to be announced at this consultation stage. There is no reason why it was not. We note there have been fines elsewhere of £9 billion and others of many billions and millions. Is it the intention to impose such fines in an appropriate case?

Article 21B(3)

35. In addition to the seriousness of the contravention, there should be a factor as to the importance of the particular aspect of the Code breached. Some aspects of the Code are more important than others.

Article 21C

36. Unless a tribunal is established, a fine should be based upon more than the Commission having mere "grounds to believe". There should be:

(1) clear and convincing evidence. It should be stated (in our view);
(2) the onus of proof should be stated. It should either be on a balance of probability (the civil test) or on a beyond reasonable doubt (the criminal standard);

(3) the level of the fine should be stated to be objectively fair and reasonable in all the circumstances.

Article 21E(1)

37. 5% per month would normally be considered an extortionate amount and would be disallowed in commercial contracts as a matter of public policy. See Doorstop Limited v. Gillman and Lepervier Holdings Limited 2012 (2) JLR 297

Article 21G

Proceeds of Penalties

38. If the suggestion of a tribunal or supervisor is not adopted:-

(1) the proceeds of the fines should be applied wholly and directly to reduce the registration fees; or

(2) The fines should not affect registration fees. The correct registration fees should be set for the work of the commission as at present is the case. In that case, fines could be applied direct to all registered persons; or

(3) Any benefit by method (1) or (2)should result in all sectors, not just the sector of the defaulting registered person; or

(4) a fund could be created for victims of breaches. The US SEC has now moved to that model. This would further require that a victims' scheme is established.

39. It is clear that the fine can be accompanied by a name and shame announcement. It is not clear that a fine as well as withdrawal of a licence could be imposed simultaneously. It should be clarified.

40. It is not clear whether it would be fair and reasonable to impose a fine that meant the registered person could no longer conduct business through lack of cash flow or to meet various prudential requirements or, in the case of a trust company, an ANLA shortfall.

Other points

41. There appear a number of points for which no provision has been made in the proposed legislation:

(1) In Article 21A the words "to a material extent" are not defined. They are presumably there to prevent fines being imposed for technical breaches. That is not clear.

(2) The nature of the business and the business conducting different types of financial service business may have different resources to call upon. Banks have prudential requirements; trust companies have ANLA. One year's profit may not hurt a bank - as quoted by the CEO of BNP Paribas in July 2012 (on receiving a US$9 billion fine imposed by US authorities) but it would bankrupt other types of regulated businesses and therefore create problems for clients and customers rather than protect them.

(3) A fine is a fine is a fine. Whether it is criminal or civil or administrative - it is the same in money terms with an added stigma, if it is criminal.

(4) An civil or administrative fine should, by nature, be less serious and lower in amount than a criminal fine yet the Companies (Jersey) Law 1991 ("the Companies Law") is peppered with criminal offences and fines requiring proof beyond reasonable doubt before the Royal Court. Regulatory civil fines may need to be proportionate to the level or scale of fines imposed for the criminal offences under the Companies Law. There could be a case for ensuring such company law breaches are also considered by the suggested companies' tribunal. Should a civil or administrative fine be able to be imposed on balance of probabilities or on proof beyond reasonable doubt?

(5) Can one be fined twice over - once by the Commission and once by the Royal Court? It should be made clear. 4.3.24 suggests not. Is that contained in the draft law?

(6) The time period for complying with new rules required by a Code of Conduct may well involve its development and change of systems and procedures. Implementation dates should allow sufficient time for design, development, implementation and usage before fines can be raised. Fines should also take account of the new Codes.

(7) Ultimately, it is the shareholders, customers and clients who will indirectly and over time fund the fines. Fines could result in loss of bonus and loss of jobs. Those responsible for breaches will probably not be directly affected. It may be difficult properly to attach blame to an individual.

CONCLUSION

42. We favour the introduction of civil financial penalties with an appropriate structure for fairness and the perception of fairness in accordance with fundamentally important established principles. Whether those principles are or are not followed elsewhere are no grounds for Jersey to adopt standards that fall below the proper threshold.

43. There is a clear conflict of interest. It is important that there is an appropriate division of powers. There must be no tendency or possible perceived tendency for the Commission to impose fines to benefit itself or its own work nor to act as a tax to lighten the costs of registration for others. There must be no possibility of a tendency or perceived tendency to promulgate new Codes of

Conduct so as to increase the number of breaches and to increase the amount of fines to overcome any financial constraints.

44. Clearly, the Commission has no financial difficulties at present, but it will obviously have current financial constraints. The Commission's budget for 2014 may explain the position better by showing an expected shortfall:

- In 2012 the surplus was: £114k with reserves of £7,247k.
- The forecast surplus for 2013 was: £129k with reserves of £7,376k.
- The budget for 2014 is: £(406) with reserves of £6,970k[7]

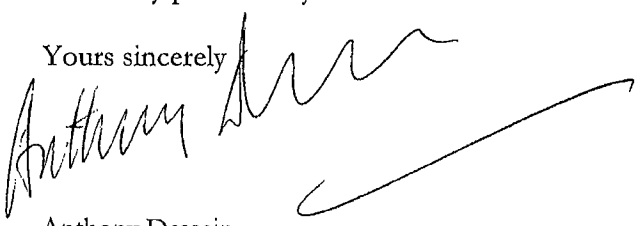
45. The work of the Commission is not likely to reduce.

46. We enclose an extract of the extent of fines in the USA to show this is a huge issue.

We are of course available to discuss this further or to answer any questions.

The proposed conflicts for the Commission and its Commissioners are daunting and as great as any can be for any public body.

Yours sincerely



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[7] Commission Business Plan 2014 published in January 2014.

Appendix

Extracts from quoted sections.

'the most eminent of our judges' *GUARDIAN*

TOM BINGHAM

THE RULE OF LAW

9

A Fair Trial

(7) Adjudicative procedures provided by the state should be fair

The right to a fair trial is a cardinal requirement of the rule of law. It is a right to be enjoyed, obviously and pre-eminently, in a criminal trial, but the rather ponderous language of this principle is chosen to make clear that the right extends beyond a criminal trial. It applies to civil trials, whoever is involved, whether private individuals or companies or public authorities. It applies to adjudicative procedures of a hybrid kind, not criminal but not civil in the ordinary sense either: proceedings in which one or more parties may suffer serious consequences if an adverse decision is made. There is no requirement that these three forms of proceeding should follow the same pattern, and in practice they do not. But there are some principles which apply to all three.

First, it must be recognized that fairness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it. A trial is not fair if the procedural dice are loaded in favour of one side or the other, if (in the phrase used in the European cases) there is no equality of arms.[1] This is sometimes overlooked, and evidence is not infrequently the subject of objection in criminal trials as 'prejudicial' when the real basis of the objection is simply that it is damaging to the defence. In truth, of course, almost all prosecution evidence is, or is intended to be, damaging to the defence.

It must, secondly, be accepted that fairness is a constantly evolving concept, not frozen at any moment of time. This is most obviously

true of criminal trials. It was only in 1836, after failures in 1821, 1824, 1826 and 1834, that a measure was introduced granting defence counsel (if the accused was lucky enough to be represented) the right to address the jury on his behalf.[2] So the prosecutor could tell the jury why the defendant was guilty, but there was no advocate to say why he was not. Mr Justice Hawkins, in his *Reminiscences*,[3] recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted two minutes fifty-three seconds, including an economical jury direction: 'Gentlemen, I suppose you have no doubt? I have none.' Not until just over a century ago was the defendant entitled to give evidence at his own trial. For the first thirty years of the twentieth century attempts to provide legal assistance for criminal defendants who could not afford it were largely frustrated by official hostility and the obstructiveness of magistrates and judges.[4] Well after the middle of the century, it was the practice of some trial judges to sum up to juries in favour of conviction in highly tendentious, sometimes even rhetorical, terms, mitigated only by reminders that of course the facts were a matter for the jury. In even more recent times, the lack of an obligation on the prosecution to disclose material in their possession has led to notorious miscarriages of justice. In some countries (some of the Southern States of the United States and parts of the Caribbean), the poor quality of defence representation is a source of unfairness. A time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all, and in retrospect most legal systems operating today will be judged to be defective in respects not yet recognized.

The constitution of a modern democracy governed by the rule of law must, thirdly, guarantee the independence of judicial decision-makers, an expression I use to embrace all those making decisions of a judicial character, whether they are judges (or jurors or magistrates) or not. Acceptance of this principle, as a principle, is widespread. In the UK, as briefly recounted in Chapter 2, the keel of judicial independence was laid in the Act of Settlement 1701, which effectively protected the judges against dismissal by the government without good cause. Further protection is codified in the Constitutional Reform Act 2005, which provides in section 3(1) that 'The Lord Chancellor, other Ministers of the Crown and all with responsibility

for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.' Section 3(5) goes further: 'The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.' The Lord Chancellor must also have regard to the need to defend judicial independence, and must swear an oath to defend it. The Lord Chancellor was in the past a judge, the head of the judiciary and the minister responsible for appointing the senior judges in England and Wales. Since 2003 he has not been a judge, and since 2005 he has no longer been head of the judiciary. His role in the appointment of judges is also much reduced. But the Lord Chancellor has also, since 2005, been Secretary of State for Justice, and he carries the major ministerial responsibility for the integrity of the justice system. He still comes into frequent contact with the judges. In the quoted sections of the 2005 Act it is judges in the strict sense who are referred to, but independence is essential to the integrity of all decision-makers in the fields under discussion, not just judges.

These statutory references make clear that judges must be independent of ministers and the government. Does the principle require independence of anyone or anything other than the government? It does. It calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be. There would be an obvious threat to that independence if a decision-maker's salary or tenure of office were dependent on the acceptability of his judgments to those affected by them. A similar threat would arise if (as has happened in other countries but scarcely ever, in recent years, in the UK) a decision-maker's prospects of promotion could be blighted because his judgments were unwelcome to the powers that be.

Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who

cannot represent themselves, however unpopular or distasteful their case may be.

Closely allied to the requirement of independence is the requirement that a decision-maker be impartial. The European Convention requires a tribunal to be both independent and impartial. This means that the decision-maker, to the greatest extent possible, should approach the issues with an open mind, ready to respond to the legal and factual merits of the case. A decision-maker who is truly independent of all influences extraneous to the case to be decided is likely to be impartial, but may nonetheless be subject to personal predilections or prejudices which may pervert his judgment. Of course, since judges and other decision-makers are human beings and not robots, they are inevitably, to some extent, the product of their own upbringing, experience and background. The mind which they bring to the decision of issues cannot be a blank canvas. But they should seek to alert themselves to, and so neutralize, any extraneous considerations which might bias their judgment, and if they are conscious of bias, or of matters which might give rise to an appearance of bias, they must decline to make the decision in question. In all this, Sir Matthew Hale (who featured in Chapter 2) was ahead of his time.

Historically, relations between judges and the government in this country were much closer than they are today, and the most senior judicial offices were held by political appointees. Today the UK has a professional judiciary which is as non-political as any in the world, and appointments are made on the recommendation of independent selection boards, which consult widely but have no political representatives. This does not prevent close and friendly co-operation on an administrative level, which is essential to the smooth running of the courts, but it ensures that the judges' decisions are theirs alone.

In this connection three cautionary tales may be pertinent. The first relates to a legislative proposal made in Britain in 1928 which would, if enacted, have permitted a minister, if it appeared to him that a substantial question of law had arisen, to submit the question to the High Court, which, after hearing such parties as it thought proper, would give its opinion on the question.[5] The proposal was the subject of a sustained attack by the judicial members of the House of Lords. The thrust of the criticism was expressed by one judge (Lord Merrivale),

The Rule of Law

Perspectives from Around the Globe

General Editor
Francis Neate

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2

THE RULE OF LAW – A COMMENTARY ON THE IBA COUNCIL'S RESOLUTION OF SEPTEMBER 2005

Francis Neate

INTRODUCTION

2.1 The following is the text of the Resolution passed by the IBA Council in September 2005:

> 'The International Bar Association (IBA), the global voice of the legal profession, deplores the increasing erosion around the world of the Rule of Law. The IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.
>
> 'An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.
>
> 'The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.'

Only two votes were cast against this Resolution. At the next meeting of the Council, the two members who voted against the Resolution declared their support for it and explained that they had only voted against it because they wanted it to be 'stronger'. It can, therefore, be fairly said that the Resolution was passed without a single dissenting vote.

The IBA is the largest international organisation of lawyers in the world, its membership comprising about 195 bar associations and law societies from

almost every nation and more than 30,000 individual lawyers, many of whom are leading international practitioners in their chosen fields. The IBA Council is the supreme governing body.

The Resolution is, therefore, an authoritative statement on behalf of the worldwide legal profession. However, it does not purport to be complete. It merely sets out *some of the essential characteristics* of the Rule of Law in a way which could be endorsed by the IBA Council and should command worldwide respect.

Since the Resolution was passed, it has become apparent that there may be some respects in which the scope of the Resolution can be expanded; and that it may also be helpful to offer an explanation of the reasoning behind the Resolution. This paper is an attempt to meet these limited objectives. It does *not* purport to be a definition.

PART I

The Foundations

2.2 The Rule of Law is the only mechanism so far devised to provide *impartial control of the use of power by the state.* That single sentence is sufficient to explain why the Rule of Law is pre-eminently the best available system for organising civilised society.

The Rule of Law is referred to in the preamble to the Universal Declaration of Human Rights[1] and in other subsequent international treaties, without being defined. The relationship of the Rule of Law to other important concepts, such as democracy and human rights, is discussed in Part III of this paper.

The Rule of Law is a relatively recent and developing concept. It has taken centuries for the Rule of Law to take root even in those countries which now claim to adhere to it. Those countries which, in the 19th century, would have claimed to be governed by the Rule of Law, have a very different view of its requirements today. Many other countries, in particular those emerging from colonial status or from various other forms of oppression, have only recently had the opportunity to begin the attempt to establish it. It is arguable that there is no country which can claim to comply fully with its requirements.

This is why the IBA Council has not attempted to provide a definition of the Rule of Law[2]. Rather, it has simply provided a list of some of the essential characteristics (described in the Resolution as 'fundamental principles') of the

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1 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law ...'

2 There have been voluminous writings about the Rule of Law, particularly in recent years: a useful bibliography can be found at http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf.

Rule of Law. These are discussed in more detail in Part II of this paper. It may well be that, in time, it will be possible to identify other essential characteristics, or to expand upon those already listed. However, all these characteristics essentially rest upon two pillars:

(1) submission of all to the law;
(2) the separation of powers.

1 Submission of All to the Law

2.3 The 'Rule of Law' means exactly that: the law is the ruler, the supreme authority. No one is above or beyond the law. Everyone is subject to and governed by the law.

Experience suggests that the only way to control power is by countervailing power, not by an abstract concept such as law. It follows that the Rule of Law can only operate in a society in which it receives widespread acceptance – not just majority acceptance, but widespread acceptance. It is essential that the organs of state power – the executive branch of government, the armed forces, the police, the security services, even the legislature and the judiciary – all accept that they are subject to the law; and that, therefore, they may only exercise such powers as are granted to them by the law and in a way consistent with the law. It is also essential that the vast majority of the other members of society accept that they are subject to the law, even if they feel disadvantaged by it. If a sizeable minority feel themselves so disadvantaged that they have no option but to resort to disobedience or violence, civil unrest or even civil war will result.

It follows that the law must be identified, devised and administered in such a way as to continue to receive widespread acceptance within society. This requires *a culture of respect for the Rule of Law*, which can take a long time to develop, and much care to maintain. 'Acceptance' does not mean 'approval': nevertheless, it is this requirement for widespread acceptance which demands attention to minority rights and individual human rights. The law is unlikely to receive widespread acceptance unless it is widely regarded as reasonable, proportionate and fair.

Acceptance does not just mean obedience enforced by fear. It means respect for the body of law in general, which is demonstrated by voluntary overall compliance with the law. Experience suggests, however, that even a reasonable body of law will not continue to be acceptable to the members of a society if their basic economic needs cannot be satisfied over a significant time period.

The requirement of widespread acceptance means that the law must be responsive to the needs of the people it serves. Thus, over time, an extensive body of criminal, administrative and civil law will be developed. In many countries much of this process will take place long before the country in question can even begin to claim to adhere to the Rule of Law. All countries, even those governed by the crudest dictatorship, need or have laws, although

they disregard the individual or collective rights of all or parts of the population. Indeed, apartheid was enforced with meticulous attention to legal form and detail.

If acceptance of the law can be achieved, it must be supplemented by enforcement. Acceptance of the law is irreconcilable with extensive tolerance of breaches of the law. Enforcement is a process which must itself be subject to the law.

A fair, independent and efficient process for resolving disputes between citizens and punishing criminality is, clearly, a fundamental requirement of any legal system. It is likely, therefore, that such a process will be provided by many legal systems which do not in other respects adhere to the Rule of Law. Accordingly, the IBA Council's Resolution scarcely refers to this aspect of a legal system at all, although it would be the first characteristic which would spring to mind for many. The inclusion of this requirement among the *minimum essential characteristics* of the Rule of Law could encourage countries which disregard the Rule of Law in other, crucial respects, to claim adherence to it and thereby deflect attention from their shortcomings.

The law will continue to change and develop in response to the changing and developing needs of its citizens even when the foundations of the Rule of Law are in place. Indeed, the more responsive the law is to need, the more change and development is likely to occur.

The provision and administration of the Rule of Law is expensive. It is a necessity required by all, but that does not lower its price.

2 The Separation of Powers

2.4 This is the other cornerstone of the Rule of Law. The primary obligation of the state is to maintain internal order and to protect its citizens from external threat. The Rule of Law does not seek to diminish the power of the state. It seeks merely to assure its proper exercise. This is achieved by separating those who make the law (the legislature), those who interpret and apply the law (the judiciary) and those who have the power to enforce it (the executive), each from the other. No one has yet come up with a better formula. The three branches of government are not inherently hostile to each other. They work together under the Constitution and the Rule of Law, and at times their functions overlap. But the separation of their essentially different constitutional tasks must be jealously guarded.

The independence of both the legislature and the judiciary is, therefore, a fundamental requirement of the Rule of Law. In practice, a perfect and complete separation of powers is difficult, if not impossible, to achieve: there has to be a system of checks and balances to ensure that the process of selecting and remunerating the persons entrusted with the respective powers does not compromise their independence.

As to the legislature, it is difficult to conceive of an appropriate system of appointing it which does not involve a democratic vote. In many countries, the head of the executive (president, prime minister or similar) is the leader of the majority party in the legislature. In such cases, considerable vigilance is required to ensure that the executive's control of the legislature is not abused. Indeed, it is difficult to conceive of a system in which the legislature is wholly free of influence by the executive.

Many countries have a written constitution which guarantees, usually subject to exceptions, certain fundamental individual and minority rights. In these cases, extreme vigilance is required when the exceptions are invoked, and an even greater responsibility falls on the judiciary, whose independence becomes all the more important.

There are similar issues in relation to the appointment of the judiciary. It is fundamental to the Rule of Law that the system of appointment of the judiciary does not impair the judiciary's independence from influence by the executive or the legislature. Even more important is the requirement that the judiciary, once appointed, should be free from any threat of removal or other form of intimidation from the other arms of government. Respect for the Rule of Law requires that there be independent, transparent mechanisms for the removal of judicial officers found guilty of misconduct, but it is essential that such mechanisms are beyond manipulation by other arms of government and do not undermine the independence of the judiciary.

In addition, an independent judiciary requires an efficient, functioning court system and a strong, independent, properly qualified legal profession to support it. An independent legal profession is also fundamental to the maintenance of citizens' rights and freedoms under the Rule of Law, so that they are guaranteed access to independent, skilled, confidential and objective legal advice. Similar principles are required to protect the independence of the legal profession as for the judiciary.

These fundamental requirements of the Rule of Law also call for the highest standards of skill, professionalism and integrity among the judiciary and the legal profession. If these are not maintained, confidence in the legal process will be undermined. So will the necessary culture of respect for the Rule of Law. If this happens, the executive and legislative branches will be both tempted and enabled to interfere in the processes which protect their independence.

States of Emergency

2.5 The Rule of Law is most likely to come under threat, even in countries which claim to abide by it, in times of war or other emergency, when the executive is most likely to seek, and the people most likely to be willing to grant it, exceptional powers. This is a time when the utmost care and calm, rational consideration is required, and when it is least likely to be provided. In such cases, the absolute necessity for a rigorous separation of powers becomes

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Wall Street bank fines

Wall Street banks and their foreign rivals have paid out $100bn in US legal settlements since the financial crisis, according to Financial Times research, with more than half of the penalties extracted in the past year.

During stress tests last week, the Federal Reserve found that the biggest banks could still face a further $151bn bill for operational risk, repurchasing soured mortgage bonds and dealing with the falling value of buildings they own.