

## THE BINGHAM CENTRE FOR THE RULE OF LAW

### **SUBMISSIONS ON THE PROPOSED AMENDMENTS TO THE CARTEL OFFENCE CONTAINED IN CLAUSE 41(2) OF THE ENTERPRISE AND REGULATORY REFORM BILL**

1. The Bingham Centre for the Rule of Law submits the following observations in support of the CLLS submissions on the proposed amendments to the cartel offence. We do not comment on the points of detail made in those submissions, either to endorse or reject them. We are strictly confining our remarks to the threat posed by the proposed clause section 41 (2) to the rule of law.
2. The fundamental principle involved was expressed by Lord Bingham himself in *Regina v. G*<sup>1</sup>:

“[I]t is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if ... one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.”

3. A person guilty of the cartel offence under section 188 of the Enterprise Act 2002 is liable on conviction on indictment, to imprisonment for a term of up to five years or to a fine, or to both. It is, therefore, a “serious crime”.

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<sup>1</sup> [2004]1 AC 1034, at para 34.

4. As currently formulated, the cartel offence meets the requirement of Lord Bingham's "salutary principle" that conviction of such a serious crime requires a culpable state of mind. That is because the offence requires that the individual must "dishonestly" agree with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the type identified.
5. By contrast, the proposed amendments to the cartel offence in clause 41 of the bill will remove the existing requirement of "dishonesty". That may not in itself offend Lord Bingham's principle, provided there were also introduced into the offence an alternative form of mental culpability<sup>2</sup>. However, as currently drafted, the amendments do not appear to provide any such adequate replacement.
6. It would not therefore suffice to provide that individuals accused of the offence could escape liability if they could prove that they engaged in particular forms of open conduct in relation to the arrangements. Under the well established principle described by Lord Bingham, it is the prosecution that is required to prove mental culpability, not the defendant to prove innocence.
7. Absent an alternative mental element that the prosecution must establish, there is a real possibility of the unjust conviction of a person who simply did not perceive the risk that what he was doing could harm others. It is not possible to anticipate every circumstance in which a person falling within the letter of the offence might lack any mental culpability.
8. However, it can be said that this risk seems to be particularly exacerbated in the present case by two factors.
9. First, the precise meaning of a number of the concepts contained in section 188 of the Enterprise Act are yet to be clearly defined by statute or established by precedent. For example, specialists in this area have noted the uncertainty in meaning and scope of concepts such as: an "agreement", "limiting supply or production", or "dividing customers". In *R v Rimmington*<sup>3</sup>, Lord Bingham said that there were two "guiding principles" relevant in that case, namely:

"no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it;

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<sup>2</sup> Whether the replacement of dishonesty with some equivalent mental element would be justified or advisable is another matter, and one outside the scope of this short note.

<sup>3</sup> [\[2006\] 1 AC 459](#), para 33

and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done".

In his book *The Rule of Law*, Lord Bingham similarly enunciated as a first "ingredient" of the rule of law that "The law must be accessible and so far as possible intelligible, clear and predictable".<sup>4</sup>

10. Secondly, the now widespread perception that engaging in a secret cartel is criminal (or at least wrongful) is relatively recent to British law and business practice. As the Appellate Committee of the House of Lords (presided over by Lord Bingham) observed in *Norris v United States of America*<sup>5</sup>, until the Enterprise Act 2002, the making or operating of a secret price-fixing agreement could not, without more, amount to dishonesty or, hence, to a criminal offence at common law.
11. An offence that is both unclear in its ambit and relatively novel in its nature seems a particularly unsuitable candidate for strict liability. However, even in the absence of those factors we believe that the threats posed by the proposed amendments should be very carefully weighed against the "salutary principle" that conviction for a serious crime should depend upon a culpable state of mind.

**Sir Jeffrey Jowell QC**

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<sup>4</sup> Penguin Books, (2010)ch.3 p.37.

<sup>5</sup> [2008] UKHL 16