PATTERNS OF CRIMINALISATION

1951, 1997, 2010 AND 2014

EMMA AINSLEY, JAMES CHALMERS AND FIONA LEVERICK

This research note presents findings stemming from a research project that aims to track the creation of criminal offences from the 1950s until the present day. The project was motivated by the political debate in the UK over the (allegedly) excessive creation of offences – the Labour government elected in 1997 was accused of creating them at a rate of around one per day.[1] Until now, our findings have focused on three twelve month periods, analysing the first year of criminalisation under governments elected in 1951, 1997 and 2010.[2] Put briefly, our analysis of these three samples demonstrated two things. The first was that the figures that were being quoted in the political debates were, if anything, under-estimates. The second was that the creation of large numbers of criminal offences is not a new phenomenon. Successive governments since the 1950s have created criminal offences at a far higher rate than had been previously assumed.

This research note updates the account by focusing on the criminal offences created in 2014. In November 2010, the then Coalition government set up a "Gateway" procedure designed to scrutinise legislation containing criminal offences.[3] It did so in response to concern about the supposedly rising tide of offence creation and it offered its own figures to indicate that the existence of the Gateway had achieved some success in stemming this.[4] Our own analysis of a broadly similar time period indicated that the Ministry's figures were an under-estimate and the actual number of offences created was somewhat greater.[5] Notwithstanding this, it was perhaps a little early to make any useful assessment, the Gateway only having been introduced towards the end of 2010. Focusing on offences created in the calendar year 2014 allows us to revisit that assessment and to see, among other things, whether the Gateway (which operates only in England and Wales) has made any real difference to the volume of offences created. It also allows us to see if some of the trends identified in previous samples (such as the practice of creating highly punitive criminal offences by statutory instrument) have continued.

KEY POINTS

- On the face of it, there is little evidence that the Gateway has reduced the volume of criminal offences created. Our analysis indicated that 346 more criminal offences were created in 2014 than in the 2010 sample, and 711 more than in the 1997 sample. That said, this is attributable in large part to three pieces

[1] N Morris, "Blair's 'frenzied law making': a new offence for every day spent in office", The Independent, 16 August 2006.

[2] For our findings in relation to the 1997 and 2010 samples, see J Chalmers and F Leverick, "Tracking the creation of criminal offences" [2013] Crim LR 543. For our findings in relation to the 1950s sample, see J Chalmers, F Leverick and A Shaw, "Is formal criminalisation really on the rise? Evidence from the 1950s" [2015] Crim LR 177.

[3] Ministry of Justice, *Criminal Offences Gateway Guidance* (2011), www.justice.gov.uk/legislation/criminal-offences-gateway. "Gateway clearance" will only be given by the Secretary of State for Justice if "he is satisfied that the proposed offences are necessary".

[4] Ministry of Justice, *New Criminal Offences: England and Wales 1st June 2009-31st May 2011* (2011).

[5] Chalmers and Leverick (n 2) at 550-554.

of legislation, all implementing Council Regulation (EC) 1099/2009 of 24th September 2009 on the protection of animals at the time of killing (in, respectively, England, Wales and Northern Ireland), which created an unusually large number of offences. If these were to be discounted from the sample, 1218 offences would have been created, a lower figure than that for the 1997 and 2010 samples, but more than the sample from 1951.

- Analyses conducted post devolution can give a misleading picture as identical legislation is sometimes passed in two or more of the UK jurisdictions. As such, an analysis was also undertaken only of the offences relating specifically to England. This indicated that 1056 were created in the 2014 sample, fewer than in the 1997 sample (1235) but substantially more than in the 2010 sample (634). However, if the 296 offences created by the Welfare of Animals at the Time of Killing (WATOK) Regulations 2014 were to be removed from the analysis, there would remain 787 offences.

- The majority of offences in the 2014 sample (92%) were created by statutory instrument, a similar proportion to that in the other sample period.

- As in the 1951, 1997 and 2010 samples, many of the 2014 offences created by statutory instrument were highly punitive, although the number of offences created by SI and carrying a maximum penalty of imprisonment fell from 867 in the 2010 sample to 638 in the 2014 sample. That said, a far larger number of the offences in the 2014 sample that were created by statutory instrument carried a maximum penalty of seven or ten years imprisonment (55 offences), compared to none in the 1951 and 1997 samples, and only three offences in the 2010 sample.

- The majority of the offences (91%) created in the 2014 sample were not aimed at the general public, but at those acting in some form of special capacity. This is similar to the figures for the 1951, 1997 and 2010 samples, which were 81%, 98% and 89% respectively.

- The most common subject matter of the offences in the 2014 sample was animals (general welfare, veterinary medicine). This is unsurprising, given the volume of offences created by the WATOK Regulations, noted above. Aside from this, as in the 1997 and 2010 samples, the most common areas of criminalisation were agriculture; healthy and safety at work; and terrorism/international sanctions.

A Brief Note on Methodology

In each 12 month period, we reviewed all Acts of Parliament that received Royal Assent, and all statutory instruments that were made, in order to identify every criminal offence that was created. As such, we can be reasonably confident that we did not miss any significant numbers of offences, as we did not rely on a filtered source[6] nor did we focus only on legislation that was obviously 'criminal' on its face. In determining whether a criminal offence was created, the 'test of separability'[7] was applied. Put briefly, whenever a primary or secondary legislative provision set out a clear and distinct act or omission, separable from other specified acts or omissions, that would result in a punitive sanction of some kind, it was recorded as a separate offence. The exercise was not without its methodological difficulties, which we have described elsewhere,[8] but our overriding approach was to try not to over-estimate the number of offences created – where any doubt existed, we erred on the side of under-counting rather than over-counting.

[6] See further Chalmers and Leverick (n 2) at 544-545.
[7] See further Chalmers and Leverick (n 2) at 548-549.
[8] Chalmers and Leverick (n 2) at 548-550; Chalmers, Leverick and Shaw (n 2) at 179-180.

THE KEY RESEARCH FINDINGS

1. HOW MANY OFFENCES WERE CREATED?

The first analysis conducted was to identify the number and means of creation of the offences in the 2014 sample and the findings are presented in table 1.

TABLE 1: NUMBER OF CRIMINAL OFFENCES CREATED[9]

Mode of creation	1951	1997	2010	2014
Statute	159 (18%)	18 (1%)	247 (14%)	171 (8%)
Statutory instrument	704 (82%)	1377 (99%)	1513 (86%)	1935 (92%)
Total	863	1395	1760	2106

The first point to make is that in terms of the manner in which the offences were created, in 2014 (as in every previous sample) the vast majority of offences were created by way of statutory instrument, as opposed to primary legislation.

In terms of numbers, there is little evidence that the Gateway has reduced the volume of criminal offences created. Our analysis indicated that 346 more criminal offences were created in 2014 than in the 2010 sample, and 711 more than in the 1997 sample. That said, this is attributable in large part to three pieces of legislation, implementing Council Regulation (EC) 1099/2009 of 24th September 2009 on the protection of animals at the time of killing, which created an unusually large number of offences. Three separate instruments were created in Wales, Northern Ireland and England,[10] creating 888 offences between them.[11] If these were to be discounted from the sample, 1218 offences would have been created, a lower figure than that for the 1997 and 2010 samples, but more than the sample from 1951.

The use of these figures for comparison can, however, be misleading, as the numbers in the 2014 and 2010 samples are substantially inflated as a result of devolution, whereby offences are often created in duplicate form in different parts of the UK.[12] A more meaningful comparison can be made by analysing only those offences applicable to England, as shown in table 2.

[9] Percentage totals in this and all other tables throughout this research note may be more or less than 100 due to rounding.

[10] Namely, the Welfare of Animals at the Time of Killing (Wales) Regulations 2014, the Welfare of Animals at the Time of Killing Regulations (Northern Ireland) 2014, and the Welfare of Animals at the Time of Killing Regulations 2014. It should be noted that the Welsh instrument never came into force.

[11] This group of Regulations shall be referred to as the WATOK Regulations throughout this research note.

[12] See the discussion in Chalmers and Leverick (n 2) at 550-551, although this was also the case in the 1951 sample to a much lesser extent.

TABLE 2: OFFENCES APPLICABLE TO ENGLAND

Geographical extent	1951	1997	2010	2014
England	8	None	212	379
England and Wales	15	None	9	53
Britain	153	213	4	80
UK	610	1022	409	416
England, Wales and NI	None	None	None	7
UK, Isle of Man, Channel Islands and Territories specified by the Order	None	None	None	12
UK, Channel Islands and Isle of Man	None	None	None	None
England, Wales and Scotland	None	None	None	109
Total	786	1235	634	1056

As table 2 shows, the number of offences created applicable to England was greater than in the 2010 sample (although it was lower than in the 1997 sample). As discussed above, however, these figures are heavily inflated by the WATOK Regulations. If the offences created by those instruments were to be removed from the analysis, there would remain 787 offences, a figure much lower than that for the 1997 sample and slightly higher than that for the 2010 sample. As to what this tells us about the effectiveness of the Gateway, all that can really be concluded is that the jury is still out. These figures are snapshots and the inflation of the 2014 figures by the WATOK Regulations casts some doubt over whether a 12 month snapshot provides a reliable picture of the decade as a whole. Bearing that limitation in mind, there is some limited evidence that things have improved in terms of the volume of offences being created since the introduction of the Gateway, but this evidence is hardly overwhelming.

2. CAUSES OF CRIMINALISATION: INTERNAL AND EXTERNAL PROMPTS

Table 3 indicates whether offences were created due to an external obligation to criminalise, whether this was at the EU level (i.e. the implementation of an EU Directive) or the international level (i.e. the implementation of an internationally agreed treaty.

TABLE 3: DID THE CRIMINAL OFFENCE IMPLEMENT AN INTERNATIONAL OBLIGATION?

	1951	1997	2010	2014
No	860 (99.7%)	128 (9%)	529 (30%)	454 (22%)
Yes – European Directive	None	947 (68%)	1043 (59%)	1357 (64%)
Yes – international obligation	3 (0.3%)	320 (23%)	84 (5%)	164 (8%)
Yes – international obligation implemented at EU level	None	None	104 (6%)	131 (6%)
Total	863	1395	1760	2106

As in the 1997 and 2010 samples, a significant number of offences (78%) were created due to an external obligation to criminalise. This was not mirrored in the 1951 sample,[13] given that the UK was not, at that time, part of the EU's forbearer, the European Steel and Coal Community, a body which in any case did not have the same regulatory competence as today's EU. It is perhaps worth noting that the proportion of offences that were driven by an external obligation was slightly higher in the 2014 sample (at 88%) than in the 2010 sample (where it was 70%). Or to put that slightly differently, only 454 offences were created purely on the impetus of the government in 2014, compared to 529 in the 2010 sample period and 128 in the 1997 sample period.

3. AREAS OF CRIMINALISATION

To help further understand the specific use of the criminal law, the offences created in the 2014 sample were classified alongside those from the previous samples according to categories used in *Halsbury's Statutes*,[14] with a number of additions to avoid gaps or inappropriate categorisation,[15] the results of which are shown in table 4.

TABLE 4: SUBJECT MATTER OF THE OFFENCES CREATED

	1951	1997	2010	2014
Sale of goods	418 (48%)	3 (0.2%)	34 (2%)	43 (2%)
Taxes, customs and excise	151 (18%)	None	None	19 (0.9%)
Roads, railways and transport	96 (11%)	13 (0.9%)	21 (1%)	11 (0.5%)
Animals (general welfare, veterinary medicine)	45 (5%)	134 (10%)	32 (2%)	961 (46%)
Agriculture (inc. farming and horticulture)	36 (4%)	420 (30%)	569 (32%)	163 (8%)
Health and safety at work (inc. on ships)	36 (4%)	348 (25%)	45 (3%)	236 (11%)
Companies, commerce and competition	30 (4%)	None	4 (0.2%)	3 (0.1%)
Food production (exc. agriculture)	15 (2%)	88 (6%)	148 (8%)	24 (1%)
Registration concerning the individual	12 (1%)	None	5 (0.3%)	1 (0%)
Health and care regulation	9 (1%)	None	131 (7%)	31 (2%)
Environment (energy conservation, pollution control)	2 (0.2%)	127 (9%)	54 (3%)	21 (1%)
Armed forces (inc. weapons)	1 (0.1%)	3 (0.2%)	33 (2%)	97 (5%)
Terrorism/international sanctions	None	158 (11%)	188 (11%)	229 (11%)
Fishing	None	52 (4%)	41 (2%)	14 (0.7%)
Shipping and navigation (inc. port management)	None	19 (1%)	8 (0.5%)	45 (2%)
Criminal law (general)	None	8 (0.6%)	23 (1%)	26 (1%)
Nature conservation (inc. forestry but exc. animals)	None	3 (0.2%)	20 (1%)	5 (0.2%)
Land, tenants and housing	None	1 (0.1%)	22 (1%)	30 (1%)
Water (supply of, exc. nature conservation issues)	None	None	171 (10%)	7 (0.3%)
Parliament/elections	None	None	170 (10%)	16 (0.8%)
Other	12 (1%)	18 (1%)	41 (2%)	124 (6%)
Total	863	1395	1760	2106

[13] See Chalmers, Leverick and Shaw (n 2) at 179.
[14] A commercially produced compendium of legislation in England and Wales, first published in 1929.
[15] The additions were fishing, food production (excluding agriculture); parliament/elections; and terrorism/international sanctions.

As discussed above, disregarding the disproportionate effect of the WATOK Regulations, which provided 888 of the 961 offences in the category of 'Animals (general welfare, veterinary medicine)', the most common criminalisation categories were agriculture, health and safety at work and terrorism/international sanctions. This was, perhaps unsurprisingly, similar to that in the 2010 sample, the only real difference being that, if anything, terrorism and armed forces legislation accounted for a slightly higher proportion of the offences created in the 2014 sample.

4. SERIOUSNESS OF OFFENCES

A further analysis was undertaken in order to gain a picture of the respective seriousness of the offences created in 2014, as compared to the other three samples. Table 5 indicates the form of the maximum penalty available on conviction.[16]

TABLE 5: MAXIMUM PENALTY AVAILABLE ON CONVICTION

	1951	1997	2010	2014
Imprisonment	578 (67%)	906 (65%)	993 (56%)	687 (33%)
Fine (nominate value)	249 (29%)	17 (1%)	3 (0.2%)	40 (2%)
Fine (standard scale)[17]	None	270 (19%)	641 (36%)	1356 (64%)
Fine (unlimited)	36 (4%)	202 (15%)	123 (7%)	23 (1%)
Total	863	1395	1760	2106

The proportion of offences punishable by imprisonment was lower in the 2014 sample than in any other. This, again, may in part be due to the WATOK Regulations, 864 (or 97%) of which create offences punishable by standard scale fines, or it may simply be due to the snapshot nature of the study. That said, the actual number of imprisonable offences (687) created was lower than both the 1997 and 2010 samples.

As noted above, the majority of offences in the 2014 sample were created by means of statutory instrument, but what is more significant is that so were the majority of imprisonable offences. This is demonstrated in Table 6 below, which shows both the total number of imprisonable offences created by statutory instrument and the length of the maximum penalty concerned.

[16] It should be noted that the maximum penalty attached to an offence does not necessarily correlate with the 'moral' seriousness of the regulated conduct.

[17] The "standard scale" is fixed by primary legislation (see Interpretation Act 1978, Schedule 1 for the relevant references) and at the time of writing (April 2016) had five levels ranging from £200 to £5000 (in England, Wales and Northern Ireland) and £10000 (in Scotland).

TABLE 6: MAXIMUM PENALTY FOR IMPRISONABLE OFFENCES CREATED BY STATUTORY INSTRUMENT

	1951	1997	2010	2014
1 month	49 (9%)	None	None	None
3 months	None	6 (1%)	334 (39%)	102 (16%)
6 months	None	202 (23%)	4 (0.5%)	89 (14%)
51 weeks	None	None	33 (4%)	None
1 year	None	2 (0.2%)	8 (1%)	None
2 years	483 (91%)	664 (74%)	355 (41%)	390 (61%)
5 years	None	1 (0.1%)	130 (15%)	2 (0.3%)
7 years	None	21 (2%)	1 (0.1%)	50 (8%)
10 years	None	None	2 (0.2%)	5 (0.8%)
Total imprisonable offences created by SI	532	896	867	638

There are a number of different ways in which the figures in table 6 might be interpreted. The first point to note is perhaps that the majority (93%) of imprisonable offences in the 2014 sample were created by means of statutory instrument. This compares to figures of 92%, 99% and 87% of imprisonable offences being created by secondary legislation in the 1951, 1997 and 2010 samples respectively. In terms of the actual numbers, however, reflecting the fact that overall fewer imprisonable offences were created in 2014 than in the other sample years, the actual number of imprisonable offences created in 2014 specifically by SI is lower than in the 2010 and 1997 samples, at 638 (compared to 896 in the 1997 sample and 867 in the 2010 sample).

Another way of looking at the figures is to focus on the length of the maximum sentences. As for the other sample periods, the majority of the imprisonable offences created by SI in 2014 carried a maximum penalty of two years' imprisonment. However, the 2014 sample demonstrated an upward trend in those offences created by SI carrying maximum penalties of seven or ten years, with 9% of imprisonable offences created by statutory instrument falling into this category (55 offences). This compares to only 21 such offences in the 1997 sample and only three in the 2010 sample (and none whatsoever in the 1950s sample).

Regardless of the particular interpretive focus adopted towards these figures, the most important point to be made is that the phenomenon whereby offences penalised by potentially lengthy periods of imprisonment are created by secondary legislation, without the scrutiny of Parliament, is neither new, nor abating over time.

5. WHO ARE THE OFFENCES ADDRESSED TO?

As with the previous sample periods, the bulk of offences (91%) were found to be addressed to those acting in some form of special capacity,[18] rather than to the public at large. This is demonstrated in table 7, below. The categorisation in the table does require some explanation. Some legislative provisions explicitly stated that a form of special capacity was required. This was either by virtue of engaging in a particular activity (see,

[18] See the discussion in Chalmers and Leverick (n 2) at 557-558

for example, Regulation 23(1)(c) of the Welfare of Animals at the Time of Killing Regulations (Northern Ireland) 2014, addressed to the operator of a slaughterhouse) or by virtue of being awarded a licence (see, for example, regulation 9(6)of the Central African Republic (European Union Financial Sanctions) Regulations 2014, which makes it an offence for licence holders not to comply with the conditions of their licence). Other offences did not explicitly provide for special capacity, but nonetheless carried this implication, and we included these in the table in two categories: those where special capacity was implied because the offence required the accused to have engaged in an activity which 'ordinary people' would never undertake or would be highly unlikely to undertake. An example of the former was section 11(1) of the Tuberculosis (Deer and Camelid) (England) Order 2014, which criminalises any failure of a person in charge, or in possession, of a camelid carcase to notify the Secretary of State of their suspicion that the carcase may have been infected with tuberculosis. An example of the latter was section 8(1) of the South Sudan (Sanctions) (Overseas Territories) Order 2014, which makes it an offence for any person to knowingly provide assistance relating to the sale, supply, transfer or export of restricted goods to any person in South Sudan, or for use in South Sudan. The attribution of an offence to one or other of these categories was not always easy, but the main point is that in neither case were the provisions likely to be of any real relevance to the public at large.

TABLE 7: SPECIAL CAPACITY REQUIRED FOR EACH CRIMINAL OFFENCE CREATED

	1951	1997-98	2010-11	2014
None	164 (19%)	33 (2%)	200 (11%)	185 (8%)
Role (by virtue of engaging in an activity)	307 (36%)	728 (52%)	652 (37%)	968 (46%)
Role (by virtue of being awarded a licence or by registration)	68 (8%)	87 (6%)	158 (9%)	45 (2%)
Role (status, e.g. "a debtor")	2 (0.2%)	None	18 (1%)	19 (0.9%)
Implied (ordinary people highly unlikely to undertake activity)	143 (17%)	47 (3%)	117 (7%)	217 (10%)
Implied (ordinary people never undertake activity)	49 (6%)	256 (18%)	345 (20%)	508 (24%)
Imposed (prior requirement/direction imposed on accused)	96 (11%)	203 (15%)	187 (11%)	115 (6%)
Prior circumstances (e.g. receiving information or a donation)	20 (2%)	20 (1%)	39 (2%)	None
Specific body (e.g. "the harbour trust")	12 (1%)	12 (1%)	6 (0.3%)	44 (2%)
Corporate offence	1 (0.1%)	9 (1%)	35 (2%)	4 (0.2%)
Familial	1 (0.1%)	None	3 (0.2%)	1 (0%)
Total	863	1395	1760	2106

As table 7 indicates, the predominant target of criminalisation across all four sample periods are persons undertaking activities in some form of special capacity. Across the samples, the vast majority of offences are what might be termed 'regulatory'[19] in nature, in the sense that they seek to control the behaviour of persons involved in specified activities. As has been noted previously,[20] the criminal law's use a regulatory

[19] Although the meaning of the term 'regulatory' offence is contested: for discussion see Graham Smith, Toby Seddon and Hannah Quirk, 'Regulation and Criminal Justice: Exploring the Connections and Disconnections', in Hannah Quirk, Toby Seddon and Graham Smith (eds.), *Regulation and Criminal Justice: Innovations in Policy and Research* 2010 (Cambridge: Cambridge University Press) at 2-4.

[20] See Chalmers, Leverick and Shaw (n 2) at 184-187.

tool and the creation of 'regulatory offences' are not new phenomena, and nor is the frequency with which they can be observed diminishing.

For those offences explicitly targeted at someone acting in a specific role or engaging in a specific activity, a further analysis was undertaken to record the nature of that activity as set out in the legislative provision in question. Table 8 details the results of this exercise.

TABLE 8: STATED TARGET OF ROLE RELATED OFFENCES

	1951	1997-98	2010-11	2014
Person acting in the course of a business (or similar)	136 (44%)	202 (28%)	240 (37%)	582 (60%)
Driver/owner of a vehicle	51 (17%)	2 (0.3%)	1 (0.2%)	3 (0.3%)
Person applying for a licence/registration/authorisation	29 (9%)	17 (2%)	14 (2%)	24 (3%)
Owner/occupier of premises or building/landlord	27 (9%)	21 (3%)	12 (2%)	68 (7%)
Master or owner of ship/commander of an aircraft	20 (7%)	378 (52%)	18 (3%)	203 (29%)
Keeper/owner of animals	10 (3%)	38 (5%)	134 (21%)	11 (1%)
Person objecting to licence/registration/authorisation	9 (3%)	None	None	None
Employee/worker	6 (2%)	8 (1%)	2 (0.3%)	5 (0.5%)
Holder of a specified public office	6 (2%)	None	36 (6%)	None
Person engaging in certain type of work e.g. construction	3 (1%)	6 (0.8%)	116 (18%)	2 (0.2%)
Employer	3 (1%)	26 (4%)	45 (7%)	5 (0.5%)
Person responsible for X (e.g. safety officer, supervisor)	None	17 (2%)	29 (4%)	14 (1%)
Veterinary surgeon	None	8 (1%)	2 (0.3%)	5 (0.5%)
Other	7 (2%)	5 (0.7%)	3 (0.5%)	46 (5%)
Total	307	728	652	968

In line with the previous samples, the 2014 data analysis showed that, most commonly, special capacity offences were addressed to those acting in the course of business. This figure was especially high in the current sample (60%), followed by those addressed to the master or owner of a ship or commander of an aircraft (29%).

GENERAL OBSERVATIONS

As with the 1951, 1997 and 2010 samples, certain offences in the 2014 sample were "drafted so inaccessibly as to breach basic principles of fair notice".[21] Take, for example, the Merchant Shipping (International Safety Management (ISM) Code) Regulations 2014 ("the ISM Regulations"). Regulation 15 of the ISM Regulations provides that contravention of regulation 4 is an offence punishable by an unlimited fine. Regulation 4 states

[21] Chalmers and Leverick (n 2) at 559.

that an ISM company must not operate a ship "to which the EU Regulation applies" unless it complies with Article 5 of the EU Regulation. It is then necessary to look to the interpretation section of the ISM Regulations to discover that the relevant EU Regulation is Regulation 336/2006. So the next step is to look at EU Regulation 336/2006 ("the EU Regulation"), Article 5 of which provides that: "The ships referred to in Article 3(1) and the companies operating them shall comply with the requirements of Part A of the ISM Code." Article 3(1) of the EU Regulation says this:

> 1. This Regulation shall apply to the following types of ships and to companies operating them: (a) cargo ships and passenger ships, flying the flag of a Member State, engaged on international voyages; (b) cargo ships and passenger ships engaged exclusively on domestic voyages, regardless of their flag; (c) cargo ships and passenger ships operating to or from ports of the Member States, on a regular shipping service, regardless of their flag; (d) mobile offshore drilling units operating under the authority of a Member State.

But what is the ISM Code? Here it is necessary to turn to the preamble to EU Regulation 336/2006, which states that: "The International Management Code for the Safe Operation of Ships and for Pollution Prevention, hereinafter referred to as 'the ISM Code', was adopted by the International Maritime Organisation (IMO) in 1993." This still doesn't tell you where to find it – for that it is necessary to turn to Article 2 of the EU Regulation, which indicates that the ISM Code is set out in Annex 1 to the EU Regulation.

Another example is the Salmon Netting Regulations (Northern Ireland) 2014. This prohibits the use of bag nets, drift nets and tidal drift nets to fish for salmon (in regulation 3), but nowhere in the Regulations or the Explanatory Note to these Regulations does it mention that breaching this prohibition is a criminal offence. This only becomes apparent by seeking out the enabling legislation (s.26(1) of the Fisheries Act (Northern Ireland) 1966) which provides that breach of any regulations made under this section is an offence. It also says nothing in s.26(1) about what the penalty might be. For that it is necessary to turn to s.201 of the Fisheries Act, which provides that: "A person who commits an offence under any provision of this Act for which a penalty is not provided by any provision of this Act other than this section shall be liable on summary conviction to a fine not exceeding £500."[22]

As well as this, certain offences were drafted in such a way that to ascertain the penalty for breach of the law was an almost impossible task. For example, four offences in our analysis derived from Regulation 49 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, relating to the obtaining or disclosing of information contained in personal data. Although regulation 49(4) criminalises a contravention of the Regulations, no penalties are set out therein, and nor is there any explicit reference to penalties contained in other legislation. As the wording of the offence is almost identical to that contained in section 55 of the Data Protection Act 1988, and the Regulations reference the Act on a number of occasions, we assumed for the purposes of the research that the penalties are the same too, as set out in section 60 of the 1988 Act. However, this is by no means an infallible analysis, and reconfirms the notion that legislative drafting often breaches basic rule of law principles. This is especially worrying when the offences in question, as in this example, may have the potential penalty of an unlimited fine.

[22] Another example of a set of Regulations where it is unclear on its face that breach of its provisions is a criminal offence is the Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2014, but at least here the Explanatory Note to the Order states that breaching the provisions is an offence (under the Sea Fish (Conservation) Act 1967).

CONCLUSIONS

Previous analyses of the data from the 1951, 1997 and 2010 samples resulted in a number of conclusions being made about criminalisation practices in the post-war period. The addition of the 2014 data analysis only confirms and reinforces these conclusions.

Firstly, the rate at which criminal offences are being created has remained consistently high throughout the periods analysed, and this showed no real sign of abating in the 2014 sample. Although this may be due in part to the disproportionate number of offences created under the WATOK Regulations, there are, regardless, still a huge number of offences being created year on year, the majority of which are created under secondary legislation outwith the scrutiny of Parliament. The adoption of the Gateway procedure (which operates only in respect of England and Wales) in 2010 may, on the evidence of our analysis, have made some difference to the volume of offences being created that are applicable to England and Wales, but any effect is a minor one rather than a substantial one.

Additionally, the highly punitive nature of many of the offences created through subordinate legislation is a cause for concern across all of the sample periods. The vast majority of imprisonable offences created in the 2014 sample were created by statutory instrument, as was the case for the other three samples. The actual number of imprisonable offences created by SI in the 2014 sample was lower than in the 2010 or 1997 samples, but this does have to be balanced against an increase in the 2014 sample in the number of offences created by SI with a maximum penalty of seven years or more.

Finally, certain offences analysed in this most recent snapshot of contemporary criminalisation practice could be criticised on fair notice grounds for failing to make it obvious that breach of the provisions concerned is, in fact, a criminal offence. There were also examples where – even if it was clear that the legislation was creating a crime – ascertaining the maximum penalty upon conviction required considerable powers of deduction. The inaccessibility of some of the legislation creating criminal offences is a problem that was first identified in the 1950s sample. Things have undoubtedly improved since then – but considerable scope for improvement still exists, especially considering the highly punitive nature of some of the offences in question and the fact that, although the majority are targeted at those operating in some form of special capacity, this does not necessarily mean that those concerned are large corporations able to draw on the services of legal advisers.