



CONSULTATION PAPER
ON
CORPORATE KILLING

(LRC CP 26 - 2003)

IRELAND

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date the Commission has published 69 Reports containing proposals for reform of the law; 11 Working Papers; 25 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 23 Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

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Part-time Commissioner Professor Finbarr McAuley,
Jean Monnet Professor of
European Criminal Justice,
University College Dublin

Part-time Commissioner Marian Shanley, Solicitor

Secretary John Quirke

Research Staff

Director of Research Raymond Byrne BCL, LLM, Barrister-
at-Law

Legal Researchers Deirdre Ahern LLB, LLM (Cantab),
Solicitor
Simon Barr LLB (Hons), BSc
Patricia Brazil LLB, Barrister-at-Law
Ronan Flanagan LLB, LLM (Cantab)
Glen Gibbons BA, LLB (NUI), LLM
(Cantab)
Claire Hamilton LLB (Ling Franc),
Barrister-at-Law
Darren Lehane BCL, LLM (NUI)
Trevor Redmond LLB, MPhil, LLM
(Cantab)
Eadaoin Rock LLB, LLM (Cantab)
Jennifer Schweppe BCL (Euro)

Administration Staff

Project Manager Pearse Rayel

*Legal Information
Manager* Marina Greer BA, H Dip LIS

Cataloguer Eithne Boland BA (Hons) H Dip Ed,
H Dip LIS

Higher Clerical Officer Denis McKenna

*Private Secretary
to the President*

Liam Dargan

Clerical Officers

Alan Bonny
Debbie Murray

Principal Legal Researchers on this Consultation Paper

G Brian Hutchinson BCL, LL.M, DAL, FCI Arb, Barrister-at-Law,
Senior Lecturer and Associate Dean, Faculty of Law, University
College Dublin

Deirdre Ahern LLB, LL.M (Cantab), Solicitor

Other Legal Researchers involved with this Consultation Paper

Simon Barr LLB (Hons), BSc

Nessa Cahill LLB, LL.M (Bruges), Barrister-at-Law

Contact Details

Further information can be obtained from:

*The Secretary
The Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4*

*Telephone (01) 637 7600
Fax No (01) 637 7601
E-mail info@lawreform.ie
Website www.lawreform.ie*

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Full responsibility for this publication, however, lies with the Commission.

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INTRODUCTION

Background to the Consultation Paper

1. The topic of ‘corporate killing’ comes before the Commission as the intersection of two separate areas identified in the Law Reform Commission’s Second Programme for Law Reform;¹ namely, the *criminal law of homicide*, and *corporate criminal liability*. The law of homicide has been flagged as meriting priority in the Law Reform Commission’s Second Programme of Law Reform, and so far one Consultation Paper has been published dealing with the mental element in murder;² and two are in preparation dealing with provocation; and the plea of legitimate defence. An additional Consultation Paper will follow on the proper limits of the offence of manslaughter. The Commission has already expressed the view (in relation to the reform of the law of murder) that the classification or ‘labelling’ of homicide offences is more than a matter of administrative categorisation - it is an ethical question which touches, deep moral intuitions about the essential differences between distinct patterns of wrongdoing.³ Given the timing of this review, the Commission is anxious to ensure that any solution to the narrow issue of corporate liability for wrongful killing would be compatible with its views on the proper limits of the defence of involuntary manslaughter.

2. Corporations, notably (though not exclusively) those incorporated under the *Companies Acts 1963-2001*, are firmly

¹ See Law Reform Commission *Twenty Second Annual Report* (2000).

² Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001). See also Law Reform Commission, Seminar Paper - *Homicide: The Mental Element in Murder* (LRC SP 1- 2001).

³ Law Reform Commission Seminar Paper – *Homicide: The Mental Element in Murder* (LRC SP 1-2001) at 7 *ff.*

established as a legitimate and beneficial means of conducting commercial or other activity; and though it is not necessary to list the advantages of corporations in any detail here, the Commission's general approach in this Consultation Paper is predicated on the widely acknowledged benefits that have been brought to society and to the economy by their use. The challenge therefore is to identify whether the concerns giving rise to the perception that the law is inadequate in this area can be addressed in a way which strikes the right balance between society's need to prevent corporate activity which may result in death, the need to render corporations and the persons who control them accountable for wrongful activity actually resulting in death, and the need to support and encourage the legitimate use of corporations as a continued means of conducting various forms of socially valued activity.

3. A balanced approach to the issue of corporate killing also requires some further consideration of the existing forms of corporate liability for death, notably the liability of employers for regulatory offences under health and safety legislation, and also the civil liability of corporations for fatal accidents. If the law is to address properly all of the concerns in this general area there must also be debate about whether it is the law of homicide – as opposed to, for example, a regulatory offence - which is the appropriate response to corporations whose activities cause death. In this Consultation Paper, therefore, whilst there is some focus on the criminal liability of corporations for crimes of homicide, the goal is to review the law in a way which may further enable such serious policy issues to be considered.

The Law Reform Options

4. Three alternative law reform options arise in the context of the criminal liability of corporations for corporate killing:

(i) Amendment of the *Safety, Health and Welfare at Work Act 1989* to provide for the prosecution of offences under section 48(17) of the 1989 Act on indictment rather than summarily, thereby allowing an unlimited fine to be imposed on offenders;

(ii) The establishment of a statutory corporate killing offence to be prosecuted on indictment which would impose criminal liability on

a corporation (or other ‘undertaking’) where it is proved that ‘careless management’ by the undertaking was a cause of death of a person;

(iii) The establishment of a statutory corporate killing offence to be prosecuted on indictment whereby the acts or omissions of a ‘high managerial agent’ of a corporation (or other ‘undertaking’) would be treated as those of the undertaking. On the death of a person, an undertaking could be found guilty of the offence of corporate killing where it is proved that the acts or omissions of a high managerial agent of the undertaking, or the acts or omissions of any person which were authorised, requested or recklessly tolerated by a high managerial agent of the undertaking, fell far below what could reasonably be expected in the circumstances and those acts or omissions involved a high degree of risk of serious personal injury to any person and were a cause of death.

Outline of this Paper

5. This Consultation Paper is divided into four Parts.

Part I (Introduction and Chapter 1) situates the debate about the criminal liability of corporations for fatalities in the broader context of discussion about the role of the criminal law, the general criminal liability of corporations and the role of the law in promoting safety and preventing death.

Part II (Chapters 2 – 4) outlines the current law on corporate liability for homicide, identifying the problems associated with it. Irish legislative proposals in the area are examined as well as some comparative approaches in other jurisdictions.

Part III (Chapters 5 and 6) examines proposals for reform which have been put forward in England and Wales and the Australian State of Victoria.

Part IV (Chapters 7 - 9) examines the options for reform and outlines the Commission’s provisional recommendations.

6. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations contained herein are provisional only. The Commission will make its final

recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations contained in this Consultation Paper are welcome. In order that the Commission's Final Report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by **31 January 2004**.

CHAPTER 1 SCOPE AND CONTEXT OF THE DEBATE

A Introduction

1.01 This Consultation Paper focuses on the criminal liability of corporations for the death of human beings.¹ The generic term ‘corporate killing’ is used in the Paper to refer to circumstances where culpability can be ascribed to a corporation for the death of a human being. The term ‘corporation’ as used in this Paper refers to all forms of body corporate including companies formed and registered under the *Companies Acts 1963 - 2001*.

B The Need for Review

1.02 At present in Irish law, murder and manslaughter are the two general homicide offences for which human persons can be convicted. Murder is the more serious of the two, requiring proof of an intention to kill or cause serious injury, and is punishable by mandatory imprisonment for life. If there are mitigating circumstances, such as provocation, then the offence becomes one of manslaughter; commonly referred to as ‘voluntary manslaughter’. Where someone kills without an intention to cause death or serious injury, they may still be convicted of manslaughter, commonly referred to as ‘involuntary manslaughter’, if they have been grossly reckless or grossly negligent or if the death occurred during the commission of an unlawful and dangerous act.

1.03 Corporations are undoubtedly a common and important feature of modern society, but as the range of corporate activity expands and industrialisation increases, there is a certain inevitability

¹ While the primary focus of this Paper is on corporate liability, we discuss the attribution of criminal liability to unincorporated entities at paragraph 7.20 *ff* below.

in the assertion that “corporations can and do kill”.² In Ireland, when a corporation’s activity results in death, the corporation may face prosecution for an offence under health and safety legislation.³ It may also be sued by the victim’s estate or dependants in a civil action for compensation in tort.⁴ The corporation’s officers, as well as or apart from the corporation itself, may also be made liable in either case.

1.04 Never in modern Ireland (as far as the Commission has been able to establish), however, has a corporation been proceeded against for a more serious crime – such as manslaughter – in connection with activity having fatal consequences; indeed there are residual doubts in Irish law as to whether a corporation is legally capable of committing manslaughter. It is commonly perceived, therefore, that the criminal law and its processes are deficient in that respect.

1.05 The perception that the criminal law and its processes are inadequate in dealing with corporations whose activities result in death has been heightened by a grim catalogue of high profile disasters followed by official inquiries which resulted in corporate procedures being found to have been defective. 61 persons died from workplace injuries during 2002, of which 21 were in the construction sector.⁵ Such incidents invariably give rise to questions such as “how can it be ensured that they will not happen again?” and “can those responsible be made accountable for their actions?” These questions are not unrelated, for it is commonly assumed that if those who were responsible for fatal incidents are (and will in the future be) made accountable, others will be deterred from acting in a similar way. Notably, there is no duty in Irish law on corporations or their directors to conduct an internal inquiry into the circumstances of a death in the course of corporate activities – or to make their findings known. Accordingly, the opportunity to learn or share lessons from past mistakes may be lost. A further criticism sometimes made by the relatives of victims of fatal accidents is that directors are not required

² Miester “Criminal Liability for Corporations that Kill” [1990] 64 Tulane LR 919, at 919.

³ See paragraph 2.33 *ff* below.

⁴ See paragraph 2.61 *ff* below.

⁵ Health and Safety Authority *Annual Report 2002* (Dublin 2003).

to attend court when civil or criminal proceedings are brought against corporations. This criticism is in part related to the point that lessons may not be learned; but in the main the criticism is that such failure to attend is symptomatic of apathy at board level.

1.06 These concerns have informed recent debate in Ireland on the Hepatitis C scandal. The Finlay Report⁶ of March 1997 concluded that responsibility for contamination of customers of the Blood Transfusion Service Board with Hepatitis C rested with former staff of the Board (a statutory corporation). The Report was sent to the Director of Public Prosecutions who was asked to consider whether criminal charges should be brought against the Board or its staff and the DPP determined that no prosecutions should follow. That decision was met by disappointment⁷ and criticism,⁸ and there were public calls for manslaughter charges and a review of the law in this area. The Taoiseach accepted the need for such a review⁹ and in July 2003, following an investigation into the matter by the National Bureau of Criminal Investigation, two former senior officials in the Blood Transfusion Service Board were charged with unlawfully and maliciously causing a noxious substance to be taken thereby inflicting grievous bodily harm contrary to the *Offences against the Person Act 1861*.¹⁰ At the time of writing, it does not appear that there are any plans to prosecute the Board (now restructured as the Irish Blood Transfusion Service). A second tribunal report, that of the Lindsay Tribunal into the infection of haemophiliacs with Hepatitis C and

⁶ *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (1997) (Pn.3695).

⁷ “Group ‘Shocked’ at DPP’s Decision” *The Irish Times* 22 October 1997. The initial decision not to prosecute in Ireland may be compared with the prosecution in France of three former government ministers on manslaughter charges for the deaths of persons who contracted AIDS from blood products, though the ultimate acquittal of two of them and the partial conviction of the third raised further concerns about the efficacy of the law in dealing with such issues; see “Verdicts on Ministers in Trial Seen as Rigged” *The Irish Times* 10 March 1999.

⁸ “Manslaughter Charges Urged by Shatter” *The Irish Times* 23 October 1997.

⁹ *Ibid.*

¹⁰ *The Irish Times* 24 July 2003.

AIDS,¹¹ which resulted in the death of 79 people was sent to the Director of Public Prosecutions in late 2002 to consider possible grounds for prosecution.

1.07 In the last couple of decades or so, the Buttevant¹² and Cherryville¹³ rail crashes, the Whiddy Island explosion,¹⁴ and the Stardust fire,¹⁵ all involved substantial loss of life and resulted in public inquiries.¹⁶ Infamous analogues in the UK include the *Piper Alpha* oil rig explosion,¹⁷ the sinking of the *Herald of Free Enterprise*,¹⁸ the King's Cross fire,¹⁹ the sinking of the

¹¹ *Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters* (2002 Pn 12074).

¹² 18 people were killed when a train derailed in 1980. See Feehan and Budd *Report of the Investigation into the Accident on the CIE Railway at Buttevant, Co Cork on 1st August, 1980*. (Prl. 853 April 1981).

¹³ 7 passengers died in this rail crash in 1983. See Feehan and Budd *Report of the Investigation into the Railway Accident near Cherryville Junction, Co Kildare on 21st August, 1983* (Dublin Stationery Office No T28 1985).

¹⁴ 50 people lost their lives as a result of a fire which enveloped a large section of the MV *Betelgeuse* and the off-shore jetty off Whiddy Island, Bantry Bay, County Cork in 1978. See *Report of the Tribunal of Inquiry: Disaster at Whiddy Island, Bantry Bay, Co. Cork* (Prl. 891 1980).

¹⁵ 48 people were killed in the Stardust nightclub fire in 1981. See *Report of the Tribunal of Inquiry on the Fire at Stardust, Artane, Dublin, on 14 February 1981* (P1 853).

¹⁶ Inquiries do not administer justice but are simply intended to make authoritative findings on facts and set out recommendations. See generally Law Reform Commission *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22-2003).

¹⁷ 167 people were killed in the explosion and ensuing fire, which were found to have been attributable to “mundane design faults, human error and unsafe working conditions”: Cullen Report *Public Inquiry into the Piper Alpha Disaster* (HMSO London 1990) Cm 1310.

¹⁸ 187 people died when the *Herald of Free Enterprise* capsized in 1987 having put to sea with her bow doors open. The judicial enquiry into the disaster found that “from top to bottom the company was infected with the disease of sloppiness”: Sheen *The Merchant Shipping Act, 1894, mv Herald of Free Enterprise*, Report of Court No. 8074 (1987) paragraph 14.1.

¹⁹ The fire at King's Cross underground station in 1987 killed 31 people. London Underground were later criticised for not having anyone charged with overall responsibility for fire safety, and for failing to guard against

Marchioness,²⁰ and the Clapham,²¹ Southall,²² Ladbroke Grove,²³ Hatfield²⁴ and Potters Bar²⁵ rail crashes. Manslaughter prosecutions of the corporations implicated in the Zeebrugge and Southall incidents did follow in the UK, but they were later dropped or thrown out because no one of sufficient standing within the corporations could be shown to have been so negligent that it could be said that the corporations *themselves* had committed manslaughter. In the UK, the

the unpredictability of the fire: Fennell *Investigation into the King's Cross Underground Fire* (HMSO London,1998) Cm 499.

²⁰ The sinking of the pleasure boat *Marchioness* by the *Bowbelle* in 1989 was responsible for the loss of 51 lives. The *Report of the Chief Inspector of the Marine Accident Investigation Branch into the Collision between the Passenger Launch Marchioness and MV Bowbelle with Loss of Life on the River Thames on 20 August 1989* (London HMSO 1991) identified those in direct charge of the vessels and those responsible for the perpetration and acceptance of their faulty design as culpable; *ibid* paragraph 18.20. A full public inquiry was announced only in 2001 following the publication of Lord Justice Clarke's final report on the incident: *Thames Safety Report, Final Report by Lord Justice Clarke* (January 2000) Cm 4558.

²¹ The Clapham rail crash killed 35 people in 1988. British Rail was later officially criticised for allowing work practices which were "positively dangerous". Responsibility was said to lie much wider and higher in the organisation than merely with those who had been working at the scene at the time: see the Home Office Consultation Paper *Reforming the Law of Involuntary Manslaughter: The Government's Proposals* (May 2000) at paragraph 3.15. British Rail pleaded guilty to breaches of the Health and Safety Acts and were fined STG£250,000 and ordered to pay STG£55,000 prosecution costs: *The Guardian* 15 June 1991.

²² The Southall rail crash in 1997 resulted in 7 deaths. The rail company Great Western Trains was criticised by Lord Cullen for having had "serious faults of senior management" - *R v Great Western Trains Company*, English Central Criminal Court 30 June, 1999 *per* Scott-Baker J.

²³ The Ladbroke Grove rail crash in 1999 killed 31 people when a train passed a red signal and collided with a high speed train. There was a media outcry after the Crown Prosecution Service confirmed that it would not bring any manslaughter charges against Railtrack and Thames Trains.

²⁴ The Hatfield rail crash in 2001 which killed 4 people was found to have been caused by a broken rail which caused the train to derail. Two companies and six managers were charged with manslaughter in 2003. See *The Times* (London) 10 July 2003.

²⁵ The Potters Bar rail crash in 2002 killed 7 people. The final report of the British Transport Police and the Health and Safety Executive is awaited.

charging of the two companies involved with the Hatfield rail crash with manslaughter in July 2003 is only the third time that large companies have been charged with manslaughter following such a disaster.

1.08 The perception that the criminal law and its processes are inadequate in dealing with corporations whose activities result in death has been added to by related concerns about the operation and enforcement of the health and safety legislation under which until recently, prosecutions were invariably brought in the District Court where a maximum fine of €1,900 applied.²⁶ However, since 2000, when the first prosecution on indictment was brought, a shift is apparent. This may be traced to the *Zoe Developments* case in 1997²⁷ where the Health and Safety Authority obtained a closure order against the company, which had previously been convicted in the District Court for safety offences. The company was described by Kelly J as a “recidivist criminal” and “not entitled to make profits on the blood and lives of [its] workers”,²⁸ and its managing director was required to make a contribution of IR£100,000 (€127,000) to charity to show his regret for his company’s attitude to safety. Some of Zoe Development’s pre-1997 offences later led to the first prosecutions on indictment under safety legislation with fines of IR£15,000 (€19,046) and IR£5,000 (€6,349) being imposed. At sentencing stage, Judge O’Donnell in the Circuit Criminal Court said that the fines imposed should be more than a “blip” in the company balance sheet.²⁹ More recently, a fine of €500,000 was imposed in 2003 in the Circuit Court.³⁰

1.09 It can be argued that to prosecute corporations whose activities result in death under the health and safety legislation for what are perceived to be regulatory offences fails to reflect society’s outrage at the seriousness of their wrongs. If, for example, an

²⁶ See paragraph 2.33 *ff* below.

²⁷ See Gardiner “Corporate Manslaughter” (2000) CLP 218.

²⁸ *The Irish Times* 18 November 1997. See Gardiner “Corporate Manslaughter” (2000) 7 CLP 218.

²⁹ *The Irish Times* 24 June 2000.

³⁰ *The People (DPP) v Oran Pre-Cast Limited* Circuit Criminal Court (Castlebar) 3 July 2003. See paragraph 2.47 below.

individual can be convicted of manslaughter for gross negligence in driving, then it may be asked why corporations are not prosecuted for manslaughter in Ireland where their gross carelessness results in death? A recurring theme in much of the literature in this field is a criticism of the law's general reticence to view corporations, and the people who control them, as criminals.

1.10 Nevertheless there have been some developments which evidence a change in the judicial perception of businesses whose activities result in death. In *The People (DPP) v Cullagh*,³¹ a funfair operator was convicted of criminal negligence arising out of the death of a member of the public on a chairplane (he received a three year suspended sentence). In *The People (DPP) v Roseberry Construction Co. Ltd*,³² manslaughter charges were initiated against the managing director of a company following the death of two workers on a building site. While the manslaughter charges were not proceeded with, a fine of IR£200,000 (€254,000) was imposed on the company and a fine of IR£40,000 (€50,800) was imposed on the director for breaches of health and safety legislation. A sub-contractor who pleaded guilty to a charge of reckless endangerment under the *Non-Fatal Offences Against the Person Act 1997* was given an 18 month suspended sentence.³³

1.11 It is not surprising that the area of criminal liability for corporate killing is one that has received attention from academics and reformers both in other jurisdictions and closer to home. In Ireland, the *Corporate Manslaughter Bill 2001*³⁴ was introduced in the Dail as a Private Member's Bill by Pat Rabbitte TD. That Bill sought to extend the law of manslaughter to corporations. However, the Bill lapsed without being debated. In the United Kingdom, the Home Secretary announced in May 2003 that proposals for draft legislation dealing with corporate manslaughter would be published

³¹ Court of Criminal Appeal 15 March 1999 (*ex tempore* judgment of the court, Murphy J). See paragraph 3.09 below.

³² Circuit Criminal Court (Naas) 21 November 2001.

³³ The criminal liability of corporations for non-fatal offences against the person is outside the scope of this Paper.

³⁴ See paragraph 2.80 *ff* below.

before the end of 2003.³⁵ The area has also received attention in the Australian State of Victoria, where the introduction of an offence of ‘corporate manslaughter’ was proposed in the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*. That Bill was, however, defeated.³⁶

C Relevant Issues

1.12 The above concerns give rise, to a need for review of the issue of whether corporations should be open to prosecution for manslaughter and other serious crimes of homicide. As is often the case with law reform, however, the narrow debate about the criminal liability of corporations for corporate killing does not occur in a vacuum: it is one of a broad range of issues which are worthy topics of review in their own right and require some discussion here in order to place the reform options that are open to the Oireachtas in proper context.

(1) *The Role of the Criminal Law*

1.13 The ongoing debate about the proper function of the criminal law is illuminating in this context. Modern criminal law attempts to reconcile the tension between the moral goal of denouncing activity which is regarded as socially unacceptable, on the one hand, with the utilitarian objective of preventing harm through deterrence, incapacitation and rehabilitation of offenders, on the other. These goals are not entirely mutually exclusive, and criminal legislation rarely if ever expresses its preference in specific circumstances for either. It is important to appreciate, however, that tension between them limits the effectiveness of criminal provisions in achieving either goal in an attempt to achieve both; indeed it is often the case that utilitarian objectives are more effectively achieved through other processes – social and educational, administrative and regulatory, remedial and compensatory - than through the simple application of criminal sanctions.

³⁵ See Chapter 5 below.

³⁶ See Chapter 6 below.

1.14 Seen in this light, exposing corporations to the prospect of criminal prosecution for acts of corporate killing may be less effective in terms of protecting safety than, say, a programme of education, monitoring and support, backed up by regulatory sanction where necessary. That view is reflected in the current regime governing health and safety.³⁷

1.15 That does not necessarily mean, however, that criminal law has no role to play in the field. In serious cases, the prosecution of a corporation for corporate killing may satisfy society's legitimate need to denounce seriously unacceptable activity. Even so, the limits of criminal sanction must be recognised.³⁸ Logistical factors further limit the achievement of the goals of the criminal law. Much crime goes undiscovered, unrecognised or unreported and much criminal law goes unenforced. Detected crime must be established beyond reasonable doubt in a process which pays close attention to procedural fairness. Convicted criminals must be given a sentence which is appropriate not merely to the crime they have committed but also to their individual circumstances. A limited range of sentencing options exists. While such factors do not impede the moral argument that crime should be punished, they do play a significant part in the assessment of the criminal law as a means of social control.

1.16 There is therefore a need for realism regarding what can be achieved by the imposition of criminal liability on corporations for homicide. The Commission accepts that the criminal law in general plays an important role in attaching opprobrium to harmful conduct, and that it may sometimes engender useful deterrent effects by creating a fear of prosecution. In this regard it is also important in the commercial context to avoid the so called 'deterrence trap' - "the situation where the only way to make it rational to comply with the law is to set penalties so high as to jeopardise the economic viability of corporations that are the lifeblood of the economy".³⁹ The challenge is to strike the right individual and public balance between

³⁷ See paragraph 2.33 *ff* below.

³⁸ See paragraph 8.02 below.

³⁹ Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993) at 136.

the use of the criminal law and other mechanisms in the promotion of safety.

(2) *The Criminal Liability of Corporations*

1.17 The question of the criminal liability of corporations for corporate killing is part of the broader debate concerning the liability of corporations generally. As was noted earlier, the broad question of the criminal responsibility of corporations has been flagged by the Commission in its Second Programme of Law Reform as one which will be the subject of review in its own right. The Commission accepts that the debate on the broad issue impinges on the narrower question of corporate killing. By parity of reasoning, the Commission recognises that its provisional recommendations on the question of corporate killing could have implications for any future review of the general issue. However, the Commission cautions against the adoption of any solution to the problem of corporate killing which would result in the adoption of any wider principle of corporate liability for homicide than currently exists in respect of other crimes.

1.18 The broader debate begins with the question of whether corporations should be made criminally liable for serious – as opposed to regulatory – crimes *at all*? That debate is ongoing, having received attention only in recent decades, and the distinction between individual and collective criminal responsibility is central to it. The criminal law has traditionally been primarily concerned with the responsibility of individuals rather than organisations. Older aphorisms that corporations are not capable of being subjected to the criminal law since it punishes “violations of the social duties that belong to men and subjects”⁴⁰ and corporations cannot be expected to have a conscience when they have “no soul to be damned, and no body to be kicked”⁴¹ have partially fallen from favour in the modern context since corporations can be and are frequently subjected to the criminal law in the form of regulatory offences. They nonetheless point to the fundamental difficulties facing any attempt to introduce serious criminal liability in the corporate context.

⁴⁰ *Per* Denman LCJ in *R v Great North of England Railway Company* (1846) 9 QB 315, 326.

⁴¹ Attributed to Edward, First Baron Thurlow (1731-1806) Lord Chancellor.

D Why Prosecute Corporations?

1.19 The first question is whether it is the corporation itself, as distinct from the individuals who constitute or control it, which is the proper subject of criminal responsibility? The law has long recognised that a corporation is a separate and distinct legal person from the individuals associated with it,⁴² but the law also recognises that a corporation is incapable of doing anything without the intervention of natural persons. Given the criminal law's preoccupation with the liability of individuals rather than organisations, should it not focus exclusively on the criminal conduct of directors, officers, employees or even controlling members? What can be gained by prosecuting a corporation?

1.20 First, it may be argued, many corporations (and other types of organisation) promote themselves as distinct *personae*, through advertising or otherwise. To fail to attach blame to the publicly perceived wrongdoer creates a perception that the real wrongdoer is getting away with criminal activity. On the contrary, it is argued that a conviction of an individual within the corporation should not result in automatic conviction of the corporation itself in the absence of significant corporate participation in the crime or without substantial policy considerations such as would justify the imposition of liability on one person (the corporation) for the acts of another (the individual). Such policy considerations are considered valid in the common law tradition only in the regulatory field in order to protect, for example, the health and safety of employees, the environment, or the integrity of financial markets.

1.21 Secondly, a focus on individual wrongdoers within the corporate structure may deflect attention from the fact that corporations may have a momentum and dynamic of their own which seriously influences individual conduct. Take the examples of the train driver whose negligence was the immediate cause of the Southall train crash in England, or the junior employees of P&O European Ferries in the Zeebrugge ferry disaster⁴³ whose carelessness

⁴² See paragraph 2.05 *ff* below.

⁴³ See further paragraph 1.52 *ff* and paragraph 3.25 below.

led directly to the capsizing of the *Herald of Free Enterprise*: in each case it was apparent from official inquiries into the accidents that organisational failure rather than purely individual acts and omissions led to their conduct. In the Zeebrugge case, when the company and senior management were acquitted of manslaughter, such concerns led to a decision not to continue with prosecution of the junior employees (even though it appears there was sufficient evidence against them to allow the case to go to the jury) since their prosecution would attract public sympathy and they would be regarded as ‘scapegoats’.⁴⁴ As against such concerns, it is said that all human activity – whether within the corporate environment or otherwise - is influenced by a variety of factors (these would include social and cultural, familial, institutional, political and economic factors). Such external influences do not negate individual responsibility, though they can be given substantial weight in mitigation of sentence.

1.22 A third, related, argument is that it may not be possible to attach liability to any individual within a corporation since the fault may lie within the organisational structures of the corporation - a ‘management failure’ - so that responsibility for the conduct is dispersed throughout the organisation and diluted rather than concentrated in any individual. The argument, then, is that corporations should be prosecuted where an offence is attributable to their organisational decision-making processes and structures, or to management failure.⁴⁵ There is also the important issue of whether it

⁴⁴ McAuley and McCutcheon *Criminal Liability* (Dublin 2000) at 397; Wells “Manslaughter and Corporate Crime” (1989) 139 New LJ 931. Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993) discuss the difficulties of scapegoating further at 38-41, 55-57, and 96-97.

⁴⁵ See generally Fisse and Braithwaite *op cit* fn42; Wells *Corporations and Criminal Responsibility* (2nd ed Oxford 2001); Fisse “Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties” (1990) UNSW LJ 1; Clarkson “Kicking Corporate Bodies and Damning their Souls” (1996) 59 MLR 557, at 518-519; Gobert “Corporate Criminal Liability: Four Models of Fault” (1994) 14 LS 393, at 403-404; French *Collective and Corporate Responsibility* (New York, 1984) at 45 *ff*; Bucy “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability” (1991) 75 Minn L Rev 1095; Khanna *Criminal Liability* (1994) 23 J Leg Stud 833; Khanna “Corporate Criminal Liability: What Purpose Does it Serve?” (1996) 109 Harv L Rev 1477;

is the corporation alone or also the individuals within it who should be penalised.⁴⁶

1.23 Fourthly, it is argued that corporations should be the subjects of criminal responsibility because it is they, rather than their individual constituents, who are best placed to prevent or remedy the defects in their operations which led to the incident.⁴⁷ Such arguments assume, of course, that corporations will react to criminal sanction by mending their ways and by adopting remedial policies. There is more force in the argument that corporations may be deterred from acting recklessly or negligently in the first place where they are aware of the possibility of ultimate criminal sanction. Corporations, like any other offender, may measure the impact of criminal sanction against a variety of scales: the risk of offending; the risk of detection; the cost of compliance; and the cost of sanction *versus* the potential for profit.

1.24 Fifthly, it is argued by those opposed to the imposition of corporate criminal liability that the attachment of blame to corporations inevitably impacts on persons who are *not* blameworthy (unless everyone in the corporation was a participant in the crime). The argument is countered by those who say that once such individuals within the corporation are not directly blamed their suffering can be likened to that of the family of a convicted person: “they are not convicts but corporate distributees”.⁴⁸

1.25 Finally, the imposition of criminal sanction on corporations can have perverse effects, either by encouraging corporations to become defensive or uncooperative in their practices, or by encouraging them to adopt only minimum compliance measures rather than promoting the adoption of best practice.

Khanna “Is the Notion of Corporate Fault a Faulty Notion: The Case of Corporate Mens Rea” (1999) 79 BULR 355.

⁴⁶ See paragraph 8.49 *ff* below.

⁴⁷ See for example Bucy *op cit* fn45, at 1158 *ff*.

⁴⁸ Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993) at 50.

E Can Corporations Suffer Criminal Sanction?

1.26 A second question forming part of the broader debate asks whether corporations can suffer criminal sanction? One aspect of this question involves a focus on the range of available sanctions: corporations cannot suffer imprisonment; and the argument has been made that they can buy their way out of proper retribution by paying fines. Further, it is said, fines indirectly hit innocent shareholders and customers rather than the real wrongdoers. On the other hand, fines can be ‘felt’ by a corporation if they are substantial and if they interfere with its competitiveness in the marketplace; and the spill-over effects of fines may be justified by making those who reap the benefits also shoulder the burdens. Such concerns point to a need for special considerations to be brought into play in the sentencing of corporate offenders, and highlight the need for new and innovative penalties.⁴⁹

1.27 At a much more fundamental level, however, the second question raises the issue of whether corporations are capable subjects of the criminal law. Is there such a thing as ‘corporate morality’? Some doubt that corporations, particularly large business corporations, are influenced in any significant way by moral considerations. Many have argued that they are simply cold-blooded, profit-maximising machines, incapable of ‘feeling’ the moral opprobrium of society when criminal obligations or sanctions are imposed. The necessary participation of individuals - who *are* capable of moral thought - in corporations cannot be overlooked, but individual moral goals may be emasculated by the corporate dynamic and the complexities of organisational decision-making processes. Accordingly, many continental jurisdictions have, until recently, rejected any notion of corporate criminal liability on the basis that corporations are incapable of moral reasoning and sentiment.⁵⁰

1.28 Other studies suggest, however, that many corporations are, and can be, influenced by moral considerations in their decision-making processes, sometimes even when the latter do not accord with

⁴⁹ See paragraph 8.02 *ff* below.

⁵⁰ See Chapter 4 below.

the profit motive.⁵¹ It is also widely acknowledged that preservation of reputation is an important element in commercial decision-making. The decision of Shell to abandon its plans to dispose of the *Brent Spar* oil platform (containing toxic sludge) at sea in response to public uproar and boycotts is an example.⁵² Cases of this kind tend to support the proposition that the imposition of moral duties on corporations can have an effect on the way in which they operate and that accountability should replace the notion of morality where corporations are concerned. This leads to the conclusion that corporations can be the subject of criminal responsibility, albeit a different form of responsibility to that of individuals. This in turn gives rise to questions about whether it is just for the criminal law to treat corporations differently from human beings?

F How Can Corporations be made Criminally Liable?

1.29 This question is concerned with the identification of corporate wrongdoing. Corporations can only act, or fail to act, through human beings: their officers, employees and agents. Assuming that a case can be made for the imposition of criminal liability on corporations, the next question is should they be criminally liable for every act or omission of such individuals?

1.30 *R v Cory Brothers & Co*,⁵³ decided in 1927 was the first English case in modern times to consider whether a corporation could be prosecuted for manslaughter. Finlay J considered himself bound by earlier authorities and held that a corporation could not be prosecuted for felony or misdemeanour involving personal violence. However, since then a number of principles of corporate liability have emerged, namely, vicarious liability; the identification doctrine; strict liability; organisational liability; reactive liability; power and acceptance; aggregation; and flexible attribution.

⁵¹ See generally Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993) Chapter 1; Wells *Corporations and Criminal Responsibility* (Oxford 1993) Chapters 4 and 8.

⁵² See, for example, Goldberg "Legal Licence" in *What Price Your Corporate Reputation?* British Safety Council (London 2001) at 11.

⁵³ [1927] 1 KB 810.

(1) Vicarious Liability

1.31 Under the vicarious liability or *respondeat superior* principle, a master or employer is liable for the acts or omissions of his or her servants or agents. The principle was conceived in the law of torts to facilitate the recovery of civil damages from the defendant with the deepest pocket.

1.32 The Federal Courts in America have embraced the *respondeat superior* principle to hold corporations liable for federal offences, but corporations are permitted to put forward the defence that employees or agents were acting outside the scope of their employment and for personal gain.⁵⁴ Even then, the principle sits uncomfortably with liability for serious crimes - particularly crimes involving *mens rea* (a mental element) - because fundamentally it involves the imposition of liability on one 'person' (the corporation) for the wrongs of another (the employee or agent) in circumstances where, in the nature of things, the person on whom liability is being vicariously imposed lacks *mens rea*.

1.33 As a general rule, the common law does not embrace the principle of vicarious liability for crimes requiring *mens rea*,⁵⁵ but there are three notable exceptions: the common law offence of public nuisance;⁵⁶ the common law offence of criminal libel;⁵⁷ and offences created by statute where to deny such liability would render the statutory regime nugatory.⁵⁸ In the latter regard, the courts have further developed two distinct approaches. The first is the delegation principle, which ensures that a corporation is held liable where it has delegated the duties imposed on it by statute to another. This approach is often used in dealing with offences under the Licensing Acts and similar statutes where only the licensee or inn-keeper could

⁵⁴ See paragraph 4.14 *ff* below.

⁵⁵ *R v Huggins* (1730) 2 Stra. 883. See McAuley and McCutcheon *Criminal Liability* (Dublin 2000) at 361 *ff*.

⁵⁶ *R v Stephens* (1886) LR 1 QB 702.

⁵⁷ *R v Holbrook* (1878) 4 QBD 42.

⁵⁸ *Mullins v Collins* (1874) LR 9 QB 292.

commit the offence.⁵⁹ The second is the extended purposive construction approach of attributing an employee's acts to his or her master for breaches of statutory duties.⁶⁰

1.34 Thus the American Law Institute's *Model Penal Code*,⁶¹ which has been adopted by a large number of US States, reserves the *respondeat superior* principle for statutory crimes where the overriding public policy goals of regulation are thought to justify it. The *Model Penal Code* introduces a 'due diligence' defence for corporations that take reasonable care to prevent the commission of the offence in the first place.

1.35 In general, however, the vicarious liability approach has been limited to situations where a purposive interpretation of the relevant statute would justify it, and, even in such circumstances, constitutional doubts have been raised about its use in the criminal context in Ireland. In *Re Employment Equality Bill 1996*,⁶² the Supreme Court considered that while the vicarious liability principle forms part of Irish Law, its application must be proportionate to the mischief which it is designed to defeat. In that case, provisions rendering an employer vicariously liable for employees' wrongs and making the employer punishable on indictment by a fine of up to £15,000 (€19,046) and two years' imprisonment were struck down as unconstitutional since the employer would "be tainted with guilt for offences which are far from being regulatory in character but are likely to attract a substantial measure of opprobrium".⁶³

1.36 There is little doubt in Irish and English law, at any rate, that the vicarious liability approach does not apply to most common law crimes, particularly manslaughter. The English Court of Appeal roundly rejected the vicarious liability principle in cases of

⁵⁹ The delegation principle has been applied in a number of Irish cases, for example, *Department of Agriculture and Technical Instruction v Burke* [1915] 2 IR 128. See McAuley and McCutcheon *op cit* fn55 at 375 ff.

⁶⁰ See, for example, *Mousell Brothers Ltd v London and North Western Railway Co* [1917] 2 KB 836.

⁶¹ American Law Institute *Model Penal Code* (Philadelphia 1962).

⁶² [1997] 2 IR 321.

⁶³ *Ibid* at 373.

manslaughter by corporations in *Attorney General's Reference (No 2 of 1999)*.⁶⁴ The Court noted that all recent authorities on the issue of corporate liability for manslaughter reaffirmed the requirement that such liability must be direct rather than vicarious.⁶⁵

1.37 *The Commission recommends that vicarious criminal liability should not be imposed on corporations for crimes of homicide.*

(2) Strict Liability

1.38 One solution to the practical problem of having to identify an individual wrongdoer within the corporation would be to hold corporations strictly liable for wrongs committed by their officers, agents and employees. Under such a model, once a crime is shown to have been committed, the corporation will automatically be held liable without the need to show which individual or individuals were responsible (unlike vicarious liability). Strict liability works well for offences of omission or failure. However, strict liability can be objected to in principle on the same grounds as vicarious liability since it punishes the corporation which takes reasonable steps to prevent the wrong as well as the corporation which takes no such steps⁶⁶ - though preventative efforts could be taken into account at the sentencing stage. The Irish and English courts have long been sceptical of the principle for this reason, though it has been accepted for regulatory offences where there are strong policy justifications.⁶⁷ The strict liability principle can be modified with a 'due diligence' defence to mitigate some of its harsh effects. That, in many respects, is the basis for imposing criminal liability for statutory offences under the *Safety, Health and Welfare at Work Act 1989*⁶⁸ (which includes a defence to cater for circumstances where the corporation has done all that is reasonably practicable in the circumstances to comply with its statutory duties).

⁶⁴ [2000] QB 796.

⁶⁵ *Ibid* at 810-816.

⁶⁶ *Alphacell Ltd v Woodward* [1972] AC 824.

⁶⁷ See generally McAuley and McCutcheon *Criminal Liability* (Dublin 2000) Chapter 7.

⁶⁸ See paragraph 2.35 *ff* below.

1.39 It has been suggested that there is nevertheless some scope for the adoption of the principle in relation to a wider range of offences in Irish law provided that protection is afforded to the faultless;⁶⁹ but the courts have yet to explore such options in detail.

1.40 Strict liability is, however, incompatible with the requirement for *mens rea* (a mental element) in serious common law offences. The Commission does not consider that strict liability is an appropriate basis for the imposition of criminal liability on a corporation for serious crimes of homicide. The Commission's view is that serious crimes of homicide (as opposed to regulatory offences) involve too great a degree of moral turpitude to allow for the attribution of criminal liability for such offences to corporations on the basis of strict liability. Furthermore, an extension of the *status quo* to enable criminal liability to be imposed without identifying corresponding wrongs on the part of individuals acting within a corporation would require a reconsideration and reshaping of fundamental concepts within the criminal justice system, particularly the concept of blame.

1.41 *The Commission recommends that strict liability should not be imposed on corporations for crimes of homicide.*

(3) The Identification Doctrine

1.42 Another means of attributing criminal liability to corporations is the 'identification doctrine'. This doctrine views the crimes of a corporation's controlling officers as constituting the acts of the corporation itself by identifying them as being one with the corporation. The identification doctrine has been favoured by a number of jurisdictions where principles of corporate criminal responsibility are emerging in some shape or form, and the doctrine is the dominant model in most jurisdictions which extend criminal liability to corporations for serious crimes.⁷⁰

⁶⁹ See, for example, *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, 290 *per* Keane J; and *McAuley and McCutcheon op cit* fn67 at 345 *ff*.

⁷⁰ See paragraph 4.14 *ff* below.

1.43 In *HL Bolton (Engineering) Co Ltd v TJ Graham & Co Ltd*,⁷¹ Lord Denning said:⁷²

“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

(a) *Tesco Supermarkets Ltd v Natrass*

1.44 The leading English authority on the identification doctrine is the decision of the House of Lords in *Tesco Supermarkets Ltd v Natrass*,⁷³ where the appellant company was prosecuted for an offence of misleading advertising under the British *Trade Descriptions Act 1968*. A local branch manager was at fault in providing the misleading information, and the company invoked the two-pronged defence provided by the Act of due diligence and that the offence was due to the act of “another person” – specifically, the branch manager. The House of Lords, drawing on the earlier distinctions made by Lord Denning between the “hands” of a company and its “brains”,⁷⁴ held that the branch manager at fault was too low in the managerial hierarchy of the company to be said to represent the directing mind and will of the company; accordingly he was acting as “another person” rather than as the company, and the defence succeeded.

⁷¹ [1957] 1 QB 159.

⁷² *Ibid* at 172.

⁷³ [1972] AC 153. See also the discussion of section 48(19) of the *Safety, Health and Welfare at Work Act 1989* at paragraph 2.52 ff below.

⁷⁴ *HL Bolton (Engineering) Co Ltd v TJ Graham & Co Ltd* [1957] 1 QB 159, 172.

1.45 The House of Lords in *Tesco* offered varying solutions as to how the “controlling mind and will” of a corporation may be identified. Lord Reid thought that the company should be identified with

“the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of the management and speak and act as the company...”⁷⁵

1.46 Viscount Dilhorne, on the other hand, said that a company would be criminally liable only for the acts of

“a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders...”⁷⁶

1.47 Lords Pearson and Diplock considered that the controlling mind should be found by looking to the constitutional provisions of the corporation. Lord Diplock said that the controlling mind and will should be found

“by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.”⁷⁷

(b) *Criticism of the Tesco Doctrine*

1.48 Despite the internal variations in the solutions offered by the Law Lords, which, if applied strictly would produce differing results, it is clear that the focus of the identification doctrine in English law is on persons at the apex of the corporate hierarchy. By limiting the focus of the criminal law to the senior officers of the corporation, the

⁷⁵ [1972] AC 153, 171.

⁷⁶ *Ibid* at 187.

⁷⁷ *Ibid* at 200.

doctrine fails to reflect the reality that corporate decision-making can occur at many levels within a sophisticated organisational structure. In consequence, corporations will not be held criminally liable for the majority of their corporate acts, and some may even structure their organisational system by devolving potentially criminal decisions to a lower level within the organisation. To date the identification doctrine has worked best in relation to smaller companies where everyday corporate affairs are conducted at a higher level; its requirements will rarely be satisfied in larger corporations having more diffuse structures. The doctrine also suffers from the same practical limitations as the vicarious liability principle - it is necessary to find at least one person acting within the corporation who is guilty of the offence in question before liability can attach to the corporation itself. Some jurisdictions vary the doctrine by extending the category of persons who can be identified with the corporation to include responsible officers - not merely those at board level, but anyone having a significant degree of autonomy with regard to making corporate decisions and instigating corporate actions.⁷⁸

1.49 The narrow scope of the English identification doctrine may be contrasted with the broader principles of attribution which have been developed since *Tesco* by the English Courts to deal with statutory offences by corporations. In *Re Supply of Ready Mixed Concrete (No 2)*⁷⁹ the House of Lords found companies to be in contempt of court when their employees implemented anti-competitive practices in breach of injunctions against the company and in violation of the English *Restrictive Practices Act 1976*. The Law Lords held that the employees were carrying on the business of the company in the course of their employment, and that liability would attach despite instructions from senior management - the directing mind and will - not to engage in such practices.

1.50 A similar approach was adopted by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities*

⁷⁸ Such a modified form of the identification doctrine is applied in the American *Model Penal Code*, American Law Institute (Philadelphia 1962), in the Australian *Criminal Law Act 1995*, and was adopted by the Canadian Supreme Court in *Canadian Dredge and Dock Co. Ltd. v The Queen* (1985) 19 DLR (4th) 314. See also Chapter 4 below.

⁷⁹ [1995] 1 AC 456.

*Commission*⁸⁰ where a company was convicted for failing to issue a notice disclosing a substantial shareholding contrary to New Zealand securities legislation. The shares were acquired by employees acting on behalf of the company, but without the knowledge of the board of directors and the managing director. Lord Hoffman held that where the “primary” principles of attribution of responsibility, such as those derived from the company’s constitution or implied by company law, would defeat the intended application of a particular provision to companies, it is necessary for the courts to devise a special rule of attribution which will give effect to the provision.⁸¹ What that rule should be would depend in each case on an interpretation that is appropriate to the offence involved and the policies behind it. In *Meridian*, the rule of attribution was held not to require consideration of whether the board and managing director knew of the infringements, since such an interpretation would defer any enforceable reporting obligation until senior executives became so aware. *Meridian* was cited with approval by the Irish High Court in the context of the attribution of civil liability to a company in *Crofter Properties Limited v Genport*.⁸²

1.51 *Meridian* was considered significant in the law relating to corporate criminal liability not merely because it involved a displacement of the identification principle in favour of a broader approach in cases where statutory provisions are concerned, but because the purposive approach to attribution gave recognition to the complexities of diffuse management structures and the fact that corporations do not always operate on a purely hierarchical or vertical model.⁸³

⁸⁰ [1995] 2 AC 500.

⁸¹ *Ibid* at 507.

⁸² High Court (McCracken J) 23 April 2002.

⁸³ See, for example, Grantham “Corporate Knowledge: Identification or Attribution?” (1996) 59 MLR 732; and Robert-Tissot “A Fresh Insight into the Corporate Criminal Mind: *Meridian Global Funds Management Asia Ltd v Securities Commission*” (1996) 17 Co Law 99.

(c) *Application of the Identification Doctrine to Corporate Manslaughter*

1.52 In *R v P&O European Ferries (Dover) Ltd*,⁸⁴ a case concerning the prosecution of the ferry company and seven of its employees for manslaughter in connection, again, with the Zeebrugge ferry disaster, Turner J in the Central Criminal Court rejected the argument that a corporation could not, as a matter of substantive law, be indicted for manslaughter. Referring to authorities such as Coke, Hale, Blackstone and Stephen which defined homicide as killing by a human being, he noted that they reflected a time when the very notion of corporate criminal liability was beyond contemplation. Noting also that further authorities established that corporations could not be indicted for certain offences,⁸⁵ Turner J said that these could be explained as exceptional and limited to procedural considerations such as the inability of corporations to suffer punishment such as imprisonment. Recognising that the criminal law had subsequently come to terms with the identification doctrine, Turner J concluded as follows:

“Since the nineteenth century there has been a huge increase in the numbers and activities of corporations ... A clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law. By tracing the cases decided by the English Courts over the period of the last 150 years, it can be seen how first tentatively and finally confidently the courts have been able to ascribe to corporations a “mind” which is generally one of the essential ingredients of common law and statutory offences ... Once a state of mind could be effectively attributed to a corporation, all that remained was to determine the means by which that state of mind could be ascertained and imputed to a non-natural person. That done, the obstacle of acceptance of general criminal liability of a corporation was overcome. ...[T]here is nothing essentially incongruous in the notion that a corporation should be guilty of the offence of unlawful killing. ...[W]here a corporation,

⁸⁴ (1991) 93 Cr App R 72.

⁸⁵ *R v Birmingham and Gloucester Railway Co* (1842) 3 QB 223; *R v Great North of England Railway Company* (1846) 9 QB 315.

through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter.”⁸⁶

1.53 Applying the identification doctrine, Turner J ruled that the assistant bosun and the chief officer of the ship were not sufficiently high in the management hierarchy of the company for their acts and omissions to represent those of the company. Turner J’s reasoning in *P & O* has since been accepted by the Court of Appeal as the “classic analysis of the relevant principles”,⁸⁷ and it is now beyond doubt that an indictment lies against a corporation for manslaughter in England based on an application of the identification doctrine.

1.54 In *R v Great Western Trains Company (GWT)*,⁸⁸ a company was prosecuted for manslaughter on seven counts arising from the Southall rail crash in England in 1997 in which seven passengers were killed and many more were injured. A high-speed train with a malfunctioning automatic warning system was driven, unusually, by only one person. Both of the train’s safety devices, which would have prevented the crash, were turned off with the driver’s knowledge. The train ran past a signal pointing at danger, while the driver was packing his bag in anticipation of arrival at London, and it then collided with a goods train.

1.55 The prosecution’s case against the company was that it owed a duty of care to its passengers to assess and address all foreseeable risks, which included the risk of a single driver’s negligence causing a train to pass a signal pointing at danger. It was argued that the company could in its policies have required the train to be replaced or the driver to be accompanied; instead it allowed the train to proceed normally, and encouraged its drivers to depart on time even where not complying with its own safety rules. The company pleaded guilty to breaches of section 3(1) of the British *Health and Safety at Work Act 1974*, and was fined STG£1.5 million.

⁸⁶ (1991) 93 Cr App R 72, 77-78.

⁸⁷ *Attorney General’s Reference (No 2 of 1999)* [2000] QB 796, 815 per Rose LJ.

⁸⁸ English Central Criminal Court 30 June 1999. See Wells *Corporations and Criminal Responsibility* (2nd ed Oxford 2001) at 112 ff.

The trial judge directed an acquittal on the manslaughter charges, however, since the negligence of the driver could not be attributed to the company, he being too low in the corporate hierarchy to come within the identification doctrine. Moreover, no member of senior management could be identified as satisfying the elements of the crime of gross negligence manslaughter. The trial judge's direction was subsequently upheld by the Court of Appeal in *Attorney General's Reference (No 2 of 1999)*.⁸⁹ The Court of Appeal firmly rejected the argument that *Meridian*⁹⁰ admitted of any principle of attribution other than the identification doctrine in cases of manslaughter by corporations. Rose J, speaking for the Court, said that "Lord Hoffman's speech in *Meridian* ... is a re-statement, not an abandonment, of existing principles".⁹¹

1.56 The outcome in the *Great Western Trains Company (GWT)* case can be contrasted with that in *R v Kite and OLL Ltd*,⁹² where an outdoor leisure company was convicted of manslaughter for the death of a canoeist during a negligently managed canoeing expedition. The company was essentially a one-man operation, and the company's liability was established automatically upon his conviction for manslaughter in connection with the same events since he was its managing director and directing mind and will.

(d) *The Identification Doctrine in Ireland*

1.57 The identification doctrine has been accepted - with reservation - by the Supreme Court in Ireland in the context of the imposition of civil liability on a corporation.⁹³ As already indicated, however, there is no reported decision of the Irish superior courts on the question of whether the doctrine extends to the criminal sphere.

⁸⁹ [2000] QB 796.

⁹⁰ [1995] 1 AC 456.

⁹¹ [2000] QB 796, 814.

⁹² Winchester Crown Court 8 December 1994 *The Independent* 9 December 1994.

⁹³ *Superwood Holdings Plc v Sun Alliance Assurance Plc* [1995] 3 IR 303. See paragraphs 2.74-2.75 below.

1.58 The suitability of the identification doctrine as a basis for the imposition of criminal liability on corporations for corporate killing is examined further in Chapter 7 below.⁹⁴

(4) *Organisational Liability*

1.59 Each of the models of corporate criminal liability thus far examined is *derivative* in nature: the liability of the corporation is derived from the liability (or aggregated liability, as the case may be) of individuals operating within the corporation.⁹⁵ Some recent debate,⁹⁶ however, proposes a different and *direct* means of attributing fault to corporations, suggesting an ‘enterprise’ or ‘organisational’ liability model of corporate liability. This approach gives recognition to the emerging notion that organisations have an existence transcending that of their employees, directors, agents and members. Studies in the field of organisation theory, for example, suggest that corporate decisions are often products of procedures and internal bargaining processes which have a life of their own and so cannot be traced back to individual originators.⁹⁷

1.60 Organisational liability models are founded on the notion that corporate criminal fault is capable of being viewed in terms different to individual criminal fault. Whereas individual fault is measured by reference to moral criteria, corporate fault, it is argued, can be found in corporate policies or ‘culture’, particularly those

⁹⁴ See paragraph 7.45 *ff* below.

⁹⁵ Strict liability may prove the exception where crimes of omission are concerned – strict liability for such crimes might be imposed on a corporation without the need to show that a specific individual was guilty.

⁹⁶ See, for example, Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993); Wells *Corporations and Criminal Responsibility* (Oxford 1993); Fisse “Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties” (1990) UNSW LJ 1; Clarkson “Kicking Corporate Bodies and Damning their Souls” (1996) 59 MLR 557, at 518-519; Gobert “Corporate Criminal Liability: Four Models of Fault” (1994) 14 LS 393, at 403-404; French *Collective and Corporate Responsibility* (New York 1984) at 45 *ff*; Bucy “Corporate Ethos: A Standard for Improving Corporate Criminal Liability” (1991) 75 Minnesota LR 1095; Clarkson “Corporate Culpability” [1998] 2 Web JCLI.

⁹⁷ *Ibid.*

which fail to give due regard to the requirements of the criminal law or which fail to prevent a breach of it. Under an organisational model of liability, corporate fault can be regarded as being inherently criminal – the fault lying in the corporation’s failure to establish and maintain sound operational policies.⁹⁸

1.61 Under such organisational liability models, a corporation commits an offence if its corporate policy (or failures in its corporate policy) led to the causation of the offence in question. It is conceded that this will inevitably lead to the question of what precisely corporate policy is - how is it to be identified, and which acts of individuals within the corporation may be said to evince corporate policy? The answers are not entirely clear. Corporate policy can manifest itself in different ways from corporation to corporation. The question will arise as to whether the departure from acceptable policies is sufficiently serious as to be adjudged blameworthy to the requisite degree.

1.62 One practical advantage of organisational liability is that it does not require proof that any single individual within the corporation is guilty of the offence in question. This is easily misunderstood as meaning that it will be easier to find corporations liable for criminal offences if the model is employed. In practice, however, it would still be necessary to prove beyond reasonable doubt that a corporate policy existed (or where management failure is at issue, that the corporate policy ‘failed’ by reference to other more acceptable and available corporate policies) and that the policy was truly corporate and not merely the misconception of one or a few individuals acting within the corporation.

1.63 The suitability of organisational liability as a basis for the imposition of liability on corporations for corporate killing is examined further in Chapter 7 below.⁹⁹

⁹⁸ The proposal finds partial expression in the ‘management failure’ concept recommended by the Law Commission as the basis for reform in England and Wales: see Chapter 5 below.

⁹⁹ See paragraph 7.35 *ff* below.

(5) Reactive Liability

1.64 Reactive liability has been presented by theorists as a radical alternative approach to the imposition of liability on corporations. Once the *actus reus* (physical element) of an offence is shown to have been committed on behalf of a company, a court could order the company to investigate the occurrence in order to sanction the individuals responsible and to ensure no recurrence. Under this theory, the criminal fault of the company would arise if and only if there were a failure to react properly in accordance with the court order.

1.65 The ‘reactive liability’ model¹⁰⁰ concentrates on a corporation’s reaction when it has committed the *actus reus* of an offence. This approach locates corporate fault in a corporation’s failure to adapt its policies and to discipline internally and manage its employees in the light of past errors. The corporate wrong, then, is the organisation’s failure to respond positively to the commission of an offence rather than the commission of the offence itself. The model is radical in that it separates the time at which the *mens rea* is assessed from that at which the *actus reus* occurs: *mens rea* is now found in the corporation’s failure to react after the event.

1.66 The advantages of the reactive liability approach are that it punishes corporations which fail to react diligently when their attention is drawn to the harmful or excessively risky nature of their operations; and it also may force corporations to improve their compliance policies. In some respects that is what occurs in the current regulatory regime of health and safety when a corporation fails to comply with a prohibition notice¹⁰¹ - criminal prosecution will be a likely consequence. The reactive liability model, however, could extend beyond regulatory regimes to the general sphere of criminal liability where prohibition notices are not a feature. Moreover, the reactive liability model has the advantage of saving on prosecutorial energy and court time which might otherwise be spent in trying to

¹⁰⁰ See Fisse “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions” (1983) 56 SCLR 1141, at 1183 *ff*; Fisse and Braithwaite *Corporations, Crime and Accountability* (Cambridge 1993) at 47.

¹⁰¹ Under section 37 of the *Safety, Health and Welfare at Work Act 1989*.

disentangle the often convoluted internal structures and policies of corporations to find a *mens rea* which is contemporaneous with the *actus reus*. The radical nature of the reactive liability model may make the concept slow to gain acceptance.¹⁰² The model is also beset with practical difficulties – for example, it leaves uncertain which type of corrective measures would suffice to avoid liability.

1.67 A considerable difficulty with the reactive liability model is that it would be unjust to label a crime as something it fundamentally is not – for example, by calling failure to produce a safety statement following a death in the workplace ‘manslaughter’ without requiring proof of gross negligence. While the concept of reactive liability is interesting in theory, the Commission is not satisfied that it accords with fundamental principles of Irish criminal law.

1.68 *The Commission does not recommend the adoption of the concept of ‘reactive liability’ as a basis for the imposition of criminal liability on corporations for crimes of homicide.*

(6) Power and Acceptance

1.69 Another model of liability is employed by the Dutch courts who, in a move away from a strict liability model of corporate criminal liability, have adopted a unique ‘power and acceptance’ approach.¹⁰³ Under this approach, a corporation will be criminally liable if it was within its power to determine whether an employee acted in a criminally prohibited manner, and the employee’s act was nonetheless routinely accepted by the corporation in the ordinary course of business. As with other organisational models of liability, it is not necessary to show that any specific individual within the corporation acted in the prohibited manner. The concepts of ‘power’ and ‘acceptance’ are as yet imprecise in Dutch law, however, and the model continues to import elements of the identification doctrine since in each case an assessment has to be made as to where the

¹⁰² The Law Commission of England and Wales preferred to defer any detailed consideration of the reactive liability model in its review of the law of corporate liability for manslaughter: Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 7.35.

¹⁰³ The approach is examined further at paragraph 4.20 *ff* below.

‘power’ of the corporation resides - normally it will reside in the corporation’s senior officers.

1.70 The doctrine raises thorny questions such as whose acts and omissions are to be regarded as being those of the corporation. Moreover, the doctrine has not evolved sufficiently to resolve clearly the issues it raises. The Commission considers that the “power and acceptance” doctrine does not provide sufficient certainty to serve as a basis for imposing criminal liability on corporations for corporate killing.

1.71 *The Commission does not recommend the ‘power and acceptance’ doctrine as a basis for the imposition of criminal liability on corporations for crimes of homicide.*

(7) Aggregation

1.72 A practical requirement of each of the models of corporate criminal liability discussed so far is that some individual acting within the corporation must first be identified as having committed all the ingredients of the offence before liability can be attributed to the corporation. Such requirements are unsurprising, since the criminal law has traditionally been concerned with individual responsibility. In practice, however, it can often be difficult to identify such a person, either because corporations are well placed to shield or hide the individual wrongdoer or because there simply is no one person within the corporation who satisfies all the requirements of individual liability. The aggregation principle is thought to offer a limited solution to this problem.

1.73 The aggregation principle is of American provenance.¹⁰⁴ It allows the aggregate or combined fault of a number of individuals, each lacking the requisite *mens rea*, to be attributed to the corporation thus fixing it with liability. The approach is thought to reflect the reality of corporate organisation where frequently no one person has overall responsibility or sufficient fault to fix them, or through them, the company, with liability under the identification doctrine.

¹⁰⁴ See for example *United States v Bank of New England* 484 US 943 (1987). See Ragozino “Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach” (1995) 24 SULR 423.

1.74 The theory was rejected in two cases arising out of the Zeebrugge ferry disaster. Bingham J in *R v HM Coroner for East Kent, ex parte Spooner*¹⁰⁵ rejected it on the basis that

“A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.”¹⁰⁶

The rejection of the aggregation principle gives pause for thought not least because the company in question had been severely criticised in the formal investigation¹⁰⁷ into the disaster which concluded that it was “infected with the disease of sloppiness” at all levels “from the board of directors down”.¹⁰⁸ Judicial unease with the principle surfaced again in *Attorney General’s Reference (No 2 of 1999)* where the Court of Appeal ultimately rejected the theory as having any application in prosecutions of corporations for manslaughter.¹⁰⁹

1.75 The aggregation principle is essentially an addition to the identification doctrine which permits the acts and omissions and mental state of more than one person to be aggregated together to form the liability of a corporation. However, the approach is problematic when it is taken to mean that the fragmented knowledge of a number of innocent individuals is fitted together to make a culpable whole by supplying the aggregate mental element required.

¹⁰⁵ (1989) 88 Cr App R 10.

¹⁰⁶ *Ibid* at 16. See also *R v Stanley and Others* English Central Criminal Court (Turner J) 19 October 1990.

¹⁰⁷ Sheen *The Merchant Shipping Act, 1894, mv Herald of Free Enterprise, Report of Court No 8074* (1987).

¹⁰⁸ *Ibid* paragraph 14.1.

¹⁰⁹ [2000] QB 796, 813. The Court placed some store on the recommendations of the Law Commission of England and Wales against the adoption of the principle of aggregation in its report *Legislating the Criminal Code: Involuntary Manslaughter* (1996) (Law Com. No. 237) at paragraph 7.33. The Law Commission’s Report is considered further in Chapter 5 below.

1.76 *The Commission does not consider that the aggregation principle is appropriate in the context of the imposition of criminal liability on corporations for crimes of homicide.*

(8) *Flexible Attribution*

1.77 Each of the principles of corporate criminal liability discussed above offers potential advantages in respect of particular types of crime, but none seems to offer a complete solution for all types of crime. This may explain why the identification doctrine, which offers the narrowest principle of corporate criminal liability, is preferred in most jurisdictions which countenance corporate liability for serious crime. As was noted above, some commentators consider that the best system of corporate criminal liability is one which selects the appropriate principle from the above list having regard to the type of crime in issue. That approach is reflected to some degree in the US *Model Penal Code*,¹¹⁰ which applies modified forms of the identification, vicarious liability, and strict liability principles depending on the type of offence concerned. A similar approach is evident in the Australian reforms contained in the *Criminal Code Act 1995*,¹¹¹ which draws also on organisational liability models.

1.78 The *Meridian* approach¹¹² yields a flexible judicial response to questions of corporate criminal liability. However, it is open to the criticism that it injects vagueness into the criminal law by leaving the choice of principle of corporate criminal responsibility to the discretion of the court. It has been argued that in the Irish context the approach offends against the constitutional principles that the ingredients of an offence should be clearly stated and that the courts cannot be given discretion as to what is criminally prohibited. In *King v Attorney General*¹¹³ Henchy J considered that both the ingredients of the offence *and* the mode by which its commission could be proved were so arbitrary and vague, and the discretion left to the prosecutor and the judge so broad, that they were “indiscriminately contrived to mark as criminal conduct committed

¹¹⁰ See paragraph 4.14 *ff* below.

¹¹¹ See paragraph 6.03 *ff* below.

¹¹² See paragraphs 1.50 - 1.51 above.

¹¹³ [1981] IR 233, 257.

by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality” and that they offended, *inter alia*, the constitutional guarantees of equality and trial in due course of law.¹¹⁴

1.79 *The Commission does not recommend the adoption of a flexible approach to the attribution of criminal liability for crimes of homicide to corporations because to do so would create uncertainty and could operate unjustly.*

1.80 To sum up, the Commission does not provisionally recommend the adoption of vicarious liability, strict liability, reactive liability, the power and acceptance doctrine, aggregation of liability or a flexible attribution of liability approach to the imposition of criminal liability on corporations for corporate killing. The suitability of the identification doctrine and organisational liability models as a basis for the establishment of a statutory offence of corporate killing is explored further in Chapter 7 below.

¹¹⁴ See Conway “The Criminal Character of A Company “(1998) 7 ISLR 23.

CHAPTER 2 THE CURRENT LAW ON CORPORATE KILLING

A Introduction

2.01 In this chapter we outline the current law on the liability of corporations whose activities result in death. As the law stands, a corporation that causes death may face prosecution for a regulatory offence under health and safety legislation, and it may further face civil liability in tort in an action by the victim's dependants and kin. There is no tradition in this jurisdiction, however, of prosecuting corporations which kill for crimes of homicide such as manslaughter – indeed, as yet there is no direct Irish judicial authority for the proposition that an indictment lies against a corporation for such offences. The issue of corporate liability for murder and manslaughter is considered further in the next Chapter.

2.02 This chapter looks at the current law relating to corporate homicide under two headings: Criminal Liability under health and safety legislation, (in Part C); and Civil Liability (in Part D). Part E examines the *Corporate Manslaughter Bill 2001*. Before turning to these areas, however, it is first necessary to describe some particular considerations that arise where a corporation appears as a defendant, whether in criminal or civil proceedings. This is done in Part B.

B Corporations

(1) *What is a Corporation?*

2.03 A corporation or 'body corporate' is a legal person having a legal identity separate and distinct from its constituent members. A corporation may be *sole - ie* comprising one individual holding an office which has perpetual succession - or *aggregate - ie* constituted by more than one person or single member companies. The office

held by a government minister or clerical bishop is a corporation sole. Bodies, such as registered trades unions,¹ and certain public, civic, educational and professional bodies may enjoy corporate status, though they are not companies in the normal sense. Companies formed and/or registered under the Companies Acts are the typical form of corporation in Ireland.² Within that group by far the most common form of company is the private company limited by shares, accounting for 88.8 per cent of companies on the Register.³ Such companies are prohibited by law from having more than 50 members, and from inviting the public to subscribe for their shares. At the end of 2002, there were 136,948 private companies on the Register, excluding those in the course of liquidation.⁴ Public limited companies, by way of contrast, which are not restricted in their size or in their ability to offer their shares for sale to the public (on the stock exchange, for example), account for only 0.6 per cent of companies on the Register.⁵ At the end of 2002 there were 985 such companies on the Register. At the end of June 2003 there were 69 Companies listed on the Irish Stock Exchange.⁶

2.04 Such statistics are of very limited assistance, however, in providing a picture of the typical organisational structure of Irish companies. Companies vary widely in their structures. The fact that a private company, for example, may have only one member, does not exclude the possibility that the company may have a large operation, with sophisticated management structures and many employees. Nonetheless, a sizeable number of Irish private companies are small, owner-operated ventures, where the members not only participate in the management of the company by taking

¹ *R (IUDWC) v Rathmines UDC* [1928] IR 260.

² It should be noted that not all companies in Irish law draw their corporate status from (or are necessarily regulated by) the *Companies Acts 1963 - 2001*.

³ Department of Enterprise, Trade and Employment *Companies Report, 2002* (Dublin 2003) Appendix 12.

⁴ *Ibid.*

⁵ *Ibid.* There were also 3,047 unlimited companies, 9,810 guarantee companies, 3,437 external companies and 15 European Economic Interest Groupings on the Register at the end of 2002.

⁶ Irish Stock Exchange *Monthly Report, June 2003* (Dublin 2003).

office as directors, but also where, as directors, they participate closely in the day-to-day transactions of the company.

(2) Corporations as Legal Persons

(a) Separate Legal Personality

2.05 It is trite law, cemented in the House of Lords' decision in *Salomon v Salomon & Co* in 1897,⁷ that a company formed under the Companies Acts is in law a separate person from those that constitute it. As a legal person in its own right, it is therefore capable of being the subject of both rights and duties, separate to those of its members; and as a 'perpetual' person it is capable of doing this even though its members may change or die. A corporation may hold property, enter contracts, sue and be sued. Separate legal personality 'shields' the individuals who own or operate the corporation from becoming personally liable on foot of commercial activities transacted in the corporate name.

2.06 Both the courts and the Legislature have recognised that the convenience of separate corporate personality can be disregarded where it is misused⁸ or where there are overriding concerns - such as the need to curb fraudulent or reckless trading, or to view the economic activities of a group of companies as a single concern.⁹

(b) Constitutional Rights

2.07 Corporations may be accorded some personal constitutional rights, though the full extent of such entitlements has yet to be established, and the aim of such extension seems to be the protection of the rights of the individuals associated in the corporation rather than those of the corporation *per se*.¹⁰ It seems that corporations can

⁷ [1897] AC 22. The Irish Courts have, with little exception, applied the principles of *Salomon's* case assiduously. In *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519, 534, Murphy J in the Supreme Court described the principles as "the corner stone of company law".

⁸ See Courtney *Law of Private Companies* (2nd ed Dublin 2002) Chapter 5, and paragraph 2.14 *ff* below.

⁹ See, for example, Keane *Company Law* (3rd ed Dublin 2000) Chapter 11.

¹⁰ See Keane *Company Law* (3rd ed Dublin 2000) at 4 *ff*.

invoke the constitutional procedural guarantees of fair procedures, due process, and access to the courts.¹¹ Corporations clearly do not enjoy the constitutional guarantee of equality of treatment in the eyes of the law.¹² Corporations are incapable of enjoying rights which are inherently human, such as the right to bodily integrity or the right to life. This limitation can be overcome in some cases – for example, where constitutional property rights are invoked – by joining a human co-plaintiff or co-defendant as the case may be.¹³

(c) *Criminal Liability of Corporations*

2.08 So far as the criminal law is concerned, however, the convenience of separate corporate personality appears less firmly rooted – it appears not to have been intended that it should shield individuals from criminal liability in the same way that it shields them from commercial liability; nor does it appear that it was ever intended to make ‘persons’ of corporations in the eyes of the criminal law. As we saw in Chapter 1, the issue as to whether corporations are even capable of fulfilling the characteristics of personhood in criminal law is anything but settled.¹⁴ This has not prevented the Legislature from imposing criminal liability on corporations in limited, mostly regulatory, circumstances; and the *Interpretation Act 1937*, clearly contemplates that a corporation can be prosecuted for any crime created by statute which involves commission by a “person”. Section 11 provides:

“(c) Person. The word “person” shall, unless the contrary intention appears, be construed as importing a body corporate (whether a corporation aggregate or a corporation

¹¹ *Bula Ltd v Tara Mines Ltd* [1987] IR 85; *Re National Irish Bank* [1991] ILRM 321.

¹² Article 40.1 of Bunreacht na hÉireann extends the guarantee only to “human persons”. Even without such a limitation, differing treatment might be justified on the basis of “differences of capacity, physical and moral, and of social function”; *ibid*.

¹³ *Private Motorists Provident Society v Attorney General* [1983] IR 339. Compare *Iarnród Éireann v Ireland* [1996] 3 IR 321 where Keane J held that corporations should be protected as citizens for the purposes of the constitutionally guaranteed property rights.

¹⁴ See paragraph 1.26 *ff* above.

sole) and an unincorporated body of persons as well as an individual ...

(i) Offences by corporations. References to a person in relation to an offence (whether punishable on indictment or on summary conviction) shall, unless the contrary intention appears, be construed as including references to a body corporate.”

2.09 The separate legal personality of corporations is complicated by further factors. For a start, their legal capacity to engage in commercial transactions is limited by the *ultra vires* doctrine, which renders any activity not contemplated in their stated objects null and void.¹⁵ It has never been firmly established whether this doctrine renders corporations legally incapable of committing crimes (for they could never have a valid object permitting criminal activity),¹⁶ but opinion seems to favour the view that the *ultra vires* doctrine should not constitute a defence to corporate criminal liability.

2.10 Furthermore, as fictional or metaphysical persons, corporations are themselves incapable of acting or thinking – in reality all their decisions are made, and all their actions are taken, by natural persons. A fundamental question in every sphere of corporate activity, therefore, is “who is acting – the corporation or the individual?”. Defining the boundaries of individual and corporate activity is a difficult task, and the law has developed a variety of techniques, applicable variously in differing circumstances, to determine whether individual acts should be regarded as personal to the individual or as belonging to the corporation.

¹⁵ See Keane *Company Law* (3rd ed Dublin 2000) Chapter 12. The Company Law Review Group recommended the abolition of the doctrine in as much as it applies to companies limited by shares: Company Law Review Group *First Report* (Dublin 2001) paragraph 10.9.2.

¹⁶ *Re German Date Coffee Company* (1882) 20 ChD 169.

(3) Corporate Governance and Risk Management

2.11 Irish company law requires every company formed and/or registered under the Companies Acts 1963-2001 – even single member private limited companies - to have two directors, one of whom must be resident in Ireland. The role of the directors is significant: company law prescribes that the management of the company's affairs is conducted by the directors rather than the members, and much law preserves the right of the directors to govern the company without interference from the membership. The directors owe fiduciary and contractual duties to the general body of members, principally to act in good faith and in the best interests of the company. In the exercise of their functions, directors are expected to act with reasonable skill and care. However, directors need not exhibit any degree of skill and care greater than could be expected from a person of their knowledge and experience; nor can they be held responsible for errors of judgment as such; nor are they obliged to give continuous attention to the affairs of the company (a person may hold up to 25 directorships);¹⁷ and a director will in general be justified in delegating many of his or her duties to another person in the company, unless he or she has grounds for suspecting that the delegate will not exercise those functions properly. While recent amendments to the Companies Acts impose additional specific obligations on directors in relation to the financial interests of the members and creditors of the company, the general tenor of the law is that directors owe their duties primarily to the company as a whole, and they are not required to concern themselves with the interests of others - save where they impinge upon the interests of the company.

2.12 The last decade has seen a number of initiatives emanating from the UK and internationally¹⁸ to improve corporate governance

¹⁷ Section 45(1) of the *Companies (Amendment) (No.2) Act 1999*.

¹⁸ In May 1999 ministers representing the 29 governments which comprise the Organisation for Economic Co-operation and Development (OECD) voted unanimously to endorse the OECD Principles of Corporate Governance. These principles were negotiated over the course of a year in consultation with key players in the market. They constitute the chief response by governments to the G-7 Summit leaders' recognition of corporate governance as an important pillar in the architecture of the 21st century global economy. The Principles were welcomed by the G7 leaders at the Cologne summit in June 1999 and are likely to act as signposts for

practices such as the Cadbury report,¹⁹ the Hampel report²⁰ and the *Combined Code: Principles of Good Governance and Code of Best Practice* adopted in January 1999 by the London Stock Exchange and also applied by the Irish Stock Exchange. The Higgs report²¹ and a review of audit committees²² led to the adoption of a new *Combined Code on Corporate Governance* in July 2003.²³ These developments mark a move towards the view that better corporate practices can be achieved by getting corporations to address and control risks internally. A limitation of such codes, however, is that at present they are aimed at large companies listed on the stock exchange. The potential impact of such codes on health and safety in Ireland is limited, then, to the 69 companies currently listed on the Dublin Stock Exchange, and to any other companies listed on the London Stock Exchange which may have operations in Ireland. While they may have some effect on other companies, a failure to follow them would not result in any sanction that might follow a listed company. That being said, in recent times (and particularly, following certain much publicised corporate scandals) there has been an increasing emphasis on risk management and corporate governance issues, one aspect of which is the recommendation that directors ought to give closer attention to corporate risk - not merely financial risk, but the risk of non-compliance with all relevant legislation, including health and safety legislation.²⁴ The *Companies (Auditing and Accounting) Bill 2003* provides for a requirement on directors to prepare a directors'

activity in this area by the International Monetary Fund, the World Bank, the United Nations and other international organizations. Corporate governance codes have also been published in Australia, Belgium, Brazil, Canada, France, Germany, Hong Kong, India, Italy, Japan, Malaysia, The Netherlands, the Russian Federation, Singapore, South Africa, Spain, Sweden, Thailand, and the United States.

¹⁹ Committee on the Financial Aspects of Corporate Governance *Report* (London 1992).

²⁰ Committee on Corporate Governance *Final Report* (London 1998).

²¹ Higgs *Review of the Role and Effectiveness of Non-Executive Directors* (London 2003).

²² Smith *Audit Committees Combined Code Guidance* (London 2003).

²³ UK Financial Reporting Council (24 July 2003). The new Code will apply for reporting years beginning on or after 1 November 2003.

²⁴ See paragraph 5.34 *ff* below.

compliance statement concerning its policies on compliance with its obligations under the Companies Acts, tax law and other enactments that provide a legal framework within which the company operates.²⁵

(4) Appearance and Representation in Court

2.13 As a defendant in legal proceedings, a corporation cannot appear in person and must, when necessary, be represented by some natural person. In criminal proceedings, however, a company to which the Companies Acts 1963-2001 apply may be represented in court by any natural person.²⁶ It would appear, thus, that there is no objection in principle to the prosecution of corporations on indictment.

(5) Dissolution and Reconstitution and Lifting the Veil of Incorporation

2.14 The ability of a corporation to dissolve or reconstruct (for example, by transferring responsibilities to a subsidiary or a related company) poses difficulty for the enforcement of judgment against a corporation, whether civil or criminal. The Australian case of *The Queen v Denbo Pty Ltd and Nadenbousch*²⁷ provides a convenient and graphic example of the difficulties. In 1994, Denbo Pty Ltd, a small construction company, pleaded guilty in the Supreme Court of Victoria to the manslaughter of one of its employees. The company's conviction was the first of its kind in Australia, and the fine of \$120,000 the largest ever imposed on a Victorian company for the death of an employee. The company was in liquidation at the time, however, and it was wound up six months before sentencing. It never paid the fine. Shortly afterwards, a new company was formed and registered at the same address, continuing operations as before.

2.15 Similar tactics could be deployed by an Irish corporation in an attempt to evade civil or criminal liability. An Irish court might,

²⁵ Section 43 of the *Companies (Auditing and Accounting) Bill 2003* (as initiated).

²⁶ Section 382 of the *Companies Act 1963*.

²⁷ Supreme Court of Victoria 14 June 1994. See Chesterman "The Corporate Veil, Crime and Punishment: *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*" (1994) 19 Melb Univ LR 1066.

however, allow the veil of incorporation of any new company formed in such circumstances to be lifted so that it became responsible for the sanctions.²⁸ But while European legislation provides for the continuation of corporate obligations to employees upon the transfer of undertakings to another body,²⁹ such statutory provisions are not of general application, so reliance would have to be placed on the common law powers of the courts to lift the corporate veil where a judgment or fine was concerned. Where no new corporation is formed, there is slender authority for the proposition that the corporate veil could be still lifted to make connected individuals liable.³⁰ A fundamental concern in any such approach, however, would be whether the individuals were being punished for crimes they did not commit. It is apparent that the courts will sometimes treat a group of companies as one, where to do otherwise would have inequitable results. In *Power Supermarkets Ltd v Crumlin Investments Ltd*³¹ Costello J allowed separate group companies for each branch of Dunnes Stores to be treated as one in order to avoid breaching a covenant of a lease. He stated:³²

“It seems to me to be well established ... that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group, if this conforms to the economic and commercial realities of the situation.”

²⁸ In *Re Shrinkpak Ltd*, High Court (Barron J) 21 December 1989, the High Court ordered a new company to be wound up on the application of the liquidator for the old company where it appeared that the new company was formed with the sole purpose of evading creditors of the old company. See Courtney *Law of Private Companies* (2nd ed Dublin 2002) paragraph 5.034 ff.

²⁹ *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003* (SI No 131 of 2003).

³⁰ *Gilford Motor Company v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 All ER 442, both English authorities, suggest that the corporate veil may be lifted to thwart the evasion of existing civil liabilities. They are both exceptional cases, however.

³¹ High Court (Costello J) 22 June 1981.

³² *Ibid* at 8.

2.16 It may be noted that it is not an abuse of the privilege of incorporation to form a corporation with a view to evading potential, as opposed to accrued, liability. That was successfully done in the case of *Adams v Cape Industries*³³ where the asbestos supply business of an American subsidiary of Cape Industries was transferred to a separate American corporation to minimise Cape's exposure to liability in America for potential employee asbestosis claims. Similarly, in the Irish case of *Roundabout Ltd v Beirne*³⁴ a private business was incorporated with its employees as directors, thereby successfully avoiding being picketed as an "employer" under the *Trade Disputes Act 1906*. However, in *Lubbe v Cape plc*,³⁵ the House of Lords decided that, in principle, the English parent company of a South African subsidiary could be sued in the English courts in respect of failures by the South African subsidiary to take reasonable care of its employees and others who were exposed to asbestos in South Africa.

2.17 The Court of Criminal Appeal in *People (DPP) v Roseberry Construction Ltd*³⁶ was not willing to allow a defendant to throw off the veil of incorporation by suggesting that the company and its director were one and the same in order to avoid separate penalties being imposed on both a company and its director for failing to prepare a safety statement as required by the *Safety, Health and Welfare at Work Act 1989* in circumstances where two workers died on a construction site.

(6) Restriction and Disqualification of Directors

2.18 The restriction and disqualification provisions of the Companies Acts 1963-2001 would appear to provide only a limited solution at present to the problem of a company being dissolved and re-established to evade liability for homicide. Restriction of directors is dealt with by section 150 of the *Companies Act 1990* (the '1990

³³ [1990] Ch 433.

³⁴ [1959] IR 423.

³⁵ [2000] 4 All ER 268. See Byrne "Asbestos Litigation" Health and Safety Review, forthcoming October 2003.

³⁶ Court of Criminal Appeal 6 February 2003.

Act'), as amended. Under that section, a director or shadow director³⁷ of a company which is wound-up in insolvency may be restricted from acting as director, secretary or promoter of another company for five years unless that other company meets certain capital requirements. But once the new company meets such capital requirements, the section poses no problem.

2.19 Disqualification is dealt with in section 160 of the 1990 Act, as amended. Subsection 1 provides:

“Where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of five years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order—

(a) he shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978;

(b) he shall be deemed, for the purposes of this Act, to be subject to a disqualification order for that period.”

2.20 The disqualification is automatic and takes effect from the date of conviction, but the offence must have been “in relation to a company” or “involving fraud or dishonesty”. Whether this is broad enough to encompass offences of homicide or breaches of the Health and Safety legislation remains unclear as yet in Ireland. In the UK, by way of comparison, section 2 of the *Company Directors (Disqualification) Act 1986*, as amended, provides for the disqualification of directors who have been convicted of an indictable offence “in connection with the promotion, formation, management, liquidation or striking off of a company”. This broader wording, it

³⁷ *Ie* a person (not acting in a professional capacity) in accordance with whose instructions the directors are accustomed to act; Section 27 of the *Companies Act 1990*.

has been argued,³⁸ can be interpreted to cover breaches of health and safety legislation as well as other criminal offences committed while engaged in the “management” of the company.

2.21 In addition, section 160(2) of the 1990 Act (as amended) gives the High Court discretion to disqualify a person from acting as director for a specified period where:

“(a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or

(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or

(c) a declaration has been granted under section 297A of the Principal Act (inserted by *section 138* of this Act) in respect of a person; or

(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or

(e) in consequence of a report of inspectors appointed by the court or the Director of Corporate Enforcement under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or

(f) a person has been persistently in default in relation to the relevant requirements; or

(g) a person has been guilty of 2 or more offences under section 202(10); or

(h) a person was a director or a company at the time of the sending, after the commencement of *section 42* of the *Company Law Enforcement Act, 2001*, or a letter under

³⁸ See Slapper and Tombs *Corporate Crime* (Harlow 1999) at 222.

subsection (1) of section 12 of the *Companies (Amendment) Act, 1982*, to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section; or

(i) a person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking and the court is satisfied that, if the conduct of the person or the circumstances otherwise affecting him that gave rise to the said order being made against him had occurred or arisen in the State, it would have been proper to make a disqualification order otherwise under this subsection against him.”

2.22 This list of grounds is clearly aimed at ensuring compliance with the Companies Acts rather than imposing any wider standards. None of them expressly contemplates disqualification for involvement in a homicide or for breaches of the health and safety legislation. Perhaps section 160(2)(d) of the 1990 Act offers some scope for disqualification in such circumstances on the ground that the person is thereby “unfit to be concerned in the management of a company”, though to date the High Court has not been asked to consider the issue. It may also be argued that in as much as the Companies Acts recognise that directors owe a duty to the company to have regard to the general interests of employees,³⁹ there is some scope for the argument that disqualification could follow directors’ disregard for the health and safety of company employees under section 160(2)(b). No judicial consideration has yet been given to the question in Ireland, and it may be noted that the High Court has indicated that the discretion to order disqualification will not be exercised lightly. In *Business Communications Ltd v Baxter and Parsons*,⁴⁰ Murphy J said:

³⁹ Section 52 of the *Companies Act 1990*.

⁴⁰ High Court (Murphy J) 21 July 1995.

“...in relation to a disqualification order it is clear that there is a substantial burden to be discharged before the Court has jurisdiction to make the appropriate order.”⁴¹

(7) Insurance and Indemnity

2.23 Corporations may insure against civil liability for homicide. Public policy forbids insurance against criminal liability, however, and the prohibition extends to circumstances in which a civil wrong for which recovery is sought amounts to the commission of a crime.⁴² It appears that recovery for a civil wrong will only be forbidden by public policy where the criminal act was deliberate or intentional, however.⁴³ Thus, where a corporation is convicted of a crime of strict liability (such as a health and safety offence) or of negligence (such as gross negligence manslaughter) public policy would not debar an award for damages in a related civil action being met by the corporation’s insurer. But even while public policy might not pose a bar, the terms of any given policy might exclude such recovery.

2.24 Where a director or other officer is held personally liable for a civil wrong in the conduct of a corporation’s activities, he or she may be able to recover an indemnity from the corporation in respect of both the award of damages and the costs of the proceedings on foot of an indemnity clause in the contract of employment or the constitutional documents of the corporation. Section 200 of the *Companies Act 1963* renders such indemnity clauses inoperative where the company itself is the plaintiff and the liability has already accrued,⁴⁴ but the section has no application where the plaintiff is someone other than the company itself, or where the indemnity is in respect of future or potential liability. Any indemnity in respect of criminal liability for fines would most likely be void as contrary to public policy, however; nevertheless, limitations on corporate

⁴¹ High Court (Murphy J) 21 July 1995 at 13.

⁴² *Beresford v Royal Insurance Co* [1937] 2 KB 197; *Gray v Hibernian Insurance Co*, High Court (Barr J) 27 May 1993.

⁴³ *Birds Modern Insurance Law* (3rd ed London 1993) at 224-225.

⁴⁴ Even then, the company may indemnify the officer against the costs of a successful defence in civil or criminal proceedings: Section 200(b) of the *Companies Act 1963*.

indemnification of directors and officers do not extend to preventing such persons recouping the costs of a successful defence.⁴⁵

2.25 Reform in the UK⁴⁶ has permitted companies to purchase and maintain insurance for their directors and officers – commonly referred to as a ‘D&O’ policy – which covers the individuals against personal liability for damages, costs, settlements and defence costs arising from a wrongful act committed while acting in their capacity as director or officer. While it is argued that such policies might increase the moral hazard by giving directors and officers the impetus to act with impunity, they have been welcomed, on balance, as being more beneficial than not to all those affected – including those who have been harmed by the wrong.⁴⁷ Standard D&O policies do not, however, cover damages for personal injury or death of any person; fines, penalties or punitive or exemplary damages; or consequential losses, and accordingly would allow no recovery from an insurer in respect of liability for corporate homicide – whether civil or criminal.

2.26 There is no automatic duty on corporations or their directors and officers to acquire and maintain insurance cover, save where such an obligation is imposed by statute, contract, or the proximity of the parties.⁴⁸

(8) Investigating Corporate Activity

2.27 The Companies Acts make provision for the investigation of corporate activity by official investigators known as “inspectors”. Here we consider whether these investigation provisions might be employed to investigate the circumstances of a corporate homicide.

2.28 Sections 7 and 8 of the *Companies Act 1990*, as amended, allow an application to be made to the High Court by a company, member, creditor, director (or in limited circumstances, the Director of Corporate Enforcement) to have an inspector appointed to examine the “affairs” of the company. The word “affairs” is not defined,

⁴⁵ Section 200(b) of the *Companies Act 1963*.

⁴⁶ Section 137 of the UK *Companies Act 1989*.

⁴⁷ Clarke *The Law of Insurance Contracts* (3rd ed London 1997), at 681.

⁴⁸ *Sweeney v Duggan* [1991] 2 IR 274 (High Court), [1997] 2 IR 531 (Supreme Court), discussed at paragraph 2.77 below.

though the courts have given it a broad interpretation in the financial context to include the goodwill, profits or losses, contracts and assets, and shareholding of a company, and in appropriate cases the affairs of its subsidiaries and sub-subsidiaries.⁴⁹ “Affairs” might arguably include the circumstances surrounding death in the course of corporate activity, but as yet the position is unclear. The inspector’s report will be admissible in evidence in any civil proceedings, and its findings will be given presumptive weight.⁵⁰ Furthermore, the High Court has very broad powers to make such orders as it deems fit in response to the inspector’s report, including an order winding-up the company, and an order “for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company”.⁵¹ This would appear not to exclude the making of an award of damages. The costs of an investigation under the Companies Acts will be defrayed in the first place by the Minister for Justice, (or by the Director of Corporate Enforcement in an inspection ordered by the Director) but the High Court has the power to order any corporation identified in the report, or any person convicted on indictment or ordered to pay damages in proceedings on foot of the report to reimburse some or all of the costs.⁵² The Court will be sensitive to the effect such orders may have on innocent shareholders.⁵³

2.29 The broad thrust of the inspection provisions of the Companies Acts may be contrasted with the more general powers of a Tribunal of Inquiry established by the Oireachtas, including those vested with powers contained in the Tribunals of Inquiry (Evidence) Acts 1921 to 2001. Such tribunals are typically empowered to make recommendations with a view to preventing the future occurrence of

⁴⁹ *R v Board of Trade ex parte St Martin’s Preserving Co Ltd* [1965] 1 QB 603.

⁵⁰ Section 22 of the *Companies Act 1990*. The constitutionality of the section was questioned by Laffoy J in *Countygleng Plc v Carway, Anglo Irish Bank Corporation & Others* High Court (Laffoy J) 20 February 1996. The judge did not give reasons for her concern, however, but presumably they relate to the fact that the exclusionary rules of evidence are intimately bound up with the constitutional notion of fair procedures.

⁵¹ Section 12(1) of the *Companies Act 1990*.

⁵² Section 13 of the *Companies Act 1990*.

⁵³ *Minister for Justice v Siúcre Éireann* [1992] 2 IR 215, 228 *per* Lynch J.

the matters giving rise to their establishment; however, their determinations cannot pre-empt any pending or future civil or criminal proceedings, and their role is essentially one of “fact finding”.⁵⁴

(9) The Privilege Against Self-Incrimination

2.30 The privilege against self-incrimination may not be invoked by any person (legal or natural) in an investigation under the Companies Acts.⁵⁵ Section 10 of the 1990 Act provides for the duty of all officers and agents of a company as well as other persons who may be in possession of information concerning the affairs of the company to produce all books and documents relating to the company; to attend before the inspectors; and otherwise to give the inspectors all assistance in connection with the investigation as they are reasonably able to give. A person who refuses to co-operate may be ordered to do so by the High Court. Section 18 of the 1990 Act further provides that an answer given by persons to a question put to them by the inspectors may be used subsequently in evidence against them. In *Re National Irish Bank (No. 1)*⁵⁶ the Supreme Court held that these provisions were constitutional, adding, however, that in subsequent criminal proceedings the answers given might be excluded from evidence as involuntary confessions. The extent to which a person could assert involuntariness in such circumstances, however, has been questioned.⁵⁷

2.31 The privilege against self-incrimination can be invoked in other investigations, and in some cases statute expressly allows it. Section 34(1)(g) of the *Safety, Health and Welfare at Work Act 1989*, for example, provides that in investigations and inquiries by a health and safety inspector no person shall be required to answer any question or to give any evidence tending to incriminate himself or

⁵⁴ *Goodman International v Hamilton* [1992] 2 IR 257. See generally Law Reform Commission Consultation Paper *Public Inquiries including Tribunals of Inquiry* (LRC CP21-2003).

⁵⁵ *In Re National Irish Bank Ltd (No.1)* [1999] 3 IR 145. See also *Dunnes Stores and Others v Ryan and Others* High Court (Kearns J) 5 June 2002.

⁵⁶ [1999] 3 IR 145.

⁵⁷ Dillon-Malone “Voluntariness, the Whole Truth and Self-Incrimination after *In Re National Irish Bank*” (1999) Bar Rev 237.

herself. A question which has yet to be settled in Irish law, however, is whether corporations, as legal persons, can invoke the privilege. The view in England⁵⁸ and under the European Convention on Human Rights⁵⁹ is that corporations do enjoy the privilege. That approach may represent the position in Ireland given that the *European Convention on Human Rights Act 2003* requires judicial notice to be taken of the Convention's provisions and the decisions of the European Court of Human Rights.⁶⁰

2.32 Even if corporations can invoke the privilege, an issue remains as to which persons may invoke it on behalf of the corporation. In the English case of *Walkers Snack Foods Ltd v Coventry County Council*⁶¹ an employee was held not to be entitled to invoke the privilege on behalf of his company when refusing to answer questions put by an environmental health officer since as a mere employee he was not authorised to speak on behalf of the company. It has been suggested, then, that only persons whose answers represent the controlling mind and will of the corporation can invoke the corporate privilege,⁶² but the issue is by no means settled.

C Criminal Liability under the Health and Safety Acts

(1) *The Role of the Criminal Law in Promoting Safety and Preventing Death*

2.33 There are many factors, legal and practical, which determine whether corporations (and other organisations) operate safely. The recommendations of the Barrington Commission⁶³ which led to the adoption of the *Safety, Health and Welfare at Work Act*

⁵⁸ *AT&T Istel Ltd v Tully* [1993] AC 45.

⁵⁹ *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213. See Aldred "Businesses have rights too: the Human Rights Act 1998" (2002) Co. Law Vol.23 No.8 241.

⁶⁰ Section 4(1) of the *European Convention on Human Rights Act 2003*.

⁶¹ [1998] 3 All ER 163.

⁶² Dillon-Malone *op cit* fn57, at 241.

⁶³ *Report of the Commission of Inquiry on Safety, Health and Welfare at Work* (Stationery Office Dublin 1983).

1989 (the '1989 Act') echo this view, and the modern regime under the auspices of the Health and Safety Authority is designed to promote a safer environment in and about the workplace; not merely through active enforcement but through programmes of education, monitoring and supervision that promote the establishment of a 'safety culture'. The role of the criminal law in this area is one of support for a process which relies heavily for its effectiveness on encouragement and conciliatory intervention. The 1989 Act enables the Health and Safety Authority in the early stages of its dealings with an employer to serve an improvement notice⁶⁴ followed, if necessary, by a prohibition notice,⁶⁵ which allows employers to put their affairs in order before more draconian steps have to be taken. The law lends effectiveness to these processes through the imposition of statutory duties, standards and procedures; through the provision of injunctive remedies (which themselves may lead to quasi-criminal consequences such as fines or imprisonment for disobedience); and through the imposition of criminal sanctions for those who blatantly disregard those standards. Without such support the health and safety regime would be seriously deprived of effect.

2.34 The record of the Health and Safety Authority in promoting safety is impressive, and while the Authority accepts that its record of prevention could be improved further through increases in funding and personnel, strengthened investigatory powers and interim measures of enforcement, that is a broader topic for review. Indeed a review of the 1989 Act is likely to lead to updated legislation in the near future. It is not the purpose of this Consultation Paper to enter into that debate. The Commission recognises that reform of the law of corporate liability for homicide has to be done in a way which is sympathetic to the preventative approach which characterises the field of health and safety. Accordingly, it is important to recognise that harsh liability regimes can sometimes have a contrary effect by introducing defensive or reactionary practices, for example, by driving accident reporting mechanisms underground, or by introducing adversarial practices into inspection procedures. If severe criminal sanction is to be imposed at all, then, it should be reserved for the most serious cases.

⁶⁴ Section 36 of the *Safety, Health and Welfare at Work Act 1989*.

⁶⁵ Section 37 of the *Safety, Health and Welfare at Work Act 1989*.

(2) *The Safety, Health and Welfare at Work Act 1989*

2.35 *The Safety, Health and Welfare at Work Act 1989* (the ‘1989 Act’) is the principal legislation dealing with occupational health and safety in Ireland. It sets out the responsibilities which employers and employees have in relation to providing and maintaining a safe working environment. It applies to all places of work and to all employers, employees and the self-employed. The 1989 Act is concerned not only with the safety of workers, but also with that of visitors, passers-by and other members of the public.

(a) *Duties of Care*

2.36 Under the 1989 Act, the primary duty of care to provide a safe and healthy working environment rests with the employer. The two principal duties imposed by the 1989 Act are the duty of an employer in section 6 of the 1989 Act to “ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees” and the duty in section 7 to “conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their safety or health”. Section 8 deals with the responsibility of employers and self-employed persons to contractors. Section 9 places a number of obligations on employees while at work in relation to health and safety. Section 10 places obligations on designers, manufacturers and suppliers to ensure that the relevant articles are not a threat to health and safety when used by a person at a place of work. Section 11 deals with the duties of designers and builders of places of work.

(b) *Safety Statements*

2.37 Section 12 of the 1989 Act requires employers to have in place a safety statement stating how health and safety risks are managed.⁶⁶ Directors’ reports under section 158 of the *Companies Act 1963* are required to contain an evaluation of the extent to which the policy set out in the safety statement was fulfilled during the

⁶⁶ See also Regulation 5 of the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (SI No. 44 of 1993).

period covered by the report.⁶⁷ The Health and Safety Authority has produced *Guidelines on Safety Statements and carrying out Risk Assessments*, and *Guidelines on Workplace Health and Safety Management*.

(c) *Strict Liability*

2.38 Offences under the health and safety legislation are regulatory in nature and are offences of strict liability, so it is not necessary for the prosecution to prove any mental attitude or *mens rea* on the part of the offender.⁶⁸ The strict liability approach is of particular significance in the prosecution of corporate defendants because it dispenses with the need to attribute to the corporation the *mens rea* of some individual closely associated with it.⁶⁹ Furthermore, the liability is *direct* rather than vicarious. Professor Smith has explained it thus:⁷⁰

“Where a statutory duty to do something is imposed upon a particular person (here, ‘an employer’) and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case for vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. There is no need to find someone - in the case of a company, the ‘brains’ and not merely the ‘hands’ - for whose act the person with the duty can be held liable. The duty on the company in this case was to ‘ensure’ - i.e. to make certain - that persons are not exposed to risk. They did not make it certain. It does not matter how; they were in breach of their statutory duty and, in the absence of any requirement of *mens rea*, that is the end of the matter.”

⁶⁷ Section 12(6) of the *Safety, Health and Welfare at Work Act 1989*.

⁶⁸ *R v British Steel Plc* [1995] 1 WLR 1356.

⁶⁹ See paragraph 1.38 above.

⁷⁰ [1995] Crim LR 654, at 655.

(d) *Defence of Reasonable Practicability*

2.39 Many of the offences in health and safety legislation are qualified by a defence of ‘reasonable practicality’.⁷¹ In the English case of *R v Gateway Foodmarkets Ltd*,⁷² the Court of Appeal held that the onus is on the defence to prove that reasonably practicable precautions have been taken. The Court further held that the ‘identification doctrine’ and ‘directing mind and will’ concepts⁷³ have no application in establishing such a defence. Accordingly, the corporation will be liable for breaches of the health and safety legislation by any persons for whom it is responsible, even where there had been no failure to take practical precautions at higher levels of management. In *Gateway*, the company was convicted of the offence of failing in its duty to ensure, as far as reasonably practicable, the health and safety of its employees when an employee at a supermarket site fell to his death down an unguarded lift shaft. The company had employed an experienced and highly reputable firm of lift contractors to maintain the lift, and the head office was unaware of an informal arrangement at store level whereby company employees would themselves adjust the lift mechanism when it became stuck. The employee was killed when carrying out this informal procedure. The Court of Appeal found that the failure at store level was attributable to the company without the need to consider whether head office knew or ought to have known of the informal procedures.

2.40 Corporations cannot evade liability for offences under the health and safety legislation merely by issuing injunctions at board level prohibiting dangerous activity; what is required is a proactive response to safety concerns at all levels of operation. In the English case of *R v British Steel plc*⁷⁴ the Court of Appeal rejected the

⁷¹ For example, section 6(1) of the *Safety, Health and Welfare at Work Act 1989* provides that “it shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees”.

⁷² (1997) 2 Cr App R 40.

⁷³ See further paragraph 1.42 *ff* above.

⁷⁴ [1995] 1 WLR 1356. The approach of the Court of Appeal was endorsed by the House of Lords in *R v Associated Octel Co. Ltd* [1996] 1 WLR 1543.

company's argument that taking reasonable care at board level should lead to an acquittal. In that case a worker for an independent contractor was killed because of the collapse of a steel platform during a repositioning operation which a competent supervisor would have recognised was inherently dangerous. The defence was that the workmen had disobeyed instructions and, even if the supervisor was at fault, the company at the level of its directing mind had taken reasonable care. An appeal against conviction was dismissed by the Court of Appeal. Steyn LJ said:⁷⁵

“If it be accepted that Parliament considered it necessary for the protection of public health and safety to impose, subject to the defence of reasonable practicability, absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful event is committed by someone who is not the directing mind of the company ... That would emasculate the legislation.”

(3) *The Health and Safety Authority*

2.41 The 1989 Act is enforced by the National Authority for Occupational Safety and Health (the ‘Health and Safety Authority’). The Health and Safety Authority⁷⁶ is a state-sponsored body established under the *Safety, Health and Welfare at Work Act 1989* which is charged with responsibility for securing health and safety at work.⁷⁷ Under the 1989 Act, the Authority is given powers of entry,

⁷⁵ [1995] 1 WLR 1356, 1362-1363.

⁷⁶ Notably, there is no single government department or state agency which has overall responsibility for public safety. Fire safety comes under the remit of the Department of the Environment and local authorities which are the enforcing authorities for the *Fire Services Act 1981* (as amended by the *Licensing of Indoor Events Act 2003*). Rail, road and air transport is the responsibility of the Department of Transport. Maritime Transport comes under the remit of the Department of the Marine. Product safety is dealt with by the Department of Enterprise, Trade and Employment. There is a large amount of legislation in the area of health and safety: see fn77 below. However, we have concentrated our focus on the *Safety, Health and Welfare at Work Act 1989* by virtue of it being the principal legislation dealing with the subject matter discussed.

⁷⁷ The Health and Safety Authority established under the *Safety, Health and Welfare at Work Act 1989* exercises monitoring, inspection and

examination and inquiry, testing, and taking of possession to ensure compliance with the health and safety regime, and it has the power to initiate and bring prosecutions where the safety of any person is endangered through work practices not conducted in accordance with the Acts. The Authority seeks to support businesses in their efforts to achieve best practice in safety management through the publication of codes of practice and guidelines.⁷⁸ In 2002, the Authority carried out 12,896 investigations to ensure compliance with health and safety legislation.⁷⁹ A Memorandum of Understanding was adopted by the Authority and An Garda Síochána on 23 May 2002 whereby they will co-operate insofar as is reasonably practicable to ensure the effective enforcement of health and safety legislation and in order to agree on the course of action to be followed in particular cases.

(4) Section 48(17) of the Safety, Health and Welfare at Work Act 1989

(a) Nature of the offence

2.42 It is not an offence *per se* under health and safety legislation for an employer (whether a corporation or not) to cause death; however, where the employer has breached any of the regulatory provisions in health and safety legislation it may face prosecution both for such breach and for the separate offence of breach resulting in death or serious injury under section 48(17) of the *Safety, Health and Welfare at Work Act 1989* which provides:

enforcement functions in respect of a wide range of Acts and Regulations relating to occupational health and safety, including the *Boiler Explosions Acts 1882 & 1890*, the *Factories Act 1955*; the *Mines and Quarries Act 1965*; the *Dangerous Substances Acts 1972 & 1979*; the *Safety in Industry Act 1980*; the *Safety, Health and Welfare (Offshore Installations) Act 1987*; the *Safety, Health and Welfare at Work Act 1989*; the *Organisation of Working Time Act 1997*; the *Chemical Weapons Act 1997*; the *Carriage of Dangerous Goods by Road Act 1998*; and regulations made under them and under the *European Communities Act 1972* in compliance with various European Directives. A full list of the relevant provisions is available on the Authority's web site www.hsa.ie.

⁷⁸ For further information see the Authority's website: www.hsa.ie.

⁷⁹ Health and Safety Authority *Annual Report 2002* (Dublin 2003) at 27.

“If a person is killed, dies or suffers any personal injury, in consequence of any person who is subject to a duty by virtue of sections 6 to 11 having contravened any of the relevant statutory provisions, the latter person shall be guilty of an offence under this subsection; but

(i) the latter person shall not be guilty of an offence under this subsection if a prosecution against him in respect of the act or default by which the death or injury was caused, has been heard and dismissed before the death or injury occurred...”

(b) *The Narrow Scope of Section 48(17)*

2.43 There is little doubt that corporations which are employers can be convicted of the offence provided for in section 48(17) of the *Safety, Health and Welfare at Work Act 1989*.⁸⁰ Moreover, it is apparent from the wording of the subsection that it creates a separate offence rather than an alternative means of proceeding for an offence under sections 6 to 11.⁸¹ Thus, a prosecution under section 48(17) of the 1989 Act would not preclude a separate prosecution for manslaughter.⁸²

2.44 That is significant, because it would appear that the offence under section 48(17) can only be prosecuted summarily and is punishable only by fine up to a maximum of IR£1,500 (€1,905).⁸³

⁸⁰ As a statutory offence addressed to “persons” it would be capable of commission by a body corporate under the provisions of the *Interpretation Act 1937*: see paragraph 2.08 above.

⁸¹ In *R v Taylor* [1908] 2 KB 237 the analogue of section 48(17) in the *Factory and Workshop Act 1901* was held to constitute separate offences. Thus, information laid before the magistrate relating to the offence of injury caused by breach was held to have been laid within time, as it was laid within three months of the injury though more than three months after the breach.

⁸² *Per* Minister Ahern 387 Dail Debates Col. 2046 speaking during the passage of the 1989 Act.

⁸³ Section 48(17) of the 1989 Act has its historical origin in section 103 of the *Factories Act 1955* (which in turn replaced a similar provision). It is notable that while the offences under the *Factories Act 1955* were only punishable summarily, a maximum fine of IR£100 (€127) was provided for breach of section 103 compared to IR£20 (€25.40) for other offences under the Act which would indicate that the offence of causing death or

Such penalties are unlikely to reflect society's opprobrium where death is caused through gross negligence. In contrast, the statutory offences under sections 6 to 11 can be prosecuted summarily or on indictment. This undoubtedly sends the message that section 48(17) of the 1989 Act, in contrast to its previous manifestation in the 1955 Act, is viewed as a lesser offence than breach of sections 6 to 11 of the Act, which may be tried on indictment.

2.45 A closely related shortcoming of the statutory offence is that it can only be committed where there has also been a breach of the "relevant statutory provisions" – which, in short, means the Health and Safety Acts and any regulations made under them.⁸⁴ Where a corporation has not breached any of the statutory provisions in sections 6 to 11 of the 1989 Act, no prosecution may be brought under section 48(17). Where death occurs in the workplace of a corporation which has been compliant no offence is committed - even though, as mentioned above, there may have been a failure to comply with some other regulations.

(5) Penalties for Health and Safety Offences in General

2.46 The offence of breach resulting in death or serious injury created by section 48(17) of the *Safety, Health and Welfare at Work Act 1989* appears to be a summary offence only. This is apparent from section 49 of the Act, which deals with penalties. The section only provides for penalties on conviction on indictment for offences in connection with a breach of sections 6 to 13 and 28 of the Act (as already noted, prior to the 1989 Act, no provision existed in health and safety legislation for the prosecution of offences on indictment).⁸⁵ All other offences under the Act for which no express monetary penalty is provided (including, it would appear, the offence created by section 48(17)) are punishable "on summary conviction thereof to a fine not exceeding £1,500"⁸⁶ (€1,905).

bodily harm was treated more seriously under the 1955 Act than an offence without such consequences.

⁸⁴ Section 2 of the *Health, Safety and Welfare at Work Act 1989*. See fn77 above.

⁸⁵ See fn83 above.

⁸⁶ Section 49(1) of the *Safety, Health and Welfare at Work Act 1989* (as amended by section 41 of the *Organisation of Working Time Act 1997*).

2.47 There is no upper limit to the fine which may be imposed on conviction on indictment for an offence under the 1989 Act. The potential for the use of the fine was illustrated in 2003 when fines totalling €500,000 were imposed on a construction company for breaches of health and safety legislation which resulted in the death of an employee when he fell from a height when replacing a damaged roof guttering.⁸⁷ However, prosecutions on indictment for health and safety legislation offences are rare and are reserved for only the most serious offences; indeed, it was not until 2000 that the first prosecution on indictment was brought under the 1989 Act. In 2002, only two prosecutions were brought on indictment in respect of a fatal accident.⁸⁸ High penalties are unusual, even in cases involving death. The highest fine in cases taken on indictment which were concluded in 2002 was €25,000.⁸⁹ The principles to be employed in determining the level of fines in such cases have received some recent judicial attention. In *People (DPP) v Zoe Developments Ltd*⁹⁰ Judge O'Donnell in the Circuit Criminal Court said that the fine "should be more than a blip on the balance sheet of the company", implying, perhaps, that the fine should bear some relationship to the size and profits of the offender.

2.48 In the recent judgment of the Court of Criminal Appeal in *The People (DPP) v Roseberry Construction Ltd*,⁹¹ the Court referred with approval to the decision of the Court of Appeal in *R v F. Howe & Sons (Engineering) Ltd*⁹² which set down guidelines for the sentencing of offenders convicted under the British *Health and Safety at Work Act 1974*. Noting concern that the general level of fine imposed for health and safety offences was too low, the English Court

⁸⁷ *The People (DPP) v Oran Pre-Cast Ltd* Circuit Criminal Court (Castlebar) 3 July 2003.

⁸⁸ *The People (DPP) v Penrhos Plant Hire Ltd* Circuit Criminal Court (Dublin) 3 May 2002; *The People (DPP) v John F Supple Ltd* Circuit Criminal Court (Cork) 19 November 2002.

⁸⁹ *The People (DPP) v Andrews Construction Ltd* Circuit Criminal Court (Dublin) 2 December 2002.

⁹⁰ Circuit Criminal Court (Dublin) 23 June 2000. See also paragraph 1.08 above.

⁹¹ Court of Criminal Appeal 6 February 2003. See paragraph 8.05 below.

⁹² [1999] 2 All ER 249.

of Appeal stated that the fine imposed must reflect the objectives of health and safety regulation and the gravity of the offence, and

“needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders.”⁹³

2.49 Conduct falling far below appropriate standards; conduct resulting in death, deliberate breach with a view to maximisation of profits and repeated failure to heed warnings were all identified as factors which would aggravate the sentence, while prompt admission and plea, the taking of steps to remedy the deficiencies, and a good safety record would be mitigating factors. The English Court of Appeal further added that the sentence should not only reflect the gravity of the offence but also the means of the offender; but that point was made in favour of mitigation rather than aggravation, for the Court held that the offender should be afforded an opportunity to provide evidence of its inability to pay a fine, and fines of STG£40,000 imposed by the Crown Court were reduced to STG£15,000 on appeal.⁹⁴

2.50 The recent imposition by the Circuit Court of fines totalling €500,000 for breaches of health and safety legislation⁹⁵ may be evidence of increased judicial willingness in Ireland to adopt a more robust sentencing approach. Moreover, in that case, Judge Kenny was reported as stating that it was for others to determine whether other penalties were appropriate in such cases.

2.51 On another level, and distinct from the fact that sentences will reflect all the circumstances of the case and not merely the gravity of the offence, there are reasons why higher fines might not become the norm. Apart from the danger that the prospect of higher sanctions might cause employers to become more defensive in their dealings with the Authority (which places significant emphasis on the importance of co-operation and encouragement in the promotion of a

⁹³ [1999] 2 All ER 249, 255, *per* Scott Baker J.

⁹⁴ See further paragraph 8.04 *ff* below on the issue of the means of the offender in imposing fines.

⁹⁵ *The People (DPP) v Oran Pre-Cast Ltd* Circuit Criminal Court (Castlebar) 3 July 2003. See paragraph 2.47 above.

‘safety culture’) the decision to proceed on indictment requires a legal assessment to be made of whether the offence is non-minor in character and appropriate for prosecution in the higher courts. This has resource implications for the Authority. Furthermore, it requires liaison with and the support of the Office of the Director of Public Prosecution, and the increased - but limited - number of prosecutions on indictment indicates that such liaison has developed in recent years.

(6) *The Liability of Directors, Managers, Secretaries and Similar Officers under the Health and Safety Acts*

2.52 In addition to making corporations liable for offences under the *Safety, Health and Welfare at Work Act 1989*, the 1989 Act also imposes personal criminal liability on directors, managers, secretaries or similar officers for the corporation’s unlawful conduct. The personal offence is imposed by section 48(19) of the 1989 Act and adheres to a form of wording standard in many regulatory statutes⁹⁶ which has been described as “parasitic”⁹⁷ because it makes inroads into the principle of the separate legal personality of corporations. Section 48(19)(a) provides as follows:

“Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly...”⁹⁸

⁹⁶ See, for example, section 5(5) of the *Fire Services Act 1981* and the provisions of the British *Trade Descriptions Act 1968*, discussed in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, on which see paragraph 1.44 *ff* above.

⁹⁷ *Per* Evans LJ in *R v Wilson* [1997] 1 All ER 119, 121.

⁹⁸ The section goes on to provide that where the affairs of the corporation are managed by its members they too can be made liable as though they were directors.

2.53 Personal liability under these provisions is not absolute:⁹⁹ the onus is on the prosecution to prove that the corporate offence was attributable, for example, to that person's consent or neglect. Accordingly, not only will the mental attitude of the individual have to be shown to have involved the degree of knowledge, appreciation or acquiescence appropriate to consent, connivance or neglect, but a chain of causation must also be established to show that the corporate offence was *attributable* to that mental attitude.

2.54 There is no automatic duty in law on directors to supervise their co-directors or to acquaint themselves with all the details of the running of the company.¹⁰⁰ The law accordingly recognises a measure of freedom whereby directors and other officers may delegate certain of their functions, and whether a corporate offence is attributable to a particular person's mental attitude will depend both on their position in the company as well as on their duties and responsibilities.

2.55 Section 48(19)(a) of the *Safety, Health and Welfare at Work Act 1989* is similar to section 37 of the *British Health and Safety at Work Act 1974* (the '1974 Act'), on which there is some case law. In *Armour v Skeen*,¹⁰¹ Mr Armour was the Director of Roads for Strathclyde Regional Council. A Council employee in the Roads Division was killed when he fell from a bridge during a repainting job. The Council did not have any written safety policy concerning the job in question, as required by the 1974 Act. The Council had, however, issued a circular to its departmental directors in 1975 which included a 'Statement of Safety Policy' requiring directors to prepare written policy documents relating to each director's department in order to comply with the 1974 Act and other existing legislation, to inform employees of the implications of the 1974 Act and to ensure the application of safe working practices. Mr Armour had not prepared a written policy for his department at the time of the fatal accident. The Council also pleaded guilty to the charges brought. Mr Armour was also prosecuted under section 37 of the 1974 Act and

⁹⁹ Per MacPherson J in *Hirschler v Birch* [1987] RTR 13, 19.

¹⁰⁰ Per Romer J in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 428-430; applied in the context of provisions similar to those under discussion by Parker LCJ in *Huckerby v Elliott* [1970] 1 All ER 189.

¹⁰¹ 1977 SLT 71.

was found guilty. His conviction was upheld on appeal and the Scottish High Court ruled that, bearing in mind his position as Director of Roads, he fell within the category of persons contemplated by section 37 of the 1974 Act. Both he, and the Council, were therefore guilty of the offence.

2.56 In *R v Boal*¹⁰² the defendant was the assistant manager in a bookshop who was in day-to-day charge of the shop when the manager was not present. On one day when the manager was not present, an inspection of the shop found defects in the fire precautions. The company owners were then prosecuted under the *British Fire Precautions Act 1971* and were convicted of an offence. The defendant was also prosecuted personally under an almost identical provision to that contained in section 48(19) of the 1989 Act. However, the case against him was dismissed on the basis that, although he was in charge on the day that the premises were inspected, he had no control over the shop's policy on fire safety.

2.57 While there are no comparable decisions of the Irish courts providing a definitive interpretation of section 48(19)(a) of the 1989 Act,¹⁰³ it would appear on the basis of the British authorities that s.48(19) would apply to those managers and other officers who have an input into corporate policy, that is, those persons who have executive functions in an organisation.

(7) Remedial Orders and Prohibition Orders

2.58 Where a person is convicted of an offence under the health and safety legislation, the court may, in addition to, or instead of

¹⁰² [1992] QB 591.

¹⁰³ Three examples of prosecutions under section 48(19) of the *Safety, Health and Welfare at Work Act 1989* are referred to in the Health and Safety Authority's Annual Reports for 1998 and 2001. Two of these, *National Authority for Occupational Safety and Health v Noel Frisby Construction Ltd and Noel Frisby* District Court (Waterford) 6 November 1998 and *National Authority for Occupational Safety and Health v B International Ltd (t/a Oasis) and Gallagher* District Court (Ballina) 24 July 2001, involved pleas of guilty in the District Court. The third, *The People (DPP) v Roseberry Construction Ltd* Circuit Criminal Court (Naas) 21 November 2001, involved a plea of guilty on indictment in the Circuit Court and is discussed further at paragraph 1.10 above.

imposing a fine, order him or her to take steps within a specified time to remedy the matters in respect of which the contravention occurred, and any person who fails to comply with any such order within the specified time will be guilty of an offence.¹⁰⁴ The Health and Safety Authority may also apply to the High Court under section 39 of the 1989 Act for a prohibition order, in effect an order closing a place of work. Such applications are reserved for serious cases involving imminent danger or previous non-compliance.¹⁰⁵ Failure to comply with the terms of an order can amount to contempt. In January 2003, Kelly J in the High Court ordered a director of a company to be imprisoned for three days for contempt for breach of an undertaking to comply with an order under section 39 of the 1989 Act. The company was fined €10,000 for contempt.¹⁰⁶

(8) Costs

2.59 In addition to liability to pay a fine, it should be noted that a convicted offender in health and safety proceedings may also be made liable for the costs of the Health and Safety Authority in bringing the proceedings.

(9) Special Reports and Inquiries

2.60 Sections 46 and 47 of the *Safety, Health and Welfare at Work Act 1989* enable the Health and Safety Authority to order an investigation into the circumstances surrounding an accident and to produce a special report, which may be made public; and/or to establish (with the consent of the Minister) an inquiry to be held into any accident, disease, occurrence, situation or any other matter related to the general purposes of the 1989 Act.

¹⁰⁴ Section 48(16) of the *Safety, Health and Welfare at Work Act 1989*.

¹⁰⁵ See the case of Zoe Developments discussed at paragraph 1.08 above.

¹⁰⁶ *Kilkishen Homes Limited* High Court (Kelly J) 24 January 2003.

D Civil Liability for Homicide

(1) *Actions in Tort and Contract*

2.61 A corporation whose activities cause death may also face civil liability in an action for compensation by the deceased's estate or dependants. Such actions will be founded on ordinary principles of tort or contract, but will be subject to particular limitations laid down in the *Civil Liability Act 1961*, as amended, or the *Air Navigation and Transport Act 1936*, as amended, (in cases of the death of air passengers) or the *Merchant Shipping (Liability of Shipowners and Others) Act 1996* (in cases of the death of sea passengers) as appropriate. The Civil Liability Acts contemplate two separate though related types of proceeding where fatal injuries are concerned. The first is an action by the deceased's estate, which may include a claim for compensation for loss of earnings in the 'lost years'. The second is an action by the deceased's dependants for compensation for loss of reasonably expected pecuniary benefits, funeral expenses and mental distress. Usually only one action is brought for damages for all of the following: mental distress; special damages (such as headstone cost and funeral expenses); and 'actuarials' *ie* cost or loss of contribution to budget from earnings, and the value of services (such as assistance about the home) that were lost.

2.62 The decision whether to bring civil proceedings is, of course, personal to the plaintiff in each case, and will regularly be influenced by economic considerations, such as the cost of bringing proceedings and the danger of being made liable for the defendant's costs in the event of an unsuccessful action. Very few fatal actions fail – most are settled, and insurance companies seem to be sympathetic and generous. However, awards in civil proceedings for fatal injuries are limited by statute,¹⁰⁷ and there may sometimes be little relative advantage in pursuing such claims, though they might provide the only avenue for the family of a deceased to establish that the deceased was not at fault. Practical considerations, such as the wish not to re-open or revisit the tragic circumstances of the death, may also come into play. The currency of criminal proceedings or other official investigation or inquiry may influence civil proceedings,

¹⁰⁷ See paragraph 2.64 *ff* below.

causing them to be postponed or stayed as a legal or practical necessity. It should be recalled that the time for commencement of civil proceedings generally, and civil proceedings for fatal injuries in particular, is limited by statute.¹⁰⁸ Such periods may have expired by the time the cause of action is revealed by the findings of another tribunal. Liability may be easier to establish in civil proceedings, however, given that the ordinary standard of proof on the balance of probabilities, as opposed to the higher standard of proof required in criminal proceedings, will apply.

(a) *Actions by the Deceased's Estate*

2.63 The action by the deceased's estate must be in respect of a cause of action which was vested in the deceased at the time of his or her death, or which would have been but for that death. No special cause of action beyond those available in tort or contract or otherwise is introduced by the Civil Liability Acts, but certain causes of action, such as claims for compensation under the *Workman's Compensation Act 1934*, are excluded. It should be noted also that section 60(1) of the *Safety, Health and Welfare at Work Act 1989* provides that the general duties to ensure health and safety imposed by sections 6 to 11 of that Act are not to be construed as conferring a right of civil action in relation to a breach thereof; though the exclusion is not extended to breaches of section 12 of the 1989 Act (requiring preparation of a safety statement) or specific duties imposed by Regulations made under the 1989 Act.

2.64 A significant limit to the compensation awarded in actions by the deceased's estate is that it may not include damages for purely personal loss. Section 7(2) of the *Civil Liability Act 1961* provides that:

“the damages recoverable for the benefit of the estate of that person shall not include exemplary damages, or damages for

¹⁰⁸ See sections 9 and 6(1) of the *Civil Liability Act 1961*, as amended, which impose a two or three year limitation period depending on whether it is the deceased's estate or dependants who is or are bringing the action. The limitation period in the case of actions by the dependants is subject to a “date of knowledge” exception, however: see McMahon & Binchy *Law of Torts* (3rd ed Dublin 2000) at 1064 and 1068.

any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness.”

2.65 While such awards may include compensation for loss of contribution to the family budget by way of expected earnings (less the deceased’s costs of maintaining himself or herself),¹⁰⁹ they must, accordingly, exclude any recovery in respect of those items of damage intimately connected with the deceased’s person. This statutory approach reverses the earlier approach of the courts,¹¹⁰ which recognised a claim for loss of expectation of life, and has been the subject of criticism and departure in other jurisdictions.¹¹¹

2.66 Neither may the award take account of any loss (such as termination of a life interest in property) apart from funeral expenses¹¹² or gain (such as payments under a life insurance policy)¹¹³ consequent on the death. Account is taken of the value of an accelerated benefit by reason of death.¹¹⁴

(b) *Actions by the Deceased’s Dependents and Family*

2.67 Irish law confers a further right of action in tort on the deceased’s dependants in respect of wrongs resulting in fatal injuries. Section 48(1) of the *Civil Liability Act 1961* provides:

“Where the death of a person is caused by the wrongful act of another as would have entitled the party injured, but for his death, to maintain an action and recover damages in

¹⁰⁹ See White “Damages for the Lost Earnings in the Lost Years” (1985) 20 Ir Jur (ns) 295.

¹¹⁰ *Rose v Ford* [1937] AC 826.

¹¹¹ See McMahon and Binchy *op cit* fn108 at 1062 fn4.

¹¹² Section 7(3) of the *Civil Liability Act 1961*.

¹¹³ *Ibid.* Section 50 further provides that in cases of fatal injuries the assessment of damages shall not take account of any sum payable on the death of the deceased under any contract of insurance, or any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased.

¹¹⁴ See Law Reform Commission *Report on Section 2 of the Civil Liability (Amendment) Act, 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68-2002).

respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased.”¹¹⁵

2.68 “Dependant” is given a broad interpretation¹¹⁶ to include all those in a family relationship with the deceased who have suffered financial injury or mental distress as a result of the death, including adoptees and cohabitants but excluding those whose marriage is void or has been annulled and aunts, uncles, nephews, nieces and other indirect relations.¹¹⁷ Only one action can be brought by dependants in respect of fatal injuries under the Act,¹¹⁸ and the action is in the nature of a class action for the benefit of all the dependants.¹¹⁹

2.69 Compensation in an action by the deceased’s dependants is allowed under three heads: compensation for loss of pecuniary benefits or other benefits which can be given a monetary value;¹²⁰ compensation for funeral expenses actually incurred,¹²¹ and

¹¹⁵ The provisions are displaced in the case of the liability of carriers by air for the death of passengers by the provisions of section 18 of the *Air Navigation and Transport Act 1936*, and in the case of passengers by sea by the *Merchant Shipping (Liability of Shipowners and Others) Act 1996*. The wrongful act can be a default or omission including a tort, breach of contract or breach of trust: section 2(1) of the *Civil Liability Act 1961*.

¹¹⁶ See section 47 of the *Civil Liability Act 1961* as amended by section 1(1) of the *Civil Liability (Amendment) Act 1996*. The right of action under section 18 of the *Air Navigation and Transport Act 1936* is conferred on “members of the passenger’s family” *ie* half-brother, half-sister, child, stepchild, grandchild.

¹¹⁷ Divorcees, in addition, are not allowed to recover for mental distress: section 49A of the *Civil Liability Act 1961* as inserted by section 3(2) of the *Civil Liability (Amendment) Act 1996*.

¹¹⁸ Section 48(2) of the *Civil Liability Act 1961*.

¹¹⁹ *Ibid* section 48(4).

¹²⁰ *Ibid* section 49(1)(a), as amended. The compensation awarded under this head may include loss of earnings in the ‘lost years’. The possibility of double liability to different plaintiffs (the estate and the dependants) led to the statutory removal of such compensation in England and Australia. See McMahon and Binchy *Law of Torts* (3rd ed Dublin 2000) at 1063.

¹²¹ *Civil Liability Act 1961* section 49(2).

compensation for mental distress.¹²² The latter, sometimes referred to as *solatium* is limited to a total maximum of IR£20,000¹²³ (€25,395). Due regard will be given to any contributory negligence of the deceased and, if applicable, that of the plaintiff dependants themselves,¹²⁴ and also to any damages recovered in an action by the deceased's estate.¹²⁵ Moreover, the ordinary principles of consent and compromise will limit the availability of the action, so that where the deceased had consented to the wrong resulting in death,¹²⁶ or had settled his or her claim finally prior to death,¹²⁷ no further claim will lie.

(c) *A Tort of Wrongful Death?*

2.70 The statutory rights of action described above are thought to be the only actions available to a deceased's estate and dependants in cases of fatal injuries. It has, however, been contended¹²⁸ that the Irish courts are not precluded by the statutory provisions from recognising a common law right to sue for wrongful death. There is no Irish authority in which the existence of such an action was canvassed or denied. Were the Irish courts to recognise such a right, a prospect which is doubted by McMahon and Binchy,¹²⁹ it would nonetheless have the advantages of expanding the class of dependants

¹²² *Civil Liability Act 1961* section 49, subsections (1)(a)(ii) and (b), as amended.

¹²³ *Civil Liability (Amendment) Act 1996*, section 2, which also provides that the sum may be altered in the future by order of the Minister for Justice, Equality and Law Reform.

¹²⁴ Section 35 of the *Civil Liability Act 1961*.

¹²⁵ *White Irish Law of Damages for Personal Injury and Death* (Dublin, 1989) paragraph 14.4.02.

¹²⁶ *O'Hanlon v ESB* [1969] IR 75.

¹²⁷ *Nunan v Southern Railway Company* [1924] 1 KB 223; *Mahon v Burke and The Mid-Western Health Board* [1991] 2 IR 495. McMahon and Binchy *op cit* fn120 and White *op cit* fn125 point to debate on this issue, however.

¹²⁸ *White Irish Law of Damages for Personal Injuries and Death* (Dublin 1989) Chapter 7.

¹²⁹ McMahon & Binchy *Law of Torts* (3rd ed Dublin 2000) paragraphs 42.03-42.05.

who are entitled to sue beyond those recognised by statute, as well as the kind of damages for which the dependants might claim beyond the statutory entitlements, to include, perhaps, damages for loss of society or loss of parental education. The common law might also take a different view of the situation where the deceased had compromised his or her claim before dying or where the claim has become statute-barred.¹³⁰

(d) *Remedies*

2.71 Awards of damages in civil actions - even within the limits of the Civil Liability Acts in cases of fatal injuries - have until recently exceeded the maximum penalty imposed by way of fine for breaches of the health and safety legislation though the imposition of substantial fines on indictment has changed this general view. It may be noted in particular that some awards of compensation by the non-statutory and later statutory Hepatitis C Compensation Tribunals have been responsible for pushing out the envelope of damages awardable for personal injuries, and have been upheld by the Courts.¹³¹ The limitations of the Civil Liability Acts apply, however, to the award of compensation where the person who contracted Hepatitis C has died.¹³²

(e) *Direct and Vicarious Liability of Corporations for Wrongs Resulting in Death*

2.72 Commonly, a corporation's liability in tort for fatal injuries arises vicariously through the operation of the principle of *respondeat superior*.¹³³ Accordingly, where the wrong is committed in the course of an employee's activities, the corporation will be vicariously liable as employer in much the same way as a human employer would, regardless of whether the corporation consented to the

¹³⁰ McMahon & Binchy *Law of Torts* (3rd ed Dublin 2000) paragraphs 42.03 – 42.05.

¹³¹ See *Ryan v Compensation Tribunal* High Court (Costello J) 15 November 1996; *Kealy v Minister for Health* [1999] 2 IR 456; *O'N v Minister for Health* High Court (O'Neill J) 19 October 1999.

¹³² Section 5 of the *Hepatitis C Compensation Tribunal Act 1997*.

¹³³ See paragraph 1.31 above.

particular act in question.¹³⁴ For vicarious liability to be imposed, a relationship of duty and control must be shown to have existed. This may be broader than the employer/employee relationship. It must also be proved that the wrong occurred within the scope of the employee's employment and was not a 'detour' or 'frolic' of his or her own. It also appears that the corporation may, in cases of vicarious liability, be entitled to recover an indemnity from the employee whose acts or omissions gave rise to the wrong.¹³⁵

2.73 On the other hand, some tortious activity may be said to be the result of a corporation's own acts or omissions as opposed to those of its agents or employees, as where they are done under the direction of the board of management or the senior management of the company.¹³⁶ In such cases the natural person committing the wrong is identified with the corporation as its *alter ego* so that his or her acts are said to be the acts of the company itself. In *Lennard's Carrying Co v Asiatic Petroleum Co*, Viscount Haldene explained what has come to be known as the 'identification doctrine'¹³⁷ as follows:¹³⁸

"A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active directing mind and will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation...[T]he fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is responsible upon the footing of *respondeat superior*; but somebody for whom the company is liable because the action is the very action of the company itself."

¹³⁴ See, for example, *Pearson & Son Ltd v Dublin Corporation* [1907] 2 IR 27.

¹³⁵ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

¹³⁶ See Courtney *The Law of Private Companies* (2nd ed Dublin 2002) at paragraph 3.048.

¹³⁷ See paragraph 1.42 *ff* above.

¹³⁸ [1915] AC 705, 713-714.

2.74 The above statement of principle was quoted with approval by McCarthy J in *Taylor v Smith*¹³⁹ and was later applied by the Supreme Court in *Superwood Holdings plc v Sun Alliance and London Plc Assurance plc*¹⁴⁰ with the qualification that the directing mind and will of a corporation was not necessarily that of the person or persons who had general management and control since the directing mind and will could be found in different persons in respect of different activities.¹⁴¹ The Supreme Court applied the identification doctrine in a practical manner by determining who within the company was in control of the relevant activities. Denham J quoted with approval the observations of Ussher that “there is an artificiality in seeking to force complex and varying corporate structures into a uniform human mould; in particular a search for Lord Haldene’s very ego and centre of personality of the corporation may prove fruitless where power is diffused through a company”.¹⁴² In the event, however, the Supreme Court found that neither the company’s principal directors, nor its production director, operations director, and sales directors, held the necessary intent to establish a case of fraud against the company itself.

2.75 The approach of the Supreme Court to the identification doctrine in *Superwood* reflects the fact that it has been applied with great variability by the English courts and those of other common law jurisdictions, particularly in the context of the direct *criminal* liability of corporations. In the context of civil liability for fatal injuries, however, there has been less concern about the doctrine, possibly because the law of torts embraces the principle of vicarious liability to a far greater extent than the criminal law, but also perhaps because an altogether different approach may be justified in cases where the civil wrong complained of is a breach of statutory duty, particularly a duty under health and safety legislation.¹⁴³ Evidence of this different

¹³⁹ [1991] IR 142, 166.

¹⁴⁰ [1995] 3 IR 303.

¹⁴¹ Following *El Ajou v Dollar Land Holdings plc and Another* [1994] 2 All ER 685.

¹⁴² Ussher *Company Law in Ireland* (London 1986) at 39.

¹⁴³ Thus while breach of the general duties imposed on employers under sections 6 to 11 of the *Safety, Health and Welfare Act 1989* will not give rise to civil liability (see section 60(1)(a) of the Act), the duty under section 12 of the 1989 Act to prepare a safety statement - in effect a

approach may be found in *M'Mullan v Lochgelly Iron and Coal Company Ltd*,¹⁴⁴ where the House of Lords observed that legislation of this kind places a duty directly on the employer corporation, so that once a breach is shown to have occurred the corporation will be directly and 'personally' liable without need to prove knowledge, consent or neglect on the part of the corporation itself.

(f) *Civil liability of Directors, Managers, Secretary or Other Similar Officers*

2.76 It is well established that the separate legal personality which distinguishes a corporation from its members and officers is no bar to the imposition of civil liability on such individuals. Whether personal liability for corporate wrongs resulting in death may be imposed on directors or other officers or controllers of the company depends in each case on the nature of the tort or wrong complained of. There is clear evidence of a reluctance to impose personal liability on such persons merely because they hold a position of influence in the corporation.¹⁴⁵ Accordingly, liability will only be imposed where a director or controller has authorised, directed or procured the commission of the tort (in which case the corporation may be regarded as their agent in the commission of the wrong)¹⁴⁶ or where they owed an independent duty of care to the victim.¹⁴⁷ Liability may also be found where the individual has breached any statutory duties placed on holders of the office which they occupy.¹⁴⁸

2.77 There are strong policy considerations which inform the decision whether to impose personal civil liability on directors or controllers, as both the High Court and Supreme Court identified in

document setting out how the corporate body manages and controls risks in relation to health and safety at work - *can* give rise to civil liability.

¹⁴⁴ 1934 SLT 114.

¹⁴⁵ See, for example, *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] AC 465, *per* Parmoor LJ at 488.

¹⁴⁶ *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* [1924] All ER 294.

¹⁴⁷ See, for example, *Fairline Shipping Co v Adamson* [1975] 1 QB 180.

¹⁴⁸ *Sweeney v Duggan* [1991] 2 IR 274 (High Court); [1997] 2 IR 531 (Supreme Court).

Sweeney v Duggan.¹⁴⁹ The plaintiff in *Sweeney* was seriously injured whilst employed by a quarrying company. His action in negligence against the company succeeded, but the company went into voluntary liquidation during the proceedings and was unable ultimately to satisfy the judgment against it. The plaintiff then commenced proceedings against the defendant, who was principal shareholder in the company and quarry manager within the meaning of the *Mines and Quarries Act 1965*. The two broad planks of his case against the defendant were that in reality he was the company (or its *alter ego*) and that as quarry manager he owed the plaintiff duties in contract and tort to take reasonable care to ensure that the company had adequate insurance cover to meet any claims in respect of injuries to employees. Barron J in the High Court (whose views were upheld by the Supreme Court) refused to hold the defendant liable, saying:

“Neither of these matters is a ground for imposing liability on the defendant personally. He is in law a different person from the company and there are no circumstances from which it could be inferred that the company was a sham or should be treated as an instrument of fraud. Undoubtedly, as quarry manager the defendant was personally liable for breach of any of the statutory duties imposed upon the holder of that office. But such duties relate only to safety. There is no statutory duty of the type which the plaintiff seeks to establish...The reality of the plaintiff’s claim is that the defendant was the person in control of the company. He can certainly have no greater liability than that of the company itself. However it does seem to me that perhaps this claim should be answered by saying that to allow it as against the defendant would in effect be depriving the defendant of his protection under company law and to nullify all the essential principles of that law.”¹⁵⁰

2.78 Each case will turn on its own facts, however, and in *Shinkwin v Quin-Con Ltd and Quinlan*,¹⁵¹ a case said by Fennelly J to

¹⁴⁹ *Sweeney v Duggan* [1991] 2 IR 274 (High Court); [1997] 2 IR 531 (Supreme Court).

¹⁵⁰ [1994] 2 IR 274, 284.

¹⁵¹ [2001] 1 IR 514.

bear superficial resemblance to *Sweeney v Duggan*, a manager was held to be directly liable in tort for an employee's injuries as he involved himself very closely in the operation of the factory and, in particular, in the supervision of the plaintiff. The question in each case, then, is whether there was sufficient proximity between the director or officer and the plaintiff as to give rise to a duty of care.

(2) *Product Liability*

2.79 The *Liability for Defective Products Act 1991* supplements other remedies in contract and tort. The Act implements the Product Liability Directive¹⁵² and provides that a producer is strictly liable in damages in tort for damage caused wholly or partly by a defect in his product.¹⁵³ A product is defective when it “does not provide the safety which a person is entitled to expect taking all the circumstances into account ...”¹⁵⁴ “Damage” is defined to include death.¹⁵⁵ “Products” is defined widely in section 1(1) to cover most movable rather than immovable products. However, if a movable product is a component of a movable product it would be covered - for example, where a defective brick used in the construction of a house. A previous exclusion for primary agricultural products has been removed.¹⁵⁶ Liability under the Act is on a no-fault basis and it is not required to show that the producer was negligent, only that the injury

¹⁵² Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products 85/374/EEC. The Product Liability Directive is complemented by a series of Product Safety (“New Approach”) Directives which impose duties on producers to place products on the market which do not pose risk to humans. A general product safety Directive 92/59/EEC was implemented in Ireland by the *European Communities (General Product Safety) Regulations 1997* (SI No. 197 of 1997). The 1997 Regulations provide that failure to comply with its provisions is a summary offence carrying a maximum fine of IR£1,500 (€1,905) and/or three months’ imprisonment. Civil liability may also arise under the 1997 Regulations: see *Rodgers v Adams Children Wear Ltd* High Court (Carroll J) 14 February 2003.

¹⁵³ Section 2 of the *Liability for Defective Products Act 1991*.

¹⁵⁴ *Ibid* section 5(1).

¹⁵⁵ *Ibid* section 1(1).

¹⁵⁶ *European Communities (Liability for Defective Products) Regulations 2000* (SI No. 401 of 2000).

was caused by a defect in the product. Section 7(1) provides for a discoverability test in relation to claims for death. Under section 3, damages assessed as in excess of IR£350 (€445) can be awarded and no maximum is provided for.

E The Corporate Manslaughter Bill 2001

2.80 The *Corporate Manslaughter Bill 2001*¹⁵⁷ was introduced in the Dáil as a Private Member's Bill, sponsored by then Labour Party Spokesperson on Enterprise, Trade and Employment, Deputy Pat Rabbitte, on 11 April 2001. The Bill has lapsed, having fallen at the end of the term of the 28th Dáil.¹⁵⁸

2.81 By its long title it is described as “an Act to define circumstances in which a body corporate, its officers and its employees may be found guilty of manslaughter”. The Explanatory Memorandum set the Bill against a background of increasing public concern at the rate of fatalities arising from industrial accidents and of public frustration at the difficulties involved in holding corporate bodies liable in criminal law. The limitations of the identification doctrine are cited as the principal problem. The Memorandum states that it is far easier to convict a small ‘one-man’ company for a criminal offence than it is to convict a large multi-national corporation where there are varying levels of responsibility and where serious lapses may be the responsibility of an individual who is very far from the company boardroom. The *P&O* case¹⁵⁹ is given as an example of the difficulties that arise when the identification doctrine is used as a mechanism of establishing corporate culpability.

2.82 The Explanatory Memorandum states that the Bill is based on the 1996 Report of the Law Commission of England and Wales.¹⁶⁰ The Memorandum states that there is no material difference between the law of England and Irish law in the area, but then notes that there is little or no specifically Irish jurisprudence in this area, proof itself,

¹⁵⁷ Initiated as Number 28 of 2001. The Bill was not debated in the Dail.

¹⁵⁸ 17 May 2002.

¹⁵⁹ See paragraph 1.52 *ff* above.

¹⁶⁰ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996). See Chapter 5 below.

it says, “of the difficulty faced by the Irish authorities in mounting a successful prosecution”.

2.83 The Bill did not propose a new offence of ‘corporate killing’, rather, it simply proposed to extend the existing crime of manslaughter to corporations by redefining the causal circumstances in which that crime can be committed by a corporation.¹⁶¹ Secondly, the Bill proposed to extend corporate liability to corporations sole – including, the Memorandum says, Ministers of the Government.¹⁶² Thirdly, the Bill proposed to extend personal liability for the crime of manslaughter to any director, manager, secretary, or other officer, or an employee of the company if the corporate offence was attributable to their recklessness or gross negligence.

2.84 Section 1(1) of the Bill provided:

“Where, within the State the undertaking, or any activities in connection with the undertaking, of a company is or are managed or organised in a way that fails to ensure that the health or safety of persons liable to be affected (including employees of the company) is not thereby threatened,

(a) that failure amounts to conduct falling far below the standard of care and attention it is reasonable in the circumstances to expect would be paid to ensuring that the health or safety of such persons is not so threatened, and

(b) that failure is the cause or one of the causes of the death of a person (notwithstanding that the immediate cause of the person’s death is the act or omission of another individual),

the company shall be guilty of manslaughter.”

¹⁶¹ Section 1 of the Bill.

¹⁶² The Law Commission of England and Wales expressly excluded such corporations from the remit of their proposed offence.

(1) Management and Organisational Failure

2.85 The Bill adopted a modified form of the Law Commission of England and Wales' 'management failure' test to extend liability for manslaughter to corporations. The conduct causing death must be a *failure* to ensure that health and safety of persons liable to be affected is not threatened. The conduct must be a cause, not *the* cause, of death. It must further be proved that the conduct fell far below what it was reasonable to expect of the corporation in the circumstances.

2.86 In this regard the Bill speaks of the "standard of care and attention" it is reasonable to expect in the circumstances. The Law Commission of England and Wales' proposals made no reference to such standards – they simply refer to conduct falling far below what can reasonably be expected.

2.87 The Bill stipulated the matters to which regard should be had in determining whether a failure falls far below the standard of care and attention which it is reasonable to expect in the circumstances. Section 1(5) provided that:

"In determining, for the purposes of *subsection 1(b)*, whether conduct falls far below the standard of care and attention it is reasonable to expect in particular circumstances, regard shall be had to:

(a) the duties, if any, imposed on the company under the Safety, Health and Welfare at Work Act 1989, the relevant statutory provisions (within the meaning of that Act) and the provisions of any other enactment imposing duties on the company in relation to the safety and health of its employees and of other persons liable to be affected by the manner in which its undertaking, or activities in connection with its undertaking, is or are managed or organised; and

(b) the provisions of any relevant code of practice, safety code, manual, guidelines or similar publication, whether made or published under statutory authority or otherwise, that would be admissible in evidence in a civil action for personal injuries or fatal injuries, as being relevant to the

question of negligence or breach of duty, including breach of statutory duty.”

2.88 The Bill only refers to health and safety legislation in the context of determining whether conduct falls *far below* what is reasonable in the circumstances. It does not refer to the legislation in defining the conduct itself.

(2) *Liability of Directors, Managers, Secretaries, other Officers and Employees*

2.89 The Bill proposed to extend the law of manslaughter for individuals as well as for corporations. Section 1(2) provided:

“Where -

(a) an offence is committed by a company under *subsection (1)*, and

(b) the failure referred to in that subsection is proved to have been attributable to recklessness or gross negligence on the part of a person who is a director, manager, secretary or other officer, or an employee, of the company,

that person shall be guilty of manslaughter.”

2.90 The Bill went on to define what constitutes “recklessness” or “gross negligence” in this regard. Section 1(3) provided:

“For the purposes of *subsection (2) (b)* —

(a) a person acts recklessly when he or she knowingly takes a substantial and unjustifiable risk that his or her act or omission will threaten the health or safety of others;

(b) a person acts with gross negligence if he or she fails to exercise the foresight and prudence it is reasonable to expect of a person in his or her circumstances, with the result that his or her act or omission places others at serious risk of injury.”

2.91 The formula used to define “recklessness” and “gross negligence”, though described in the Explanatory Memorandum as a definition in “standard terms”, appears at variance with established views. “Recklessness” is understood in Irish criminal law since *The People (DPP) v Murray*¹⁶³ to involve conscious disregard of a substantial and unjustifiable risk where the disregard involves culpability of a high degree, having regard to the nature and purpose of the actor’s conduct and the circumstances known to him or her. The Bill, however, makes no reference to the culpability of the offender having to be of a high degree – though a court would probably insist on that being shown. “Gross negligence” (which is only known in Irish law as an element in the crime of manslaughter but for no other crime) occurs where the actor has, by objective standards, been negligent about a substantial risk or likelihood of the occurrence of death or serious bodily injury occurring *and* that negligence was of a very high degree – *ie* a substantial falling short of the standard of care required of a reasonable person in the circumstances. The Bill’s formulation appears to describe ‘simple’ rather than ‘gross’ negligence - it is missing the element which makes negligence ‘gross’, *ie* the requirement that the negligence be of a very high degree. A court might be expected to inject that element into the formula; otherwise, on the face of it, the Bill would extend liability to individuals for homicide for ‘simple’ negligence.

2.92 The Bill’s provisions appear, thus, to redefine the existing law of manslaughter as it applies to individuals acting in the corporate context by permitting corporate officers to be convicted of manslaughter for simple negligence as opposed to gross negligence. The Bill would not, however, preclude a corporation or an individual from being prosecuted for manslaughter at common law. Section 1(4) provided:

“*Subsections (1) and (2) do not preclude a company or an individual being found guilty of manslaughter in circumstances other than those referred to in those subsections.*”

¹⁶³ [1977] IR 360.

2.93 The *Corporate Manslaughter Bill 2001* was not debated and has lapsed.

CHAPTER 3 CORPORATE LIABILITY FOR MURDER AND MANSLAUGHTER

3.01 There is no tradition in Ireland of prosecuting corporations for crimes of homicide or other serious crimes. In this chapter we explore whether such prosecutions are possible, and the basis on which such corporate liability might be imposed.

3.02 Homicide, in the criminal context, comprises a broad category of crimes involving the unlawful killing of human persons. It includes genocide, murder (including capital murder), manslaughter and infanticide. These are among the most serious crimes known in our legal system. Murder and manslaughter are of most significance in the context of this Consultation Paper - particularly manslaughter, which, as a crime of negligence, appears to provide the greatest potential for commission by a corporation. We begin our review with an examination of the general principles of both murder and manslaughter in Irish law.

A **Murder and Manslaughter**

(1) Murder

3.03 Murder is committed where a person is intentionally killed unlawfully. Though the offence is a common law one, the mental element is limited by the *Criminal Justice Act 1964* which provides in section 4(1) that:

“Where a person kills another unlawfully, the killing shall not be murder unless the accused intended to kill, or cause serious injury to, some person, whether the person actually killed or not”.

3.04 Whether this formulation applies to corporations is a matter of great doubt; it is unlikely that it was ever conceived with a

corporate defendant in mind. The murderer must be a “person” (which applying the *Interpretation Act 1937* could include a body corporate or even an unincorporated association)¹ but the victim must be “another,” which tends to suggest that only natural persons are envisaged.² Whether some common law form of malice could be said to apply instead where the accused is a corporation is unclear, if not absurd. At any rate, conviction of a corporation for murder raises a further problem at the sentencing stage: as the law stands murder carries a mandatory sentence of life imprisonment³ - which corporations are incapable of serving.

(2) *Manslaughter*

3.05 There are two broad categories of manslaughter – voluntary and involuntary. Voluntary manslaughter occurs when murder is mitigated by provocation or excessive self-defence. Involuntary manslaughter occurs when someone kills without an intention to cause death or serious injury if they have been grossly negligent (‘gross negligence manslaughter’) or if the death occurred during the commission of an unlawful and dangerous act (‘unlawful and dangerous act manslaughter’). The crime of manslaughter encompasses a wide variety of criminal conduct, ranging in gravity “from the borders of murder right down to those of accidental death.”⁴

(a) *Gross Negligence Manslaughter*

3.06 Gross negligence manslaughter is particularly applicable where the accused is engaged in activities requiring special skill or care, though it is not limited to that category of defendant. For gross negligence manslaughter to occur, the accused does not have to perceive the danger that his or her acts or omissions might result in death; rather, it must be proved that the accused intended to do the acts which led to the death, and that a reasonable person would

¹ See paragraph 2.08 above.

² See the discussion of *People v Rochester Railway and Light Co* 195 NY 102, 88 NE 22 (1909) and *R v Murray Wright Ltd* [1970] NZLR 476 at paragraphs 4.06 - 4.07 below.

³ Section 2 of the *Criminal Justice Act 1990*.

⁴ *Per Lane LCJ in R v Walker* (1992) 13 Cr App R 474, 476.

appreciate in the circumstances a real risk of serious or fatal injury ensuing. That negligence must be gross, however. In *The People (Attorney General) v Dunleavy*,⁵ a taxi driver drove unlit at night on the wrong side of a forty-foot wide road, hitting and killing a cyclist who was only seven feet from his own kerb. Gavan Duffy J, for the Court of Criminal Appeal, laid down the test for gross negligence as follows:

“...a more satisfactory way of indicating to a jury the high degree of negligence necessary to justify a conviction for manslaughter is to relate it to the risk or likelihood of substantial personal injury resulting from it, rather than to attach any qualification to the word “negligence” or to the driver’s disregard for the life or safety of others...If the negligence proved is of a very high degree and of such character that any reasonable driver, endowed with ordinary road sense, and in full possession of his faculties, would realise, if he thought at all, that by driving in the manner which occasioned the fatality he was, without lawful excuse, incurring, in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter seems clearly to be established.”⁶

3.07 The appropriate direction to the jury in terms of what they must have explained to them in cases of gross negligence manslaughter was laid down by the Court in *Dunleavy* as follows:

“(a) That negligence in this connection means failure to observe such a course of conduct as experience shows to be necessary if, in the circumstances, the risk of injury to others is to be avoided – failure to behave as a reasonable driver would.

(b) That they must be satisfied that negligence upon the part of the accused was responsible for the death in question.

(c) That there are different degrees of negligence, fraught with different legal consequences; that ordinary

⁵ [1948] IR 95.

⁶ *Ibid* at 101-102.

carelessness, while sufficient to justify a verdict for a plaintiff in an action for damages for personal injuries, or conviction on a prosecution in the District Court for careless or inconsiderate driving, falls short of what is required in the case of manslaughter; and that the higher degree of negligence which would justify a conviction on prosecution in the District Court for dangerous driving is not necessarily sufficient.

(d) That before they can convict of manslaughter, which is a felony and a very serious crime, they must be satisfied that the fatal negligence was of a very high degree; and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others.’⁷

3.08 In summary, then, gross negligence manslaughter occurs where:

- the accused was, by ordinary objective standards, negligent; and
- the negligence caused the death of the victim; and
- the negligence was of a very high degree; and
- the negligence involved a high degree of risk or likelihood of substantial personal injury to others.

3.09 Ordinary negligence, or even recklessness, alone will not suffice – the negligence must be of a high degree and must involve high risk or likelihood of substantial personal injury. The gross negligence standard is illustrated in *The People (DPP) v Cullagh*,⁸ which was an appeal by a funfair operator convicted of manslaughter following the death of a person when a chair became detached from a ‘chairplane’ ride. The equipment was over twenty years old and described as being in appalling condition. The accused was unaware of the internal rust which affected a bolt on the chair but was aware of

⁷ [1948] IR 95, 102.

⁸ Court of Criminal Appeal 15 March 1999 (*ex tempore* judgment of the Court delivered by Murphy J); see Charleton, McDermott and Bolger *Criminal Law* (1999) paragraph 7.125.

the condition of the equipment as a whole and as such was found to be guilty of gross negligence. The jury was asked to consider having regard to all facts of which they had evidence and having regard to all of the circumstances, had the accused so failed in the duty which he owed to the deceased as to be criminally liable for her death for gross negligence. This test was confirmed by the Court of Criminal Appeal.

3.10 The House of Lords has affirmed the test for gross negligence in somewhat similar terms. In *R v Adomoko*⁹ the Law Lords rejected a line of authority¹⁰ suggesting that gross negligence was established once it was proved that the accused was “reckless” - in other words, that the accused did an act that created an obvious and serious risk of death or serious injury and either failed to appreciate it, or did appreciate it but nonetheless went on to do it.¹¹ Applying reasoning similar to that of the Irish Court of Criminal Appeal in *Dunleavy*, their Lordships held that the appropriate gross negligence manslaughter occurs where it is proved: that the accused was, by ordinary objective standards, negligent; that the negligence caused the death of the victim; and that the negligence was “gross,” marking such a departure from proper standards as to be judged criminal. Lord Mackay of Clashfern LC, with whom the other Law Lords agreed, described the test thus:

“...the ordinary principles of the law of negligence apply to ascertain whether the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established, the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in

⁹ [1995] 1 AC 171.

¹⁰ For example: *Andrews v DPP* [1937] AC 576; *R v Larkin* [1943] 1 All ER 217; *R v Lamb* [1967] 2 QB 981; *R v Cato* [1976] 1 WLR 110; *R v Stone and Dobinson* [1977] QB 354; *R v Seymour* [1983] 2 AC 624.

¹¹ This type of recklessness, which can be established without proof that the accused appreciated the risk involved, is commonly known as “Caldwell recklessness” after *R v Caldwell* [1982] AC 341.

which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him...was such that it should be judged criminal.”¹²

(b) *Unlawful and Dangerous Act Manslaughter*

3.11 Unlawful and dangerous act manslaughter is committed by a defendant who causes death in the course of performing an act which would have been unlawful whether or not death resulted. The elements of the offence were laid down by the English Court of Criminal Appeal in *R v Larkin*¹³ as follows:

“Where the act which a person is engaged in performing is unlawful, then if it is at the same time a dangerous act, that is an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter.”¹⁴

3.12 This formulation was adopted by the Irish Court of Criminal Appeal in 1966 in *the People (Attorney General) v Crosbie and Meehan*.¹⁵ To narrow the scope of such liability, which might otherwise result in liability for manslaughter for the most minor unconnected unlawful act, the courts have applied a strict approach by requiring that the act itself be inherently dangerous - and obviously so to an objective observer in possession of all the relevant facts, even if that reasonable person would not have foreseen the actual consequences which ensued. In *Crosbie and Meehan*, Kenny J, for the Court, put the test thus:

“When a killing resulted from an unlawful act, the old law was that the unlawful quality of the act was sufficient to constitute the crime of manslaughter. The correct view, however, is that the act causing the death must be unlawful

¹² [1995] 1 AC 171, 187.

¹³ [1943] 1 All ER 217.

¹⁴ *Ibid* at 219.

¹⁵ [1966] IR 490.

and dangerous to constitute the crime of manslaughter. The dangerous quality of the act must however be judged by objective standards and it is irrelevant that the person did not think that the act was dangerous.”¹⁶

3.13 A notable distinction between this type of manslaughter and gross negligence manslaughter, then, is that nobody, not even the fictitious reasonable person, need foresee that the act would result in the actual consequences which ensued; all that is necessary is that a reasonable person would foresee the likelihood of *some* injury to another person. The two types of manslaughter are not mutually exclusive.

(c) *Penalty for Manslaughter*

3.14 Section 5 of the *Offences Against the Person Act 1861* (as amended by the *Criminal Law Act 1997*) provides:

“Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be imprisoned for life or for any term not less than three years or to be imprisoned for any term not exceeding two years, or to pay such fine as the court shall award, in addition to or without such discretionary punishment as aforesaid.”

(3) *Causing Death by Dangerous Driving*

3.15 Mention may also be made of a related form of criminal liability for homicide, namely the statutory offence of causing death by dangerous driving which appears in section 53 of the *Road Traffic Act 1963*, as amended. The section provides that:

“(1) A person shall not drive a vehicle in a public place in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected to be therein) is dangerous to the public.

¹⁶ [1966] IR 490, 495.

(2) A person who contravenes subsection (1) of this section shall be guilty of an offence and—

(a) in case the contravention causes death or serious bodily harm to another person, he shall be liable on conviction on indictment to penal servitude for any term not exceeding five years or, at the discretion of the court, to a fine not exceeding three thousand pounds [€3,809] or to both such penal servitude and such fine...”

3.16 Dangerous driving does not require the degree of negligence required for gross negligence manslaughter, but mere carelessness will not be sufficient. Some degree of objectively assessed fault has to be shown on the part of the driver in contributing to the situation alleged to have constituted dangerous driving.

3.17 The statutory offence of causing death by dangerous driving is also an indictable offence, but in such cases the maximum penalty is set at five years’ penal servitude and/or a fine of IR£3,000 (€3,809). Disqualification from driving for not less than two years will also follow.¹⁷

B Does a Prosecution lie against a Corporation for Manslaughter?

3.18 Although, as was noted in the preceding chapter, Irish criminal law has come to recognise that corporations can be subjected to prosecution, the principle is not one which extends to all crimes. So far, Irish criminal law recognises that corporations can be prosecuted for statutory offences, most of which arise in regulatory regimes designed to protect, for example, health and safety, the environment, and the integrity of financial markets. The Irish courts have not openly espoused the view that corporations can be prosecuted for other crimes.

3.19 Certain crimes,¹⁸ by their nature, can only be committed by natural persons (although corporations may be guilty as secondary

¹⁷ Section 26 of the *Road Traffic Act 1961* (as amended by section 2 of the *Road Traffic Act 1995*).

¹⁸ Such as bigamy or rape.

parties to such crimes).¹⁹ Furthermore, it is thought that corporations cannot be convicted of crimes such as murder where imprisonment is the only punishment.²⁰ In England, manslaughter was thought at one time to belong to the category of crimes for which a corporation could not be indicted, being a crime of personal violence. Recent judicial attention to the issue by the Court of Appeal has firmly established, however, that (in English Law at least) an indictment for manslaughter now lies against a corporation.²¹ Whether a corporation can be prosecuted in Irish law for manslaughter remains as yet unclear, for the proposition has neither been asserted nor denied in the courts.

3.20 So far, prosecutions of corporations for manslaughter in England have been confined to criminal or ‘gross’ negligence manslaughter. Given the relative frequency with which corporations are convicted of breaches of health and safety legislation, there may also be scope for corporations to be prosecuted for manslaughter arising from a criminal and dangerous act reflected in such breach.

3.21 Whether the Irish courts would feel similarly inclined to expose corporations to prosecution for manslaughter is questionable. For a start, the Irish courts have not openly espoused the identification doctrine (at least in criminal cases) which was central in Turner J’s reasoning in *P&O*²² that a corporation could be convicted of manslaughter. Were the Irish courts to adopt the principle in criminal cases, or some other principle of attribution of criminal liability, there would remain the question of whether corporations should be open to prosecution for manslaughter (or murder, for that matter), which is a crime requiring significant individual and moral wrongdoing.

3.22 As we have seen, the recognition by the English Courts that an indictment lies against a corporation for manslaughter is intimately bound up with the notion that a corporation is capable of committing

¹⁹ See Courtney *The Law of Private Companies* (2nd ed Dublin 2002) paragraph 3.050.

²⁰ See McAuley and McCutcheon *Criminal Liability* (Dublin 2000) at 308.

²¹ *Attorney-General’s Reference (No. 2 of 1999)* [2000] QB 796.

²² See paragraph 1.52 *ff* above.

an offence requiring proof of a mental element through its agents or employees. Irish law recognises a number of techniques for attributing criminal responsibility to a corporation for its agents' and employees' acts or omissions: namely, vicarious liability and the doctrine of delegation. Notably, however, the identification doctrine, which has prevailed as the technique used by the English Courts to attribute criminal liability to corporations in cases of manslaughter, has not been considered by the Irish courts in the criminal context.

3.23 If the Irish Courts were to expose corporations to prosecution for manslaughter, how would it work in practice? In order to secure conviction of a corporation for gross negligence manslaughter under Irish law, the prosecution would have to prove that the corporation was, by ordinary objective standards, negligent; that the negligence caused the death of the victim; that the negligence was of a very high degree; and that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.²³ One cannot speak of a corporation being negligent, however, unless the negligence of some natural person or persons is attributed to it. That negligence would not be attributed to the corporation using principles of vicarious liability and delegation, for, as we have seen, those principles have no application where serious crimes such as manslaughter are concerned. If the identification doctrine were employed, as in England, the negligence would have to be shown to have existed in the corporation's most senior officers – its “controlling mind and will”.

3.24 The English experience may again prove instructive. The judicial recognition that a corporation may be prosecuted for manslaughter has not led to widespread prosecution of corporations, and some of the prosecutions which have been brought have ended in notable failure.

3.25 In *R v Stanley*,²⁴ the Zeebrugge ferry disaster case, Turner J considered that neither the natural defendants, who were all senior executives, nor, consequently, the company, had the requisite *mens rea* for gross negligence manslaughter. Applying the then prevailing test for the mental element in negligent manslaughter to the facts of

²³ See paragraph 3.06 *ff* above.

²⁴ English Central Criminal Court 19 October 1990.

the case, the Judge considered that the prosecution had to prove that there was an “obvious and serious” risk that the vessel would sail with her bow doors open, when trimmed by the head, and capsize.²⁵ Evidence was tendered on behalf of the company to show that there were previous open door sailings which were all completed safely; that the company had experience of upwards of 50,000 sailings without incident; and that the safety systems and procedures in place had worked for over seven years without mishap. The prosecution was unable to prove through the testimony of witnesses outside the company that the risk of capsizing was either obvious or serious. A significant element in the learned Judge’s reasoning is an insistence that the defendants’ perception of the existence of the risk be shown to have been seriously deficient when compared with that of a reasonably prudent person engaged in the same activity.

3.26 The law of manslaughter in the corporate context was clarified recently in *R v DPP, ex parte Jones*,²⁶ which establishes in England that where a company is charged with gross negligence manslaughter it is no longer necessary to establish that the controlling mind and will actually perceived the risk of serious injury or death. The deceased in that case, Simon Jones, was employed as a labourer by a company. On his first day at work he was engaged in an operation to unload bags of cobblestones from the hold of a ship using a crane possessing a grab bucket adapted for the purpose by the addition of two chains. He was decapitated when the grab bucket under which he was standing closed unexpectedly. The English Director of Public Prosecutions decided not to prosecute the company or its managing director for manslaughter, and the deceased’s brother sought judicial review of the DPP’s decision. The DPP maintained that there was insufficient evidence to convince a jury that the objective test for negligent manslaughter as established by the House of Lords in *Adomako*²⁷ had been satisfied. It was accepted that the requirements of duty, breach and causation had been fulfilled, the issue being whether the breach amounted to a sufficiently gross act of negligence to warrant criminal sanctions. Granting the application, the Court held that while subjective recklessness was a factor which

²⁵ *R v Stanley* English Central Criminal Court 19 October 1990.

²⁶ [2000] Crim LR 858.

²⁷ [1995] 1 AC 171. See paragraph 3.10 above.

might be taken into account by the jury as being indicative of culpability, negligence would still be criminal in the absence of subjective recklessness once the test in *Adomako* was satisfied. Although the DPP had correctly stated the test, it appeared clear from his conclusions as to the managing director's concerns about safety that his decision had in fact been based upon the manager's personal perceptions, and that it had therefore been the manager's lack of subjective recklessness which had been the determining factor in taking the decision not to prosecute. The Court found no adequate explanation for the DPP's conclusion that the grab bucket procedure had not posed an obvious danger. The DPP had not explained why he had preferred the evidence of a service engineer employed by the manufacturer of the crane to that of the manufacturer's service manager. To reach a conclusion that the danger had not been sufficiently obvious had therefore been irrational.

3.27 A corporation may also become liable as an accessory to an offence of homicide. In *R v Robert Millar (Contractors) Ltd*,²⁸ a company was convicted of the lesser offence of causing death by dangerous driving when a tyre on one of its lorries burst, causing it to crash into an oncoming car, killing six people. The driver of the lorry had complained to his employer about the tyre on numerous previous occasions. The Court of Appeal accepted that the company and its managing director had procured the offence in question. A fine was imposed on the company and the managing director imprisoned for nine months.

C Criminal Liability of Natural Persons for Homicide in the Corporate Context

3.28 The recognition of corporate liability for manslaughter in England does not exclude the concurrent or independent liability of directors, managers, other officers, agents, employees or even persons not formally associated with the corporation. If anything, the identification doctrine, as we have seen, requires such liability to be established in persons occupying a high managerial position such that they represent the directing mind and will of the corporation. Not only do natural persons continue to face personal liability – even

²⁸ [1970] 1 All ER 557.

where they are engaged in corporate activities – as primary offenders, but they may also, in appropriate circumstances, be convicted as accessories to the corporate offence in cases where they have aided, abetted, counselled or procured the corporate offence.²⁹

3.29 It is also apparent that natural persons can be guilty of conspiring with the corporation to commit offences,³⁰ though there is some doubt as to whether a person who represents the directing mind and will can conspire with the corporation since conspiracy requires two minds.³¹

²⁹ Section 7(1) of the *Criminal Law Act 1997*. See also *R v Robert Millar (Contractors) Ltd* [1970] 1 All ER 577, discussed at paragraph 3.27 above.

³⁰ *R v McDonnell* [1966] 1 QB 233; see also *Taylor v Smith* [1991] IR 142 where a director representing the controlling mind and will of a company was found guilty of civil conspiracy with the companies he controlled.

³¹ See Courtney *The Law of Private Companies* (2nd ed Dublin 2002) paragraph 4.058.

CHAPTER 4 CORPORATE HOMICIDE IN COMPARATIVE REVIEW

4.01 Approaches to corporate homicide in other jurisdictions vary considerably. This is particularly evident in the criminal law, where they range from a clear denial of corporate criminal liability for homicide, at one end of the spectrum, through to a general embracing of such liability on the other.

A Jurisdictions which do not accept any form of corporate criminal liability

4.02 The variety stems in large part from differences in attitude to the general issue of whether corporations should be subject to the criminal law. Many continental European jurisdictions, for example, have shown particular reluctance to the very idea of imposing criminal liability on corporations *at all*. Until recently, the principle *societas delinquere non potest* (a corporation has no capacity to commit a crime) dominated European legal theory. Imposing criminal liability on corporations was unthinkable in the German-speaking countries and in countries inspired by German legal doctrines, such as Italy, Spain, Portugal, Greece and Poland.¹ Corporations were thought to lack the capacity to act criminally, and guilt - conceived in terms of a personal reproach - could not logically be imputed to them. The same approach is evident in countries whose criminal law is based on the French *Code Pénal*, notably Belgium. The entire European classical doctrine of criminal liability rejected such a notion.

¹ Heine “New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience - or Vice Versa?” (1998) *St Louis-Warsaw Transatlantic LJ* 173, at 174; Stessens “Corporate Criminal Liability: A Comparative Perspective” (1994) 43 *ICLQ* 493.

4.03 Recent years have seen a gradual move towards the introduction of limited forms of quasi-criminal sanction in European countries. In the 1980s many countries such as Germany, Italy and Spain, confronted the growing power of economic enterprises by devising various forms of administrative sanction to punish regulatory wrongs.² Such measures are non-criminal in nature, though in some cases, as in Germany, an appeal will lie to a criminal court. Such penalties are also known in European Union law. While the EU does not have authority to legislate in the field of criminal law, it does have a well-established system of administrative sanction for breaches of EU competition law whereby the Commission may impose hefty monetary penalties on corporations or groups of corporations for breaches.³ The European Commission on Human Rights has held, however, that large fines of this kind are fundamentally criminal in nature and that the procedural fairness guarantees in Article 6 of the European Convention on Human Rights must be respected in the process.⁴

4.04 Changes in attitude are discernible also in France, Norway, Finland,⁵ Switzerland, Belgium, and the German region of Hessen, where new or draft laws establish criminal liability for corporations in specific areas.⁶ Such changes are usually characterised, however, by a narrow focus on corporate governance issues (such as the misappropriation of corporate assets and the filing of fraudulent information on the Companies Register) rather than on general criminal liability which is considered to require moral capacity, something corporations are thought to lack.⁷ The Council of Europe has also recently embraced the notion of corporate criminal liability

² Heine *op cit* fn1; Stessens *op cit* fn1, at 498-506.

³ See, for example, *Commercial Solvents* joined cases 6 and 7/73,[1974] ECR 254; *BPB Industries and British Gypsum* case T-65/89 [1993] ECR II 442.

⁴ Stessens *op cit* fn1, at 505.

⁵ Muhonen "The Proposed Legislation for Criminal Liability of Enterprises in Finland" (1995) 6 ICCLR 3.

⁶ Heine *op cit* fn1, at 175.

⁷ See, for example, Omar "The Criminal Liability of Company Managers in France" (2000) 12 ICCLR 101; and Omar "France: Company Law Reform: Corporate Criminal Liability" (2001) 22 Co Law 320.

in its Cybercrime and Corruption draft conventions,⁸ as has the EU *Corpus Juris* project.⁹

4.05 In general, continental European jurisdictions reject any possibility of corporate criminal liability for serious crimes such as homicide.¹⁰ The focus in such jurisdictions, accordingly, has been on the liability of individuals within the corporation. Some jurisdictions, notably Belgium,¹¹ have gone so far in this regard as to develop rules for the attribution of corporate conduct to individuals - a form of vicarious liability of individuals for corporate acts - so that supervisory managerial officers, such as directors or managers, can be held criminally liable for specific offences committed within the corporation even though they are individually without blame themselves.

B Jurisdictions which see homicide as an offence which individuals alone can commit

4.06 A related view evident in the approach of some jurisdictions is that homicide is purely an offence of individual liability. Corporations are thought, thus, to be incapable of committing such crimes. This view was commonly held in many US jurisdictions until legislative intervention cleared the way for corporate prosecution. In New York in the case of *People v Rochester Railway and Light Co*,¹² for example, a charge of manslaughter against a corporation in connection with the “grossly negligent” installation of residential gas

⁸ See paragraphs 4.26 - 4.29 below.

⁹ See, for example, Dona “Towards a European judicial area? A corpus juris introducing penal provisions for the purpose of the protection of the financial interests of the European Union” (1998) 6 Eur J Crime Cr L Cr J 282. See paragraphs 4.30 - 4.31 below.

¹⁰ The approach is echoed in the Griffith Code states of Australia; see paragraph 6.01 below.

¹¹ Stessens “Corporate Criminal Liability: A Comparative Perspective” (1994) 43 ICLQ 493, at 499; Heine “New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience - or Vice Versa?” (1998) St Louis-Warsaw Transatlantic LJ 173, at 191.

¹² 195 NY 102, 88 NE 22 (1909).

fixtures was dismissed since the relevant statute read “the killing of one human being by another”. The New York legislature eventually revised the statute, given that the courts had pointed to the social utility of such prosecutions and the gradual erosion of corporate immunities.¹³

4.07 The approach is still evident in New Zealand. There, the *Crimes Act 1961* defines homicide as the “killing of one human being by another”. The Court of Appeal in *R v Murray Wright Ltd*¹⁴ held that this definition excludes criminal liability of any artificial person for homicide. Turner J considered the argument that the omissions of a company, rather than its acts, could constitute manslaughter for which the company would be liable as principal. He continued:¹⁵

“For myself I was for a time attracted by this argument, but reflection has convinced me that it cannot succeed, for the reasons which I shall now set out. Manslaughter is culpable homicide. Homicide is the killing of one human being by another. No act or omission of a company which causes death can itself amount to manslaughter, because the act or omission which kills must *ex hypothesi* be the act or omission of a human being. On the other hand, if the act or the omission of the company is relied on, not as directly causing death, but as causing some human being to cause death, the chain of causation is broken in law...”

This lacuna in the law has attracted criticism from one of New Zealand’s Law Commissioners who proposed that that the law be changed to provide for some form of corporate liability.¹⁶

4.08 It is worthy of note also that civil remedies for homicide are restricted in New Zealand by the “non-fault” accident compensation

¹³ See Maakestad “Corporate Homicide” (1990) 140 New LJ 356.

¹⁴ [1970] NZLR 476.

¹⁵ *Ibid* at 484.

¹⁶ See Dugdale “Promoting Protection from Accidental Injury and Death” (2000) www.lawcom.gov.nz. The New Zealand *Health and Safety in Employment Amendment Act 2002* now provides for up to two years’ imprisonment for serious offences on conviction on indictment under the Act.

scheme which precludes anyone from bringing an action for damages arising directly or indirectly out of personal injury (including death) caused by an accident.¹⁷

C Jurisdictions which recognise corporate criminal liability for homicide

4.09 The common law countries, notably England and Wales, the United States, Australia, Canada, and (for crimes other than homicide) New Zealand moved away from the *societas delinquere non potest* principle with the growth of the industrial economy. In these jurisdictions, the identification doctrine, in various forms, is the main principle used to attribute general criminal responsibility to corporations for the acts and omissions of their controlling officers.

4.10 Corporate criminal liability for homicide is also recognised in the Netherlands, where (by way of exception to the general approach of the civil law jurisdictions) the criminal code expressly provides that offences such as battery and involuntary manslaughter can be committed by corporations.¹⁸ Differences in approach are discernible in the jurisdictions that recognise corporate criminal liability for homicide. We turn, now, to a review of the law in these jurisdictions, grouping them according to the type of approach they adopt.

D Corporate Homicide in England and Australia - the narrow form of identification doctrine.

4.11 The courts in England and Wales employ a narrow form of the identification doctrine to attribute liability to corporations for the crime. The doctrine employed there is characterised by a narrow

¹⁷ *Accident Insurance Act 1988; Accident Insurance Amendment Act 2000; Accident Insurance (Transitional Provisions) Act 2000*. The scheme was initially enacted by the *Accident Compensation Act 1972*. Actions for exemplary damages, however, are not barred.

¹⁸ See paragraph 4.20 *ff* below.

focus on the acts and state of mind of the corporation's "directing mind and will" which is to be found only in its controlling officers.¹⁹

4.12 Most Australian states have followed the English common law with regard to general corporate criminal liability, though the Griffith Code states, such as Queensland, employ stricter criteria, reminiscent of the continental European approach, in the imposition of corporate criminal liability.²⁰ In Victoria, corporations have been prosecuted for manslaughter on three separate occasions.²¹ In the first, *The Queen v Denbo Pty Ltd and Nadenbousch*,²² the corporation entered a guilty plea. In the other two, *The Queen v AC Hatrick Chemicals Pty Ltd*,²³ and *The Queen v Dynamic Demolitions*²⁴ the corporations were acquitted. In *AC Hatrick Chemicals Pty Ltd*, Hempel J directed the acquittal on the basis that there was no criminal negligence on the part of the company's plant manager and plant safety co-ordinator since their omissions were personal to them, being

¹⁹ See paragraph 1.42 *ff* above.

²⁰ The original Griffith Code did not contain any principles of corporate criminal responsibility, and the result was that corporations could not be made criminally responsible at all. In 1978 Queensland added section 594A to its code making procedural provision for the prosecution of companies only for strict liability offences. See Criminal Law Officers Committee of the Standing Committee of Attorneys General *General Principles of Criminal Responsibility, Chapters 1 & 2* (1992) Part 5 "Corporate Criminal Responsibility" at 107-109.

²¹ In South Australia also, manslaughter charges were brought against Garibaldi Smallgoods Pty Ltd (in liquidation), a small company specialising in the production of salami, when a consumer died following an outbreak of food poisoning attributable to the defendant's product. The charges were dropped, however, when the DPP entered a *nolle prosequi* and proceeded instead against the company's co-accused directors and financial controllers. See *The Queen v Marchi and Others* [1996] SASC 5963.

²² Unreported, Supreme Court of Victoria, 14 June 1994. See Chesterman "The Corporate Veil, Crime and Punishment: The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch" (1994) 19 Melb Univ LR 1066. See also paragraph 2.14 above.

²³ Unreported, Supreme Court of Victoria, 29 November 1995. The prosecution arose out of the explosion of a tank during a welding operation in which an employee was killed and another seriously injured.

²⁴ Unreported, Supreme Court of Victoria, 8 December 1997.

contrary to company policy. The Judge noted the growing judicial and community concern for greater corporate responsibility, but maintained that any reform in this area should be a matter for Parliament, saying:²⁵

“..while we maintain the concept of the company as a separate legal person the rules of criminal law in the area of homicide which ought to be as clear and precise as possible cannot be relaxed in order to give effect to policy considerations which demand greater responsibility of corporations.”

4.13 In 1995 the Commonwealth Parliament in Australia enacted the *Criminal Code Act 1995*, which extends the principles of attribution of corporate criminal liability beyond the identification doctrine²⁶ (homicide, however, remains a matter for the State jurisdictions). The *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* which was put before the Parliament of Victoria in 2001, would, if enacted, have applied the principles of the 1995 Act in a new offence of “corporate manslaughter”. The Bill was struck down, however, in 2002. The provisions of the Bill and its progress through parliament are considered in further detail in Chapter 6 below.

E Corporate Homicide in the United States – The Modified Vicarious Liability and Identification Approaches

4.14 At federal level in the United States there is provision in the *Occupational Safety and Health Act 1970*²⁷ for criminal penalties for wilful violations causing death. In prosecutions against corporations

²⁵ Unreported, Supreme Court of Victoria, 29 November 1995, at 21-22.

²⁶ See paragraph 6.03 *ff* below.

²⁷ United States Code, Title 29, section 666(e) provides: “any employer who wilfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both”.

at federal level, the courts apply a vicarious liability or *respondeat superior* approach holding the corporation liable for the acts of any of its employees if the offence is committed within the scope of his or her employment and if it was done for the benefit of the corporation.²⁸ Many US states have followed suit by enacting workplace criminal liability legislation.²⁹

4.15 Criminal liability for homicide is the concern of the state jurisdictions in the United States. As we have seen, some state courts ruled against corporate liability for homicide where statutory language defined homicide as the killing of a (natural) person by another.³⁰ As early as 1917, however, the New Jersey Court of Appeals considered that a corporation could be held liable for negligent manslaughter since there is nothing in “the nature of the crime, the character of the punishment, or the essential ingredients of the crime” which makes it impossible for a corporation to be held liable.³¹ Since the famous Ford Pinto prosecution in Indiana in 1979,³² the number of corporate homicide cases in the state courts has increased steadily.

4.16 Many US states follow the federal *respondeat superior* approach in attributing criminal liability to corporations. It has been those states which have adopted the more restrictive attribution

²⁸ Note “Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions” (1979) 92 Harv LR 127.

²⁹ See Maakestad “Corporate Homicide” (1990) 140 New LJ 356, at 357.

³⁰ See, for example, *People v Rochester Railway and Light Co* 195 Ny 102 (1909); *State v Pacific Powder Co*, 226 Or 503 (1961).

³¹ *State v Lehigh Valley Railroad Co* 90 NJL 372 (1917), 274.

³² See generally Cullen, Maakestad and Cavender *Corporate Crime Under Attack: The Ford Pinto Case and Beyond* (Cincinnati 1987). The Ford Motor Company was prosecuted for manslaughter following the death of three teenage girls in a rear end collision. Evidence showed that the company’s engineers knew the fuel tank would rupture in rear-end collisions, but had concluded that the cost of settling potential law suits brought by injured motorists would be less expensive than installing an eleven-dollar rubber fuel bladder in the fuel tank of each car: see Miester “Criminal Liability for Corporations that Kill” (1990) 64 Tulane L Rev 928. The jury ultimately found the company not guilty.

principles of the *Model Penal Code*,³³ however, that have led the way in terms of corporate homicide prosecutions.³⁴

4.17 Section 207 of the *Model Penal Code* provides for three separate principles of attribution of corporate criminal liability. The first,³⁵ which is closely modelled on the English identification doctrine, applies to offences for which there is no clear legislative intention to impose liability on corporations. This includes common law offences such as fraud and manslaughter. In such cases the corporation will only be liable if “the commission of the offence was requested, commanded, performed, or recklessly tolerated by the board of directors or a high managerial agent.” Under section 2.07(4)(c) of the Code, “high managerial agent” means:

“an officer of a corporation ... or any other agent of a corporation or association having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the corporation or association.”

It will be noted that this definition is apparently broader than the “directing mind and will” test propounded by the House of Lords in *Tesco Supermarkets v Natrass*,³⁶ since the individual does not have to be a board member.

4.18 The second principle of attribution of corporate criminal liability in the *Model Penal Code*, which follows more closely the federal approach, applies where the crime is one for which there is a clear legislative intention to impose liability on corporations. In such cases, the vicarious liability principles of the *respondeat superior* approach apply. Accordingly, a corporation will be liable to be convicted without the need for regard to be had to the wrongdoer’s position in the corporate hierarchy, provided he or she acted within the scope of his or her employment and with the intent to benefit the corporation. A defence is available, however, where the corporation proves that the high managerial agent having responsibility over the

³³ American Law Institute *Model Penal Code* (Philadelphia 1962).

³⁴ Maakestad *op cit* fn29, at 356 *ff*.

³⁵ *Model Penal Code*, section 207(1).

³⁶ [1972] AC 153. See paragraph 1.44 *ff* above.

subject matter of the offence employed due diligence to prevent its commission - unless this result would be inconsistent with the legislative purpose of the law violated.

4.19 The third model of corporate liability in the *Model Penal Code* concerns offences of strict liability. In such cases, on the basis of the *respondeat superior* principles, corporations may be held criminally responsible for all the acts of their agents and employees without the need to prove criminal intent or an intention to benefit the corporation. In contrast to the second principle, above, there is no due diligence defence to such liability.

F Corporate Homicide in the Netherlands - the ‘Power and Acceptance’ Principle

4.20 Corporations have been prosecuted in the Netherlands for negligent homicide.³⁷ Prior to 1976, Dutch Law recognised that corporations could be criminally liable only for a limited range of criminal offences, all of which were technical or regulatory in nature. Corporate liability in such circumstances was strict, provided the criminal acts were committed by the corporation’s agents or employees while acting within the ‘sphere of the corporation’,³⁸ and corporations were convicted even where senior managers had prohibited the conduct in question. In 1976, however, Article 51 of the Dutch Criminal Code was reformulated to allow corporations to be convicted for the full range of criminal offences, and the explanatory memorandum accompanying the reformulation specifically identified battery and involuntary manslaughter.

4.21 Applying the new law, the Dutch Supreme Court considered that the prevailing ‘sphere of the corporation’ principle of attribution was too wide, and it formulated a new principle of attribution which was seen as more appropriate in limiting liability to situations where the corporation could plausibly be seen as having been morally

³⁷ See generally Field and Jorg “Corporate Liability for Manslaughter: Should We be Going Dutch?” (1991) Crim LR 156, at 163 *ff*.

³⁸ Any activities which were conducted with an intention to benefit the corporation were considered to fall within the ‘sphere of the corporation’: *Vroom and Dreesmann* case, Hoge Raad, 27 January 1948 NJ 1948, 197; see Field and Jorg *op cit* fn37, at 163.

culpable.³⁹ This is the ‘power and acceptance’ principle. Under this principle of attribution a corporation will only be criminally liable if:

- (a) it was within the corporation’s “power” to determine whether an employee acted in the manner prohibited, and
- (b) the employee’s act belonged to the category of acts ‘accepted’ by the firm as being in the normal course of business operations.

4.22 The concepts of ‘power’ and ‘acceptance’ are yet vague in Dutch jurisprudence, and doubts linger in the context of manslaughter about the extent to which it may be said that a corporation has accepted a dangerous practice or as the power to prevent it. In the 1987 *Hospital* case,⁴⁰ however, a hospital trust was convicted of manslaughter for failing to ensure that old or redundant anaesthetic equipment was removed or made un-useable. The equipment in question was not listed as being in service, and routine maintenance of it had ceased. No safety system for checking the work of maintenance technicians was in place. As a result, the wrong tubes were connected to obsolete equipment which was then used in an operation with fatal consequences. The management of the hospital trust claimed they could not prevent the unsafe practices because they did not know of them, but the District Court responded that their lack of knowledge actually made the case against them, since they ought to have been aware of routine practices within the hospital.

4.23 The narrow form of the identification doctrine has been expressly rejected in the Dutch courts, since the power and acceptance approach accepts that the power to determine the activities of persons within the organisation is not limited to those at the highest organisational levels. Elements of the identification doctrine are present within the power and acceptance principle, given that those who have power to influence the general practices of a corporation inevitably occupy senior positions within its structure. It appears that the aggregation principle⁴¹ does apply in Dutch law, so that the fault

³⁹ *Kabeljauw* case Hoge Raad 31 July 1981 NJ 1982, 80, at 164.

⁴⁰ A decision of the Dutch District Court, Rechtbank Leeuwarden, 23 December 1987; at 164-165.

⁴¹ See paragraphs 1.72 - 1.76 above.

of two or more individuals can be aggregated to constitute the fault of the corporation. Thus, it was not necessary in the *Hospital* case to identify any specific individual in a position of power within the corporation who could be said to have been responsible for the unsafe practices.

G The Growth in Acceptance of the Identification Doctrine

(1) France

4.24 The identification doctrine has found some recent favour in continental Europe. In France, where the law has only recently come to accept corporate criminal liability in limited circumstances, sections 121 and 122 of the French *Code Pénal* (1992) provide that in the circumstances where a corporation can be made criminally liable under French law (and these do *not* include homicide), the corporation will only be liable for the acts of its legal representatives or organs.⁴²

(2) Germany

4.25 Section 30 of Germany's *Ordnungswidrigkeitengesetz*⁴³ limits the class of natural persons whose acts may make the corporation liable to an administrative penalty to senior officers. The limited field of application of this provision is extended, however, by making a failure by a senior officer to prevent employees from engaging in prohibited activity itself an administrative offence. This extension, which has been described as "a disguised form of vicarious liability",⁴⁴ has apparently proved difficult to enforce in practice.⁴⁵

⁴² See Stessens "Corporate Criminal Liability: A Comparative Perspective" (1994) 43 ICLQ 493, at 507; Omar "The Criminal Liability of Company Managers in France" (2000) 12 ICCLR 101, at 102.

⁴³ That is, *Administrative Offences Act*.

⁴⁴ Stessens *op cit* fn42, at 508.

⁴⁵ *Ibid.*

(3) *The Council of Europe*

4.26 The Council of Europe has also adopted the identification doctrine as the principle by which legal persons may be made civilly, criminally or administratively liable for offences under its Conventions. In 1983, the Council appointed a select committee to examine the issue of whether the principle of corporate criminal liability should be introduced in the member states.⁴⁶ The Council adopted the recommendation in 1988 that member states *should* adopt principles of corporate criminal liability so as to attach liability even where the offence is alien to the purposes of the corporate body, irrespective of whether an individual could be identified as having committed it, save where the enterprise could be shown to have exonerated itself through its management taking all reasonably necessary steps to avoid commission of the offence.⁴⁷ The Council's 1998 Environment Convention⁴⁸ contained an Article permitting member states to adopt corporate criminal liability on the above basis, but left the choice of whether to do so to the option of each state. The recent Convention on Cybercrime,⁴⁹ and Criminal Law Convention on Corruption,⁵⁰ contain more specific provisions, however, which evidence a shift in philosophy towards the identification doctrine. Both Conventions require the offence in question to have been committed by a natural person in a "leading position" within the corporation - that is, having authority, discretion and control - and both require that the offence have been committed for the benefit of the corporation.

4.27 The identification doctrine adopted by the Conventions differs from the narrow doctrine employed in England in that liability

⁴⁶ Decision CDPC/68/070582.

⁴⁷ See Wells *Corporations and Criminal Responsibility* (2nd ed Oxford 2001) at 141 *ff*.

⁴⁸ Article 9 of the Convention on the Protection of the Environment through Criminal Law, done at Strasbourg 4 November 1998 (ETS No.172). At the time of writing, no Member State of the Council of Europe has ratified the Convention.

⁴⁹ Done at Budapest 23 November 2001 (ETS No. 185). This Convention was signed by Ireland on 28 February 2002.

⁵⁰ Done at Strasbourg on 27 January 1999 (ETS No. 173).

may also be imposed where lack of control or supervision by a person holding a leading position within the corporation makes possible the commission of an offence by a subordinate employee acting for the benefit of the corporation.⁵¹ Article 18 of the Corruption Convention⁵² provides as follows:

“1. ...legal persons can be held liable for the criminal offence established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within, based on:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person;
- an authority to exercise control within the legal person as well as for involvement of such a natural person as accessory ...

2. Apart from the cases already provided for in paragraph 1 ... a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person acting under its authority.”

4.28 The following features of the ‘modified’ identification doctrine adopted in the Conventions are of note:

- (a) The offence must have been committed for the benefit of the corporation.
- (b) The offence must have been committed either:
 - by a person having a leading position in the corporation; or

⁵¹ Convention on Cybercrime, Article 12; Criminal Law Convention on Corruption, Article 18.

⁵² Analogous provisions appear in Article 12 of the Cybercrime Convention.

- by virtue of a failure on their part to exercise supervision or control.

A leading position in the corporation is gauged not merely by formal position, but by the power to exercise authority, or to make decisions, in the relevant field of corporate activity. Notably, this extends beyond the board of directors to lower management or others vested with executive authority. Even if such persons have not actually committed the offence in question, a failure on their part to exercise control to prevent the offence being committed leads to the imposition of corporate liability. The Corruption Convention was ratified in Ireland by the *Prevention of Corruption (Amendment) Act 2001*, section 9 of which uses a formula similar to section 48(19) of the *Safety, Health and Welfare at Work Act 1989*⁵³ to provide for the criminal liability of a person having a “leading position” in the corporate body.

4.29 Paragraph 4 of Article 12 of the Cybercrime Convention stresses that the liability of corporations is to be without prejudice to the liability of individuals, which may also arise under ordinary principles.

(4) The EU ‘Corpus Juris’ Code

4.30 Article 14 of the draft code of European criminal law and procedure proposed by the European *Corpus Juris* Project in 1997 contains similar principles. The draft code is aimed at the protection of the financial interests of the EU, and it was requested by the European Parliament and prepared by a group of academic experts under the aegis of the European Commission. Article 14 of the code provides:

“Article 14 - Criminal liability of organisations:

1 - The offences defined in Articles 1 to 8 above may be committed by corporations, and also by other organisations which are recognised by law as competent to hold property in their own name, provided the offence is committed for the benefit of the organisation by some organ or

⁵³ See paragraph 2.52 *ff* above.

representative of the organisation, or any person acting in its name and having power, whether by law or merely in fact, to make decisions.

2 - Where it arises, the criminal liability of an organisation does not exclude that of any natural person as author, inciter or accomplice to the same offence.”

4.31 The principle of attribution of corporate criminal liability set out in Article 14 of the *Corpus Juris* code is broader in its scope than that in Article 12 of the Cybercrime Convention. It applies to organisations with capacity to hold property in their own names as well as to corporations. The offence must be committed by some organ or representative of the company having power to decide on its behalf, formally or otherwise. Like the Cybercrime Convention, however, the offence has to be committed for the benefit of the corporation.

(5) Other EU Developments

4.32 The *Corpus Juris* project builds on previous EU developments which evidence a growing willingness to recognise the criminal liability of corporate bodies and those in a “leading position” within them. Thus, Article 3 of the 1995 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests provides:

“Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud affecting the European Community’s financial interests, as referred to in Article 1, by a person under their authority acting on behalf of the business.”

In addition, Article 2 of the 1997 Second Protocol to the 1995 Convention provides:

“1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud...”

committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in such fraud...

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud..."

The 1995 EU Convention and 1997 Protocol were implemented in Ireland by the *Criminal Justice (Theft and Fraud Offences) Act 2001* (the '2001 Act'). In implementing Article 3 of the Convention and Article 2 of the 1997 Protocol, section 58 of the 2001 Act also uses a formula similar to section 48(19) of the *Safety, Health and Welfare at Work Act 1989*. Section 58(1) of the 2001 Act provides:

"Where—

(a) an offence under this Act has been committed by a body corporate, and

(b) the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a person who was either—

(i) a director, manager, secretary or other officer of the body corporate, or

(ii) a person purporting to act in any such capacity,

that person, as well as the body corporate, is guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence."

Article 2 of the 1995 Convention requires that implementing national laws include a penalty of deprivation of liberty for serious fraud. Section 42 of the 2001 Act provides for a maximum term of imprisonment for 5 years on conviction on indictment for an offence of fraud affecting the European Communities' financial interests.

(6) Italy

(a) Administrative Liability

4.33 In June of 2001, Italy adopted a new statute on “the administrative responsibility of legal persons, corporations and associations (including those not having legal personality)”.⁵⁴ The new statute was introduced to facilitate the adoption by Italy of a number of international and European conventions and protocols having to do with combating fraud, bribery and corruption,⁵⁵ and which include provisions allowing the “heads of business” and persons having power to take decisions or exercise control within a business to be declared criminally liable.⁵⁶ The statute applies to property crimes committed against both the State or against private individuals. It is of note, however, that corporations are incapable of being prosecuted for crimes in Italy; instead they are subjected to an administrative penalty regime.

The statute creates two types of corporate liability. The first corresponds to the identification doctrine in that the corporation or organisation will be liable for crimes committed in its interest and for its benefit by persons who represent, manage or administer it.⁵⁷ Like

⁵⁴ Decreto Legislativo n. 231 “Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica” of 8 June 2001 *Gazzetta Ufficiale* n. 140, 19 June 2001. A description of the statute in the English language appears in Gobert and Mugnai “Coping with Corporate Criminality – Some Lessons From Italy” [2002] *Crim LR* 619.

⁵⁵ Including the 1995 EU Convention on the European Communities financial interests and its Protocols: see paragraph 4.32 above. See also the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* Paris, 7 December 1997.

⁵⁶ See, for example, Article 3 of the 1995 Convention on the Protection of the Community's Financial Interests, discussed at paragraph 4.32 above.

⁵⁷ Article 5(1)(a).

the 1999 Council of Europe Corruption Convention, discussed above,⁵⁸ the statute broadens the scope of the identification doctrine by holding the corporation or organisation liable where the offence is committed by persons who do not hold formal positions at the top of the management pyramid.

4.34 The statute provides for a due diligence defence to such liability. What is interesting about the due diligence defence is that it is designed to combat what is described as “structural negligence”⁵⁹ in the corporation or organisation. Article 6 of the statute gives some indication of what constitutes “structural negligence”. Under that article, a corporation or organisation will not be held liable for wrongs committed by its heads or persons in a directing position if it proves that a control system aimed at preventing an offence of the kind committed had been set up and was efficiently running prior to the occurrence of the offence. To avail of this defence a corporation must prove that:

“(a) the directing board has enacted and effectively applied, before the offence was committed, organisational and managerial schemes appropriate for the prevention of offences of the kind that was committed;

(b) The supervision and updating of the schemes has been allocated to a body with autonomous powers of initiating controls;

(c) The offenders have committed the crimes by deliberately evading the organisational and managerial schemes;

(d) There has not been a lack of supervision by the body listed under (b).”

4.35 Article 6(2) further requires that organisational and managerial schemes must take into account the amount and type of

⁵⁸ Paragraphs 4.26 - 4.29 above.

⁵⁹ See Gobert and Mugnai “Coping with Corporate Criminality – Some Lessons From Italy” [2002] Crim LR 619, at 626 *ff.*

power delegated within the organisation and the risk of commission of offences; the scheme must:

- “(a) single out the various spheres of activities in which crimes might be committed;
- (b) foresee specific protocols directed at programming the taking and implementing of decisions of the corporation regarding the crimes that have to be prevented;
- (c) find ways of managing the financial resources of the company that would prevent the commission of crimes;
- (d) create duties/obligations to inform the supervising body on the implementation and functioning of the schemes;
- (e) introduce an appropriate disciplinary system to sanction violators.”

(b) *The Introduction of Elements of an Organisational Model of Attribution of Criminal Liability in Italy*

4.36 The second type of corporate liability created by the new Italian statute is more novel, and it employs the elements of an organisational liability model of attribution of corporate criminal liability.

4.37 Under Article 5(1)(b) of the statute, a corporation will be held vicariously liable for the acts of a subordinate who does not have decision making capacity on behalf of the organisation where their actions are the result of “structural negligence”. But the model of vicarious liability adopted is not straightforward – apparently the Italian Legislature rejected a simple vicarious liability model on the basis that the corporation or organisation should be shown at a minimum to have been culpable or blameworthy to some degree. That culpability or blameworthiness is found through the application of the organisational liability model of corporate liability.

4.38 Accordingly, under Article 7 of the statute, the prosecution must prove that the corporation or organisation failed to set up an appropriate and effective system of control over its employees before

it will be held to be vicariously liable. The detailed requirements of such a system are not set out, but Article 7(3) requires the system to ensure that the corporation acts in accordance with law and that breaches of the law can be discovered in a timely fashion and be eliminated. Article 7(4) provides for periodic review of the system, particularly where it has been shown to be defective or where there are changes to the corporation or organisation's sphere of activity. The corporation or organisation must also put a disciplinary system in place to deal with violations. Once the corporation or organisation proves that a system of supervision and control having these features existed, the onus shifts to the prosecution to prove that it was inadequate or inappropriate.

(7) Canada

4.39 In *Canadian Dredge and Dock Co. v The Queen*,⁶⁰ the Supreme Court of Canada formulated a broadened version of the identification doctrine and aggregation principle for attribution of corporate criminal liability as follows:

“The identity doctrine merges the board of director, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.”⁶¹

However, the Supreme Court later restricted the ambit of the identification doctrine on the basis that the directing mind must have the capacity to exercise decision-making authority on matters of corporate policy, rather merely to give effect to such policy on an operational basis.⁶²

4.40 The Canadian Government later recommended that the identification doctrine should be expanded so that the class of persons capable of engaging the liability of the corporation went beyond the board of directors and the principal executive officers to include

⁶⁰ [1985] 1 SCR 662.

⁶¹ *Ibid* at 693.

⁶² *The Rhone v MV The Peter A.B. Widener* [1993] 1 SCR 497.

individuals who exercise delegated, operational authority.⁶³ The Canadian Government stated:

“Determining whether an individual should be considered the mind of the corporation with respect to the commission of a specific criminal offence solely on the basis that the individual could set policy is very narrow and quite artificial. In a large corporation, the board of directors and the principal executive officers who set policy can only do so in broad, general terms and are incapable of overseeing the day-to-day operations of the corporation. They must give managers a great deal of latitude to implement the policies in the workplace. The class of persons capable of engaging the liability of the corporation should be expanded to include individuals who exercise delegated, operational authority.”⁶⁴

4.41 The Government concluded that codifying a duty of reasonable care for the safety of workers on all persons was a better solution than providing for a special corporate killing offence.⁶⁵ On 12 June 2003, the Minister for Justice and Attorney General of Canada introduced a bill in the House of Commons which is designed to ensure that organisations⁶⁶ including corporations are held accountable when they commit criminal offences.⁶⁷ The proposed measures would impose a legal duty on employers to take reasonable measures to protect employee and public safety. If this duty is carelessly disregarded and bodily harm or death results, it is proposed that an organisation could be charged with criminal negligence.

4.42 “Management of a corporation” is defined in section 476.3(1) of the Bill as:

⁶³ *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights* (November 2002).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Under the legislation, the term “organization” refers to a variety of group structures including a company, a public body and a partnership.

⁶⁷ Bill C-418.

“(a) the one or more persons who, being directors or officers of the corporation are responsible for the direction and control of the part of the activity of the corporation in respect of which the act or omission occurs; and

(b) the one or more persons to whom the corporation has delegated the day-to-day management of that part of the activity of the corporation.”

The attribution of criminal liability to corporations for crimes is formulated as follows:⁶⁸

“Where it is shown that an act or omission has been committed on behalf of a corporation, directly or indirectly by the act or omission pursuant to the order of one or more of its officers, employees or independent contractors, and

- (a) the act or omission was authorized by the management of the corporation either as a specific authorization of the act or omission or by following a policy established by or a practice authorized or allowed by the management of the corporation,
- (b) the act or omission was tolerated, condoned or encouraged by the policies or practices established by or permitted to subsist by the management of the corporation, or the management of the corporation could and should have been aware of but was wilfully blind to the act or omission,
- (c) the management of the corporation had allowed the development of a culture or common attitude among its officers and employees that encouraged them to believe that the act or omission would be tolerated, condoned or ignored by the corporation, or
- (d) the management of the corporation, whether or not it knew of the act or omission,
 - (i) failed to take steps that a reasonable, prudent and responsible corporation should take so that its officers and employees would know that

⁶⁸ Section 476.3(2) of Bill C-418.

such acts or omissions, or acts or omissions of the same or a similar nature, were unlawful or forbidden by the corporation, or

(ii) failed to provide procedures and practices whereby such acts or omissions would come to its notice,

the corporation is guilty of every offence of which an individual could be found guilty for committing that act or omission.”

4.43 The proposed measures would therefore make corporations criminally liable as a result of the actions of officers who oversee day to day operations but who may not be directors or executives where they intentionally commit, or direct employees to commit, crimes to benefit the corporation or they become aware of offences being committed by other employees but do not take action to stop them; when the actions of those with authority and other employees, taken as a whole, demonstrate a lack of care that constitutes criminal negligence.

CHAPTER 5 COMPARATIVE REFORM PROPOSALS IN ENGLAND AND WALES

A Law Commission Report on Involuntary Manslaughter

5.01 In 1996, the Law Commission of England and Wales recommended, as part of its review of the law of involuntary manslaughter,¹ that a new offence of “corporate killing” be introduced. The recommendation was taken up by the Home Office who in May 2000 produced a consultation paper outlining the Government’s proposals.² The Home Office announced in May 2003 that the UK government intends to introduce legislation on corporate manslaughter and that further details would be announced in autumn 2003.

5.02 The Law Commission’s recommendations are contained in their 1996 Report *Legislating the Criminal Code: Involuntary Manslaughter*.³ Following consultation, the Law Commission recommended in their 1996 Report that the current offence of involuntary manslaughter be abolished and replaced by two new offences of “reckless killing” and “killing by gross carelessness”, and further recommended the introduction of a new offence of “corporate killing”.

¹ See Law Commission of England and Wales *Criminal Law Involuntary Manslaughter* Consultation Paper (Law Comm 135 1994) and Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996).

² Home Office Consultation Paper *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (May 2000).

³ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996).

(1) Shortcomings of the Identification Doctrine

5.03 The Law Commission's proposals for a new crime of corporate killing were put forward to avoid any "unacceptable limitations"⁴ that might be dictated by the identification doctrine if applied to the proposed new offence of "killing by gross carelessness" in the context of corporations. The Commission avoided articulating in detail what such unacceptable limitations might be, though it is clear from their extensive review⁵ of the *P&O* manslaughter trial⁶ that they were concerned that the ferry company in that case could not be found guilty of gross negligence manslaughter because of the inability to identify culpability on the part of its controlling mind and will - despite the fact that the company had been slated in the Sheen Report⁷ as having been "infected" from top to bottom with the "disease of sloppiness". The Commission also noted "the public concern over the difficulty of establishing criminal liability against a large corporation whose grossly careless failure to set up and monitor adequate systems of operating its undertaking results in death or serious injury, sometimes on a large scale".⁸ The Commission was also concerned that there were many deaths in factories and building sites where death could have been avoided.

5.04 In considering how the identification doctrine might be avoided in cases of "killing by gross carelessness", the Law Commission looked at whether some different principle of attribution of liability might be applied to the proposed corporate killing offence. Vicarious liability⁹ was considered but rejected on the basis that "the almost complete absence of vicarious liability for a common law offence is a traditional and fundamental feature of the criminal law".¹⁰

⁴ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 8.1.

⁵ *Ibid* paragraphs 6.49-6.56, and especially paragraph 7.21.

⁶ See paragraphs 1.52 - 1.53 and paragraph 3.25 above.

⁷ Sheen *The Merchant Shipping Act, 1894, mv Herald of Free Enterprise* Report of the Court No. 8074 (1987) paragraph 14.1.

⁸ Law Commission of England and Wales *op cit* fn4 paragraph 7.1

⁹ See paragraph 1.31 *ff* above.

¹⁰ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 7.29.

Moreover, the vicarious liability approach would require proof that an individual employee had committed an offence, and it might be difficult to identify any such person in many cases.¹¹ The aggregation theory¹² was rejected as “no more than a gloss” on the identification theory since it would still require an investigation into the conduct and state of mind of the controlling officers and “might well give rise to difficult (and perhaps insoluble) problems where different controlling officers knew or believed different things”.¹³

5.05 The ‘reactive liability’ theory was also considered.¹⁴ The Law Commission concluded, however, that it was inappropriate to consider a reform that would affect the whole of the criminal law at the time of their review since their project was limited to involuntary manslaughter.¹⁵ In any event, they decided, it was unnecessary to consider such a radical approach, since a special offence could be devised for corporations.

(2) A Corporate Killing Offence

5.06 Section 4(1) and (2) of the draft Involuntary Homicide Bill proposed by the Law Commission provided for the offence of “corporate killing” as follows:

“4- (1) A corporation is guilty of corporate killing if -
a management failure by the corporation is the cause or one of the causes of a person’s death; and

that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

(2) For the purposes of subsection (1) above -

¹¹ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 7.30.

¹² See paragraphs 1.72 - 1.76 above.

¹³ Law Commission of England and Wales *op cit* fn11 paragraph 7.33.

¹⁴ See paragraph 1.64 - 1.68 above.

¹⁵ Law Commission of England and Wales *op cit* fn11 paragraph 7.35.

there is management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and

such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.”

5.07 The Law Commission determined that creating a special offence of “corporate killing” which applied the elements of the offence of “killing by gross carelessness” to corporations in an adapted form, not involving the identification principle, was the way forward. This was possible in the case of the offence of “killing by gross carelessness” because the crime was not one of conscious wrongdoing but, rather, was one of neglect or omission - albeit neglect or omission in a context of objectively serious culpability. The Commission explained:

“It is our view that it is much easier to say that a *corporation*, as such, has failed to do something, or has failed to meet a particular standard of conduct than it is to say that a corporation has done a positive act, or has entertained a particular subjective state of mind. The former statements can be made directly, without recourse to the intermediary step of finding a human mind and a decision-making process on the part of an individual within or representing the company; and thus the need for the identification theory, in order to bring the corporation within the subjective requirements of the law, largely falls away.”¹⁶

5.08 One difficulty in relation to the proposed offence of “killing by gross carelessness” in the corporate context, however, was that it would require proof that risk of death or serious injury was obvious to a reasonable person in the defendant's position, and that the defendant was capable of appreciating that risk. To speak of reasonable foreseeability in the corporate context would be illogical, the Law

¹⁶ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 7.4.

Commission considered, since corporations are metaphysical persons,¹⁷ and to try to contemplate a reasonable natural person in the defendant's position in the corporate context would be a logical impossibility; as would any inquiry as to whether the corporation had the capacity to appreciate the risk. The Commission concluded that the foreseeability of risk requirement should be left out of the definition of the corporate offence.

5.09 The Law Commission saw no reason, on the other hand, why the requirement in the new offence of "killing by gross carelessness" that the defendant's conduct must have fallen far below what could reasonably be expected of them in the circumstances should not apply to corporations. This requirement, they explained, was imposed to reflect their view that the offence should be one of last resort, available only when all the other sanctions that already exist seem inappropriate or inadequate.¹⁸ In this context, the Commission thought, it *would* be appropriate for a jury to consider whether the risk was foreseeable to any individuals within the company who were responsible for taking safety measures.¹⁹ They felt it would be neither practical nor desirable to specify in legislation what might be regarded as "reasonable in the circumstances"- that should be a matter for a jury to assess by balancing the risk of harm against the social utility of the activity and the cost of taking steps to eliminate or reduce the risk.²⁰ The jury might also take account of whether the defendant's conduct diverged from practices generally regarded as acceptable in the trade or industry in question.

¹⁷ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 8.3.

¹⁸ The Law Commission gave the regulatory offences under sections 2 and 3 of the British *Health and Safety at Work Act 1974* (which mirror those in sections 6 - 11 of the *Safety, Health and Welfare at Work Act 1989*) as an example of the other remedies that exist.

¹⁹ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 8.4.

²⁰ *Ibid* paragraph 8.6.

(3) Corporate Conduct Causing Death - ‘Management Failure’

5.10 Greater discussion²¹ was devoted to the principal element in the proposed offence of “killing by gross carelessness”, *ie* the requirement that the defendant’s conduct caused death. The question was: in what circumstances can it properly be said, not merely that the conduct of a corporation’s agents has caused a death, but that the conduct of the corporation itself has done so? The Law Commission considered that the common law obligation of an employer in tort to provide a safe system of work provided the key. The duty ends where the harm is caused by an employee through conduct which could not be foreseen by the employer and which could not be guarded against by the employer. The Law Commission observed that the duty in tort, however, does not extend so far as to impose liability for the “casual” negligence of an employee - *ie* negligence beyond the reasonable foresight and control of the employer. This, they considered, was the appropriate approach to take in assessing the conduct of a corporate employer in the context of the special corporate offence:

“We have adopted a similar approach for the corporate offence under our recommendations, the crucial question would be whether the conduct in question amounted to a failure to ensure safety *in the management and organisation of the corporation’s activities* (referred to as a “management failure” for short). This would be a question of fact for the jury to determine...”²²

5.11 Attention was also devoted to the question of whether the negligence of an employee might be regarded as an act which broke the chain of causation between the management failure and the death. The Law Commission concluded that existing principles of causation might result in the management failure not being regarded as a

²¹ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraphs 8.8 - 8.39.

²² *Ibid* paragraph 8.19.

contributing factor, and accordingly they recommended that it should at least be possible for a jury to find that the circumstances of a management failure were such that it was a cause of death, even if it was not the immediate cause.²³

(4) *Personal Liability of Natural Persons*

5.12 The Law Commission considered that while individuals acting within a corporation should remain liable to prosecution for the proposed individual offences of “reckless killing” and “killing by gross carelessness”, they should *not* face liability for the corporate offence, even as secondary parties. Such an extension, they said, “would be entirely contrary to our purpose”, which was to adapt the individual offence of “killing by gross carelessness” to the corporate context.²⁴ Following publication of the Report, however, the Commission indicated, in consultation with the Home Office, that they would support the Home Office’s proposal to extend liability in some form to corporate officers although it would appear that the view of the Home Office on this point had changed again in 2003.²⁵

(5) *Independent Contractors*

5.13 The Law Commission saw no need to make special provision to deal with cases where the negligence of an independent contractor caused death. In each case it would be for the jury to consider whether the independent contractor’s conduct was attributable, at least in part, to management failure.²⁶

(6) *Unincorporated Bodies and Corporations Sole*

5.14 The Law Commission considered whether the offence of “corporate killing” should be extended to unincorporated bodies or corporations sole. Given that the individual members of such bodies would remain personally liable for the individual offences, and that intractable problems could arise in deciding what kinds of

²³ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 8.39.

²⁴ *Ibid* paragraph 8.58.

²⁵ See paragraph 5.27 below.

²⁶ Law Commission of England and Wales *op cit* fn23 paragraph 8.44.

unincorporated bodies should attract liability for the corporate offence, the Commission thought it better to wait and see how the corporate offence fared in practice before extending further the range of prospective perpetrators.²⁷

(7) Compensation and Remedial Orders

5.15 The Law Commission further recommended that a court should have its ordinary powers to order compensation on conviction of the corporate offence, and that the court should further have the power, on application by the prosecution, to order steps to be taken to remedy any matter which appears to the court to have resulted from the management failure and which was a cause of death. The Commission noted the courts' existing powers in respect of remedial orders which are contained in the *Health and Safety at Work Act 1974*.²⁸

(8) Miscellaneous

5.16 The Law Commission recommended that the offence of "corporate killing" should be tried on indictment only. They saw no pressing need to impose liability for corporate offences committed outside the jurisdiction, and recommended that the offence of corporate killing should be territorially based.²⁹ The Commission added that there would commonly be an overlap between the offences contained in the Health and Safety Acts and the new offence, and accordingly recommended that a jury should, subject to the discretion of the trial judge, be able to return an alternative verdict that the defendant is guilty of an offence under those Acts.³⁰ Finally, the Law Commission considered that a corporation should remain liable to prosecution for proposed new offences of "reckless killing" and

²⁷ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraphs 8.53 and 8.55.

²⁸ Similar provisions appear in the Irish *Safety, Health and Welfare at Work Act 1989*: see paragraph 2.58 above.

²⁹ Law Commission of England and Wales *op cit* fn27 paragraph 8.62.

³⁰ *Ibid* paragraph 8.70.

“killing by gross carelessness” on ordinary principles – *ie* through the application of the identification doctrine.³¹

B The Government Response

5.17 The Law Commission’s 1996 recommendations were not taken up, at least publicly, until 2000. During those four years a number of high profile accidents occurred which served to heighten public concern that the corporations at fault should be prosecuted for manslaughter;³² moreover, the Court of Appeal had since confirmed that the identification doctrine was the proper principle for the attribution of responsibility to corporations in cases of manslaughter and had more or less called on Parliament to consider the Law Commission’s proposals.³³ A Private Member’s Bill, the *Corporate Homicide Bill, 2000*, was introduced in the House of Commons on 18 April 2000 by Labour Party backbencher Andrew Dismore. The Bill provided for the implementation of the Law Commission’s Proposals, with the addition that most senior officers of the company would also be made liable. The Bill did not pass onto the statute book.

5.18 In May 2000 the Home Office published its Consultation Paper *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals*. The Home Office broadly accepted the Law Commission proposals in respect of “reckless killing”, “killing by gross carelessness” and “corporate killing”.³⁴ With regard to the corporate offence, the Home Office considered that while the identification doctrine made the prosecution of large companies difficult, and while there might also prove to be difficulties in proving a ‘management failure’, there was nonetheless a need to restore public confidence that companies responsible for loss of life can properly be held accountable in law. The new offence of “corporate killing” would give useful emphasis to the seriousness of health and safety

³¹ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Comm 237 1996) paragraph 8.77.

³² See generally paragraph 1.06 above.

³³ See *Attorney General’s Reference (No 2. of 1999)* [2000] QB 796, 816.

³⁴ Home Office *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (May 2000).

offences and would give force to the need to consider health and safety as a management issue.³⁵

(1) *Extension to ‘Undertakings’*

5.19 The Home Office differed with the Law Commission on the range of potential defendants for the proposed offence of “corporate killing”.³⁶ Since the Commission had itself recognised that there is often little difference in practice between an incorporated body and an unincorporated association, the Home Office preferred to apply the offence to ‘undertakings’ – *ie* any trade or business or other activity providing employment - and sought comments on the proposal. This wording would encompass a range of bodies which have not been classified as corporations aggregate, including schools, hospital trusts, partnerships and unincorporated charities, as well as one or two person businesses. It might also cover bodies, such as local authorities, which currently enjoy crown immunity. The Home Office sought views on the proposal to extend the offence to undertakings, and as to whether Crown immunity should be removed from such bodies in respect of the new offence.³⁷

(2) *Liability of Others for the Corporate Offence*

5.20 The Home Office was concerned that Law Commission’s recommendation that “corporate killing” should be a purely corporate offence could fail to provide a sufficient deterrent, particularly in large or wealthy companies or within groups of companies; and would not prevent culpable individuals from setting up new businesses or managing other companies or businesses, thereby leaving the public vulnerable to the consequences of similar conduct in future by the same individuals.³⁸ The Home Office proposed that any individual who could be shown to have had some influence on, or responsibility for the gross management failure which resulted in the corporate offence should be subject to disqualification from acting in

³⁵ Home Office *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (May 2000) paragraph 3.1.9.

³⁶ *Ibid* paragraphs 3.2.3 *ff.*

³⁷ Home Office *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (May 2000) paragraphs 3.2.7 *ff.*

³⁸ *Ibid* paragraphs 3.4.1 *ff.*

a management role in any undertaking carrying on a business or activity in Great Britain. The ground for disqualification would not be that of causing the death but of contributing to the management failure resulting in the death. However, the Home Office later concluded that no disqualification should follow the corporate offence save any that might follow under existing company law.

5.21 The Home Office also considered the argument that the public interest in encouraging officers of undertakings to take health and safety seriously is so strong that officers should face criminal sanctions in circumstances where, although the undertaking has committed the corporate offence, it is not (for whatever reason) possible to secure a conviction against an officer for either of the individual offences of “reckless killing” or “killing by gross carelessness”. The Home Office reached no firm view on whether it should be possible to prosecute an individual separately for another offence of substantially contributing to the corporate offence, and invited comments on whether it would be right in principle that officers of undertakings, if they contribute to the management failure resulting in death, should be liable to a penalty of imprisonment in separate criminal proceedings. However, the Home Office later concluded that no criminal consequences should follow for directors and officers in respect of the corporate offence.

5.22 The Home Office was further concerned that it should not be possible for holding companies to attempt to evade possible liability on a charge of “corporate killing” through the establishment of subsidiary companies carrying on the group’s riskier business which could most readily give rise to charges of “corporate killing”. Moreover, they were concerned by the possibility that a subsidiary company within a large group of companies might have insufficient assets to pay a large fine, and that, in such cases, liability could not be transferred to its parent company. Accordingly they proposed that the prosecuting authority should also be able to take action against parent or other group companies if it could be shown that their own management failures were a cause of the death concerned. The Home Office also felt there would be a strong case for the taking of enforcement action against companies incorporated outside Great Britain and Northern Ireland which commit the offence within the jurisdiction of the English Courts.

(3) Penalties and Enforcement

5.23 In accordance with the Law Commission's recommendations, the Home Office proposed that undertakings, including corporations, should be liable to a fine and subject, as necessary, to orders to take remedial action.³⁹ They were concerned, however, that there should not be scope for avoidance measures by unscrupulous companies or directors, and that enforcement action should act as a real deterrent, even in large companies and within groups of companies. The directors of a company, or of a parent company, should not be able to evade fines or compensation orders, or otherwise frustrate corporate killing proceedings, by dissolving the company or by deliberately making it insolvent. It might be necessary to ensure that criminal proceedings in relation to corporate killing could continue to completion notwithstanding the formal insolvency of the company. Another possibility would be to provide for proceedings which would 'freeze' the property and assets of companies. Such proceedings could be similar to the charging and restraint orders under the English drug trafficking offences legislation. In the case of corporate killing, it might be necessary to allow the prosecuting authority to take action to freeze company assets before criminal proceedings were started to prevent the directors or shadow directors of the company transferring assets in the knowledge that it had been involved in a death which might give rise to a corporate killing charge. The Home Office expressed concern, however, that such powers might breach the presumption of innocence which is a feature of English law and the European Convention on Human Rights, and they welcomed views on the matter.

(4) Territorial Extent

5.24 The Home Office accepted on balance that the offence of "corporate killing" should not extend to companies registered in England and Wales who committed the offence abroad, though it would lead to the situation that an individual could be prosecuted in the England or Wales for the individual offences of "reckless killing" and

³⁹ Home Office *Reforming the Law of Involuntary Manslaughter: The Government's Proposals* (May 2000) paragraph 3.6.1 ff.

“killing by gross carelessness” which were committed abroad, while an undertaking could not.

(5) Investigating and Prosecuting Authorities

5.25 The Home Office considered there was a good case for existing health and safety enforcing authorities and other enforcement agencies, as appropriate, to investigate and prosecute the new offences, in addition to the police and Crown Prosecution Service.⁴⁰ Who should actually investigate and prosecute in any particular case should be based on suitable working agreements to be developed between the police, Crown Prosecution Service and the relevant authorities in each area. Such agreements had already been reached between relevant enforcement agencies⁴¹ and the Home Office saw little difficulty in the relevant agencies reaching agreement on charges relating to the new offences.

(6) Recent Developments

5.26 The consultation period which followed the Home Office’s May 2000 proposals ended in September 2000. In 2002, the Home Office decided to undertake a further process of impact assessment by surveying industries in the public and private sector in relation to specific aspects of the proposals.

5.27 Since the publication of the Law Commission Report, the UK government has come under increasing pressure to fulfil its commitment to introduce a corporate manslaughter offence. On 20 May 2003, the Home Secretary announced that the UK government would publish a draft bill on corporate manslaughter.⁴² A timetable for legislation and further details is expected to be announced in autumn 2003.⁴³ The Home Secretary has stated that: “No new

⁴⁰ Home Office *Reforming the Law of Involuntary Manslaughter; The Government’s Proposals* (May 2000) paragraph 3.3 ff.

⁴¹ Health and Safety Executive, Association of Chief Police Officers, and Crown Prosecution Service *Work Related Deaths: A Protocol for Liaison*. A similar agreement has been reached between the Health and Safety Authority and the Garda Síochána: see paragraph 2.41 above.

⁴² Home Office Press Release 142/2003 21 May 2003.

⁴³ *Ibid.*

burdens will be placed on companies which already comply fully with Health and Safety legislation. The criminal liability of individual directors will not be targeted by the proposals”.⁴⁴ The Home Office has stated that when draft legislation is published, it will be the subject of industry-wide consultation.

(7) *Common Themes*

5.28 A common theme in most reactions, whether from academia or industry, is a general welcome for the increased concern about health and safety issues, with which the “corporate killing” proposals are inextricably linked. It is widely accepted that the existing regime in the regulatory area requires improvement: the level of penalties imposed for serious breaches is considered by many to be too low, while some complain that the current range of regulatory offences fails to attach sufficient stigma where death results. Few, if any, observers, however, consider that the “corporate killing” proposals alone will be enough. Where commentators differ is on the issue of whether the “corporate killing” proposals are necessary *at all* if the regulatory regime is to be improved. A point made by many is that the unlimited fines which may be imposed for the new offences already exist for offences under the Health and Safety Acts, but this is countered by those who argue that the new offences will attach greater stigma to the offences and that the proposed extension of liability to individuals for the corporate offence will have a greater deterrent effect. This suggestion is defended by those who contend that similar deterrent effects can be achieved in a revitalised health and safety regime. Some query the extent of potential deterrent effects in any event.

5.29 Industry commentators, in particular, have expressed concern that the proposed offences may do more harm than good by causing accident reporting mechanisms to be driven underground and by making relations with the health and safety authorities more defensive. In this regard it is complained that the introduction of “blame culture” into organisational structures is entirely at odds with best modern managerial practice, which relies heavily on an internal “no-blame” system to allow the maximum exchange of information on all aspects of corporate activity, including health and safety. They

⁴⁴ Home Office Press Release 142/2003 21 May 2003.

have also pointed to the likelihood in any event that corporations will simply re-organise internal responsibility for health and safety so that scapegoats can be made of some directors while others will evade liability. Another concern raised by industry commentators is that too high a level of liability may cause foreign investors to reconsider locating in Britain, and cause others to shut up shop.

5.30 Academic commentators have remained largely sceptical of the proposed offence of “corporate killing”. While most welcome the attention that the proposals have brought to the general issue of corporate criminal liability, all question the “management failure” formula to some degree. Apart from making the point that the formula lacks definition, and therefore certainty, a recurring criticism is that the Law Commission’s focus on ‘management failure’ mixes up culpability with causation.⁴⁵

5.31 Other reactions include the comment that ‘management failure’ will still have to be shown to have been more than a “*de minimis*” cause of death,⁴⁶ and that the forensic process of identifying a management failure will still require more than some investigation of the directing mind and will to decide who is the management and which systems can be said to be those of the company.

5.32 It is noteworthy, but on reflection unsurprising, that all commentators give some support for the notion that corporate officers should be held in some way accountable for activities which cause death. Most feel that either existing practice, or prevailing law, or both, fail in that regard. Thereafter, however, there is some divergence: most accept that there should be greater use of the Health and Safety Acts against directors and officers; but only some would go further and support the introduction of individual liability for “corporate killing”.

5.33 The proposed offence of corporate killing has been criticised for its vagueness and imprecision, particularly in the corporate context where it requires a jury to compare the defendant

⁴⁵ Wells “The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity” [1996] Crim LR 545, at 552.

⁴⁶ Sullivan “Corporate Killing - some Government Proposals” [2001] Crim LR 31, at 32.

with a ‘reasonable’ corporation in the context of “gross negligence”. Such comparisons may be difficult to make. The proposed offence does not give guidance on how a management failure can be a cause of death and does not deal with serious non-fatal injuries.

(8) *The ‘Revitalisation of Health and Safety’ Strategy and the Directors’ Code*

5.34 The “Revitalising Health and Safety”⁴⁷ strategy was launched jointly by the British Government and the Health and Safety Commission on 7 June 2000. The ten-year strategy seeks to achieve significant improvements in workplace health and safety by setting targets aimed at reducing the incidence of work-related ill-health, the number of fatal and major injuries and working days lost caused by injuries and ill-health. The key themes identified in the strategy include raising awareness of health and safety issues generally; improvement of enforcement and monitoring; raising the importance of health and safety at boardroom level; encouraging the insurance industry to play a more proactive role in the promotion of health and safety; strengthening the position of employee health and safety representatives; providing greater access to occupational health services; the provision of financial incentives to employers to motivate them to act on health and safety issues; and the improvement of practices in government and local authority bodies to ensure that they, too, maintain equally high standards in the area of health and safety.

5.35 With regard to the responsibility of corporations and their officers, the strategy provides for the introduction of a code of practice on directors’ responsibilities. The strategy document notes⁴⁸ the “corporate killing” proposals which are under consideration, and adds that:

“Many consultees considered that greater prominence for health and safety issues at board level was the key to raising

⁴⁷ UK Department of the Environment, Transport and the Regions *Revitalising Health and Safety: Strategy Statement* (London 2000).

⁴⁸ UK Department of the Environment, Transport and the Regions *Revitalising Health and Safety: Strategy Statement* (London 2000) paragraph 67.

standards. Responses from health and safety practitioners pointed unanimously to the perception of a low profile for their profession with little support from senior management...Health and Safety Executive guidance confirms that, in organisations that are good at managing health and safety, health and safety is a boardroom issue and a board member takes direct responsibility for the co-ordination of effort. Ministers and the Health and Safety Commission attach importance to ensuring that organisations appoint an individual director for health and safety, or a responsible person of similar status. Health and safety management needs to be set firmly in the wider context of corporate governance and corporate social responsibility. Guidance on the internal control requirements of the Combined Code on Corporate Governance, developed by a working party under the Chairmanship of Nigel Turnbull ... is intended to ensure that the board is aware of the significant risks faced by their company and the procedures in place to manage them. Boards of directors are called on to review regularly reports on the effectiveness of the system of internal control in managing key risks, and to undertake an annual assessment for the purpose of making their statements of internal control in the annual report.”⁴⁹

5.36 The Health and Safety Commission followed with a guidance code of practice - *Directors Responsibilities for Health and Safety*⁵⁰ - in July 2001. The guidance code sets out the roles and responsibilities of the board and its members in respect of health and safety risks arising from the organisation’s activities. It recommends that every board should appoint one of their number to be a “health and safety director”. It also advises that senior management set out their expectations in relation to health and safety and make arrangements for keeping the board informed of all relevant matters concerning performance. The guidance code is aimed at all

⁴⁹ UK Department of the Environment, Transport and the Regions *Revitalising Health and Safety: Strategy Statement* (London 2000) paragraph 68-70.

⁵⁰ UK Health and Safety Commission *Directors Responsibilities for Health and Safety* (July 2001).

organisations, not merely corporations, and the term director is used broadly. The guidance code is not compulsory. The Health and Safety Commission will, under the revitalising strategy, be advising the Government in due course on how the law should be changed to make the code's provisions mandatory under statute. Companies listed on the stock exchange are required under the Combined Code to follow the Turnbull recommendations, and derivations such as the Health and Safety Commission's Code.⁵¹

⁵¹ See further paragraph 2.12 above.

CHAPTER 6 COMPARATIVE REFORM PROPOSALS IN AUSTRALIA

Introduction

6.01 Most Australian states have followed the English common law with regard to general corporate criminal liability. In 1921, the High Court adopted the principle of the vicarious responsibility¹ of corporations for offences involving *mens rea*,² and the identification doctrine principles of *Tesco Supermarkets v Nattrass*,³ appear to have been applied in relation to offences of corporate manslaughter in the State of Victoria.⁴ In *Griffith Code* states, such as Queensland, however, stricter criteria are applied for the imposition of corporate criminal liability.⁵

¹ See further paragraph 1.31 *ff above*.

² *The King and the Minister for Customs and Excise v Australasian Films Ltd* (1921) CLR 195. The High Court held that a body corporate may be guilty of an offence involving an intent to defraud the Revenue where its servant or agent, in the course of his or her employment, had engaged in proscribed conduct and that servant or agent, or some superior servant or agent by whose direction the conduct was engaged in, had the necessary intent.

³ [1972] AC 153. See paragraph 1.44 *ff*.

⁴ *The Queen v AC Hatrick Chemicals Pty Ltd* Supreme Court of Victoria, 29 November, 1995; *The Queen v Dynamic Demolitions*, unreported, Supreme Court of Victoria 8 December, 1997. The Court did not refer specifically to *Tesco Supermarkets* however: see Edwards “Corporate Killers” (2001) Aust J Corp L 1, at 3.

⁵ The original *Griffith Code* did not contain any principles of corporate criminal responsibility, and the result was that corporations could not be made criminally responsible at all. In 1978 Queensland added section 594A to its code making procedural provision for the prosecution of companies for strict liability offences. See Criminal Law Officers Committee of the Standing Committee of Attorneys General *General*

6.02 Various law reform bodies and commentators have considered reform of the Australian law of corporate criminal liability, with much of the activity originating in the State of Victoria. In 1991, the Law Reform Commission of Victoria in its report *Homicide*⁶ dedicated a section to the topic of “work and product related deaths”.⁷ The Commission was concerned at the number of what it described as “hidden homicides” arising in the workplace or from dangerous products. The Commission recommended that: (1) the *Occupational Health and Safety Act 1985* (Victoria) should be amended to make it clear that its provisions did not exclude the possibility of prosecution for murder or manslaughter; (2) a computerised information base should be established in relation to work related deaths; and (3) specialist prosecution teams comprising officers from the Office of the Director of Public Prosecutions, the Homicide Squad and the Department of Labour (or other appropriate agency) should investigate and prosecute work related deaths which occur in circumstances which suggest criminal negligence or recklessness by an employer. These recommendations culminated in the introduction in late 2001 of the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* before the Victorian State Parliament. The Bill suffered a resounding defeat, however, at second reading in the Legislative Council (upper house of Parliament) in May 2002. The Bill’s provisions, and the circumstances of its defeat, are discussed further, below.⁸ Before turning to that review, however, it is necessary to examine in some detail another piece of reform in the Australian Federal jurisdiction - the *Criminal Code Act 1995* - which restates the identification doctrine with respect to the general criminal liability of corporations, and expands it by reference to notions of “corporate culture” and “inadequate corporate management”. Though the 1995 Act has no application to crimes of homicide, some of its principles were adopted in the Victorian proposals.

Principles of Criminal Responsibility Chapters 1 & 2 (1992) Part 5
“Corporate Criminal Responsibility” at 107-109.

⁶ Law Reform Commission of Victoria *Homicide* (R 40, 1991).

⁷ *Ibid* at 7-13.

⁸ See paragraph 6.13 *ff* below.

A The Criminal Code Act 1995 – General Principles of Corporate Criminal Liability under Australian Federal Law

6.03 As a piece of federal legislation, the Australian *Criminal Code Act 1995* is aimed at federal offences which, it should be noted, in Australia are regulatory or economic in nature. The individual states and territories retain their own jurisdiction over general and serious crime, including homicide.

6.04 Prior to the adoption of the *Criminal Code Act 1995*, each state or territory also applied its own principles of criminal responsibility in federal cases. The Gibbs Committee, which reported in 1991,⁹ and the Criminal Law Officers Committee of the Standing Committee of Attorneys General, which reported in 1992,¹⁰ were charged, therefore, with the task of examining the adoption of a uniform criminal code for federal offences for the Commonwealth. The latter Committee produced a draft criminal code which forms the basis of the *Criminal Code Act*.

6.05 Both committees were of the opinion that neither the common law nor the *Griffith Codes* were adequate in attributing criminal liability for federal offences to large corporations. The Criminal Law Officers Committee observed:¹¹

“Given the ‘flatter structures’ and greater delegation to relatively junior employees in modern corporations...the *Tesco* test - which among other things, requires the prosecution to prove, beyond reasonable doubt, that the officer was at a sufficiently high level to be regarded as the ‘directing mind and will’ of the corporation - is no longer appropriate.”

⁹ Attorney-General’s Department *Review of Commonwealth Criminal Law: Final Report* (Canberra 1991).

¹⁰ Criminal Law Officers Committee of the Standing Committee of Attorneys General *General Principles of Criminal Responsibility Chapters 1 & 2* (1992) Part 5 “Corporate Criminal Responsibility”.

¹¹ *Ibid* at 107.

6.06 The Criminal Law Officers Committee considered a number of alternatives to the identification doctrine. These included reversing the onus of proof in the case of corporations so that they would be convicted unless they could prove, on the balance of probabilities, that they took reasonable precautions within their organisational structures to avoid wrongdoing. The Committee concluded, however, that such a general reversal of the onus of proof could not be justified, and determined that its objective should be to develop a scheme of corporate criminal responsibility which, as far as possible, adapted individual criminal responsibility to fit the modern corporation. It recommended that subject to such modification, the Criminal Code should apply to corporations in the same way as it applied to individuals.

B Crimes Requiring Proof of Intent, Knowledge or Recklessness

6.07 The Criminal Law Officers Committee concluded that where the requisite fault element of a crime is intent, knowledge or recklessness, that fault element should be found in a body corporate which expressly, tacitly or impliedly authorised the commission of the offence. Such authorisation can be found in one of three ways. Section 12.3(2) of the *Criminal Code Act 1995* provides:

“(2) The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.”

6.08 Sub-paragraph (a) echoes the *Tesco* principles of identification,¹² and sub-paragraph (b) extends the net wider to “high managerial agents”, echoing the provisions of the US *Model Penal Code*.¹³ A defence of due diligence is further extended to the corporation for the acts of its high managerial agents.¹⁴ Sub-paragraphs (c) and (d) are novel, and represent a clear endorsement of an organisational or systems model of enterprise liability based on the concept of ‘corporate culture’, which is defined as:

“an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.”

6.09 The ‘corporate culture’ model, which represents a recognition of enterprise liability, is defined in more detail than the Law Commission of England and Wales’ ‘management failure’ test for the proposed offence of corporate killing,¹⁵ but it is aimed at crimes of intention or recklessness whereas the English test is intended for crimes of negligence. A management failure test closer to the English model is employed by the Australian reforms for crimes of negligence, as shall be seen below. The section goes on to provide, in paragraph (4), that the following factors will be relevant in assessing corporate culture:

¹² See paragraph 1.42 *ff* above. “Board of directors” is defined in the section 12.3(6) of the *Criminal Code Act 1995* as meaning “the body (by whatever name called) exercising the executive authority of the body corporate”.

¹³ See paragraph 4.17 *ff* above. “High Managerial Agent” is defined in section 12.3(6) of the *Criminal Code Act 1995* as “an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.”

¹⁴ Paragraph 3 provides “Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission”.

¹⁵ See paragraph 5.10 *ff* above.

“(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.”

6.10 These provisions have been questioned since they appear to introduce a negligence standard,¹⁶ and the ‘corporate culture’ concept generally has been accused of “inherent ambiguity”.¹⁷ It remains to be seen how the concept will be applied by the Australian courts.

C Crimes of Negligence

6.11 The Criminal Law Officers Committee further recommended that proof of negligence against a corporation should not entail a need to show that any one person acting within the corporation was negligent; the negligence should be found in the conduct of the corporation viewed as a whole.¹⁸ This is echoed in section 12.4 of the *Criminal Code Act 1995* which provides that the test of negligence for a body corporate is the same as for individuals (which is that “its conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence”).¹⁹ Paragraph 12.4 continues:

¹⁶ Wells *Corporations and Criminal Responsibility* (2nd ed Oxford 2001) at 137-138; Coffee “Corporate Criminal Liability: An Introduction and Comparative Survey” in Eser Heine and Huber (eds) *Criminal Liability of Collective Entities* (Freiburg 1999) at 20 ff.

¹⁷ Coffee *op cit* fn16, at 9; Wells *op cit* fn16 at 138.

¹⁸ Criminal Law Officers Committee of the Standing Committee of Attorneys General, *General Principles of Criminal Responsibility, Chapters 1 & 2* (1992) Part 5 “Corporate Criminal Responsibility” at 115.

¹⁹ Section 5.5 of the *Criminal Code Act 1995*.

“(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”

6.12 These provisions introduce a ‘management failure’ test akin to that recommended by the Law Commission of England and Wales, with some differences. A notable feature of these provisions is the endorsement of the ‘aggregation’ principle of attribution,²⁰ which was rejected by the Law Commission of England and Wales in its proposals.²¹ Aggregation arises in this context, however, only in the context of negligence (as opposed to intent or recklessness) and, it has been observed,²² the concept “may be strictly unnecessary in the light of the general principle of allowing all of the body corporate’s relevant conduct to be considered”. It should be noted also that aggregation is identified only as a means of attributing negligence to a

²⁰ See paragraphs 1.72 - 1.76 above.

²¹ See paragraph 5.04 above.

²² Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill - Explanatory Memorandum*, (Victoria 2000) at 13.

corporation - whether a corporation, when viewed as a whole, has been actually been negligent is determined by reference to paragraph (3) which is non-exhaustive. In short, the provision leaves the question of what constitutes negligence largely open and to the discretion of the court.

D The Crimes (Workplace Deaths and Serious Injuries) Bill 2001

(1) Legislative Proposals

6.13 In October 2000, the Victorian Department of Justice, the Victorian Department of Treasury and Finance, and the Victorian Workcover Authority published proposals for a *Crimes (Industrial Manslaughter) Bill*.²³ The proposals were aimed at ensuring that workplaces were, as far as practicable, safe and without risks to health. A significant element in the proposals was the introduction of two new statutory offences for corporations – “corporate manslaughter” and “negligently causing serious injury” – which were designed²⁴ to overcome concerns that it is too difficult to prosecute corporations for homicide or serious injury under the common law. The proposals drew on the principles of corporate criminal liability set down in the *Criminal Code Act 1995* for federal offences. Following a process of consultation, a Bill – the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* - was introduced before the Parliament of Victoria in November of 2001.

(2) Corporate Manslaughter

6.14 In keeping with the proposals, the Bill sought to introduce two new statutory offences into the *Crimes Act 1958* (Victoria). The first, “corporate manslaughter” equates to manslaughter by gross negligence as it is understood at common law. The second, which is

²³ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill - Explanatory Memorandum*, (Victoria 2000) at 13.

²⁴ Ministerial Letter of Robert Hulls, Attorney General, and Robert Cameron MP, Minister for Workcover, accompanying the Draft Proposals for a Crimes (Industrial Manslaughter) Bill (2000).

not discussed in detail in this Consultation Paper, would extend the law by introducing a new offence akin to gross negligence manslaughter save that the consequence giving rise to liability is serious injury rather than death.²⁵ A corporation would be guilty of the indictable offence of corporate manslaughter (and liable to a maximum fine of \$5,000,000) where:²⁶

“by negligence [it] kills –

an employee in the course of his or her employment by the body corporate; or

a worker in the course of providing services to, or relating to, the body corporate.”

6.15 An earlier draft of the Bill²⁷ provided simply that corporate manslaughter would be committed where any person was killed, without limiting the offence to the workplace. It was considered at that stage that it would be anomalous if the corporation could only be convicted for the death of the employee where the same conduct resulted in the death of a passer-by.²⁸ It is not clear why the later draft adopted a more restrictive wording.

6.16 The conduct of the corporation giving rise to liability for the proposed offence was to be found not in the acts of its most senior officers, but in those of its agents and employees acting within the

²⁵ It was considered at the proposal stage that victims who were not killed in the same incident should not be treated differently by the criminal justice system. Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority, *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill - Explanatory Memorandum*, *op cit* fn23 at 16.

²⁶ Clause 3 of the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*, inserting section 13 in Division 1 of Part 1 of the *Crimes Act 1958*.

²⁷ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill* (Victoria 2000) at 3.

²⁸ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill - Explanatory Memorandum* (Victoria 2000) at 8.

scope of their employment or authority. The Bill adopted what was effectively a vicarious liability model in that regard. The proposed section 14A provided:

“...the conduct of an employee, agent, or senior officer of a body corporate acting within the actual scope of their employment, or within their actual authority, must be attributed to the body corporate.”

6.17 An earlier draft had included the acts of agents acting within the scope of their *apparent* (as opposed to actual) authority. That extension was criticised, however, on the basis that responsibility might be attributed to a corporation for acts to which it had not consented.²⁹ On the other hand, the narrowing of the rules of attribution to conduct within the scope of the agent’s actual authority seems to exclude from consideration any conduct by the agent which occurred in contravention of an express prohibition. The Bill appeared to remedy this by defining an “agent” as a person engaged to provide services to the corporation in relation to matters over which the corporation has control, or over which it would have had control but for the agreement between the agent and the corporation.³⁰

6.18 Notably, the Bill’s provisions allowed the conduct of independent contractors and independent sub-contractors to be taken into account in an assessment of the corporation’s liability.³¹

6.19 That the negligence had to be ‘gross’ was made clear in the proposed section 14B, which required

“such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances, and such a high risk of death or really

²⁹ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill - Issues Paper* (2001) at 6.

³⁰ Proposed section 11 of Division 1 of Part 1 of the *Crimes Act 1958*, as proposed in Clause 3 of the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*.

³¹ *Ibid.*

serious injury, that the conduct merits criminal punishment for the offence.”

6.20 The Bill drew heavily on the *Criminal Code Act 1995* in that respect, and further in its provisions on how negligence was to be evidenced in corporate conduct. The proposed section 14B(4) provided that in determining whether a corporation has been negligent, the conduct of the corporation as a whole must be considered. Aggregation of the conduct of any number of the employees, agents or senior officers of the body corporate was expressly permitted.³² The Bill added to the approach taken by the 1995 Act, however, by listing the following factors as indicators of corporate negligence:³³

“...the failure of the body corporate –

adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or

to engage as an agent a person reasonably capable of providing the contracted services; or

to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or

to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or

to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.”

6.21 This list evidences a ‘management failure’ approach, reminiscent of that endorsed by the Law Commission of England and Wales.³⁴ The Bill’s provisions attempted to replace the identification doctrine with a mixture of the vicarious liability, aggregation, and

³² *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*, clause 3, inserting section 14B(5) into Division 1 of Part 1 of the *Crimes Act 1958*.

³³ *Ibid*, inserting clause 14B(6).

³⁴ See paragraph 5.06 above.

management failure attribution approaches, while linking them all to a gross negligence basis of culpability.

(3) Corporate Penalties

6.22 The Victorian Department of Justice, the Victorian Department of Treasury and Finance, and the Victorian Workcover Authority considered that there might be situations in which a fine was not an effective criminal sanction. Such situations included those where the corporation has no assets, or is very wealthy, liquidates, or is a not-for-profit organisation. Accordingly, the Bill sought to introduce two new orders to enable more effective sentences to be imposed – the “adverse publicity order” and the “work order”.³⁵

6.23 The adverse publicity order would require the corporation to publicise (for example, by advertising on television or in the daily newspapers) the offence, its consequences, and any penalties imposed. The court would be required to have regard, as far as practicable, to the financial circumstances of the corporation, and a limit (equivalent to the maximum penalty which may be imposed for the offence) is placed on the cost of such advertising.

6.24 The work order would require the corporation to perform specified acts or to establish and carry out a specified project for the public benefit (even if the project is unrelated to the offence). If the corporation failed, without reasonable excuse, to comply with such orders, the court could authorise the Victorian Workcover Authority to publicise the failure of the corporation to comply, and to recoup any costs incurred from the corporation.

(4) Liability of Directors and Senior Officers

6.25 The Victorian Department of Justice, the Victorian Department of Treasury and Finance, and the Victorian Workcover Authority considered whether to impose criminal liability on directors and senior managers of companies who committed the corporate offence. One approach, which was rejected, was to leave the prosecution of individuals to the existing principles of the law of

³⁵ *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*, clause 3, inserting section 14D into Division 1 of Part 1 of the *Crimes Act 1958*.

manslaughter and the Health and Safety Acts.³⁶ Proponents of that approach argued that the introduction of a new individual offence of manslaughter with a lower level of culpability would be unfair and complex.

6.26 The approach taken in the Bill was that there was room for an intermediate offence to strike a middle ground between manslaughter and the individual offences under the Health and Safety Acts which, like those in Ireland, provide for individual liability where the corporate offence is committed with the consent, connivance, or wilful neglect of the senior officers. The introduction of a special offence for senior officers was considered necessary to ensure that they took their health and safety duties seriously; to ensure that they did not evade accountability by dissolving or running down corporations which have committed the corporate offence; and to target the particular level of extreme behaviour which the Bill was designed to eliminate.³⁷ The proposed section 14C read:

“(1) If it is proved that a body corporate has committed an offence [of corporate manslaughter] and –

a senior officer of the body corporate –

was organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate; and

in performing or failing to perform his or her organisational responsibilities, contributed materially to the commission of the offence by the body corporate; and

knew that, as a consequence of his or her conduct, there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or really serious injury to a person; and

³⁶ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill* (Victoria 2000) at 16.

³⁷ Robert Hulls MP, Attorney-General, in his second reading speech to the Victorian Parliament on the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* 22 November 2001.

having regard to the circumstances known to the senior officer, it was unjustifiable to allow the substantial risk referred to in paragraph (a)(iii) to exist -

the senior officer is guilty of an offence...”

6.27 Notably, knowledge of a substantial risk is required by the section. On first reading, the individual offence appears to apply only to persons holding a senior position in the corporation, and in an earlier draft “senior officer” was so defined.³⁸ The Bill, however, provided that “senior officer” has the same meaning as “officer” in the *Corporations Act 2001* - section 82A of which provides that the term includes a director, secretary, executive officer or employee of the body or entity...”. Accordingly *any* person employed by the company who is organisationally responsible for the conduct giving rise to the corporate offence may be prosecuted.

6.28 Other features of the Bill included an express retention of the existing law of manslaughter in so far as it affects corporations;³⁹ extension of the new offences to bodies having crown immunity, and a territorial nexus provision which required the death or serious injury to occur in the State of Victoria.

(5) *The Fate of the Victorian Reform Proposals*

6.29 The *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* was passed by the narrowest majority (by the vote of one independent) by the Victorian Legislative Assembly (the lower house of Parliament) in May 2002. It suffered a resounding 27 to 12 defeat at second reading in the Legislative Council (the upper house of Parliament) on 29 May 2002 when the opposition parties (the Liberal Party and the National Party) united against the Labour Government.

³⁸ Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority, *Workplace Health and Safety: Draft Proposals for a Crimes (Industrial Manslaughter) Bill* (Victoria 2000) at 9.

³⁹ *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*, clause 3, inserting sections 12, 14E and 14F into Division 1 of Part 1 of the *Crimes Act 1958*.

6.30 The debate⁴⁰ was animated and lengthy. The opposition parties' principal political objection to the Bill was their fear that the Labour Government was merely doing the bidding of some trade unions. They feared that the unions' principal motivation for seeing the Bill introduced was that it could then be used as lever in industrial relations negotiations. It was also suggested that the Bill did not actually have the full support of many members of the Government or, indeed, of the Premier himself.

6.31 The opposition was also, however, concerned about the effect the Bill's provisions would have on workplace safety in Victoria. They argued that the Bill, if passed, would result in a significant negative shift in workplace safety culture on work sites and would lead to the introduction of defensive practices. These, they argued, would damage rather than improve workplace safety and put at risk the gains that had been seen in Victoria in relation to workplace accidents and deaths and workplace safety generally. The Bill was accordingly considered to be bad for employees. Moreover, they argued, the Bill was unjust and bad for employers in that it would be easier for large corporations to comply with the Bill – by hiring expensive legal advisors, updating manuals, and sending employees on training courses and the like - than it would be for small companies, particularly in difficult economic times. The Bill would have the effect, they said, of damaging trade and investment in the State of Victoria.

6.32 The debate focused to a lesser degree on the specific terms of the Bill. One criticism was that it introduced a lower threshold of liability for homicide for employers when compared to other persons. The fact that it made employers criminally liable for the acts or omission of sub-contractors was also considered unjust. There was concern, too, about the level of penalties to be imposed and about the liability of individual corporate officers under the Bill. It seems, therefore, that the Bill was rejected on two principal grounds – first, that the introduction of an offence of corporate homicide would not improve workplace safety but, rather, would damage existing achievements in that sphere; and, secondly, on the related ground that the 'management failure' basis of corporate liability adopted in the

⁴⁰ Victorian Hansard, Council 29 May 2002 at 1288 *ff.*

Bill was considered unfair because it introduced a lower threshold of liability when compared with traditional manslaughter.

CHAPTER 7 OPTIONS FOR REFORM

A Introduction

7.01 In previous chapters, the Commission has examined a number of approaches to the imposition of criminal liability on corporations for corporate killing, including the current law on corporate killing in Ireland as well as some comparative approaches to the issue. In this chapter, the Commission sets out its provisional recommendations on options for reform of the substantive law in this area.

7.02 Significantly, it would appear that there has never been a prosecution of a corporation for murder or manslaughter in Ireland. This may reflect the analysis made in previous chapters that the existing law on gross negligence manslaughter is extremely difficult to apply where large corporations have taken unjustifiable risks with the lives of human persons. The existing law may thus be seen inadequately to reflect society's legitimate concerns that conduct engaged in by an individual which carries significant penalties should, when carried on by a corporation, be dealt with in a comparable manner. That such concerns are held by some is evidenced by the introduction of the *Corporate Manslaughter Bill 2001*.¹

7.03 If it is felt that corporations should be criminally liable for their acts and omissions which result in the death of a human being, we must address how best the Oireachtas can move the law forward to address the issue effectively and comprehensively.

7.04 Part B addresses the fundamental issue of whether corporations should be exposed to criminal liability for deaths at all.

¹ See paragraph 2.80 *ff* above.

Part C considers the options for reform of the current law. Chapter 8 considers secondary issues such as the appropriate sanctions which should be available for an offence of corporate killing, the liability of corporate officers and management, and the territorial ambit of the proposed offence.

B Should corporations be exposed to criminal liability for corporate killing?

7.05 The general justifications for the imposition of corporate criminal liability have already been examined in some detail in this Consultation Paper.² The main justification which can be advanced is that to expose corporations to criminal liability for a corporate killing offence would allow society to express a greater level of condemnation than is currently possible by means of a civil right of action in tort conferred on the deceased's dependants³ or the offences created by health and safety legislation.⁴

7.06 There are, however, also certain potential disadvantages to making corporations criminally liable for corporate killing.⁵ First, it may be argued that corporate control outside of the health and safety legislation is best left to the civil liability regimes rather than to the criminal law. To some extent, this was the principle employed in continental jurisdictions until recently where a corporate wrongdoing was addressed by the imposition of administrative sanction. However, in reality, the civil regime leaves a large burden of responsibility on the individual to provide an effective means of enforcement of standards and most continental jurisdictions have now introduced criminal liability for corporations, influenced by their international obligations.

7.07 There is also the danger that it may make corporations unduly defensive in their practices, or that senior management may unfairly delegate health and safety functions to 'scapegoats' in order

² See Chapter 1 above.

³ Reviewed at paragraph 2.61 *ff* above.

⁴ Reviewed at paragraph 2.35 *ff* above.

⁵ These have been discussed in Chapter 1 above.

to minimise the extent to which blame will be attributed to the corporation itself or to its senior management for any fatalities which occur.

7.08 There is no doubt that practical difficulties may arise in the investigation of corporate crime. Large corporations are in a unique position to control the flow of information about their operations and activities. If necessary, they can erect ‘smoke screens’ to deflect attention from individuals within the organisation; they are able to shift responsibility internally, and away from the board if necessary; and they are able to present scapegoats. International corporations can place personnel and information outside the jurisdiction and beyond the reach of enforcing authorities. Corporate killing may, accordingly, be difficult to investigate but this is not, in the Commission’s view, an argument against substantive reform.

7.09 In relation to the advantages and disadvantages of extending liability for corporate killing discussed in this Paper, the Commission accepts that there is continuing debate on the general issue of whether corporations should be made liable for serious crimes at all. We note, however, that there is an increasing acceptance in other jurisdictions,⁶ whether common law or civil law, of the notion that corporations can and should be held criminally liable for a wide variety of serious offences. We note also that Irish law already accepts in principle the notion of corporate criminal liability for statutory offences.⁷

7.10 There may indeed be difficulties involved in extending liability to corporations. Nonetheless, the Commission has concluded that existing Irish law does not adequately address the criminal liability of corporations for deaths arising from grossly negligent behaviour. In particular, the Commission’s detailed review of existing law indicates that, in practice, corporations have not been prosecuted for grossly negligent conduct causing loss of life which, if carried on by a natural person, could lead to a prosecution for gross negligence manslaughter.⁸ This, in the Commission’s view, is a serious gap in the law which should be remedied. Following on from

⁶ See Chapters 4 to 6 above.

⁷ See paragraph 2.08 above.

⁸ See paragraph 3.06 *ff* above.

that conclusion, three options for reform are considered in Part C below.

7.11 *The Commission recommends that corporations should be subject to criminal liability for corporate killing.*

C Option 1: Provide for the offence under section 48(17) of the Safety, Health and Welfare at Work Act 1989 to be prosecuted on indictment

7.12 As outlined in Chapter 2 above,⁹ section 48(17) of the *Safety, Health and Welfare at Work Act 1989* (the '1989 Act') is the only statutory offence which specifically deals with the situation where the actions of an employer result in death. However, the Commission is concerned that the criminal liability which may be imposed on employers pursuant to the statutory offence in section 48(17) of the 1989 Act¹⁰ does not provide a satisfactory or comprehensive alternative to a prosecution for murder or manslaughter for a number of reasons.

7.13 In the first place, section 48(17) is limited in scope to the particular context where an employer has breached the duties of an employer within the workplace setting which have been imposed by the 1989 Act. It does not extend to the actions of corporations outside the setting of the statutory health and safety duties imposed by the 1989 Act on employers. Under the section, death does not have to occur in the workplace, but the offence is only committed where a death (wherever it occurs) is consequential upon a breach of the duty to maintain a safe place of work. It is clear that not all fatal consequences of corporate wrongdoing are the result of a lack of workplace safety.¹¹ But the most fundamental shortcoming of the offence under section 48(17) of the 1989 Act is that it may only be prosecuted as a summary offence rather than on indictment. In line with this, the maximum fine which may be imposed for that offence is

⁹ See paragraph 2.35 *ff* above.

¹⁰ See paragraphs 2.42 - 2.45 *ff* above.

¹¹ For example, the death of a motorist due to a design defect in a car. See further the *Ford Pinto* case discussed at Chapter 4, fn32 above.

€1,905.¹² It seems anomalous that this offence cannot be prosecuted on indictment (as it stands), particularly given that other offences under the 1989 Act can be prosecuted on indictment, with no maximum fine. We are strongly of the view that this in itself does not reflect the seriousness with which a corporation's high degree of culpability for a fatality should be treated. The Commission concludes that, as it stands, the offence under section 48(17) of the 1989 Act does not represent a comprehensive or adequate means of censure for corporations whose activities result in fatalities.

7.14 One possible reform might therefore seem to be to amend section 48(17) of the *Safety, Health and Welfare at Work Act 1989* to provide for prosecution on indictment which would also remove the cap on the maximum fine which could be imposed. However, in considering such a reform, it seems to the Commission that where there has been seriously culpable conduct by a corporation leading to death, the gravity with which this should be viewed can be marked only by an offence of a similar gravity to the common law offence of gross negligence manslaughter.¹³ Therefore, even if section 48(17) of the 1989 Act were amended to provide for prosecution of section 48(17) on indictment and the imposition of higher fines on offending employers, we believe that this would not be a comprehensive solution to the issue of corporate killing and the breadth of circumstances in which it can occur. In particular, the Commission believes that any such amendments to the scope or penalties of existing offences under the *Safety, Health and Welfare at Work Act 1989* would not address the issue that a conviction of a corporation for a specific corporate killing offence could be perceived to be qualitatively different in terms of gravity from a conviction for a regulatory offence under health and safety legislation. We are of the view that this distinction is important in terms of deterrence and therefore the Commission does not favour any extension to the scope of or penalties for breach of section 48(17) of the 1989 Act in the context of the present review.

7.15 *The Commission does not consider that amending the Safety, Health and Welfare at Work Act 1989 so that the offence under section 48(17) of the 1989 Act could be prosecuted on*

¹² Section 49(1) of the *Safety, Health and Welfare at Work Act 1989*.

¹³ See paragraph 3.06 *ff* above.

indictment would constitute an adequate or comprehensive solution to the issue of corporate killing in circumstances where a corporation has been seriously culpable.

D The Establishment of a Statutory Offence of Corporate Killing

(1) Rationale

7.16 The Commission believes that, in principle, corporate killing should be treated as on a par with gross negligence manslaughter in terms of gravity. The establishment of a specific corporate killing offence would resolve the difficulties created by the residual uncertainty regarding whether corporations can be prosecuted for the common law offence of manslaughter (and indeed other homicide offences). A conviction of a corporation on indictment for an offence of corporate killing would be qualitatively different to a conviction under health and safety legislation, whatever the penalty imposed. It would mark the disapproval of the community and should have a greater deterrent effect than the offences under health and safety legislation. Moreover, its scope need not be limited to the workplace. It is envisaged that a prosecution for such an offence would take place when none of the other available sanctions were adequate to address the gravity of the matter.

7.17 The Commission recommends the establishment of a statutory corporate killing offence which would be prosecuted on indictment. In essence, the offence would be defined in terms equivalent to gross negligence manslaughter. Thus the negligence required to constitute the new offence would have to be of a very high degree and would have to involve a serious risk of substantial personal injury to others. The statutory offence would be adapted to take account of the difficulties in applying such an offence to corporations.

7.18 An alternative approach to establishing a statutory offence of ‘corporate killing’ would be to extend the existing common law offence of gross negligence manslaughter by statute so that it would be applicable to corporations. On this model, the proposed extension of gross negligence manslaughter would take account of the Commission’s views on the suggested modification of the

identification doctrine as discussed below.¹⁴ This approach would meet the objection that since the proposed new offence would, in substance, be co-extensive with the existing crime of gross negligence manslaughter, it should, ideally, be labelled in a way that reflects that reality. As indicated in the Introduction to this Paper, the Commission has already endorsed the principle of accurate labelling in the context of the review of the law of homicide.¹⁵

7.19 *The Commission particularly invites comments on whether the extension of the common law offence of gross negligence manslaughter to corporations by statute would be preferable to the establishment of a statutory offence of corporate killing which has been provisionally recommended in this Consultation Paper.*

(2) *Unincorporated Entities*

7.20 The Commission is concerned that the enactment of a statutory corporate killing offence may be perceived to be unjust if it were not expressed to apply to unincorporated entities as well as to corporations. Not all entities enjoy corporate status: partnerships, social and sporting clubs and unregistered trades unions, for example, are unincorporated entities. Clearly, individual members of unincorporated bodies are subject to the general law of homicide.¹⁶ Nevertheless, there is a convincing case that such entities should fall within the scope of a statutory corporate killing offence. Legally, unincorporated entities are distinct from corporations because they do not have a separate legal personality from the individuals involved. To take the case of a partnership, in *Re a Debtor Summons*,¹⁷ Fitzgibbon J said of a partnership:

“...a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm-name is a mere expression, not a legal entity.”

¹⁴ See paragraph 7.45 *ff.*

¹⁵ Law Reform Commission Seminar Paper - *Homicide: The Mental Element in Murder* (LRC SP1-2001) at 7 *ff.*

¹⁶ See Chapter 3 above.

¹⁷ [1929] IR 139, 147.

Indeed a partner cannot usually be made liable for a crime committed by another partner.¹⁸

7.21 It would appear that while an unincorporated body of persons cannot commit an offence at common law,¹⁹ there is no bar on an unincorporated body coming within the definition of “person” in a statutory offence.²⁰

7.22 Although they do not possess a separate legal identity from their members by means of incorporation, unincorporated entities commonly establish a reputation which is distinct from their constituent members and in many cases the management structures of unincorporated bodies will not differ significantly from those of corporations. Moreover, in substance, from the perspective of health and safety issues, incorporated and unincorporated entities may be indistinguishable. Indeed, in terms of the duties imposed on employers by the *Safety, Health and Welfare at Work Act 1989*, no distinction is drawn between whether an employer is a corporation or not.²¹ If a corporate killing offence were not to include unincorporated entities within its scope, a conviction of an individual for manslaughter would not reflect the nature of the crime as having been committed within an organisational setting and it would not be possible to punish the entity.

7.23 On the plane of constitutional law, one might ask whether it would be appropriate to treat one organisation differently from another simply because it had adopted the form of a sole trader or a partnership, for example, rather than a company. Conceivably, if a corporate killing offence were not extended to unincorporated bodies, corporations could re-constitute as unincorporated bodies in order to avoid coming within the ambit of the offence.

¹⁸ *R v Harrison & Co* (1800) 8 TR 508.

¹⁹ *Attorney General v Able* [1984] QB 795, 810. This was accepted as a correct statement of the law by the High Court in *DPP v Wexford Farmers' Club* [1994] 1 IR 546, 549.

²⁰ *DPP v Wexford Farmers' Club* [1994] 1 IR 546. See, for example, the offences under sections 4 and 5 of the *Competition Act 2002*.

²¹ See paragraph 2.35 *ff* above.

7.24 The Commission believes that the inclusion of unincorporated entities in the scope of the proposed corporate killing offence would be desirable in that it would allow the acts and omissions of ‘high managerial agents’ to be attributed to unincorporated bodies and this would avoid the possibility of any individual being presented as a scapegoat where a fatality occurred.

7.25 It may be considered that there are bodies to whom it is felt that it is undesirable that an offence of corporate killing should apply. For example, charities, state bodies²² and not-for-profit entities. The Commission is not in favour of making any such exclusions based on the status of the undertaking. Rather, the nature of the undertaking and the resources at its disposal is a matter which may fall to be taken into account in assessing its culpability.

7.26 One manner of ensuring that all entities engaged in economic activity are treated in an equal manner would be for any reform to be expressed to apply to ‘undertakings’ rather than to corporations. ‘Undertaking’, a wider term than ‘corporation’, is used in Irish and EC competition law to capture the activities of a wide range of entities. The criminal law and civil law competition law regime contained in the *Competition Act 2002* (and its predecessor, the *Competition Act 1991*) defines an undertaking as:

“a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.”²³

7.27 Maher has described the nature of an undertaking (in competition law) as follows:²⁴

“the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of that entity and the way in which it is financed.

²² *Byrne v Ireland* [1972] IR 241 established that the former Crown immunity from suit did not survive the enactment of the Constitution.

²³ Section 3(1) the *Competition Act 2002*.

²⁴ Maher *Competition Law: Alignment and Reform* (Round Hall 1999) at 111.

This broad interpretation incorporates any legal entity engaged in commercial activity, thus legal form is not decisive nor does the undertaking have to be profit-making.”

7.28 The Competition Authority has treated a holding company as an undertaking because it engaged in economic activity through subsidiary companies and has treated a parent company and wholly owned subsidiaries as a single undertaking.²⁵

7.29 In the UK, the Home Office stated, in relation to proposed corporate killing reforms in England and Wales, that it:

“does not wish to create artificial barriers between incorporated and non-incorporated bodies, nor would we wish to see enterprises deterred from incorporation, which might be the case if the offence only applied to corporations.”²⁶

The Home Office favoured the use of the concept of an undertaking in the sense of “any trade or business or other activity providing employment”.²⁷

7.30 The Commission favours the use of the concept of an undertaking to encapsulate the types of entities coming within the scope of the proposed offence of corporate killing. Rather than focussing on the question of corporate status, the undertaking concept could be used to cover any entity made up of two or more individuals which is engaging in economic activity of some kind. In this regard, we broadly favour the definition of ‘undertaking’ used in the *Competition Act 2002*.²⁸

7.31 *The Commission is of the view that legislation establishing the offence of corporate killing should apply to unincorporated and incorporated entities alike but would welcome views on this point.*

²⁵ *AGF - Irish Holdings* Decision No. 2 (14 May 1992).

²⁶ Home Office *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* (2000) at paragraph 3.2.6.

²⁷ This wording derives from the *Local Employment Act 1960*.

²⁸ See paragraph 7.26 above.

We are not in favour of excluding charitable bodies, public sector bodies and not-for-profit entities from the scope of the offence. Accordingly, a statutory corporate killing offence should be expressed to apply to all ‘undertakings’ rather than limiting the scope of the offence to corporations. ‘Undertaking’ could be defined as “a person being a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service in the State”.

(3) Policy Considerations

7.32 Based on our recommendation above that a specific statutory offence of corporate killing be established,²⁹ we have examined below two further options for reform - option two, a statutory corporate killing offence based on organisational liability³⁰ and option three, a statutory corporate killing offence based on the identification doctrine.³¹ (We have already considered and rejected vicarious liability,³² strict liability,³³ reactive liability,³⁴ the ‘power and acceptance’ doctrine,³⁵ and a flexible approach to the attribution of liability³⁶ as not being appropriate principles upon which to base corporate criminal liability for corporate killing.)

7.33 In examining the two models for a statutory offence of corporate killing, we have been cognisant of two divergent policy considerations. The first of these is the legality principle of criminal law which requires legislative rules to be clear and precise in order to rule out the need for the courts to interpret them in a creative fashion. While it is important that justice is seen to be done in relation to acts of corporate killing, the imposition of liability must also be measured

²⁹ Paragraph 7.17 above.

³⁰ See further paragraph 1.59 *ff* above.

³¹ See further paragraph 1.42 *ff* above.

³² Paragraph 1.31 *ff* above.

³³ Paragraph 1.38 *ff* above.

³⁴ Paragraph 1.64 *ff* above.

³⁵ Paragraph 1.69 *ff* above.

³⁶ Paragraph 1.77 *ff* above.

and fair. McAuley and McCutcheon have described the principle of legality thus:³⁷

“all civilized legal systems now recognise that the idea of legality entails three fundamental postulates: that prohibitory norms should be prospective, should aspire to maximum certainty and should be strictly construed.”

7.34 The second policy consideration, which is in tension with the first, stems from the fact that many undertakings have extremely large numbers of employees organised according to a complex management structure. The issue of whose acts should be attributed to the undertaking in order to fix it with liability for an offence of corporate killing represents a major issue of principle. Even when it has been settled, the difficulty remains of articulating the principle in acceptably definite and predictable terms.

E Option 2: An Offence of Corporate Killing by Careless Management

7.35 The first model of corporate killing offence examined by the Commission is based on principles of organisational liability.³⁸ If an organisational model of liability were to be adopted, an undertaking could be found guilty of an offence of corporate killing where its corporate policy (or deficiencies in its corporate policy), rather than the acts of any individual or group of individuals, led to the commission of the offence. It has been said that:

“Overall, the corporate self-identity model represents an improvement upon the ‘directing mind’ theory of corporate attribution, in terms of its understanding of the realities of the modern corporation. It accounts for complex and diffuse decision-making processes and communication networks by looking at the corporate entity as a whole ... By using the company as the starting point when tracing

³⁷ McAuley and McCutcheon *Criminal Liability* (Dublin 2000) at 45.

³⁸ See paragraph 1.59 *ff* above.

liability, rather than focusing on its agents or employees, the process of attribution becomes less confused.”³⁹

7.36 The real advantage of the organisational failure approach is then that it may more fully reflect the actual reality of organisational activity today in a way that other models of liability do not.⁴⁰ A statutory corporate killing offence based on organisational liability could impose criminal liability on undertakings where a death occurs in circumstances where there is evidence of ‘careless management’, through the undertaking having sloppy or inadequate procedures or policies, being a cause of death, even where the corporation had not breached health and safety legislation. A ‘careless management’ test would be one factor which may encourage the adoption and maintenance of good management practices by undertakings in relation to the protection of life and limb. Furthermore, if a corporate killing offence based on ‘careless management’ were established, it would avoid the need to pinpoint a specific individual at a sufficiently high level for his or her acts and omissions to be attributed to the undertaking (as is required if the identification doctrine is the principle upon which the attribution of liability is based).

(1) *Whose acts and omissions would be treated as those of the undertaking?*

7.37 An organisational liability offence would not entirely eliminate the thorny issue of whose acts and which systems can be said to be those of the undertaking. Wells commented of the Law Commission of England and Wales’ proposals for a corporate killing offence based on ‘management failure’:⁴¹

“If there is one lesson from the P&O⁴² and other corporate killing sagas, it is that corporate defendants are highly motivated and well-placed to exploit the metaphysical gap between ‘the company’ and its members.”

³⁹ Brady “Corporate Homicide: Some Alternative Legal Approaches [2002] 12(2) ICLJ 12, at 13.

⁴⁰ See generally Chapter 1 above.

⁴¹ Wells *Corporations and Criminal Responsibility* (2nd ed Oxford 2001) at 125.

⁴² See paragraphs 1.52 - 1.53 above.

Therefore, in practice, a significant limitation of a corporate killing offence based on organisational liability is that it would not avoid the need to resolve the issue of whose acts and omissions can be said to count as the policies of the undertaking. In this respect, the Commission is of the view that this model cannot be said to be a major advance on the common law identification doctrine, the crux of which is identifying those persons whose acts are to be regarded as those of the corporation.⁴³

(2) *How would ‘careless management’ be defined?*

7.38 In accordance with the legality principle,⁴⁴ an offence of corporate killing based on a culpability criterion of ‘careless management’ must not make it difficult for undertakings to understand what they must do to avoid liability. ‘Careless management’ would need to be defined in some manner or, alternatively, some guidance would need to be given on what types of corporate activity would constitute careless management. It is difficult to define what standard of care it is reasonable to expect of an undertaking since there is no uniformly accepted notion of what constitutes the ‘reasonable undertaking’. In practice, the conviction of an undertaking for an offence of corporate killing based on ‘careless management’ might prove difficult to obtain since it would require detailed proof of comparative management practices and standards.

7.39 To meet this difficulty, a number of ‘management failure’ models for imposing criminal liability on organisations for corporate killing have been devised. The Law Commission of England and Wales,⁴⁵ the Irish *Corporate Manslaughter Bill 2001*⁴⁶ (now lapsed) and the corporate manslaughter proposals in the State of Victoria in Australia⁴⁷ all proposed what was essentially a ‘management failure’ test based on imposing direct liability on corporations for deficiencies in their corporate policies. The Law Commission’s proposals did not

⁴³ See paragraph 1.42 *ff* above.

⁴⁴ See paragraph 7.33 above.

⁴⁵ See Chapter 5 above.

⁴⁶ See paragraph 2.80 *ff* above.

⁴⁷ See Chapter 6 above.

define ‘management failure’ in great detail. In their Report, the Law Commission suggested that:⁴⁸

“...the crucial question would be whether the conduct in question amounted to a failure to ensure safety *in the management and organisation of the corporation’s activities.*”

In the draft legislation published with the Commission’s Report, management failure was defined thus:⁴⁹

“there is management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities.”

The Irish Bill gave the following, more precise, definition:⁵⁰

“the undertaking, or any activities in connection with the undertaking, of a company is or are managed or organised in a way that fails to ensure that the health or safety of persons liable to be affected (including employees of the company) is not thereby threatened, [and] that failure amounts to conduct falling far below the standard of care and attention it is reasonable in the circumstances to expect would be paid to ensuring that the health or safety of such persons is not so threatened.”

7.40 The Irish Bill provided that regard could be had to health and safety legislation and any relevant codes of conduct, safety manuals, guidelines and other such materials that would be admissible in evidence in a civil action.⁵¹

⁴⁸ Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com 237, 1996) paragraph 8.19.

⁴⁹ Clause 4(2) of the Law Commission’s draft bill.

⁵⁰ Section 1(1) of the *Corporate Manslaughter Bill 2001*.

⁵¹ Section 1(5) of the *Corporate Manslaughter Bill 2001*.

7.41 The (now defunct) Victorian proposals for the test of management failure required:⁵²

“such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances, and such a high risk of death or really serious injury, that the conduct merits criminal punishment for the offence.”

7.42 The Victorian proposals suggested the following indicators of corporate negligence:

“...the failure of the body corporate –

adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or

to engage as an agent a person reasonably capable of providing the contracted services; or

to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or

to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or

to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.”

7.43 However ‘careless management’ is defined, undertakings may be left in some doubt as to what they must do to prevent themselves being found to have engaged in careless management. This, however, is not the main stumbling block for this option for reform. Beyond the definitional difficulties of a ‘careless management’ test which we have acknowledged, the Commission is conscious that any acceptance of an organisational model of liability would necessitate a fundamental rethinking of traditional concepts of *mens rea* and culpability. Thus while an organisational approach may take account of the diffuse management structures in undertakings

⁵² See paragraph 6.13 *ff* above.

today, the Commission does not favour organisational liability as the underlying basis for any proposed corporate killing offence because it runs counter to the fundamental precept in our criminal law system of an individual rather than a collective *mens rea*. Furthermore, its adoption would have broader implications for our system of criminal law beyond the scope of this review. Therefore, on balance, we are not in favour of imposing organisational liability on undertakings for corporate killing.

7.44 *On balance, the Commission does not provisionally recommend the adoption of a statutory offence of corporate killing based on directly imposing organisational liability on undertakings for careless management.*

F Option 3: An Offence of Corporate Killing based on the Identification Doctrine

7.45 The second model of corporate killing offence is based on the identification doctrine.⁵³ The classic formulation of the identification doctrine in *Tesco Supermarkets Ltd v Natrass*⁵⁴ regards the crimes of a corporation's controlling officers as the acts of the corporation itself. The Commission is of the view that, in terms of the legality principle,⁵⁵ the identification doctrine respects the principle of fairness in the imposition of criminal liability by requiring that a specific individual wrongdoer be identified as having committed the offence in question, and by requiring that the individual in question should have been representing the corporation or acting 'as' the corporation while committing the offence. As such, the identification doctrine represents an appropriate basis for the imposition of criminal liability on undertakings for crimes of homicide. We consider that the attribution of an individual's acts and omissions to an undertaking rather than the imposition of direct organisational liability on an undertaking accords more easily with Irish criminal law at its current state of evolution. Therefore, the Commission is in favour of the establishment of a statutory offence based on the principles of the

⁵³ See paragraph 1.42 *ff* above.

⁵⁴ [1972] AC 153.

⁵⁵ See paragraph 7.33 above.

identification doctrine - the attribution of the behaviour of certain individuals to the undertaking.

7.46 The Commission regards the identification doctrine as an appropriate basis for the imposition of criminal liability on corporations for corporate killing. Nevertheless, given the growth in size and complexity of organisational structures, we are of the view that the “directing mind and will test” propounded by the House of Lords over thirty years ago in *Tesco Supermarkets Ltd v Natrass*,⁵⁶ is framed too narrowly and needs to be broadened to form the basis for a new offence of corporate killing. The doctrine, as developed by the courts in England, has rightly been criticised for its narrow focus on the acts or omissions of members of the board of directors. The critical weakness is that the identification doctrine as originally formulated is not readily applicable in situations where an undertaking does not operate the traditional ‘top down’ model of management. Under that version of the identification doctrine, a corporation might escape liability for all crimes except those committed through its board of directors. In short, the *Tesco* approach fails to take cognisance of the fact that responsibility for particular activities or policies may be delegated to persons who are not at the highest strata of management.

7.47 The Commission believes that the class of persons covered by the identification doctrine therefore needs to be expanded in order to reflect fairly how corporations and other undertakings operate today. The question is where should the stopping point be? On the one hand, we are in favour of expanding the class of relevant persons whose acts and omissions can be attributed to undertakings beyond the boardroom (and therefore beyond the *Tesco* formulation of the identification doctrine) in order to accommodate the broad spectrum of management structures today, particularly in large undertakings. We note the modified identification doctrine embodied in the US *Model Penal Code*,⁵⁷ in the recent conventions of the Council of Europe and of the EU,⁵⁸ and in the Australian *Criminal Code*⁵⁹

⁵⁶ [1972] AC 153. See paragraph 1.44 *ff* above.

⁵⁷ See paragraph 4.17 above.

⁵⁸ See paragraph 4.26 *ff* above.

⁵⁹ See paragraph 6.07 above.

whereby corporations can be held liable for criminal offences that have been committed for their benefit by their agents having responsibility for corporate policy in the area in which the offence occurred.

7.48 We are, at the same time, conscious that the relevant class of persons whose acts can be attributed to an undertaking should not be pitched too widely so as to include the acts of those persons who cannot fairly be said to represent the undertaking. In particular, we do not consider that the imposition of criminal liability for corporate killing based on the identification doctrine should encompass the acts and omissions of persons with day to day operational responsibility, as opposed to those of persons with responsibility for formulating policy within an undertaking.

7.49 Based on the foregoing, the Commission proposes the adoption of a statutory offence of corporate killing which would expand the scope of the common law identification doctrine in three ways. First by extending its application beyond corporations to include all types of ‘undertaking’.⁶⁰ Secondly, by extending the relevant actors beyond the top level of management to embrace what is termed a ‘high managerial agent’. Thirdly, by the inclusion of the device of ‘reckless tolerance’.

7.50 *The Commission recommends the establishment of a statutory corporate killing offence to be prosecuted on indictment whereby the acts or omissions of a ‘high managerial agent’ of an undertaking would be treated as those of the undertaking. On the death of a person, an undertaking could be found guilty of the offence of corporate killing where it is proved that the acts or omissions of a high managerial agent of the undertaking, or the acts or omissions of any person which were authorised, requested or recklessly tolerated by a high managerial agent of the undertaking, fell far below what could reasonably be expected in the circumstances and those acts or omissions involved a high degree of risk of serious personal injury to any person and were a cause of death.*⁶¹

⁶⁰ See paragraph 7.20 - 7.31 above.

⁶¹ But see the alternative approach outlined in paragraph 7.18 above.

(1) ‘High Managerial Agent’

7.51 The Commission favours using the term ‘high managerial agent’ to characterise the person whose conduct could be attributed to an undertaking for the offence of corporate killing. Based on the US *Model Penal Code* test⁶² and Australian *Criminal Code* test⁶³ for the attribution of liability to a corporation, we propose that a ‘high managerial agent’ be defined as:

“an officer, agent or employee of the undertaking having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the undertaking.”

7.52 Thus the term ‘high managerial agent’ would include employees with delegated authority to make decisions in particular areas, for example, health and safety compliance. However, it would not cover employees involved in day to day operations who do not have the power to formulate policy. Such persons may of course be guilty of manslaughter under the general law of manslaughter. However, our focus here is on the attribution of criminal liability to the undertaking for a new offence of corporate killing.

7.53 *The Commission recommends that ‘high managerial agent’ be defined as “an officer, agent or employee of the undertaking having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the undertaking”.*

(2) ‘Recklessly tolerated’

7.54 How would a high managerial agent ‘recklessly tolerate’ relevant acts and omissions? ‘Recklessness’ is understood in Irish criminal law since *The People (DPP) v Murray*⁶⁴ to involve conscious disregard of a substantial and unjustifiable risk where the disregard

⁶² See paragraph 4.17 *ff* above.

⁶³ See paragraph 6.07 above.

⁶⁴ [1977] IR 360.

involves culpability of a high degree, having regard to the nature and purpose of the actor's conduct and the circumstances known to him or her. This accords with the *American Model Penal Code*⁶⁵ which defines recklessness as follows:⁶⁶

“A person acts recklessly with regard to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree.”

7.55 The Commission believes that ‘recklessly tolerated’ in the context of the proposed offence would require the prosecution to prove that the high managerial agent *must* have been aware that toleration of the acts and omissions involved a high degree of risk that serious personal injury would result to any person and nonetheless unreasonably disregarded that risk. It would not be required to prove that they were actually aware of them. Rather, it would be sufficient to prove that the person ought to have been aware of them in the sense that they could not but have been aware of the acts and omissions which involved a high degree of risk of serious personal injury to any person.

7.56 *The Commission recommends that in order to establish ‘reckless toleration’ by a high managerial agent, it must be proved that, in the circumstances, a high managerial agent of the undertaking was aware, or ought reasonably to have been aware, of a high degree of risk of serious personal injury to any person arising from the acts or omissions of another person and nonetheless have unreasonably disregarded that risk.*

⁶⁵ American Law Institute (1962 Philadelphia).

⁶⁶ *Ibid* section 2.02(2)(c).

(3) *The Standard of Culpability*

7.57 In accordance with the gravity with which we believe an offence of corporate killing should be regarded,⁶⁷ we propose that it would not be sufficient for the prosecution to prove ordinary negligence or recklessness in order to convict an undertaking of the proposed offence.

7.58 We are concerned that the standard of culpability for the proposed offence should not differ materially from that required for gross negligence manslaughter for natural persons *ie* criminal negligence.⁶⁸ The Commission considers that the relevant acts and omissions which are attributed to the undertaking should fall a long way short of what could reasonably be expected in the circumstances and be such that any reasonable person would have realised that those acts and omissions involved a high degree of risk of causing serious injury to any person.⁶⁹ This would impose an objective, ‘reasonable person’ test of gross negligence in the particular circumstances which would be in line with that for gross negligence manslaughter in Ireland.⁷⁰ Moreover, it would not limit the responsibilities of an undertaking to compliance with the letter of health and safety legislation. We appreciate that this would not pinpoint exactly what should be done by high managerial agents of undertakings to avoid liability. However, on balance we do not believe that it would be of assistance for legislation to provide examples of indicators of acts or omissions which would satisfy the required standard of culpability. Rather, as is the case with gross negligence manslaughter, each case should be judged on its own facts based on the proposed objective standard of gross negligence for the offence. The strength of this model of offence lies in the fact that the standard of culpability is directly aligned with that of gross negligence manslaughter at

⁶⁷ Alternative legal remedies are discussed in Chapter 2 above.

⁶⁸ See *The People (Attorney General) v Dunleavy* [1948] IR 95; paragraph 3.06 *ff* above.

⁶⁹ This reflects the classic formulation of the test for gross negligence manslaughter by the Court of Criminal Appeal in *The People (Attorney General) v Dunleavy* [1948] IR 95.

⁷⁰ See paragraph 3.06 *ff*.

common law and is based on the acts of defined actors within the undertaking.

7.59 *The Commission recommends that in order to find an undertaking guilty of the proposed offence of corporate killing, the relevant acts or omissions which are attributed to the undertaking must fall far below what could reasonably be expected in the circumstances and have involved a high degree of risk of causing serious personal injury to any person.*

(4) Murder

7.60 Under this proposed model of offence, which is derived from the identification doctrine and is designed to approximate to the common law offence of gross negligence manslaughter, in principle, acts requiring malice aforethought which would amount to murder if carried on by a natural person, should not be attributed to an undertaking.⁷¹ As a matter of policy, acts of intentional killing cannot be presumed to represent the policy of an undertaking and, where appropriate, the responsible natural person alone should be prosecuted for murder.

7.61 *The Commission recommends that acts of a high managerial agent of an undertaking which constitute murder should not be attributed to the undertaking.*

(5) Defence of Reasonable Practicability

7.62 There is a fairly subtle issue which requires attention here. The Commission recognises that a strict application of the identification doctrine may lead to injustice on occasion if an undertaking were to be held liable for the acts and omissions of its high managerial agents even though it had done all that was reasonably practicable to prevent the commission of the offence.

7.63 The essential point is that the effect of the changes just proposed - the introduction of the 'high managerial agent' and the further extension of liability by virtue of reckless tolerance – is that an undertaking might be made liable for a crime, despite the fact that

⁷¹ See paragraph 3.03 *ff* above.

the undertaking at its essence, that is, the board of directors or top level management, might be relatively blameless. The most obvious example of the way in which this might come about would be if the high managerial agent were a maverick who had done some grossly negligent act which the undertaking's highest level of management would not have countenanced. Therefore, it may be considered appropriate, in the interests of justice, to provide for a defence where the top level management of an undertaking can show that it had done all that was reasonably practicable to prevent the commission of the offence. The Commission notes that a 'reasonably practicable' defence is common in health and safety statutes.⁷²

7.64 We are aware that the point may be made that providing such a defence would open the door to undertakings using high managerial agents as 'scapegoats' by claiming that they had breached internal policy, thereby exonerating the undertaking. We would counter this by stating that the defence we contemplate is not one which could easily be invoked.

7.65 The evidential burden would be on the undertaking's highest level of management to prove that they had done all that was 'reasonably practicable'. While they should be able to adduce evidence of the acts of the undertaking's servants and agents as well as of its highest management, we are of the view that 'reasonably practicable' should be interpreted as imposing a more onerous obligation on management than the common law duty on employers to exercise reasonable care. The courts have made it clear, in relation to health and safety legislation, that it is not sufficient to simply point to a safety statement without adducing evidence of the steps taken to ensure that it was being observed in practice at all levels in the undertaking.⁷³ In *Boyle v Marathon Petroleum (Ireland) Ltd*,⁷⁴ O'Flaherty J stated in relation to the obligation under section 10(5) of the *Safety, Health and Welfare (Offshore Installations) Act 1987* to ensure that the workplace was "so far as is reasonably practicable, made and kept safe".⁷⁵

⁷² See further paragraphs 2.39 - 2.40 above.

⁷³ See paragraph 2.40 above.

⁷⁴ [1999] 2 IR 460.

⁷⁵ *Ibid* at 466.

“It is an obligation to take all practicable steps. That seems to me to involve more than that they ... as employers, did all that was reasonably to be expected of them in a particular situation.”

7.66 *The Commission recommends that an undertaking should not be found guilty of the offence of corporate killing where its highest level of management adduces evidence that it had done all that was reasonably practicable to prevent the commission of the offence.*

(6) Causation

7.67 Irish criminal law recognises the concept of *novus actus interveniens* whereby an intervening act may break the chain of causation in the commission of a criminal offence.⁷⁶ To avoid any such difficulties in relation to causation, legislation providing for a corporate killing offence could provide that it would suffice if the acts and omissions of a high managerial agent were one of the causes of a person’s death rather than the only cause or the immediate cause of death.⁷⁷ This would avoid any issue as to whether other acts and omissions could be regarded as a *novus actus interveniens* thereby separating the causation from the undertaking.

7.68 *The Commission recommends that it should be provided that, the relevant acts or omissions of a high managerial agent need only be a cause of death rather than the immediate or only cause of death.*

⁷⁶ See McAuley and McCutcheon *Criminal Liability* (Dublin 2000) at 258 – 268.

⁷⁷ See Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com 237, 1996) paragraph 8.39.

CHAPTER 8 SANCTIONS AND SECONDARY ISSUES

A Introduction

8.01 Following on from the recommendations in Chapter 7 that a statutory corporate killing offence be established¹ which would apply to all undertakings,² Part B of this chapter considers various sanctions which it may be appropriate to provide for if a corporate killing offence were adopted; Part C examines secondary issues which arise in relation to the establishment of an offence of corporate killing - the liability of management and the appropriate territorial ambit of a corporate killing offence.

B Sanctions

8.02 The imposition of criminal liability on undertakings for corporate killing would be deprived of real effect without viable sanctions. In the case of the establishment of an offence of corporate killing which would be akin to gross negligence manslaughter in terms of gravity and culpability, it is important that the sanctions available have a correlation to the seriousness of such an offence, bearing in mind that imprisonment is not a sentencing option in the case of undertakings convicted of corporate killing.

(1) Fines

8.03 As a penalty, the fine has a number of advantages. Fines are, or should be, efficient to administer. There is little cost to the State in collecting fines. However, to be effective as a deterrent, the potential fine must be set at a high enough level so that the benefits of

¹ Paragraph 7.17 above.

² Paragraph 7.31 above.

offending are outweighed by the cost of a conviction for corporate killing. If not, they may actually encourage undertakings, on a cost-benefit analysis, to be reckless in failing to safeguard human life adequately. In this regard, the Commission is particularly concerned that what may appear to amount to a substantial penalty to an individual may be miniscule in the eyes of a highly profitable undertaking. In this regard, the Commission notes that, under the *Safety, Health and Welfare at Work Act 1989*, an unlimited fine is provided for in respect of a conviction on indictment.³ We believe that an unlimited fine would accord with the gravity of the corporate killing offence we recommended in Chapter 7 and would provide flexibility for the different circumstances in which the offence which may occur.⁴

8.04 Some consideration of the circumstances of the undertaking will be appropriate in arriving at the appropriate fine in a particular case. Where an undertaking has borrowed heavily in relation to the size of its share capital or is simply trading on tight margins, a high fine might drive it out of business. In the case of *The People (DPP) v Redmond*,⁵ which concerned an appeal against the leniency of a fine imposed, Hardiman J, in the Court of Criminal Appeal, observed that “a fine of £7,500 is neither lenient nor harsh in itself, but only in terms of the circumstances of the person who must pay it”.⁶

8.05 The concept of fining undertakings according to their means is not new. In *People (DPP) v Roseberry Construction Ltd*,⁷ the Court of Criminal Appeal refused a corporation leave to appeal against the severity of fines totalling IR£200,000 (€254,000) imposed on it under the *Safety, Health and Welfare at Work Act 1989*. The fines were not regarded as excessive on the basis of information before the Court that the company was a medium to large company which was building 90 houses at the time of the fatal accident and was judged to be “a substantial, relatively complex and profitable

³ See paragraph 2.47 above.

⁴ See paragraph 7.45 *ff* above.

⁵ [2001] 3 IR 390.

⁶ *Ibid* at 29.

⁷ See paragraph 1.10 above.

enterprise”.⁸ Evidence was also given that the payment of the fine would not drive the company out of business.

8.06 The Law Reform Commission has previously recommended, in relation to minor offences, that a court should have the power to impose up to treble the maximum fine for individuals on corporations⁹ and that the means and assets of a corporate offender should be taken into account in assessing the fine to be imposed.¹⁰ The competition law regime contained in the *Competition Act 2002* (which is based on the EU competition regime) provides for fines based on the convicted undertaking’s turnover. Section 8(1)(b)(i) provides for fines on indictment:

“in the case of an undertaking that is not an individual, to a fine not exceeding whichever of the following amounts is greater, namely, €4,000,000 or 10 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction.”

8.07 The sentencing court should, at its discretion, consider the resources available to an undertaking and the effect which a fine would have on the economic viability of the undertaking. However, to provide for fines for the offence of corporate killing to be based on turnover would not reflect the range of entities within our recommended definition of an ‘undertaking’.¹¹ For example, some undertakings may be asset-rich rather than having a high turnover. Moreover, a turnover-related fine would not have the same relevance to undertakings such as local authorities or non-profit organisations as they would to commercial, profit-driven undertakings. Therefore, the Commission does not favour a provision specifically linking a fine to turnover.

⁸ Court of Criminal Appeal 6 February 2003, at 5.

⁹ Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69–2003) paragraph 8.31. See also, for example, section 4(B) of the *Australian Commonwealth Crimes Act 1914* which authorises the imposition on corporations of a fine of five times the amount that can be imposed on a natural person for the same offence.

¹⁰ Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69–2003) paragraph 4.21 *ff.*

¹¹ Paragraph 7.20 *ff* above.

8.08 *On balance, the Commission is of the view that in order to reflect the gravity of the offence of corporate killing, legislation should provide for an unlimited fine in respect of an undertaking found guilty of the offence and, in imposing a fine, the court may take into account the means of the undertaking and the effect which a fine would have on the viability of the undertaking.*

8.09 A particular problem with fines as a sanction in respect of corporate killing is the secondary or 'spill-over' effect of fines - the cost of meeting the fine may be indirectly borne by others: innocent employees, who may be made redundant in a cost cutting exercise (low-level employees will regularly be more expendable than the undertaking's high managerial agents); innocent customers may be faced with extra charges; and, in the case of private sector corporations, innocent shareholders may find the value of their investments depleted. If an undertaking is driven out of business by the fine imposed upon a conviction for corporate killing, its employees, suppliers and distributors will suffer, and ultimately the State may end up footing the bill in the form of unemployment benefits while itself suffering a loss in tax revenues. Fines also have a spill-over effect when imposed on individuals - such that the offender's family and creditors are indirectly affected.

8.10 Not all such spill-over effects are unjustifiable. Shareholders may in some circumstances be regarded as being complicit in corporate wrongdoing for failing to curb directors' activity. In legal reality and in practice, however, shareholders lack any day to day power to intervene in corporate management, save where they are directors (or shadow directors) themselves. A better justification, perhaps, is that shareholders are not entitled to profit from the corporation's illegal or risky practices in the first place. Likewise, it can be argued that increased charges to customers will not ensue if the undertaking wishes to remain competitive; but this justification falls down where the undertaking has a dominant position in the market, for example, through strong brand loyalty.

8.11 In the absence of being able to sentence an undertaking to a term of imprisonment, an inherent limitation of the fine as a sanction for corporate killing, like all monetary penalties, is that it conveys the impression that corporate killing is a 'purchasable commodity'. Where corporations are concerned, the impact of such fines may be

minimised through the use of incorporated subsidiaries and other avoidance techniques such as asset-stripping. While some protection might be afforded by placing a charge on the assets of the company to secure payment of the fine, there will inevitably be spill-over effects on others who are not implicated in the offence.

8.12 *The Commission considers that the limitations of the fine as an effective and just means of sanctioning undertakings highlight a need for alternative sentencing options. We recommend that the fine should therefore play a role as one alternative in a broader range of sentencing options open to the sentencing court.*

(2) Equity Fines

8.13 The ‘equity fine’ has been suggested as a possible solution to the spill-over effect of fines.¹² An equity fine would require a corporation to pay a fine in shares rather than in cash. These shares could then be held by the State and sold when appropriate. The equity fine is not a sanction currently known to Irish law and by its nature is a sanction which could only apply to incorporated undertakings.

(a) Advantages

8.14 Since an equity fine would create no immediate need for the generation of cash, there would be no immediate spill-over effect on customers and employees. In addition, the share value may increase and dividends may be paid on the shares.

(b) Disadvantages

8.15 The equity fine suffers from a number of disadvantages, the first being that it could only be imposed on undertakings with a share capital. A major disadvantage from a principled perspective is that, in private sector corporations, an equity fine would directly affect the corporation’s innocent shareholders who, as a matter of corporate reality, have little control over the day to day management of corporate activities. In addition, the dilution of the corporation’s

¹² Coffee “No Soul to Damn: No Body to Kill: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 Michigan LR 386, at 413 *ff.*

share value may in some cases lead to a hostile takeover. Furthermore, there is no guarantee that shares in public listed companies will hold their value and the equity fine would impact on the listing rules' requirements.¹³ An equity fine may not work efficiently in the case of private companies either - by far the predominant form of company on the Irish register - which, by law, must place restrictions on the transfer of their shares.¹⁴ Even if restrictions on share transfer could be excluded for a sale by the State, there may not be a wide market for the shares. Nor could the State necessarily expect to profit from dividends on the shares, since the decision as to whether dividends should be paid lies almost exclusively in the hands of the directors. In many private companies, where the only shareholders are also officers of the company, dividends are not paid at all – the company preferring to filter its profits back to the directors in the form of salaries and bonuses. On balance, the Commission considers that the disadvantages of the equity fine as a penalty for undertakings convicted of corporate killing outweigh its possible advantages, particularly given that there is a limited market for shares in most companies and because of the administrative burden and costs involved.

8.16 *The Commission does not recommend making provision for equity fines as an alternative to the fine as a sanction for undertakings convicted of the offence of corporate killing.*

(3) Remedial Orders

(a) Remedial orders under the Safety, Health and Welfare at Work Act 1989

8.17 The remedial order, a further sentencing option in the case of undertakings, is currently available in Irish law for offences under health and safety legislation.¹⁵ Section 48(16) of the *Safety, Health and Welfare at Work Act 1989* provides:

¹³ See Courtney *The Law of Private Companies* (2nd ed Dublin 2002) paragraphs 28.015 - 28.037.

¹⁴ Section 33 of the *Companies Act 1963*. See Courtney *The Law of Private Companies* (2nd ed 2002) paragraph 1.114 *ff*.

¹⁵ See further paragraph 2.58 above.

“Where a person is convicted of an offence under any of the relevant statutory provisions the court may, in addition to or instead of inflicting a fine, order him to take steps within a specified time for remedying the matters in respect of which the contravention occurred (and may on application extend the time so specified) and any person who fails to comply with any such order within the specified time (as extended) shall be guilty of an offence.”

8.18 The remedial order provisions are limited in that they can only be invoked where an offence under health and safety legislation is in issue. There may, however, be some scope for similar orders or effects to be achieved through an application of the *Probation of Offenders Act 1907*, or through the use of a suspended sentence with conditions attached. All in all, however, the law is uncertain in that regard.

(b) *Advantages*

8.19 The advantage of the remedial order in the context of an undertaking is that the conditions imposed could require the undertaking to conduct an internal investigation into the circumstances of the occurrence of the corporate killing offence, followed by appropriate internal disciplinary proceedings, and the filing of a satisfactory compliance report with the court. Alternatively, a remedial order could require an undertaking to revise its internal control methods to focus more closely on safety and health procedures. Such orders can play a significant role in achieving changes in corporate conduct and thereby preventing repeat offending. They would also have a deterrent impact. Given the positive effects of such orders, the Commission considers that there is much to be said in favour of making the remedial order provisions available where an undertaking is convicted of corporate killing.

(c) *Disadvantages*

8.20 A common criticism of remedial orders is that they represent a significant interference in matters of internal policy. However, we consider that where remedial orders are carefully drawn, any such imposition is outweighed by their positive effects. The process may also be intensive and costly, but such difficulties can

be overcome by requiring the undertaking to bear the costs of the process, including the cost of expert supervisors where necessary.

8.21 *The Commission recommends that a remedial order should be an available sanction for the offence of corporate killing.*

(d) *Guidance as to when to impose remedial orders*

8.22 To gain full effect, and to protect the rights of the parties, the court making a remedial order should be well informed of the principles and issues at stake. Irish law, however, does not offer guidance on the nature of the remedial order to be made in any given circumstance, nor does it provide any principles as to when such orders should be made *in lieu* of a fine. The Commission believes this to be a potential impediment to the effective use of the remedial order. Without such guidance a court may be reluctant to make such an order.

8.23 Some consideration of the regime under the *United States Federal Sentencing Guidelines*,¹⁶ which are binding on the Federal Courts, may be of assistance in identifying the principles that might be employed in the decision to make a remedial order. The Guidelines provide that probation, with conditions attached, must be imposed on corporate felons if any one of the following conditions applies:¹⁷

- (i) it is necessary to secure the payment of restitution or a fine;
- (ii) the organisation does not have a compliance and detection programme;
- (iii) the organisation engaged in similar misconduct within the previous five years;
- (iv) it is necessary to ensure that the organisation will make changes to reduce the likelihood of future criminal conduct.

¹⁶ United States Sentencing Commission *Sentencing Guidelines Manual* (2001).

¹⁷ *Ibid* Article 8D1.1(a).

8.24 The Commission considers that this list provides useful guidance on the circumstances in which a remedial order may be made, including a remedial order *in lieu* of a fine. We would expect that the inclusion of a similar non-exhaustive list in Irish legislation would encourage courts to give closer consideration to the making of a remedial order, and might assist prosecutors in identifying the circumstances in which such an order might be sought.

8.25 *Accordingly, the Commission recommends the provision of non-exhaustive statutory guidance relating to the circumstances where it may be appropriate to make a remedial order including the circumstances in which a remedial order may be made in lieu of a fine.*

8.26 Such provisions would have to be devised in consultation with the relevant stakeholders, including the Health and Safety Authority, and might be modelled on the provisions of the US Sentencing Guidelines quoted above. Such a list would be for guidance only, and should not impinge upon the court's discretion and power to make a remedial order in any case where it sees fit to do so.

(e) *Conditions of remedial orders*

8.27 Under the *US Federal Sentencing Guidelines*,¹⁸ the courts monitor convicted corporations and require them to develop internal programmes to prevent and detect misconduct. Conditions which can be imposed by the courts include a requirement that a defendant reconsider and, where necessary, reform its corporate structure and decision-making practices. The Guidelines provide a strong incentive for corporations to have effective programmes for compliance with the law and the detection of contraventions, and the practice of adopting corporate compliance programmes has emerged.¹⁹ Having such programmes in place may also attract substantial mitigation in

¹⁸ United States Sentencing Commission *Sentencing Guidelines Manual* (2001).

¹⁹ See Huff "The Role of Corporate Compliance Programmes in Determining Corporate Criminal Liability: A Suggested Approach" (1996) 96 *Columbia L Rev* 1252.

sentence, provided they are shown to be effective and there is compliance with them.²⁰

8.28 The Australian Law Reform Commission has also considered the issue of remedial orders as part of a corporate probation regime (in the context of regulatory offences under the *Australian Trade Practices Act 1974*).²¹ The Commission concluded that corporate probation should be made available as a sentencing option to be imposed at the court's discretion. It further recommended that legislation provide a non-exclusive list of the kinds of condition that the court might attach to such orders. The list includes requiring the corporation to:²²

(i) develop and submit to the court a program to prevent and detect contraventions, including a schedule for implementation upon approval by the court of a programme to prevent and detect contraventions;

(ii) notify its employees and shareholders of the contravention and to advise them of the steps it has taken to avoid repetition;

(iii) make periodic reports to the court or the independent representative appointed by the court regarding the corporation's progress in implementing the compliance programme;

(iv) submit to a reasonable number of regular and unannounced examinations of its books and records at

²⁰ United States Sentencing Commission *Sentencing Guidelines Manual* (2001) Article 8C2.5(f). In order to achieve a sentence reduction, the Guidelines list seven criteria that need to be complied with: (1) policies (2) responsibility at high level (3) integrity review (4) effective communication (5) auditing system (6) consistent enforcement (7) meaningful follow-through.

²¹ Australian Law Reform Commission *Report on Compliance with the Trade Practices Act, 1974* (ALRC 68 – 1994) paragraph 10.5 ff. Remedial orders have been provided for in section 86D of the *Trade Practices Act 1974* (inserted by the *Trade Practices Amendment Act (No.1) 2001*).

²² Australian Law Reform Commission *Report on Compliance with the Trade Practices Act, 1974* (ALRC 68 – 1994) paragraph 10.5 ff.

appropriate business premises by the independent representative and to inquiries made of knowledgeable individuals within the corporation.

8.29 The Commission considers that there is much to be said in favour of formulating a similar non-exclusive list of conditions which may be imposed on an undertaking convicted of corporate killing.

8.30 *Accordingly, the Commission recommends that statutory provision be made for a non-exhaustive list of the type of conditions that might be imposed on an undertaking convicted of corporate killing by means of a remedial order.*

8.31 Such a list would have to be drawn up in consultation with relevant stakeholders, including the Health and Safety Authority, and might be modelled on the list quoted above as produced by the Australian Law Reform Commission.

(4) Community Service Orders

8.32 A community service order can be made in respect of any offender on whom a custodial sentence would otherwise be imposed.²³ However, as it may only be imposed as an alternative to imprisonment, the community service order cannot be applied to undertakings. Yet there is much to be said in favour of extending them to undertakings.

(a) Advantages

8.33 Properly constructed, the community service order would provide a valuable corporate sanction. The most obvious advantage is that the corporate defendant would provide a constructive benefit to the community. Many undertakings might see this as an advantageous means of repairing the damage which conviction would cause to their reputations. The order could be shaped to take the undertaking's expertise in its field of activity into account. By compelling the undertaking to conduct or support research into the causes of accidents in their field, for example, the community service order contributes to wider knowledge on the causes of accidents. At

²³ Section 3(1) of the *Criminal Justice (Community Service) Act 1983*.

present, the State usually ends up bearing the costs of such research in the limited context of what is achievable through inquiries. Where the programme of work is beyond the undertaking's capabilities, it could still be ordered to provide back-up support (financial or otherwise) for others better qualified to carry out such research. Properly constructed, the spill-over effects of community service orders could also be minimised.

(b) *Disadvantages*

8.34 Possible disadvantages of community service orders in the corporate context include the danger that an undertaking's resources might be channelled into 'pet charity projects', the danger that undertakings might cheat by recycling projects already completed in the ordinary course of business, and the possibility that undertakings may simply sub-contract out performance of the project to external, or possibly sub-standard, contractors. The community service order might also be used to circumvent the upper limit that may be imposed by way of a fine. Each of these dangers could be avoided or minimised if appropriate controls were put in place.

8.35 Community service orders are frequently imposed on corporate offenders in the United States. In *United States v Danilow Pastry Corp*,²⁴ for example, a New York court required convicted bakeries to supply fresh baked goods without charge to needy organisations for a twelve-month period. In *United States v Missouri Valley Construction Company*²⁵ a convicted corporation was ordered to endow a chair of ethics at the local state university. The order was, however, reversed on appeal.²⁶

8.36 A significant penological difficulty with community service orders is that they may lack the denunciatory element that is a central element in criminal sanction. The danger is that the stigma of a conviction for corporate killing would be reduced by a community service order. Long after an undertaking's wrongdoing is forgotten it may still be remembered for its good works. Moreover, it may

²⁴ (1983) 563 F. Supp. 1159 (SDNY).

²⁵ (1984) 741 F.2d 1542 (8th Cir).

²⁶ See Gobert "Controlling Corporate Criminality: Penal Sanctions and Beyond" [1994] 2 Web JCLI.

publicise its good works. This danger may be avoided in part through the imposition of an ‘adverse publicity order’. In addition, the introduction of a community service order system for corporations has resource implications. In practical terms, devising and costing such orders may be a difficult and labour intensive task.

8.37 The Australian Law Reform Commission considered the advantages and disadvantages of the community service order system in the context of reform to the Australian *Trade Practices Act 1974*,²⁷ concluding that the court should have the power to impose them on corporate offenders.²⁸ The Commission recommended that the system should have the following features:²⁹

“(i) Community service orders should be available at the discretion of the court;

(ii) If, after finding that a corporation has contravened the Act, the court decides that a community service order would be the appropriate penalty option in the circumstances, it should indicate this to the corporation and ask it to prepare a report on a community service project it could perform *in lieu* of, or in addition to, a monetary penalty;

(iii) If the contravener does not propose a project, or the court rejects its proposal, the court should specify the project to be undertaken or impose a different type of penalty;

(iv) Community service projects should be required to bear a reasonable relationship to the contravention. This requirement is necessary to prevent community service orders being used to promote ‘pet charities’. In determining the nature of a community service the court should be required to consider what, if any, damage was suffered by

²⁷ Australian Law Reform Commission *Report on Compliance with the Trade Practices Act 1974* (ALRC 68 - 1994).

²⁸ *Ibid* paragraph 10.17. Community services orders have been implemented by section 86C of the *Trade Practices Act 1974* (as inserted by the *Trade Protection Amendment (No.1) 2001*).

²⁹ Australian Law Reform Commission fn27 at paragraph 10.17.

the community as a whole as a result of the contravention, and to require a reasonable relationship between the community service project and the nature of the damage;

(v) If more supervision is required than could be performed by the court, the court should appoint a person to be an independent representative of the court. This representative could, for example, be a lawyer, accountant, auditor, receiver or other appropriately qualified person. He or she would supervise compliance with the project and, if necessary, prepare reports on a proposed project. The fees of such a person would be payable by the contravener.”

8.38 The Commission considers that the community service order provides a valuable sanction for undertakings, and we favour the model recommended by the Australian Law Reform Commission.

8.39 *The Commission recommends that in sentencing an undertaking convicted of corporate killing, a court should have the power, at its discretion, to impose a community service order.*

(5) Adverse Publicity Orders

8.40 The aim of the adverse publicity order is to place the burden of informing others of its conviction for corporate killing on the convicted undertaking. This would have retributive and deterrent effects. The concept of naming and shaming is not new to the criminal law; it is known in 19th century legislation,³⁰ and, for example, the Companies Registration Office publicises the names of defaulters in the making of annual returns under the *Companies Acts 1963-2001* and the Revenue Commissioners publish some names of tax defaulters with whom they have made settlements. The *US Federal Sentencing Guidelines* and the *Australian Criminal Code Act 1995* both allow a sentencing judge to order a convicted company to

³⁰ Fisse “Sentencing Options Against Criminals” 1 Crim Law Forum 211 points to the Bread Acts, (55 Geo. 3, ch. 49, s.10 (1815); 3 Geo.4, ch. 106, s.3 (1822).

publicise at its own expense the fact of its conviction and the remedial steps it plans to avoid future violations.³¹

(a) *Advantages*

8.41 Adverse publicity orders have the penological advantage that they directly target corporate reputation. Accordingly, they have retributive and deterrent effects. They may also have remedial effects in that the undertaking may be thereby deterred from similar wrongdoing in the future. Moreover, if properly structured, adverse publicity orders can avoid the overspill effects of fines. An adverse publicity order would be relatively easy to carry out: the corporation may be ordered to place an advertisement in a national or local newspaper at its own expense advertising the fact of its conviction for corporate killing, or it might be ordered to write to shareholders or customers.

(b) *Disadvantages*

8.42 A possible disadvantage of adverse publicity orders, however, is that they are of uncertain effect. On the one hand, it is possible that the public may over-react to the order, perhaps by boycotting the business of the corporation. On the other hand, it is possible that the public will not react at all to the publicity either because they are driven by price rather than reputation, or because such orders may become so commonplace as to lose their effect. In any event, however, the impact of fines and other sanctions is just as difficult to assess.

8.43 On balance, the Commission considers that the adverse publicity order provides a useful and effective sanction in the sentencing and punishment of undertakings.

³¹ Clinard *Corporate Corruption* (New York 1990) at 180 points to the following melodramatic example from the United States where the American Caster Corporation placed the following advertisement in the *Los Angeles Times*:

“Warning: The illegal disposal of toxic waste will result in jail. We should know. We got caught! . . . We are paying the price. Today, while you read this ad, our president and vice president are serving time in jail and we were forced to place this ad.”

8.44 *The Commission recommends that in sentencing an undertaking convicted of the offence of corporate killing, a court should have the power to impose an adverse publicity order.*

(6) Restraining Orders and Injunctions

8.45 Restraining orders and injunctions are aimed at preventing future offending. The restraining order is a significant feature of the Council of Europe's proposed sentencing regime for corporate offenders.³² Under the Council of Europe regime, a corporate offender might receive a judicial warning or reprimand for a first or minor offence, followed for subsequent or more serious offences by an order prohibiting the company from engaging in activities that might lead to repeat offences. Further up the restraint ladder, the ultimate restraint for a corporate offender would be forced liquidation or closure – the 'corporate death penalty'. The term of a prohibition order could be equal in length to a prison sentence that the court might have imposed had imprisonment been an option.

8.46 Variations on the restraint order theme include prohibiting corporations from bidding for public contracts where a prohibition order is in force; a licensing system whereby corporations are licensed for specific activities; a 'points system' similar to that for driving offences; and 'punitive injunctions' – whereby the corporation is ordered to undertake activity or to forbear therefrom as punishment.

8.47 A disadvantage of the restraining order is, again, the potential spill-over effect, particularly if the scheme escalates as far as liquidation or cessation of trade. While there is some logic in licensing and points-system schemes, the establishment and maintenance of such a scheme is not favoured by the Commission in the specific context of this review given the sanctions which we have already recommended in this chapter.

8.48 *The Commission does not recommend any change in the law in respect of restraint orders.*

³² Council of Europe Recommendation No. R.(88) of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences committed in the Exercise of their Activities (1990).

C Secondary Issues

(1) *The Liability of Management and other Individuals*

8.49 A secondary issue in constructing a corporate killing offence is the extent to which high managerial agents of an undertaking should have sanctions imposed on them. In the nature of things, high managerial agents of an undertaking convicted of corporate killing may be perceived by society to be individually culpable. The establishment of a corporate killing offence would address the concern that an undertaking's high managerial agents may be treated as scapegoats to preserve an undertaking's reputation. However, while the general law of homicide addresses grossly negligent behaviour by individuals which causes death by means of the common law offence of gross negligence manslaughter, penalising an undertaking for corporate killing without punishing its high managerial agents in related proceedings may create the public perception that the policy-makers within an undertaking are, in effect, hiding behind the undertaking.

8.50 The imposition of secondary liability for statutory offences is not new. The imposition of criminal liability on directors in certain circumstances is a feature of the Companies Acts 1963 - 2001.³³ Under the *Competition Act 2002*, directors, managers and similar officers of undertakings are guilty of an offence where they have "authorised or consented to" the doing of the acts that constituted an offence and are subject to the same penalties as an undertaking.³⁴ For offences such as price-fixing, market sharing and bid rigging, fines of up to €4 million or 10 per cent of the individual's turnover and / or up to 5 years imprisonment may be imposed.³⁵ The *Safety, Health and Welfare at Work Act 1989* provides for the imposition of criminal liability on directors as principals where an offence committed by a body corporate is proved to have been committed "with the consent or connivance of, or to have been attributable to any neglect" on their part and "he [or she] as well as the body corporate shall be guilty of

³³ Cf the provision in section 40 of the *Companies Act 1990* for fines and imprisonment to be imposed on officers and other persons in connection with a company's breach of section 31 of the *Companies Act 1990*.

³⁴ Section 8(6) of the *Competition Act 2002*.

³⁵ Section 8(1)(b)(ii) of the *Competition Act 2002*.

that offence and shall be liable to be proceeded against and punished accordingly”.³⁶ As a result, an unlimited fine may be imposed on high managerial agents on conviction of the body corporate on indictment for failure to comply with the general duties imposed by sections 6 to 11 of the *Safety, Health and Welfare at Work Act 1989*. In certain circumstances, such as conviction on indictment for failure to comply with a prohibition notice, a term of imprisonment of up to two years may also be imposed.³⁷ In the area of fire safety, a similar provision to section 49(1)(a) of the *Safety, Health and Welfare at Work Act 1989* appears in the *Fire Services Act 1981*³⁸ and provision is made for a term of imprisonment of up to six months on summary conviction and of up to two years on conviction of a person on indictment for offences under the *Fire Services Act 1981*.³⁹

8.51 Against this background, we believe that if the only penalty for corporate killing provided for were an unlimited fine on the undertaking, the failure directly to penalise culpable high managerial agents may not reflect societal disapproval of extreme recklessness which causes death and would not reflect the trend towards imposing liability independently on high managerial agents in appropriate circumstances. For these reasons, the Commission is of the view that a statutory corporate killing scheme should provide for a separate indictable offence which would allow fines or imprisonment or both to be imposed on high managerial agents.

8.52 *The Commission recommends the adoption of a secondary offence which would be prosecuted on indictment. A high managerial agent would be guilty of this offence in circumstances where an undertaking has been convicted of corporate killing and the acts or omissions which were attributed to the undertaking as constituting its liability for the offence of corporate killing were those of the high managerial agent or such acts or omissions were authorised, requested or recklessly tolerated by that person. In this context, we*

³⁶ Section 49(1)(a) of the *Safety, Health and Welfare at Work Act 1989*. See paragraph 2.52 *ff* above.

³⁷ Section 49(3) of the *Safety, Health and Welfare at Work Act 1989*.

³⁸ Section 5(5) of the *Fire Services Act 1981*.

³⁹ Section 5(1) and (2) of the *Fire Services Act 1981* (as amended by Part 3 of the *Licensing of Indoor Events Act 2003*).

recommend that 'recklessly tolerated' would carry the same meaning in the secondary offence as in the primary offence.

8.53 *In order to reflect the range of circumstances in which the secondary offence might occur, the Commission recommends that the penalty for it should be an unlimited fine or up to five years' imprisonment or both.*

8.54 The Commission considers that where a high managerial agent has been convicted of the secondary offence to an offence of corporate killing, it would be desirable to have the possibility of prohibiting them from holding high management positions in undertakings for a defined period.

8.55 *The Commission recommends that a court would also have the power to make a disqualification order prohibiting a high managerial agent from holding high management positions in undertakings for a defined period where they have been convicted of the secondary offence.*

8.56 The prosecution of an undertaking for corporate killing should not operate to prevent an individual being independently prosecuted and convicted of manslaughter or another offence⁴⁰ or *vice versa*.

8.57 *The Commission recommends that the prosecution of an undertaking for corporate killing would not prevent an individual being prosecuted for manslaughter or another offence arising out of the same circumstances.*

(2) Territorial Ambit

8.58 An Irish citizen may be prosecuted in the State for murder or manslaughter committed anywhere in the world.⁴¹ Arguably, these provisions would not apply where manslaughter is committed abroad by an Irish corporation since it is not a "citizen".

⁴⁰ For example, under section 48(19) of the *Safety, Health and Welfare at Work Act 1989*. See paragraph 2.52 *ff* above.

⁴¹ Section 9 of the *Offences Against the Person Act 1861* (as adapted by the *Offences Against the Person Act 1861 (section 9) Adaptation Order 1973* (SI No 356 of 1973)).

8.59 The Law Commission of England and Wales considered that it was unnecessary to extend similar provisions to corporations in respect of the proposed offence of corporate killing.⁴² The Law Commission considered that there might well already be liability under a foreign law in such a case, and they thought it likely that the considerations affecting the liability of British companies were different from those affecting the liability of British citizens. The Home Office⁴³ added that it could in any event be extremely difficult for the enforcing authorities to investigate the circumstances of a corporate killing abroad.

8.60 ‘Undertaking’ has been defined above as “a person being a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service in the State”.⁴⁴ The Commission believes that the correct approach is to limit the territorial scope of the proposed offence of corporate killing to deaths which occur within the State which can be attributed to an undertaking irrespective of the country of the undertaking’s formation. Furthermore, the citizenship of the person who has died should not be a determining factor in relation to the application of the offence.

8.61 *The Commission recommends that the offence of corporate killing should be limited in territorial scope to the death of a person within the State, whether the person was a citizen of Ireland or not and irrespective of the country of the undertaking’s formation.*

⁴² Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) (Law Com. No. 237) paragraph 8.62.

⁴³ Home Office *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* (2000) paragraph 3.7.3.

⁴⁴ See paragraph 7.31 above.

CHAPTER 9 SUMMARY OF PROVISIONAL RECOMMENDATIONS

9.01 The provisional recommendations contained in this Paper may be summarised as follows:

9.02 The Commission recommends that vicarious criminal liability should not be imposed on corporations for crimes of homicide. [paragraph 1.37]

9.03 The Commission recommends that strict liability should not be imposed on corporations for crimes of homicide. [paragraph 1.41]

9.04 The Commission does not recommend the adoption of the concept of ‘reactive liability’ or the ‘power and acceptance’ doctrine as a basis for the imposition of criminal liability on corporations for crimes of homicide. [paragraphs 1.68, 1.71]

9.05 The Commission does not consider that the aggregation of the acts and omissions and mental state of more than one person to form the liability of a corporation is appropriate in the context of the imposition of criminal liability on corporations for crimes of homicide. [paragraph 1.76]

9.06 The Commission does not recommend the adoption of a flexible approach to the attribution of criminal liability for crimes of homicide to corporations because to do so would create uncertainty and could operate unjustly. [paragraph 1.79]

9.07 The Commission recommends that corporations should be subject to criminal liability for corporate killing. [paragraph 7.11]

9.08 The Commission notes the limited scope of section 48(17) of the *Safety, Health and Welfare at Work Act 1989* in the context of making corporations criminally responsible for deaths. However, we do not consider that the amendment of the *Safety, Health and Welfare*

at Work Act 1989 so that the offence under section 48(17) could be prosecuted on indictment would constitute an adequate or comprehensive solution to the issue of corporate killing in circumstances where a corporation has been seriously culpable. [paragraph 7.15]

9.09 The Commission recommends the establishment of a statutory corporate killing offence which would be prosecuted on indictment. In essence, the offence would be defined in terms equivalent to gross negligence manslaughter. Thus the negligence required to constitute the new offence would have to be of a very high degree and would have to involve a serious risk of substantial personal injury to others. The statutory offence would be adapted to take account of the difficulties in applying such an offence to corporations. [paragraph 7.17]

9.10 The Commission particularly invites comments on whether the extension of the common law offence of gross negligence manslaughter to corporations by statute would be preferable to the establishment of a statutory offence of corporate killing which has been provisionally recommended in this Consultation Paper. [paragraph 7.19]

9.11 The Commission is of the view that legislation establishing the offence of corporate killing should apply to unincorporated and incorporated entities alike but would welcome views on this point. We are not in favour of excluding charitable bodies, public sector bodies and not-for-profit entities from the scope of the offence. Accordingly, a statutory corporate killing offence should be expressed to apply to all ‘undertakings’ rather than limiting the scope of the offence to corporations. ‘Undertaking’ could be defined as “a person being a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service in the State”. [paragraph 7.31]

9.12 On balance, the Commission does not provisionally recommend the adoption of a statutory offence of corporate killing based on directly imposing organisational liability on undertakings for ‘careless management’. [paragraph 7.44]

9.13 The Commission recommends the establishment of a statutory corporate killing offence to be prosecuted on indictment whereby the acts or omissions of a ‘high managerial agent’ of an undertaking would be treated as those of the undertaking. On the death of a person, an undertaking could be found guilty of the offence of corporate killing where it is proved that the acts or omissions of a high managerial agent of the undertaking, or the acts or omissions of any person which were authorised, requested or recklessly tolerated by a high managerial agent of the undertaking, fell far below what could reasonably be expected in the circumstances and those acts or omissions involved a high degree of risk of serious personal injury to any person and were a cause of death. [paragraph 7.50]

9.14 The Commission recommends that ‘high managerial agent’ be defined as “an officer, agent or employee of the undertaking having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the undertaking”. [paragraph 7.53]

9.15 The Commission recommends that in order to establish ‘reckless toleration’ by a high managerial agent, it must be proved that, in the circumstances, the high managerial agent of the undertaking was aware, or ought reasonably to have been aware, of a high degree of risk of serious personal injury to any person arising from the acts or omissions of another person and nonetheless have unreasonably disregarded that risk. [paragraph 7.56]

9.16 The Commission recommends that in order to find an undertaking guilty of the proposed offence of corporate killing, the relevant acts or omissions which are attributed to the undertaking must fall far below what could reasonably be expected in the circumstances and have involved a high degree of risk of causing serious personal injury to any person. [paragraph 7.59]

9.17 The Commission recommends that acts of a high managerial agent of an undertaking which constitute murder should not be attributed to the undertaking. [paragraph 7.61]

9.18 The Commission recommends that an undertaking should not be found guilty of the offence of corporate killing where its highest level of management adduces evidence that it had done all

that was reasonably practicable to prevent the commission of the offence. [paragraph 7.66]

9.19 The Commission recommends that it should be provided that, the relevant acts or omissions of a high managerial agent need only be a cause of death rather than the immediate or only cause of death. [paragraph 7.68]

9.20 On balance, the Commission is of the view that in order to reflect the gravity of the offence of corporate killing, legislation should provide for an unlimited fine in respect of an undertaking found guilty of the offence and, in imposing a fine, the court may take into account the means of the undertaking and the effect which a fine would have on the viability of the undertaking. [8.08]

9.21 The Commission considers, that the limitations of the fine as an effective and just means of sanctioning undertakings highlight a need for alternative sentencing options. We recommend that the fine should therefore play a role as one alternative in a broader range of sentencing options open to the sentencing court. [paragraph 8.12]

9.22 The Commission does not recommend making provision for equity fines (fines dischargeable in shares) as an alternative to the fine as a sanction for undertakings convicted of the offence of corporate killing. [paragraph 8.16]

9.23 The Commission recommends that a remedial order should be available as a sanction for the offence of corporate killing. Statutory guidance should be provided relating to the circumstances in which such a remedial order may be appropriate, the circumstances in which a remedial order may be imposed *in lieu* of a fine and the type of conditions that might be imposed by such orders on a corporation. [paragraphs 8.21, 8.25 and 8.30]

9.24 The Commission considers that the community service order provides a valuable sanction. We recommend that in sentencing an undertaking convicted of corporate killing, a court should have the power, at its discretion, to impose a community service order. [paragraph 8.39]

9.25 The Commission considers that an adverse publicity order is a useful and effective sanction in sentencing undertakings.

Accordingly, we recommend that in sentencing an undertaking convicted of the offence of corporate killing, a court should have the power, at its discretion, to impose an adverse publicity order. [paragraph 8.44]

9.26 The Commission is of the view that it is not appropriate to recommend any change in the law in respect of restraint orders. [paragraph 8.48]

9.27 The Commission recommends the adoption of a secondary offence which would be prosecuted on indictment. A high managerial agent would be guilty of this offence in circumstances where an undertaking has been convicted of corporate killing and the acts or omissions which were attributed to the undertaking as constituting its liability for the offence of corporate killing were those of the high managerial agent or such acts or omissions were authorised, requested or recklessly tolerated by that person. In this context, we recommend that ‘recklessly tolerated’ would carry the same meaning in the secondary offence as in the primary offence. [paragraph 8.52]

9.28 In order to reflect the range of circumstances in which the secondary offence might occur the Commission recommends that the penalty for it should be an unlimited fine or up to five years’ imprisonment, or both. [paragraph 8.53]

9.29 The Commission recommends that a court would also have the power to make a disqualification order prohibiting a high managerial agent from holding high management positions in undertakings for a defined period where they have been convicted of the secondary offence. [paragraph 8.55]

9.30 The Commission recommends that the prosecution of an undertaking for corporate killing would not prevent an individual being prosecuted for manslaughter or another offence arising out of the same circumstances. [paragraph 8.57]

9.31 The Commission recommends that the offence of corporate killing should be limited in territorial scope to the death of a person within the State, whether the person was a citizen of Ireland or not and irrespective of the country of the undertaking’s formation. [paragraph 8.61]

**APPENDIX LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95

Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (Pl 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (Pl 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54

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