



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

**REPORT  
ON  
CORPORATE KILLING**

**(LRC 77-2005)**

**IRELAND**

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

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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 Act.

To date the Commission has published 75 Reports containing proposals for reform of the law; eleven Working Papers; Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix C to this Consultation Paper.

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The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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However, full responsibility for the content of this publication lies with the Commission.

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## INTRODUCTION

1 In October 2003, the Commission published its *Consultation Paper on Corporate Killing*<sup>1</sup> (“the Consultation Paper”). The Commission received a numerous submissions on the Consultation Paper and held a Seminar on Corporate Killing, at the Commission’s offices on 1 December 2004. This Report is the culmination of that research and consultation process. The research was prepared under the Commission’s Second Programme of Law Reform.<sup>2</sup>

2 The Consultation paper examined the scope of the debate on corporate killing and the current law in Ireland. It also reviewed the law in a number of other jurisdictions, most notably England and Wales and Australia. In the Consultation Paper the Commission considered a number of reform options and provisionally recommended that corporate liability for manslaughter be put on a statutory footing. The Commission is still of the view that a statutory definition of the offence is needed. The Commission also provisionally recommended that this be complimented by individual statutory liability for managers who were culpable in the causation of death and that the sentencing options available for a convicted corporate entity be expanded to include remedial orders, community service orders and adverse publicity orders in addition to fines. The Commission still holds these views and so this Report follows on from and develops those provisional recommendations. The Report is divided into five chapters.

3 Chapter 1 looks at the basis for corporate criminal liability for manslaughter. The chapter begins by examining the lacuna in the current law. It then discusses the role of the criminal law, the nature of corporate causation of death, and the mental element for corporate manslaughter. Next, the nature of corporate wrongdoing is considered and finally the type of body to which the offence should apply is defined.

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<sup>1</sup> LRC (CP 26-2003).

<sup>2</sup> *Second programme for examination of certain branches of the law with a view to their reform 2000-2007* (PN 9459) (December 2000).

4 Chapter 2 outlines the recommended statutory definition of corporate manslaughter. The definition is based around the common law offence of manslaughter by gross negligence.

5 Chapter 3 looks at the liability of individuals within the corporate entity. First, the liability of individuals for manslaughter is assessed and then derivative liability of individuals, who are not liable for manslaughter but are culpable to a degree, is examined.

6 Chapter 4 deals with sanctioning of corporate entities. The differences between corporate entities and individuals are discussed and an array of sentencing options is considered. These include not only fines but also remedial orders, community service orders and adverse publicity orders.

7 Chapter 5 looks at sentencing for individuals. First sentencing for individuals for manslaughter arising in a corporate context is discussed and secondly sentencing for the derivative individual offence outlined in Chapter 3 is considered.

8 Chapter 6 provides a summary of the recommendations made in this Report and the Appendix contains a draft Corporate Manslaughter bill based on the recommendations in this Report.

## CHAPTER 1 THE BASIS FOR REFORM OF THE LAW OF CORPORATE MANSLAUGHTER

### A Introduction

1.01 In this Chapter the Commission will consider the basis for reform of the law of corporate manslaughter in Ireland. The chapter begins with a consideration of the lacuna in the current law and a discussion of the role of criminal law in preventing corporate wrongdoing of this nature. The chapter then moves on to look at corporate causation of manslaughter, the mental element in corporate manslaughter and the effect of regulatory frameworks on corporate conduct. This is followed by a consideration of the nature of corporate wrongdoing and a discussion of the form of a newly defined offence of corporate manslaughter. The Chapter concludes with a definition of the types of body to which the offence should apply.

### B The lacuna in the current Irish law

1.02 It is well established in Irish law that a corporate entity can be criminally liable.<sup>1</sup> The principle pre-dates the foundation of the state; a number of pre-1922 statutes allowed for summary prosecution of bodies corporate.<sup>2</sup> Corporate criminal liability continued to develop over the course of the 20<sup>th</sup> Century. For example, section 13 of the *Restrictive Trade Practices Act 1953* and section 100 of the *Factories Act 1955* explicitly provide for corporate liability for offences under those Acts. The *Interpretation Act 1937* allows for companies to be tried for criminal offences in the same way as natural persons, both summarily and on indictment.<sup>3</sup>

1.03 Most of the earlier offences were offences of strict liability and did not require any detailed consideration of the corporate entity's 'state of

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<sup>1</sup> See Courtney *The Law of Private Companies* (2nd ed Butterworths 2002) at 175 and Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 910.

<sup>2</sup> The *Factories Act 1901* and the *Companies (Consolidation) Act 1908* both allowed for summary prosecution of companies for offences under those acts.

<sup>3</sup> See Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 2.08

mind'. More recent Irish legislation has specifically countenanced corporate criminal liability, not only for strict liability or 'regulatory' crimes, but also for crimes requiring a mental element. The *Criminal Justice (Theft and Fraud Offences) Act 2001*, the *Competition Act 2002* and the *Prevention of Corruption (Amendment) Act 2001*<sup>4</sup> allow for corporate liability for crimes which require proof of a mental element for conviction. These later Acts also provide for criminal liability of managers who contributed to the corporate offence.<sup>5</sup>

1.04 To the Commission's knowledge, there has never been a prosecution of a corporate entity for manslaughter in Ireland.<sup>6</sup> Such a prosecution is possible under the current law. As corporate entities can be held criminally liable,<sup>7</sup> a corporate body could be charged with gross negligence manslaughter.<sup>8</sup> However, the issue has yet to be considered by an Irish Court.

1.05 While the current law in Ireland does allow for a corporate prosecution for manslaughter, there is great uncertainty as to the precise form of that liability. No single method of attributing liability to a corporate entity has been found to be authoritative. The test used in England for corporate manslaughter is the identification doctrine.<sup>9</sup> This test has been cited with approval in two leading Irish cases.<sup>10</sup> An altogether different test

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<sup>4</sup> This Act was implementing the 1999 Council of Europe *Criminal Law Convention on Corruption*.

<sup>5</sup> *Criminal Justice (Theft and Fraud Offences) Act 2001* section 58; *Competition Act 2002* section 8(6); *Prevention of Corruption (Amendment) Act 2001* section 9. There is a similar provision in the *Safety Health and Welfare at Work Act 1989* section 48(19). For a discussion of the managerial offence under the 1989 Act see the Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 2.52-2.57.

<sup>6</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.04.

<sup>7</sup> Although a company cannot be held liable for certain crimes which it is incapable of committing such as bigamy or rape, see Courtney *The Law of Private Companies* (2nd ed Butterworths 2002) at 177. It is also highly doubtful that a corporate entity can be convicted of murder; see Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 3.04.

<sup>8</sup> The Irish law on gross negligence manslaughter is set out in the case of *The People (Attorney General) v Dunleavy* [1948] IR 95.

<sup>9</sup> *Tesco Supermarkets Ltd v Natrass* [1971] 2 All E R 127 (House of Lords). For a detailed discussion of the identification doctrine see Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.42-1.58.

<sup>10</sup> *Taylor v Smith* [1991] 1 IR 142 and *Superwood Holdings plc v Sun Alliance and London Insurance plc* [1995] 3 IR 303. It should be noted that neither case was concerned with criminal liability.

was used for corporate attribution by the Privy Council in *Meridian Global Funds (Asia) plc v Securities Commission*<sup>11</sup> and that test has been quoted with approval by the Irish High Court.<sup>12</sup> In addition to these two tests there are other English cases on corporate attribution, such as *R v British Steel*<sup>13</sup> or *Re Supply of Ready Mixed Concrete (no 2)*.<sup>14</sup> Each of these tests uses different constructions to hold corporate bodies criminally liable. If an Irish court were asked to consider a prosecution of a corporate entity for manslaughter it would be open to it to apply any one of these tests or devise a new test, depending on the circumstances of the individual case.

1.06 As has been shown, there is considerable ambiguity as to the nature of corporate criminal liability for manslaughter in Ireland. If a prosecution were to be brought the formulation of the liability would necessarily be dependent on the facts of that case. From the corporate entity's perspective the current ambiguities cannot be helpful; if corporate bodies and their managers have a clear understanding of what is required then it will be far easier for them to comply with the law.

1.07 A further concern is that the current state of the law may fall foul of the legality principle. McAuley and McCutcheon state the principle as "requiring clear and precise *legislative* rules which effectively eliminate the need for creative interpretation by the judges."<sup>15</sup>

1.08 *The Commission recommends that, as the current law of corporate liability for manslaughter does not provide a clear basis for constructing liability, a new basis, contained in legislative form, is necessary.*

#### **(1) The Paradox of Size**

1.09 A significant difficulty which must be overcome in formulating a test for corporate manslaughter is the 'paradox of size'<sup>16</sup>. Cases of corporate manslaughter will necessarily involve organisational problems and failures of management. Where systems are badly constructed and clear chains of responsibility are not in place, accidents will be more likely to occur. However, this also makes it more difficult to assess the liability of the corporate entity; the larger the entity is, the more onerous the task of tracing

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<sup>11</sup> [1995] 3 All E R 918.

<sup>12</sup> *Crofter Properties Ltd v Genport Limited* High Court (McCracken J) 23 April 2002.

<sup>13</sup> [1995] ICR 586.

<sup>14</sup> [1995] 1 All Eng Rep 135.

<sup>15</sup> McAuley & McCutcheon *Criminal Liability* (Round Hall 2000).

<sup>16</sup> See Wells "The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity" [1996] Crim LR 545, at 550-552.

responsibility becomes. This problem is particularly acute with the strict application of the identification doctrine in England. As Wells puts it: "... [t]he larger and more diffuse the company structure, the easier it will be for it to avoid liability."<sup>17</sup>

1.10 The difficulty is well illustrated by two English cases. In *R v Kite and OLL Ltd*<sup>18</sup> a one-man company was convicted of manslaughter when the managing director was convicted. This contrasts with the outcome of *P&O European Ferries (Dover) Ltd*<sup>19</sup> which arose from a ferry disaster in Zebruggee harbour in which 188 people died. The report of the official inquiry<sup>20</sup> was highly disparaging of the company stating that "[f]rom top to bottom the body corporate was infected with the disease of sloppiness."<sup>21</sup> Notwithstanding the findings of the formal investigation that the company's procedures were severely lacking, the company avoided liability as no one human person could be found liable for manslaughter. The lack of a clear system of responsibility, which was the cause of the disaster in the first place, also led to the dismissal of the case.<sup>22</sup>

1.11 It could be argued that the *Kite and OLL* case was not a corporate manslaughter case at all but rather a personal manslaughter case relating to the conduct of a small enterprise that happened to be incorporated. It is comparable to the Irish case *People (DPP) v Cullagh*<sup>23</sup> which was also a gross negligence manslaughter conviction arising out of the operation of a small business.<sup>24</sup> The Commission has concluded however that these cases illustrate, by way of contrast with the *P&O* case that there is a need for a statutory formulation which should take account of different sizes of corporate entities to which the offence would apply and recommends accordingly.

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<sup>17</sup> Wells "Manslaughter and Corporate Crime" (1989) (139)(6415) *New Law Journal* 931. See also Wells "The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity" [1996] *Crim LR* 545, at 550-552.

<sup>18</sup> Winchester Crown Court, 8 December 1994; *The Independent* 9 December 1994.

<sup>19</sup> (1991) 93 Cr App R 72.

<sup>20</sup> Sheen *Report of Investigation of Herald of Free Enterprise* (Report of Court No. 8074 HMSO 1987).

<sup>21</sup> *Ibid* at 14.

<sup>22</sup> Bergman "Whither Corporate Manslaughter?" (1991) (141)(6523) *New Law Journal* 1381.

<sup>23</sup> Court of Criminal Appeal (Murphy, O'Higgins and Kelly JJ) 15 March 1999.

<sup>24</sup> For a detailed consideration of the problems of prosecuting very small enterprises with the corporate offence, see Sullivan "Corporate Killing-Some Government Proposals" [2001] *Crim LR* 31, at 36-38.



1.12 *The Commission is of the view that a statutory formulation for corporate killing should take account of different sizes of corporate entities to which the offence would apply.*

### **C The role of the criminal law**

1.13 Having established that a prosecution of a corporate entity for manslaughter is possible under the current law in Ireland, it is useful to consider whether the criminal law is appropriate for dealing with corporate killing.

1.14 The Consultation Paper outlined the purposes of criminal law as the moral objective of denouncing conduct that is socially unacceptable and the utilitarian aim of preventing such conduct.<sup>25</sup> As Ashworth puts it “[t]o criminalize a certain kind of conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it.”<sup>26</sup> It is important to assess how these goals will be served by corporate liability for manslaughter.<sup>27</sup>

#### **(1) Denunciation of wrongdoing**

1.15 The criminal law is a very powerful form of public condemnation. As such it is only used in the most serious circumstances. “...[O]ne of the main functions of the criminal law is to express the *degree* of wrongdoing, not simply the fact of wrongdoing.”<sup>28</sup> Death is irreparable and the culpable causation of death is the most serious offence in the criminal calendar.<sup>29</sup> Where a corporate entity is responsible for a death, there is a clear need for an expression of public condemnation.

1.16 In the Consultation Paper the Commission concluded that other means of liability, such as tort, are not sufficient to express society’s opprobrium for corporate manslaughter.<sup>30</sup> Tort does not involve the requisite level of public censure and whether or not liability attaches will be

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<sup>25</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.13. See also O’Malley *Sentencing Law and Practice* (Round Hall 2000) at 1-22 and 55-82.

<sup>26</sup> Ashworth *Principles of Criminal Law* (2nd ed Oxford University Press 1995) at 22.

<sup>27</sup> See Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.13-1.16.

<sup>28</sup> *Op cit* fn26 at 35.

<sup>29</sup> *Op cit* fn26 at 254.

<sup>30</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 7.05-7.11.

dependent on a bereaved family member instituting a civil action.<sup>31</sup> If the gross negligence of a human person results in death, that person will be held criminally liable. In the Commission's view, it would be inconsistent not to hold a legal person similarly liable.

**(2) Deterrence**

1.17 In addition to the need for a clear statement of public prohibition, criminal liability should act as a deterrent to the commission of the prohibited conduct. For corporate criminal liability for manslaughter to be effective, it must prevent further corporate killing.<sup>32</sup>

1.18 Theoretically, criminal punishment serves as a deterrent in two ways. The individual offender is deterred from further offending by the experience of punishment and potential offenders are deterred from offending by the example of the convicted offender's punishment.<sup>33</sup> Corporate liability for manslaughter needs to deter both the individual corporate convict from recidivism and encourage improvement in the conduct of other corporate bodies.

1.19 It is important to note that corporations do not behave in the same way that human persons do. While human motivations can be many and varied, a primary motivation for the commercial company is the maximisation of profit. There are also non-monetary considerations which motivate corporate managers.<sup>34</sup> It has been shown that criminal prosecution and punishment can motivate corporations to change their practices. Fisse cites a number of examples from the US where criminal prosecution has prompted dramatic improvements in corporate behaviour.<sup>35</sup>

1.20 However, where the punishment on conviction is a fine, there is a risk that corporate entities, particularly commercial companies, will merely see prosecutions as part of the cost of doing business.<sup>36</sup> The introduction of

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<sup>31</sup> See Clarkson "Corporate Culpability" [1998] 2 Web JCLI and Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 7.06.

<sup>32</sup> See Ashworth *Principles of Criminal Law* (2nd ed Oxford University Press 1995) at 15.

<sup>33</sup> See O'Malley *Sentencing Law and Practice* (Round Hall 2000) at 61-62.

<sup>34</sup> Fisse & Braithwaite *Corporations Crime and Accountability* (Cambridge University Press 1993) at 81-88 and Fisse "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 *Southern California Law Review* 1141.

<sup>35</sup> Fisse "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 *Southern California Law Review* 1141, at 1161.

<sup>36</sup> See Todarello "Corporations Don't Kill People-People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill" (2003) 23 *New York Law School Journal of International and Comparative Law* 481. Another drawback of fines is

a wider range of possible sentences can counteract this mindset and bring about real reform in corporate entities and increase the deterrent value of corporate criminal liability.<sup>37</sup> For example remedial orders<sup>38</sup> can be used to improve procedures that have been found to be lacking and to be a cause of death. Sentencing options were considered in the Consultation Paper<sup>39</sup> and are discussed in detail in Chapter 4 of this Report.

1.21 Deterrence can be reinforced by public censure. A clear public condemnation of an action will inevitably result in a certain degree of animosity towards the offender within the community. Others may be deterred from engaging in the prohibited action by the threat of bringing such stigma on themselves. This is particularly acute in the context of a commercial corporation, where public perceptions can have a profound effect on the economic wellbeing of the company.<sup>40</sup>

### **(3) Consistency of criminal liability**

1.22 A final argument in favour of corporate criminal liability for homicide is consistency. If corporate entities are to be treated as separate entities for the purposes of owning property and suing others, it would seem inconsistent to exempt them from criminal liability for an offence as serious as homicide. If they are to derive benefit from being treated as a single person in law, then they must also suffer any attendant detriment attaching to that status.<sup>41</sup> A similar argument could be made regarding corporate liability for murder; however the Commission is of the view that the types of situations that could give rise to corporate liability for death are far more

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that to reflect the damage done by the offence they may have to be so large as to bankrupt the company. This is known as the ‘deterrence trap’, see Coffee “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” [1981] *Michigan Law Review* 386. See also Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.16.

<sup>37</sup> See Fisse & Braithwaite *Corporations Crime and Accountability* (Cambridge University Press 1993) at 41-44. For an examination of alternative sentencing options see Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.13-8.48 and below at paragraphs 4.19-4.71.

<sup>38</sup> See Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.17-8.31 and below at paragraphs 4.22-4.46.

<sup>39</sup> Consultation Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.02-8.48.

<sup>40</sup> See Edwards “Corporate Killers” (2001) 13 *Australian Journal of Corporate Law* 1, at 12 and Gardiner “Corporate Manslaughter” (2000) *Commercial Law Practitioner* 218, at 220.

<sup>41</sup> “*Qui sensit commodum debet sentire et onus* (he who has obtained an advantage ought to bear the disadvantage as well).” Slapper “Crime without conviction” (1992) 142 6539 *New Law Journal* 192 at 192.

likely to involve negligence than an intention to kill or cause serious injury. Therefore, this report focuses on corporate liability for manslaughter. The issue of corporate liability for murder could be revisited at a later stage in the context of an examination of corporate criminal liability generally, perhaps as part of the ongoing codification project.<sup>42</sup>

**(4) Drawbacks of criminal law**

1.23 There is a concern that by focusing on death, corporate criminal liability for homicide is merely punishing corporate entities' unsafe practices after the happenstance of a fatality, rather than looking at unsafe practices with a view towards prevention generally.<sup>43</sup> While the Commission appreciates this viewpoint, the drastic effects of a fatality mean that it must be taken more seriously. Regulatory bodies, such as the Health and Safety Authority already monitors corporate conduct and can make prohibition orders under the *Safety Health and Welfare at Work Act 1989* ("The 1989 Act"). It is envisaged that corporate liability for manslaughter should complement health and safety legislation.<sup>44</sup> It is also worth noting that The 1989 Act only applies to work related deaths and would not cover instances where a corporation was responsible for a fatality through the sale of dangerous products, e.g. pharmaceuticals. The regulatory framework in which corporations operate will be examined further below.<sup>45</sup>

1.24 It was suggested in a number of submissions on the Consultation Paper that there is a risk that corporate liability for manslaughter could decrease investment and dramatically increase insurance premiums. The Commission is not convinced this is reason enough not to hold corporate entities criminally liable for manslaughter. First, tort liability and liability under regulatory regimes such as the *Safety Health and Welfare at Work Act 2005* can already result in very substantial financial liability for corporate entities. Secondly if there is a difficulty and insurance premiums do increase, that is a problem with the insurance system rather than a problem with criminal liability and it is not reason enough to abandon the protection that the criminal law affords individuals.

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<sup>42</sup> See *Codifying the Criminal Law* Report of the Expert Group on the Codification of the Criminal Law (McAuley Report) Department of Justice Equality and Law Reform, November 2004.

<sup>43</sup> See Daniels & Smith "Manslaughter and Corporate Immunity" (2000) (150)(6934) *New Law Journal* 656.

<sup>44</sup> This is considered in more detail below at paragraphs 2.40-2.43.

<sup>45</sup> See below at paragraphs 1.55-1.67.

1.25 The Commission is of the view that on grounds of public censure, deterrence and consistency, criminal liability for manslaughter is an appropriate means of dealing with death caused by corporate wrongdoing.

1.26 *The Commission is of the view that criminal liability for manslaughter is an appropriate means of dealing with death caused by corporate wrongdoing.*

## **D Corporate causation of homicide**

1.27 As a preliminary issue, it must be established how corporations commit crimes and particularly, how they kill. Tracing corporate causation becomes more complicated with a larger organisation and needs to be framed in a way that understands corporate action. The *actus reus* for a corporate offence should be equivalent to the *actus reus* of the common law offence, i.e. that the negligent conduct of the defendant caused the death of the victim.<sup>46</sup> However, the precise manner of that causation will often be different for a corporate defendant.

1.28 A corporation must act through its employees and agents.<sup>47</sup> The manner in which a corporate entity commits manslaughter can be likened to the manner in which a human person can be liable as a principal for participation in manslaughter under section 7(1) of the *Criminal Law Act 1997*.<sup>48</sup> With this in mind, it is important to look at causation broadly when assessing corporate killing.

1.29 The following case studies are considered solely for the purposes of assessing corporate causation, *mens rea* is not discussed. In examining these cases the Commission is in no way attempting to suggest that criminal liability should attach to any individual or group. The Commission's aim is merely to assess the manner in which corporate action can contribute to the causation of death.

### **(1) Health and Safety Authority Statistics**

1.30 Health and Safety Authority Statistics show that in the period 1998-2004 a total of 88 corporate entities were convicted of health and safety offences arising out of incidents where a death occurred.<sup>49</sup> This

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<sup>46</sup> See *The People (Attorney General) v Dunleavy* [1948] IR 95.

<sup>47</sup> See Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.29.

<sup>48</sup> See also Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 206-207 and McAuley & McCutcheon *Criminal Liability* (Round Hall 2000) at 453-501.

<sup>49</sup> National Authority for Occupational Safety and Health, *Annual Reports 1998-2004*, available at [www.hsa.ie](http://www.hsa.ie). Some of these cases are on appeal.

illustrates that corporate bodies are regularly responsible for fatalities. Many defendants in prosecutions under the *Safety Health and Welfare at Work Act 1989* are corporate entities.<sup>50</sup>

1.31 In 2002 the Health and Safety Authority published a survey of deaths in the construction industry in the period 1991-2001.<sup>51</sup> The survey used two different models of causation<sup>52</sup> and found that in fatal accidents on building sites, approximately 22% were primarily attributable to the injured party, 28% were caused by problems with the management of the construction company at headquarters and 47% were caused by site management deficiencies.

**(2) *Blood Transfusion Service Board (BTSB)***

1.32 The Finlay Report<sup>53</sup> which investigated the infection of over 1600 people with Hepatitis C as a result of infected blood products, found numerous institutional factors which were directly linked to the deaths. The BTSB had been in breach of its own rules; it had failed to properly react to and investigate reports and complaints made to it; and it had failed to recall contaminated batches of the blood product. The report stated that the responsibility for these failures rested to a major extent with certain senior medical officials within the BTSB. The National Drugs Advisory Board and the Department of Health were found to have inadequately supervised the BTSB.

**(3) *Whiddy Island***

1.33 The inquiry into the *Whiddy Island* disaster found that had the ship been properly maintained and had the proper instruments been available to the captain, the disaster would not have occurred. A decision had been taken by the owner of the vessel, Total, at board of management level, not to renew longitudinals and cathode protection for economic reasons. These renewals would have prevented the disaster.<sup>54</sup>

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<sup>50</sup> National Authority for Occupational Safety and Health, *Annual Reports 1998-2004*, available at [www.hsa.ie](http://www.hsa.ie).

<sup>51</sup> Dalton, M *Fatal Accidents in the Irish Construction Industry 1991-2001: A Survey of Contributory Factors* Health and Safety Authority Dublin 2002.

<sup>52</sup> These were Reason's Framework for Accident Causation and Constraint-Response Theory, Dalton *Fatal Accidents in the Irish Construction Industry 1991-2001: A Survey of Contributory Factors* Health and Safety Authority Dublin 2002 at pages 28-29.

<sup>53</sup> Finlay, *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Dublin Stationery Office 1997 Pn.3695).

<sup>54</sup> Costello *Report of the Tribunal of Inquiry: Disaster at Whiddy Island, Bantry, Co. Cork* (Prl. 891 1980) at 205.

**(4) Buttevant**

1.34 Similarly the inquiries into the *Buttevant* rail crash found the organisational factors to be instrumental. The procedures relating to unconnected points and manual level crossings, the procedures for informing staff of changes to the operating rules, the long working hours of employees and the level of continuing training (refresher courses) were all found to be deficient and to have contributed to the disaster. The report also noted the dangers of timber carriages and their role in causing the fatalities.<sup>55</sup>

**(5) Cherryville**

1.35 The 1983 *Cherryville* rail crash occurred when a train, which had run out of fuel and stopped on the tracks at Cherryville junction in Co. Kildare, was hit by a second train from the rear.<sup>56</sup> Seven people were killed and fifty-five were injured. The official investigation found a several organisational factors to have been substantial causes of the crash. These included: CIE rules that allowed drivers to proceed past red signals in certain circumstances; ambiguity of responsibility between the driver and the guard; and inadequate re-fuelling procedures.

1.36 The other causes of the accident related to technology and equipment and included: unserviceable communications systems; the use of timber carriages (as had happened at *Buttevant* three years earlier); paraffin tail lamps which were not visible to trains approaching from the rear; unreliable fuel gauges and doors which locked when stationary, impeding escape. Remedying these causes would have had resource implications. It may not have been within the means of CIE at the time to upgrade unsafe equipment but it shows that the use of unsafe equipment can lead to death. Where an organisation has the money to upgrade and the old systems are clearly dangerous it could be argued that the organisation is negligent in not doing so.

1.37 It is not the Commission's desire to attribute blame for this disaster; however the *Cherryville* case is instructive in looking at how corporate action and inaction can lead to death. A number of problems within the organisation combined in this instance to create a tragedy. It is possible that they were honest mistakes (the mental element of manslaughter

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<sup>55</sup> Feehan & Budd *Report of the Investigation into the Accident on the CIE Railway at Buttevant, Co. Cork on 1<sup>st</sup> August 1980* April 1981 (Dublin Stationery Office No T28 1985) at 32-38.

<sup>56</sup> Feehan and Budd *Report of the investigation into the Railway Accident near Cherryville Junction, Co Kildare on 21<sup>st</sup> Augst 1983* (Dublin, Stationery Office No T28 1985).

will be considered below) but from a pure causation analysis, it may be said that the accident was caused by a combination of acts and omissions attributable to CIE.

**(6) Stardust**

1.38 The inquiry into the Fire at the Stardust disco found that there were serious errors and omissions in the conversion of the building and that there were breaches of requirements of the Chief Fire Officer, relevant by-laws and the Fire Protection Standards of the Department of the Environment all of which contributed to the causation of 48 deaths. The building was owned by a private company, Scotts Food Ltd.<sup>57</sup>

**(7) Other Disasters**

1.39 Official investigations in other jurisdictions have also found organisational problems to be significant causes in major tragedies. Both the *Piper Alpha* inquiry<sup>58</sup> and the *Columbia Shuttle* investigation<sup>59</sup> mentioned organisational causes and were critical of practice leading up to the respective tragedies.

**(8) Corporate nature of large scale disasters**

1.40 All of the above cases show that organisational and management factors were instrumental in causing the deaths. Whether such organisational or management factors are due to systemic failure or individual negligence will be considered in more detail below. However, from the point of view of causation, it is clear that these are problems within the corporation that arise *because it is a corporation*. None of the above tragedies could have been caused by individuals acting alone or operating small businesses. The scale of the enterprises and the operations in question were such that they could only be achieved by an organisation, and consequently, the tragedies could only be caused by an organisation. By tracing the causes of these disasters it becomes clear that organisations kill through bad practice and bad organisation.

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<sup>57</sup> *Report of the Tribunal of Inquiry on the Fire at Stardust, Artane, Dublin on 14 February 1981* (P1 853).

<sup>58</sup> Cullen Report *Public Inquiry into the Piper Alpha Disaster* (HMSO London 1990) Cm 1310. See Also Paté-Cornell "Learning from the Piper Alpha Accident: A Postmortem Analysis of Technical and Organisational Factors" (1993)(13)(2) *Risk Analysis* 215.

<sup>59</sup> Final Report of the *Columbia Accident Investigation Board* August 2003 available at: [www.caib.us](http://www.caib.us).



1.41 *The Commission is of the view that negligent management and organisation within a corporate entity can be substantial factors in the causation of death.*

## **E The mental element in corporate homicide**

1.42 As discussed in the Consultation Paper, it is highly doubtful that a corporate entity can be convicted of murder.<sup>60</sup> All homicides that are not murder are classified as manslaughter.<sup>61</sup> There are two categories of manslaughter, voluntary and involuntary. Voluntary manslaughter is “in essence an intentional killing under extenuating circumstances.”<sup>62</sup> Involuntary manslaughter is divided into two sub-categories, manslaughter by a criminal and dangerous act and manslaughter by gross negligence.<sup>63</sup> The most appropriate charge where a corporate entity is responsible for a death would be gross negligence manslaughter.

### **(1) Gross Negligence Manslaughter**

1.43 The leading case in Ireland is *The People (AG) v Dunleavy*,<sup>64</sup> in which the test for gross negligence was set out as follows:

- 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.

The very high degree of objective negligence involving a high degree of risk or likelihood of substantial personal injury to others (points 1, 3 and 4 of the test above) constitute the mental element which would be applied to a corporate entity.

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<sup>60</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 3.04

<sup>61</sup> Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 352.

<sup>62</sup> Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 542.

<sup>63</sup> See Smith & Hogan *Criminal Law* (10<sup>th</sup> ed LexisNexis 2002) at 378-388. For a consideration of the law of manslaughter in the corporate context see Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 3.05-3.14.

<sup>64</sup> [1948] IR 95.

**(2) Categories of the mental element**

1.44 In order to put the concept of gross negligence in context it is instructive to look at the different categories of mental element. They are intent, recklessness, gross negligence and strict liability. Where an accused actually has a higher state of *mens rea* this will suffice to convict for an offence requiring a lower state; i.e. an accused who acted with intent has fulfilled the *mens rea* requirement for recklessness but not *vice versa*.<sup>65</sup>

**(a) Intention (Specific Intent)**

1.45 An accused person is said to have acted with intention where their purpose is the *actus reus* of the offence or they are aware that the *actus reus* will result.<sup>66</sup> This is the mental element in murder. The standard applied is “Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.”<sup>67</sup> The English case of *R v ICR Haulage Ltd*<sup>68</sup> provides a good example of corporate intent. In that case the corporate defendant was charged with conspiring to defraud, a common law misdemeanour, the mental element of which is intent. The Court of Criminal Appeal held that the intent of the managing director could be attributed to the defendant company.

**(b) Recklessness (Basic intent)**

1.46 Recklessness is a lesser state of blameworthiness than intent. “Recklessness can be simply defined as the conscious running of an unjustifiable risk.”<sup>69</sup> Unlike intent, recklessness does not require that the accused consciously bring about the result; merely that they consciously ran the risk that the result would come about. This test is subjective and looks at

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<sup>65</sup> Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 53. See also Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 26-27. For a discussion of the levels of *mens rea* in the corporate context, see Khanna “Corporate Liability Standards: When should Corporations be Held Criminally Liable?” (2000) 37 *American Criminal Law Review* 1239, at 1246-1248

<sup>66</sup> Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 26. See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP17-2001) at paragraphs 2.02-2.18.

<sup>67</sup> *Criminal Justice Act 1964* section 4.

<sup>68</sup> [1944] 1 All ER 691. See also *DPP v Kent & Sussex Contractors Ltd* [1944] 1 KB 146 and *Moore v I Bresler Ltd* [1944] 2 KB 515. For a discussion of these cases see Pinto & Evans *Corporate Criminal Liability* (Sweet & Maxwell 2003) at 39-46.

<sup>69</sup> Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 45. There was some controversy in England over whether the test involved conscious or inadvertent running of a risk. This is now settled by the case of *R v G* [2003] 4 All ER 765, which held that the risk must be consciously run.

the state of mind of the offender. The leading case in Ireland is *DPP v Murray*<sup>70</sup> which sets out the test for recklessness in Ireland as follows:

“A person acts recklessly with respect 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.”<sup>71</sup>

1.47 Recklessness is the mental element for manslaughter by an unlawful and dangerous act. For example, recklessness is the mental element for assault under the *Non Fatal Offences Against the Person Act 1997* is recklessness. There is no requirement that the accused actually intend the level of harm caused, even if the victim dies.<sup>72</sup> An example of recklessness in the corporate context would be handling stolen property under section 17 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*. As discussed above, corporate entities can be criminally liable under this act.

**(c) Gross negligence**

1.48 The test for gross negligence is as laid out in *Dunleavy*, cited above.<sup>73</sup> Like recklessness it involves the assumption of a risk, but the crucial distinction is that the test is objective. Whether the defendant was actually aware of the risk is irrelevant, providing the risk would have been obvious to a reasonable person.<sup>74</sup> Gross negligence differs from ordinary negligence in tort. The degree of negligence required for gross negligence is considerably higher. Gross negligence is a mental element that is only applicable to manslaughter.

**(d) Strict liability**

1.49 Strict liability does not require the offender to have any particular state of mind. The *actus reus* is proof enough for strict liability. However there is a defence of due diligence, so if it has been shown that the *actus reus* has been committed by the accused, the accused may respond by pleading that they took all reasonable care in preventing the commission of the offence. Strict liability is not applicable to any common law homicide crimes.<sup>75</sup> A number of the offences under section 48 of the *Safety Health*

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<sup>70</sup> [1977] IR 360.

<sup>71</sup> This is taken from the American Model Penal Code section 2.02(2)(c), and was cited with approval by Henchy J at 403.

<sup>72</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 78.

<sup>73</sup> See above at paragraph 1.43.

<sup>74</sup> Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 26.

<sup>75</sup> Charleton *Offences against the person* (Round Hall 1992) at 3-4.

and *Welfare at Work Act 2005* are strict liability offences. These can be committed by a body corporate.

**(3) Discussion**

**(a) Distinction between strict liability and gross negligence**

1.50 Strict liability offences under statutory schemes are generally perceived as “regulation” and not “proper crime” in the sense that strict liability is wrong because it is prohibited (*malum prohibitum*) whereas common law offences such as rape or murder are inherently wrong (*mala in se*).<sup>76</sup> Strict liability does not look to the decision-making process at all, merely the result. Gross negligence examines the decision making process and holds it accountable to an objective external standard. This is the standard of culpability to which corporate manslaughter defendants will be held. Furthermore, gross negligence is only applicable to manslaughter, the culpable killing of a human being, which is acknowledged as being the most serious offence in the criminal calendar.<sup>77</sup> Structuring a clear definition for corporate liability for gross negligence manslaughter is not to be confused with the creation of a new regulatory strict liability offence.

**(b) Distinction between gross negligence and recklessness or intent**

1.51 An important point to note is that this Report is only concerned with corporate liability for gross negligence. Gross negligence involves the taking of an unjustifiable risk which would have been obvious to a reasonable person. This is the criminalisation of an extreme form of inadvertence. Unlike intention (specific intent) and recklessness (basic intent), gross negligence does not require any understanding of the subjective mind of the offender, merely that their inadvertence to foreseeable risk was on such a scale that it can be considered egregious enough to warrant a criminal sanction. The risk in question is of a type that involves a substantial likelihood of death or serious personal harm. The key factors here are inadvertence of a high degree and the foreseeability of the risk. This is, to some degree anomalous in criminal law. Intent and recklessness involve an examination of the subjective state of mind of the offender that may be less suited to an assessment of corporate decision making than gross negligence. Gross negligence is closer to what Wells calls “accountability”, that is the requirement that corporate decision making ensure certain basic standards are met.

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<sup>76</sup> Wells *Corporations and Criminal Responsibility* (Oxford University Press 2001) at 21.

<sup>77</sup> Ashworth *Principles of Criminal Law* (2nd ed Oxford University Press 1995) at 254

**(c) Reasonableness**

1.52 Gross negligence manslaughter under the *Dunleavy* principles involves a test of reasonableness. In the *Dunleavy* case this was stated as a failure to act as a reasonable driver would have. Therefore, in order to apply this test to a corporate body the test will need to be that of a reasonable corporate entity or that of a reasonable corporate manager. It may be easy for a jury to assess the reasonableness of the conduct of a driver since most potential jurors have been road users at some point. However the same cannot be said of corporate management. It can be a highly specialised area and the line between reasonable and unreasonable may not always be entirely clear cut. Therefore there may be a need for expert testimony. However, there is no reason why a neurosurgeon or a nuclear physicist could not be prosecuted for gross negligence manslaughter arising out of their professional endeavours if it were warranted. In the Consultation Paper the Commission noted that “[g]ross negligence manslaughter is particularly applicable where the accused is engaged in activities requiring special skill or care”.<sup>78</sup> The fact that behaviour is highly specialised does not exempt it from the requirement that it be reasonable.<sup>79</sup> Furthermore, the precise definition of what is reasonable is of less concern since the gross negligence involves falling so far below that standard.

1.53 *The Commission recommends that the mental element of corporate liability for homicide should be equivalent to the existing common law offence of manslaughter by gross negligence.*

**(d) Negligence as a sentencing issue under strict liability H&S Law**

1.54 The *Safety Health and Welfare at Work Act 2005* provides for a managerial offence that allows for a custodial sentence. While it is an offence of strict liability, it is likely that a jail term will only be imposed where there is some high level of culpability. Negligence has been a sentencing issue in some strict liability health and safety cases. Most notable are the dicta of Judge Raymond Groarke in the *People (DPP) v Roseberry Construction Co Ltd*<sup>80</sup> and *People (DPP) v Smurfit News Press Ltd*,<sup>81</sup> where he mentioned "carelessness of an extreme nature"<sup>82</sup> and "cavalier attitude

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<sup>78</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 3.06.

<sup>79</sup> The reasonableness of corporate behaviour is considered in detail below at paragraphs 2.23-2.56.

<sup>80</sup> Naas Circuit Criminal Court 21 November 2001.

<sup>81</sup> Trim Circuit Criminal Court 29 October 2004.

<sup>82</sup> “Building firm and director fined £240,000 for men's deaths on site” *The Irish Times* 22 November 2001.

towards safety"<sup>83</sup> when sentencing the defendants for offences under the *Safety Health and Welfare at Work Act 1989*.

## **F Corporate assurance systems**

### **(1) Corporate bodies and compliance**

1.55 The existing law of manslaughter was originally developed to apply to individuals, though the common law has proved sufficiently flexible to apply it by analogy to corporate bodies (at least in certain common law jurisdictions). The Commission is aware that, in its transfer to the corporate context, there are a number of difficulties as far as the issue of attribution of criminal liability to corporate bodies is concerned. In addition, the Commission is aware that corporate bodies operate in a different regulatory context by comparison with individuals. There are, of course, some similarities. Thus, individuals and corporate bodies are, in general, subject to general taxation laws. But there are many differences in the application of such laws which are worthy of mention. Thus, large corporate bodies may be required by law to engage in certain processes to ensure compliance with the taxation code, such as the need to provide external validation of their tax compliance through an external auditor, whereas an individual may not always be subject to such external validation requirements. Without engaging in a detailed exposition of the differences between the legal regulation of corporate bodies as opposed to individuals, the Commission notes that existing law involves an increasing emphasis on the need for corporate entities to ensure that specific processes are in place to ensure compliance with the law. To put it simply, a corporate body and an individual may equally be prosecuted for committing an offence under environmental protection legislation, but a corporate body may be required to have in place a pollution prevention policy and strategy, whereas an individual is not.

1.56 The Commission is also conscious that, increasingly, corporate entities operate day-to-day on the basis of written policies and procedures, some of which arise from legislative requirements (such as product safety, occupational safety or environmental safety laws) and some of which arise as a matter of 'voluntary' market forces (such as 'total quality management', 'world class manufacturing' or 'strategic management initiatives'). This context marks the 'life' of corporate bodies as different from the life of individuals, who may not always plan their life and actions on the basis of prior written quality assurance systems.

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<sup>83</sup> "Smurfit fined €1m for safety breach" *The Irish Times* 30 October 2004.

**(2) *Regulatory control in general***

1.57 In this respect, the Commission acknowledges the importance of framing its proposal on corporate manslaughter in the context of the legislative and market environment in which corporate bodies operate. In the specific context of various regulatory contexts, the stated purpose of 'regulation' is to prevent adverse events, whether injury or death arising from 'unsafe' products or 'unsafe' occupational conditions, to take two examples. In the context of pharmaceutical products, virtually all developed States have in place regulatory bodies which aim to prevent the placing on the market of unsafe medical products.

**(3) *National regulatory controls***

1.58 Thus, the Irish Medicines Board (IMB) or the United States Food and Drug Administration (FDA) engage in extensive regulatory market surveillance on proposed pharmaceutical products in order to ensure, to a high legal standard, that unsafe products are not placed on the market. Such regulatory bodies owe their existence, to a large extent, to the pharmaceutical scandals of previous generations. While there are regular suggestions that they do not succeed in preventing unsafe products from being placed on the market in this generation, the standards they apply indicate a more stringent approach than might have been the case in the past.

1.59 In the context of medical treatment, the establishment in 2005 of an interim Irish Health Information and Quality Authority (HIQA) indicates the need for a similar form of assurance in respect of the delivery of medical treatment and products.

1.60 The National Standards Authority of Ireland (NSAI) is authorised to develop national standards (IS standards) aimed at ensuring a high level of protection across a range of products. Similarly, the consumer protection role of the Office of the Director of Consumer Affairs (ODCA) has an important role in ensuring, for example, that unsafe toys, which might cause injury or death, are not placed on the market. The Health and Safety Authority (HSA) have a similar role in the context of the prevention of injuries and death in places of work.

**(4) *International regulatory controls and standards***

1.61 At EU level, many of the national standards developed by bodies such as the NSAI are being superseded by regional standards, such as EN standards which are associated with European technical standards Directives. EU Members States are, in turn, required to implement these technical standards Directives in their national laws.

1.62 Indeed, in the context of globalised trading, an emerging global standards context is emerging, mediated through the World Trade

Organisation (WTO) and the International Standardization Organisation (ISO).

**(5) Assurance systems for corporate bodies**

1.63 The regulatory bodies referred to have a specific statutory obligation placed on them to prevent injury or death in the context of the remit conferred on them. In a number of respects, this duty is given effect to by requiring corporate bodies which they regulate to ensure that certain written documented processes are in place to exhibit explicitly that the corporate bodies are complying with the legal standards imposed on them by law.

1.64 In addition to such specific legal obligations under product safety or occupational safety laws, the Commission is conscious that a number of other assurance systems or schemes have been developed in recent years. These are intended to provide an element of external assurance that certain critical decision-making processes are carried out to an optimal standard of prevention. By way of example, many corporate bodies have prepared quality assurance systems which attest to internal controls which provide a certain level of protection. In addition, market-driven standards, such as IS/EN/ISO 9000, require corporate bodies to provide a degree of external assurance by engaging external auditors to review the internal standards which have been put in place.

**(6) Accreditation: auditing the auditors**

1.65 In any such arrangement, the issue arises as to who guards the guardians, or in this context, who audits the auditors. In this respect, it has become increasingly common to put in place a system usually referred to as accreditation, by which external auditors must be registered with a national accreditation body, which provides a further level of protection for the assurance systems put in place. In this jurisdiction, the Irish National Accreditation Board (INAB) performs this function. Again, to provide an example, in the context of a road building project, an issue may arise as to the appropriate stress-testing of a specific load-bearing element of the project, for example, the supports for a bridge. The civil engineering company responsible for this element of the project will be required to ensure that the concrete to be used in this bridge is stress-tested in a laboratory that conforms to the relevant ISO Standard for testing laboratories, which provides an element of internal assurance. In addition, that laboratory must be externally audited by auditors who are competent in the requirements of this standard: this provides an element of external assurance. Those external auditors must, in turn, be accredited with INAB, which provides a further element of assurance.



**(7) Assurance systems and reasonableness**

1.66 The Commission considers that assurance should inform in some respects the analysis of corporate behaviour. Thus, it might be argued that, where an appropriately validated assurance system is in place, a corporate body can be said to have behaved in a reasonable manner, or at least that it had not behaved in a grossly negligent manner, if it can be established that it made all due efforts to put in place and implement such a system. However, it is important, when considering what behaviour is reasonable to avoid the creation of a bare compliance culture. It is crucially important that organisations take direct responsibility for their actions in the conduct of affairs. It would be counter-productive to provide a generic checklist for all organisations. What constitutes reasonable behaviour will still depend, to a large extent, on the facts of the instant case and on the type of organisation involved.

1.67 *The Commission recommends that in assessing the reasonableness of corporate behaviour, consideration should be given to the regulatory framework in which the corporate entity was operating and the assurance systems in place at the time of the death.*

**(8) Concluding comments on the regulatory environment**

1.68 The Commission is conscious that any proposal for reform of the law in this area must have regard to this general regulatory background. Indeed, the Commission is aware that the provisional recommendations made in its *Consultation Paper on Corporate Killing*<sup>84</sup> had some influence on the drafting of what became the *Safety, Health and Welfare at Work Act 2005*, including the increased penalties for corporate offences under the 2005 Act and the associated offences by managers and directors of undertakings.<sup>85</sup>

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<sup>84</sup> CP (26-2003).

<sup>85</sup> In reply to a question in Dáil Éireann on 13 May 2004, the Tánaiste stated: ‘Consideration was given to the inclusion of a specific provision on corporate killing by the parliamentary counsel and advisory counsel in the Office of the Attorney General. Their conclusion was that it is not appropriate to deal with the general and wider issue of corporate killing in a Safety, Health and Welfare at Work Bill. The Minister of State... will address the matter by proposing to Government a section [section 80] in the forthcoming *Safety, Health and Welfare at Work Bill 2004* [later enacted as the 2005 Act] on the liability of directors and officers of undertakings to make more explicit an existing provision in the 1989 Act [*Safety, Health and Welfare at Work Act 1989*] under which directors and managers in companies have in the past been prosecuted for failings in safety and health which resulted in deaths or serious injuries to workers. He intends that this provision will send a clear message to decision makers at board and management levels who carry a special responsibility for safety and health. The wider issue of corporate killing will be considered by the Government in due course when the final Report on the matter is published [by the Commission].’ See Vol.585 Dáil Debates col.892 (13 May 2004).

The Commission is equally conscious that the regulatory environment, which includes but is not confined to occupational safety legislation such as the 2005 Act,<sup>86</sup> is aimed at the prevention of injuries or ill health, whether caused by unsafe or unhealthy conditions in places of work, unsafe products or the impact of a poorly provided service.

1.69 In particular, as already noted, the regulatory context by definition goes beyond the prohibition of certain unsafe acts. In large measure, relevant legislation also requires that preventative management assurance systems must be put in place. For example, the *Safety, Health and Welfare at Work Act 2005* requires employers to have in place safety management systems, based on detailed risk assessment, in the form of a safety statement,<sup>87</sup> which are then used by the Health and Safety Authority to assess the standard of safety and health in place.<sup>88</sup> Similarly, the *Irish Medicines Board Act 1993* imposes obligations on the manufacturers and suppliers of pharmaceutical products to provide detailed information to the Irish Medicines Board concerning laboratory and clinical trials as part of any application for placing a product on the market.<sup>89</sup>

1.70 In this respect, the Commission notes that the focus of regulatory legislation is to prevent adverse incidents through the requirement to engage in management assurance systems, overseen in different ways by the relevant regulatory body. The Commission has already noted<sup>90</sup> that studies on the causes of adverse incidents have concluded that many were caused, at least in part, by the absence of known preventive steps, including the management assurance systems required by legislation. While it is more difficult to assert that, before the adverse incidents in question, appropriate corporate policies and procedures would, as matter of certainty, have prevented such adverse incidents, nonetheless, studies of which the Commission is aware support the view that appropriate management systems can prevent such incidents. In Ireland, case studies published in 1996 indicated that occupational accidents were reduced significantly after the

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<sup>86</sup> In this respect, the Commission concurs with the opinion of parliamentary and advisory counsel referred to in the reply by the Tánaiste in the preceding footnote that, given the wide scope of a corporate manslaughter offence, it would not be appropriate to include it in the narrower context of occupational safety and health legislation.

<sup>87</sup> See sections 18 to 20 of the 2005 Act, replacing section 12 of the *Safety, Health and Welfare at Work Act 1989*.

<sup>88</sup> See generally the website of the Health and Safety Authority, [www.hsa.ie](http://www.hsa.ie).

<sup>89</sup> For an overview of the detailed requirements, see the website of the Irish Medicines Board, [www.imb.ie](http://www.imb.ie).

<sup>90</sup> See paragraph 1.31, above.

introduction of safety management systems in a number of public and private sector organisations which were examined over a 3 year period.<sup>91</sup>

1.71 Indeed, the focus in the regulatory legislation on management assurance systems, which has been in place in the context of occupational safety and health for a number of years,<sup>92</sup> has been matched by a fall in the rate of fatal and non-fatal accidents. Thus, the Health and Safety Authority has noted that the fatal accident rate in 1998 was 4 per 100,000 workers, and by 2003 this had fallen by 25% to 3 per 100,000 workers. The non-fatal injury rate had fallen in the same period from 53.8 per 1,000 workers to 45.1 per 1,000 workers.<sup>93</sup> These figures appear to give added support to the view that a focus on management assurance systems may lead to improved levels of safety and health at work.

1.72 The Commission notes that regulatory legislation also provides for criminal sanctions for non-compliance with the relevant provisions. In that respect, the use of criminal prosecutions must be viewed as a secondary, though occasionally necessary and salutary, means of ensuring the primary goal of prevention. It is clear that, in the occupational safety and health context, there has been an increase in recent years in the use of criminal prosecutions – notably, prosecutions indictment.<sup>94</sup> In addition, the Commission notes that the *Safety, Health and Welfare at Work Act 2005* provides for fines not exceeding €3 million on conviction on indictment and for a term of imprisonment not exceeding 2 years on conviction on indictment for most of the statutory duties imposed by the 2005 Act.<sup>95</sup> The 2005 Act is the most recent legislative indication that such regulatory offences should attract significant criminal penalties.

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<sup>91</sup> See Deloitte & Touche, *Report on the Economic Evaluation of Insurance Costs in Ireland* (Department of Enterprise, Trade and Employment, 1996).

<sup>92</sup> In the context of occupational safety and health, since the enactment of the *Safety, Health and Welfare at Work Act 1989*.

<sup>93</sup> See Health and Safety Authority, *Annual Report 2003*, p.55. In the context of the European Union, these figures indicate that the rate of fatalities and non-fatalities in Ireland are less than the EU average: see generally, Eurostat, *Work and Health in the EU - A Statistical Portrait* (Eurostat, 2004), p.34.

<sup>94</sup> See the Consultation Paper, paragraph 1.08. In 2003, fines totalling €697,950 were imposed arising from 69 convictions under safety and health legislation, of which 15 were tried on indictment: see Health and Safety Authority, *Annual Report 2003*, p.42. In 2004, fines totalling €1,339,636 were imposed arising from 41 convictions, of which 16 were tried on indictment. In one case, *The People (DPP) v Smurfit News Press Ltd*, Circuit Criminal Court, October 2004, a fine of €1 million was imposed. See Health and Safety Authority, *Annual Report 2004*, p.42.

<sup>95</sup> Section 78(2) of the 2005 Act. The Commission notes that the range of offences listed in section 77 of the 2005 Act which attract these penalties are much greater than those in the *Safety, Health and Welfare at Work Act 1989*, which the 2005 Act replaced.

1.73 It might be argued - at least in the limited context of occupational safety and health (bearing in mind that a proposed corporate manslaughter offence would apply in a wider context), that the increased penalties in the 2005 Act represent a sufficient legislative response to failures by undertakings. The Commission has concluded, however, that while a corporate manslaughter offence should not be seen in isolation from legislative provisions such as the *Safety, Health and Welfare at Work Act 2005*, the purpose of such an offence is to ensure that gross breaches of societal norms are dealt with in a manner that is graded in conformity with the existing body of criminal law. In that respect, the existing regulatory code must be given due acknowledgement, while at the same time recognising that its primary purpose – the prevention of adverse incidents – is seen as being quite different from the different (albeit limited)<sup>96</sup> role of the general criminal law, as expressed in this context through the offence of corporate manslaughter.

1.74 In that respect, the Commission accepts that a statutory offence of corporate manslaughter is not intended to operate in the preventive mode of regulatory legislation. Indeed, without seeking to predict the scale of application of the offence, it seems unlikely that it would be widely used: this is clear from the general proposal that gross negligence be established before a conviction could be entered. It is clear, therefore, that the majority of undertakings who comply with existing regulatory provisions, which are largely based on strict liability, would not come within the terms of the proposed offences. Similarly, even those undertakings who fail to comply with regulatory legislative duties are likely to fall short of the test of gross negligence and may therefore continue to face the enforcement regime laid out such legislation, including prosecution, or the associated enforcement mechanisms falling short of prosecution. The Commission would not seek to be prescriptive or indicate any view as to whether prosecutors should choose any proposed corporate manslaughter offence over any regulatory legislative provisions currently in place. This is not a question of ‘either or:’ it may that, in a suitable case, both a regulatory route and the use of the proposed offence would be considered: that is essentially a matter for prosecutorial discretion.

1.75 Finally, the Commission notes that the role of regulatory and enforcement bodies - such as the Health and Safety Authority or the Irish Medicines Board - would be particularly relevant in the context of the ancillary enforcement mechanisms which the Commission proposes should be associated with a conviction for the proposed offence.<sup>97</sup>

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<sup>96</sup> See paragraphs 1.13-1.26 above.

<sup>97</sup> See paragraphs 4.22-4.68 below.

## **G Understanding corporate wrongdoing**

1.76 The consideration of corporate manslaughter involves fundamental questions about the law's understanding of the corporate form. When assessing corporate action and particularly corporate criminal wrongdoing, there are two opposing understandings of the corporation. Wells states the conflict as follows:

“The basic choice is between the atomic (or nominalist) view, in which corporations are nothing more than a collection of individuals and the organic (or realist) view which sees the organisation as a different entity than the sum of its parts.”<sup>98</sup>

These two views will be examined in turn.

### **(1) *The Atomic View: identification doctrine and aggregation***

1.77 The atomic view sees corporate criminal wrongdoing as individual wrongdoing which in certain circumstances, can be attributed to the corporation. It is from this understanding of the corporation that the principles of identification and aggregation are derived. Identification attributes the actions of an individual human person to the corporate entity. The human person must be individually criminally liable and sufficiently highly placed to be the “directing mind” of the corporate body. If no one human actor can be found then, according to the identification principle, no crime has been committed and the corporate entity should be acquitted. Aggregation allows for the acts and omissions of a number of people within the organisation to be aggregated to make up the corporate wrongdoing.

1.78 A detailed consideration of development of the identification doctrine was given in the Consultation Paper.<sup>99</sup> The rationale of the English courts is well expressed by Viscount Haldane L.C.:

“A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing 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.”<sup>100</sup>

1.79 This rationale sees all wrongdoing as individual wrongdoing, but accepts that certain individual wrongdoing is so closely connected with the

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<sup>98</sup> Wells *Corporations and Criminal Responsibility* (2nd ed Oxford University Press 2001) at 75.

<sup>99</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 1.42-1.58.

<sup>100</sup> *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1914-15] All ER 280, 283.

running of the corporate entity that the corporate entity, in addition to the individual wrongdoer, should be held criminally liable.

**(a) Individual wrongdoing**

1.80 At the root of the modern conception of the criminal law is the principle of individual autonomy – “that each individual should be treated as responsible for his or her own behaviour.”<sup>101</sup> This principle has been a cornerstone of criminal liability since the fourteenth century and its development led to the dying out of the medieval frankpledge system of collective liability.<sup>102</sup> Sullivan argues that if terms of moral disapprobation are to be used then circumstances must justify such criticism. He suggests that culpability can only attach to a human person and that if a company is to be found liable for a crime of gross negligence then “the gross negligence can only be that of one or more individuals connected with the company.”<sup>103</sup> In its purest form the atomic view of the company sees corporate criminality as a misnomer and advocates the prosecution of individuals within the company instead of the company itself. On the basis of this principle, proponents of the atomic view would argue that if a person has committed gross negligence manslaughter, then the individual should be punished, rather than getting bogged-down in the corporation’s guilt. Todarello contends that “...punishing a corporation undermines the theoretical foundations of criminal law, which presuppose that crimes involve an act and a culpable mental state.”<sup>104</sup>

**(b) Individual liability and deterrence**

1.81 Khanna argues that “direct liability” of managers is preferable to “indirect liability” through the corporate entity as it will provide a more effective deterrent.<sup>105</sup> He suggests that corporate liability merely deflects attention away from the misconduct of corporate managers and is a lesser deterrent than focusing on the wrongdoing of those managers. He comments that:

“[t]he corporation would be forced to bear the losses from a manager's knowing misbehavior, which would in turn lead to

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<sup>101</sup> Ashworth *Principles of Criminal Law* (2nd ed Oxford University Press 1995) at 25.

<sup>102</sup> McAuley & McCutcheon *Criminal Liability* (Round Hall 2000) at 273-275.

<sup>103</sup> Sullivan “Expressing Corporate Guilt” (1995) (15) *Oxford Journal of Legal Studies* 281, at 283.

<sup>104</sup> Todarello “Corporations Don’t Kill People - People Do: Exploring the Goals of the United Kingdom’s Corporate Homicide Bill” (2003) 22 *New York Law School Journal of International and Comparative Law* 481, at 486.

<sup>105</sup> Khanna “Corporate Criminal Liability: What Purpose Does it Serve?” (1996) 109 *Harvard Law Review* 1477, at 1495.

suboptimal results: greater harm would result as managers would be less deterred than if they had been held personally liable for their own misdeeds.”<sup>106</sup>

1.82 Khanna suggests that a reason why this state of affairs has come about is that “...top management wishes to deflect some liability from themselves to the corporation.”<sup>107</sup>

**(c) Penalising innocent parties**

1.83 When a company is punished for wrongdoing, whether by a fine or some other sanction, innocent parties, such as shareholders, employees and creditors will also be penalised to some degree. Todarello argues that by focusing on punishing the individual “corporate functionaries” who carry out the immediate *actus reus* of the corporate crime, the detrimental effects on innocent parties will be minimised.<sup>108</sup> He goes on to add the further benefit that this will make “corporations act more responsibly with respect to public safety” as their irresponsible employees would be incarcerated.<sup>109</sup> This is open to the criticism that all criminal punishment will indirectly affect innocent parties, for example the family of a person who is imprisoned.<sup>110</sup>

**(d) Benefits of a modified identification doctrine**

1.84 As was discussed above, the identification doctrine, as applied by the English Courts, is also prone to disproportionately affect small organisations where the controlling mind is easy to identify.<sup>111</sup> However, it may be possible to alleviate this difficulty by restructuring the test. The English model has been heavily focused on the conduct of the board of management, regardless of how far away from the operational level they may be. The larger the organisation, the further the board will be from the point of contact with the deceased. This is particularly noticeable in cases

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<sup>106</sup> Khanna “Should the Behaviour of Top Management Matter?” (2003) 91 *Georgetown Law Journal* 1215, at 1254-1255. Todarello echoes this sentiment, see Todarello “Corporations Don’t Kill People - People Do: Exploring the Goals of the United Kingdom’s Corporate Homicide Bill” (2003) 22 *New York Law School Journal of International and Comparative Law* 481, at 493.

<sup>107</sup> Khanna “Should the Behaviour of Top Management Matter?” (2003) 91 *Georgetown Law Journal* 1215, at 1255.

<sup>108</sup> Todarello “Corporations Don’t Kill People - People Do: Exploring the Goals of the United Kingdom’s Corporate Homicide Bill” (2003) 22 *New York Law School Journal of International and Comparative Law* 481, at 493.

<sup>109</sup> *Ibid*, at 494.

<sup>110</sup> See below at paragraphs 4.72-4.79.

<sup>111</sup> See discussion of the “paradox of size” above at paragraphs 1.09-1.12.

such as *Tesco Supermarkets Ltd v Natrass*<sup>112</sup> and *P&O European Ferries (Dover) Ltd*.<sup>113</sup> A different formulation of the identification test, such the test recommended in the Consultation Paper<sup>114</sup>, would assess the human actor, who was being identified with the company on the basis of their level of authority and control over the situation and the policy which gave rise to the death, as opposed to their nominal position within the overall corporate hierarchy. Another modified version of the identification doctrine is contained in the Council of Europe *Corruption Convention 1999*. The definition in the Convention assesses not only the actions of senior officers but also their failure to supervise the actions of others has made possible the commission of an offence.<sup>115</sup> Such a use of the identification doctrine would help to solve the paradox of size.<sup>116</sup>

**(e) Aggregation**

1.85 An answer to some of the problems of the identification doctrine that still fits within the atomic understanding of corporate action is the use of aggregation of liability. This would allow for a corporate conviction where the conducts of a number of members of the organisation are such that if they had been the conduct of one individual that individual would be personally liable for the offence.

**(f) Legislative use**

1.86 The Identification doctrine is used in the American *Model Penal Code*, in a form that allows for a broader corporate liability than the English use of the doctrine. The term used to describe the individual whose actions are attributed to the corporate body is “high managerial agent” which is defined as an officer of the corporation “having duties of such responsibility that his conduct may fairly be assumed to represent the corporation or association.”<sup>117</sup> The Canadian Criminal Code section 22.2 refers to senior officers of the organisation acting with the intent at least in part to benefit the organisation. The Australian Criminal Code Act section 12.3 allows for liability for the corporation where the board of directors or a high managerial agent have engaged in or permitted the prohibited conduct. It is worth

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<sup>112</sup> [1971] 2 All E R 127.

<sup>113</sup> (1991) 93 Cr App R 72.

<sup>114</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 7.51-7.53. This test is based on the tests used in the US *Model Penal Code* Article 2.07(4)(c) and the Australian *Criminal Code Act* Section 12.3(6).

<sup>115</sup> For a detailed consideration of this test see Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 4.26-4.29.

<sup>116</sup> See above at paragraphs 1.09-1.12.

<sup>117</sup> *Model Penal Code* Article 2.07(4)(c) American Law Institute 1963.



noting that both the Canadian and Australian Criminal Codes provide for separate attribution mechanisms for crimes of negligence. Neither mechanism is based on the identification doctrine. The Canadian model is based on a vicarious liability and aggregation and the Australian model is based on aggregation and organisational liability.

1.87 A number of personal offences under such Irish acts as the *Safety Health and Welfare at Work Act 1989*<sup>118</sup> the *Competition Act 2002*<sup>119</sup> and the *Criminal Justice (Theft and Fraud Offences) Act 2001*<sup>120</sup> provide for a mechanism whereby individuals that are prominent within a corporation that has committed an offence, can be guilty of that offence in addition to the corporate body. The test used involves assessing how senior in the corporate entity they were and what their role in the offence was. This is, in effect, a reverse use of the identification doctrine whereby the officer's guilt is derived from the corporate body's.

**(2) The Organic View: organisational liability**

**(a) Corporation as a single entity**

1.88 The organic view sees corporate criminal wrongdoing as a failure of the organisation itself, a systemic problem. Advocates of this view suggest that corporate criminal prosecutions should concern themselves with the quality of organisation and the systems that were in place, rather than focusing exclusively on the wrongdoing of individuals. Where these systems were glaringly lacking the company itself should be held criminally liable.<sup>121</sup>

1.89 Proponents of the organic view hold that individualism is an unrealistic means of assessing the liability of a corporate body. Fisse and Braithwaite argue that "...[m]ethodological individualism is "unable to account for the corporateness of corporate action and corporate responsibility."<sup>122</sup> The organic view holds that corporations reach a point of complexity where they cease to be a mere collection of individuals and become, instead, an entity that is more than the sum of its parts; as Wells

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<sup>118</sup> Section 48(19)(a).

<sup>119</sup> Section 26(6)

<sup>120</sup> Section 58(1).

<sup>121</sup> Wells *Corporations and Criminal Responsibility* (2nd ed Oxford University Press 2001) at 79-80.

<sup>122</sup> Fisse & Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" [1988] *Sydney Law Review* 468, at 476.

puts it, eventually, “2+2=5”.<sup>123</sup> Fisse and Braithwaite, commenting on the atomic view, argue that reductionism “can be a near infinite regress” suggesting that “there is a need to build upon reductionism to study how the parts interact to form wholes.”<sup>124</sup> There is a risk in focusing too heavily on individual wrongdoing that junior employees will become scapegoats. If the criminal law needs to seek individual actors in every situation, there is likely to be a spiral of buck-passing between individuals within the corporate body.<sup>125</sup>

1.90 To some degree, the organic view is proven by the very fact of the corporate body’s existence. Corporate entities, in particular commercial entities, are formed by groups of individuals wishing to be more productive as a group than they would be if they were to exert their respective energies separately. The single entity nature of commercial corporations is projected through branding and advertising and jealously guarded by trade marking.

**(b) Corporate decision making and corporate culture**

1.91 The organic view extends beyond mere productivity and into decision making, where it can be equally true that “2+2=5”.<sup>126</sup> The organic view sees the organisation itself as the main force in the decisions made within the corporate entity. Decision making can be driven by the organisational structure and the lines of authority, with responsibility for issues such as occupational or product safety often spread throughout the corporate entity.<sup>127</sup>

1.92 Dan-Cohen illustrates this principle with the metaphor of the “intelligent machine”. Using the example of a public limited company, he suggests that it would be both technically and legally possible for such a company to own all of its own stock,<sup>128</sup> have a fully automated operational system and a computerised management system. Thus, he argues, a corporate entity is more than an aggregation of its constituent human members and has an existence beyond them. While the example used is that

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<sup>123</sup> Wells *Corporations and Criminal Responsibility* (2nd ed Oxford University Press 2001) at 79.

<sup>124</sup> Fisse & Braithwaite “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” [1988] *Sydney Law Review* 468, at 478-479.

<sup>125</sup> Charleton McDermott & Bolger *Criminal Law* (1999 Butterworths) at 911.

<sup>126</sup> *Op cit* fn123 at 79.

<sup>127</sup> See Clarkson “Kicking Bodies Corporate and Damning Their Souls” (1996) 59 *Modern Law Review* 557, at 568.

<sup>128</sup> In the US companies are permitted to own a certain amount of their own shares. This is not the case in Ireland.

of a public limited company, it could also be applied to other entities, such as a not-for-profit unincorporated body. Using this metaphor he seeks to illustrate that a corporate entity is neither irreducible to its constituent human parts nor perfectly analogous to a human actor.<sup>129</sup> By moving beyond human metaphors it is possible to develop a more realistic understanding of the corporate entity as a societal actor in its own right.

1.93 The more complicated an organisation becomes the greater the impact organisational structures will play in individual decision making within that organisation as individual viewpoints become diluted.<sup>130</sup> Dan-Cohen describes the essential characteristics of such an undertaking as structure; permanence; decision making; size; formality; complexity; functionality and goal orientation.<sup>131</sup> He describes how these attributes lead to the development of goals and the taking of decisions that do not necessarily correspond to the exact goals or preferences of any individuals. As such, he contends, the organisation becomes an opaque and impermeable “intentional system endowed with organisational intelligence”<sup>132</sup> and that its decisions are not the straightforward product of expression of any particular individual will.

1.94 Central to the organic view is Dan-Cohen’s idea of the effect that the permanence of the corporation has on decision making. The day to day decisions within the undertaking are made by individual human actors. However they are making these decisions on behalf of the corporation and with a view to furthering the corporation’s interests. Because a corporation is potentially immortal, the time frame for decision making goes beyond the likely career of any of the human actors and so the decision making becomes divorced from the needs and goals of the individual human actors.<sup>133</sup> Individuals cease to act purely autonomously but are influenced heavily by needs of the corporate entity and by the corporate ethos itself. In effect, the corporate entity is making the decisions through the human actors and not *vice versa*. As Fisse and Braithwaite put it “...organisations emit decisions

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<sup>129</sup> Dan-Cohen *Rights, Persons and Organisations* (University of California Press 1986) at 46-50

<sup>130</sup> French distinguished between corporate entities that were mere collections of individuals (aggregates) and those that reached a level of complexity where they went beyond that and became what he calls “conglomerates”. French *Collective and Corporate Responsibility* (1984 Columbia University Press) at 5, 13.

<sup>131</sup> *Op cit* fn129 at 30-38.

<sup>132</sup> *Op cit* fn129 at 39.

<sup>133</sup> *Op cit* fn129 at 32.

just as individuals do, but that they reach these decisions in rather different ways.”<sup>134</sup>

1.95 Wells finds corporate intentionality in “policies, standard operating procedures (SOPs), regulations and institutionalized practices.”<sup>135</sup> However these may not be enough. It might be very easy to write SOPs, vision statements and policy memos that are acknowledged as meaningless by those who will implement them. Witness testimony will inevitably be necessary to establish what the corporate culture was.

1.96 This presents the practical difficulty of how to prove what the corporate culture was responsible for. Bucy identifies eight factors on which to assess corporate ethos in the context of criminality. They are: corporate hierarchy; corporate goals; education of corporate employees about legal requirements; monitoring compliance with legal requirements; investigating the current offence; corporate reaction to past violations and violators; compensation incentives for legally appropriate behaviour; and indemnification of officers.<sup>136</sup> She contends that by examining each of these elements in turn, the fact finder can realistically evaluate the extent to which the corporate ethos encouraged the criminality.

1.97 This is not to suggest that individuals play no role in corporate decision making. They do, and may be culpable in a corporate killing in their own right, either as principals or for some lesser complicity. However, the decisions of the undertaking, even if they precisely mirror those of any one individual, will inevitably be the product of the corporate decision making process. The organic view would contend that the two must be analysed separately as coexisting systems of decision making and action.<sup>137</sup>

**(c) Corporate criminal culpability**

1.98 Even if corporations are capable of making decisions and asserting policy in a way that is beyond the influence of any one human member it must be assessed whether those decisions can be criminally culpable. Clarkson, responding to Wolf’s comment that companies are not to be held liable because they are like sociopaths, points out that sociopaths

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<sup>134</sup> Fisse & Braithwaite “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” [1988] *Sydney Law Review* 468, at 480..

<sup>135</sup> Wells *Corporations and Criminal Responsibility* (2nd ed Oxford University Press 2001) at 80.

<sup>136</sup> See Bucy “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability” (1991) 75 *Minnesota Law Review* 1095.

<sup>137</sup> Quaid “The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis” (1998) 43 *McGill Law Journal* 67, at 82.

are subject to the criminal law.<sup>138</sup> It is not so much that undertakings do not have the capacity to commit crime; it is that their capacity differs from that of a human actor.

1.99 Wells argues that “corporations are not human beings but neither do human beings act and think according to the models of culpability on which the criminal law is premised”.<sup>139</sup> For example “objective” standards such as gross negligence are used. By focusing too heavily on pre-defined notions of subjective human morality the law becomes blind to the reality that the taking of an unjustified risk can be expressed differently. She suggests that what is needed is a model which would “determine what attitude the defendant’s action displayed rather than to look for a hidden mental state or feeling”.<sup>140</sup>

1.100 Clarkson comments that as the whole notion of corporate personhood is a fiction, as are all methods of attributing liability to corporate entities, the focus should not be on whether the method of attribution is fictitious “but whether, of all the fictions, it is the one that most closely approximates modern-day corporate reality and perceptions.”<sup>141</sup> He suggests that: “[i]f it is the company that is to be blamed for the harm caused, it is the company that deserves the stigma and shaming associated with the adverse publicity attached to a criminal conviction.”<sup>142</sup>

1.101 Notwithstanding the criminal law’s general acceptance of the principle of autonomy,<sup>143</sup> the principle is by no means settled in the realm of moral philosophy. Absolute individual autonomy cannot be conclusively proven and most moral philosophers reach compromise positions.<sup>144</sup> The organic view would suggest that the principle of absolute individual human autonomy is an inappropriate basis for understanding corporate criminal liability. Corporate autonomy may be a more fitting, more realistic method of assessing corporate decision making. Clarkson comments that despite the fact that corporations are metaphysical entities, they can still be “culpability-bearing agents who through their rules, policies and operational procedures

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<sup>138</sup> Clarkson “Kicking Bodies Corporate and Damning Their Souls” (1996) 59 *Modern Law Review* 557, at 571.

<sup>139</sup> Wells “Corporations: Culture, Risk and Criminal Liability” [1993] *Crim LR* 551, at 561.

<sup>140</sup> *Ibid* at 562.

<sup>141</sup> Clarkson “Corporate Culpability”[1998] 2 *Web JCLI*.

<sup>142</sup> *Op cit* fn138 at 562.

<sup>143</sup> See above at paragraph 1.80.

<sup>144</sup> Ashworth *Principles of Criminal Law* (2nd ed Oxford University Press 1995) at 26.

can exhibit the requisite degree of *mens rea* and be blamed therefor.”<sup>145</sup> Fisse and Braithwaite argue that “...the moral responsibility of corporations for their actions relates essentially to social process and not to elusive attributes of personhood.”<sup>146</sup> Clarkson suggest that in certain cases, “...the exercise of control and the choice between various courses of action can often only be fairly attributed to the company itself.”<sup>147</sup>

**(d) Appropriate to gross negligence**

1.102 The organisational liability approach may be particularly useful when dealing with *Dunleavy* negligence. The organic view may have trouble accounting for subjective moral blameworthiness, but gross negligence, being an objective test focused on massive failures to meet reasonable standards of conduct, does not require such analysis.

**(e) Proving corporate gross negligence**

1.103 As was mentioned above, the issue of proving corporate gross negligence is more difficult than with individual gross negligence. It may be difficult to determine “whether the policies and practices of a company are sufficiently defective to be adjudged blameworthy to the requisite degree.”<sup>148</sup>

1.104 Clarkson argues that a company should be held liable where “[i]t failed to take advantage of a fair opportunity to avoid wrongdoing”.<sup>149</sup> He later suggests that this could very easily have been done in the case of the *Herald of Free Enterprise*. The company owed a duty to its passengers and the lack of safety procedures and the prior open-door sailings should have been enough to show a breach of the duty to requisite degree of blameworthiness.<sup>150</sup>

1.105 The recent English draft *Corporate Manslaughter Bill* states the liability of corporations in terms of a gross breach of a duty of care. The duty of care is defined in the Bill as are the circumstances that would indicate a gross breach.<sup>151</sup>

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<sup>145</sup> Clarkson “Kicking Bodies Corporate and Damning Their Souls” (1996) 59 *Modern Law Review* 557, at 571.

<sup>146</sup> Fisse & Braithwaite “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” [1988] *Sydney Law Review* 468, at 481.

<sup>147</sup> *Op cit* fn145 at 568.

<sup>148</sup> Clarkson “Corporate Culpability”[1998] 2 Web JCLI.

<sup>149</sup> *Op cit* fn145 at 568.

<sup>150</sup> *Op cit* fn 148.

<sup>151</sup> Draft *Corporate Manslaughter Bill* sections 3 and 4.

**(f) Individual negligence and corporate negligence**

1.106 This raises the issue of whether it is possible for the company to be grossly negligent without any one human person being cognisant of a high degree of risk and ignoring it. In reality this may not matter. It should be possible to show that the corporation was grossly negligent whether there was individual human negligence involved or not. Using the organisational model the focus is on what was expected of the company and whether or not that was achieved. “The issue would be whether the risks would have been obvious to a reasonable corporation, in that position and whether the corporation had the capacity to appreciate the risks.”<sup>152</sup> Colvin argues that:

“[c]orporate negligence itself provides the necessary connection between the defendant corporation and the conduct for which it is liable. The test of reasonable foreseeability identifies the harms against which a corporation must take safeguards. If there is a foreseeable risk that unjustifiable harm may occur as a result of a corporation's operations, the corporation should be under a duty to guard against that risk and be potentially liable for breach of that duty...it is immaterial whether or not the conduct elements of the offense can be assigned to any individual. It is sufficient that they occur.”<sup>153</sup>

1.107 If this is accepted, then the only real reason to focus on individual negligence would be as a defence, to show that the gross negligence of one individual was completely divorced from the corporate action. For example, a corporate entity might attempt to show that a particular individual had not complied with the corporate entity's own procedures and tragedy had resulted. This defence would be limited however by the reasonable expectation that a corporate entity would ensure the proper conduct of its staff.<sup>154</sup>

**(g) Legislative use**

1.108 The organisational liability approach is used in the Australian Criminal Code Act,<sup>155</sup> which allows for corporate liability for crimes of negligence using both the organisational liability model and the identification theory. The organisational liability model was also used in the Irish *Corporate Manslaughter Bill 2001*, discussed in the Consultation

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<sup>152</sup> Clarkson “Kicking Bodies Corporate and Damning Their Souls” (1996) 59 *Modern Law Review* 557, at 571.

<sup>153</sup> Colvin “Corporate Personality and Criminal Liability” (1995) 6 *Criminal Law Forum* 1, at 31.

<sup>154</sup> *Ibid* at 25-27.

<sup>155</sup> Australian *Criminal Code Act* sections 12.3 and 12.4(3).

Paper.<sup>156</sup> The test used in both of these was one which looked at the failures of the organisation as a whole. The Australian test is based on “corporate culture” and the Irish test was one of “management failure”.

1.109 The Law Commission of England and Wales’ 1996 report on involuntary manslaughter<sup>157</sup> and the subsequent Home Office proposals of 2000 also used the management failure test. The eventual outcome of those reports was the Draft *Corporate Manslaughter Bill*, which was laid before the British Parliament in March 2005. The Draft *Corporate Manslaughter Bill* also uses a management failure test but it describes it in terms of a “gross breach” of duty and lays out the nature of corporate duties and the types of conduct that would constitute a breach of such duties.<sup>158</sup> This elaboration of the definition could go some way to quietening critiques that the management failure test is indeterminate.<sup>159</sup>

### (3) *Discussion*

1.110 A difficulty with the atomic view of a corporation is that in its purest form, the atomic view would not allow for corporate criminal liability of any kind. The Commission considers that this view is not tenable.

1.111 A company can be sued, can be forced to pay compensation for wrongdoing, can own property and can do a whole host of other things as a separate entity from the human persons who make it up. The law assesses the corporate entity separately from the individuals within it for all of these.

1.112 Corporate entities are actors in society in their own right and must be held liable to the same standards of the criminal law as all other actors in society. For the criminal law to chase after one individual human person as a prerequisite to corporate liability is unrealistic and disproportionately benefits larger corporate entities.<sup>160</sup> Decision making in corporate entities is often diffused across many levels and corporate liability for manslaughter must take account of this.<sup>161</sup> Wells notes that:

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<sup>156</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 2.80-2.93

<sup>157</sup> Law Commission of England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (LAW COM No 237).

<sup>158</sup> *Corporate Manslaughter: The Government’s Draft Bill for Reform* (Home Office March 2005 Cm 6497) at 9.

<sup>159</sup> *Op cit* fn156 at paragraph 7.43.

<sup>160</sup> See above at paragraphs 1.09-1.12.

<sup>161</sup> See Brady “Corporate Homicide: Some Alternative Approaches” (12)(2) ICLJ 12 at 12



“[c]orporate liability in the United Kingdom assumes that only a select few officers exert control or have any managerial autonomy over aspects of the enterprise for which they work. This does not seem borne out by theories of organizations.”<sup>162</sup>

1.113 Wells goes on to explain that there is a need to recognise that responsibility can “both flow from the individual to the corporation and be found in the corporation’s structures themselves.”<sup>163</sup> She notes that the identification doctrine only allows for the former. Therein lies the central defect of the identification doctrine. It is most adept at transferring the offences of the individual onto the organisation. However, where the organisation itself is at fault the identification doctrine is unlikely to provide a basis for prosecution of the wrongdoing. If it is accepted that the individual who is identified with the corporation is influenced by the organisation in the course of her activities, then it is accepted that the undertaking has an influence on wrongdoing. It can then be accepted that, in an organisation, that influence may reach the requisite level to be viewed as primary wrongdoing in its own right.

1.114 This can be more easily recognised when dealing with a crime of gross negligence than with other crimes. As was noted above, both the Canadian and Australian Criminal Codes have separate mechanisms for corporate liability for negligence as opposed to crimes of recklessness or intent<sup>164</sup> and the nature of corporate gross negligence is such that it is better suited to the organic understanding of corporate wrongdoing.<sup>165</sup>

1.115 However, despite the faults with the atomic view, a purely organic understanding also has its difficulties. Just as it is unrealistic to suggest that all corporate wrongdoing is in fact solely individual wrongdoing, it is also unrealistic to argue that corporate wrongdoing can exist without any individual wrongdoing. To do so would be to shield individuals within the corporate entity who have contributed to the causation of death, notwithstanding their culpability.

1.116 The Commission considers that a well formulated scheme of corporate culpability would look separately at the liability of the corporate entity and the individuals within it. The test for gross negligence in Ireland entails a breach of duty. The Commission has concluded that a breach of duty test can be applied to a corporate entity without the stumbling block of

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<sup>162</sup> Wells *Corporations and Criminal Responsibility* (2<sup>nd</sup> ed Oxford University Press 2001) at 157.

<sup>163</sup> *Ibid* at 157.

<sup>164</sup> See above at paragraph 1.86.

<sup>165</sup> See above at paragraph 1.102.

finding one individual liable first. However, the Commission also considers that when assessing whether there was a breach of duty, regard must be had to the conduct of individuals within the corporate entity. Where individuals are culpable in the causation of death, provision must also be made for their liability so that they cannot hide behind liability of the corporate entity. This will be elaborated in Chapters 2 and 3. For the present it is sufficient for the Commission to say that it recommends that corporate liability for manslaughter be based on a test of gross negligence, formulated around a breach of duty. While the test will be applied to the entity as a whole, regard should be had to the wrongdoing of individuals within the entity when assessing whether the corporate entity has breached its duty.

1.117 *The Commission recommends that corporate liability for manslaughter be based on a test of gross negligence, formulated around a breach of duty. While the test will be applied to the entity as a whole, regard should be had to the wrongdoing of individuals within the entity when assessing whether the corporate entity has breached its duty.*

## **H Derivative liability of managers**

1.118 For a corporation to have acted in a grossly negligent manner and caused a death, individual human persons within that undertaking, who are not culpable to the degree required to convict them of manslaughter, will, inevitably be culpable to some degree. In order to deter such conduct and condemn complicity in the causation of a corporate manslaughter, a form of derivative human liability may be necessary. This would be in addition to corporate liability and individual liability for manslaughter. The Consultation Paper recommended such liability and that this offence be known as ‘reckless toleration’.<sup>166</sup> Other possible names would include “dangerous management” or “grossly negligent management causing death”.

1.119 Derivative liability could be left to the law of participation under the *Criminal Law Act 1997* but the provisions of that act do not accurately reflect the type of derivative liability envisaged here. Due to the specific nature of this offence a dedicated statutory mechanism would provide greater clarity.

1.120 The Law Commission of England and Wales has recommended against derivative individual liability<sup>167</sup> and the English draft *Corporate Manslaughter Bill* does not provide for any such liability. The rationale is

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<sup>166</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.49-8.55.

<sup>167</sup> Law Commission of England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (LAW COM No 237) at 8.58

that derivative liability would be inappropriate for an offence which stresses the liability of corporations (the offence proposed by the Law Commission and the offence outlined in the draft bill are based on organisational liability). The Law Commission was of the view that the only human persons who should be liable are those with the requisite *mens rea* and *actus reus* to be liable as principals.

1.121 As was noted above, Ireland has derivative managerial liability where an undertaking commits an offence under the *Competition Act 2002* or the *Criminal Justice (Theft and Fraud Offences) Act 2001*. Where an offence is committed ‘with the consent or connivance of, or to have been attributable to any neglect’ on the part of a person in a managerial role in the undertaking, then that person is also criminally liable. It would be inconsistent to have derivative individual liability for these offences, which require proof of a mental element, but not for corporate manslaughter. As was discussed above,<sup>168</sup> the decisions of the company are deeply intertwined with the decisions, acts and omissions of its constituent human members. The creation of the circumstances leading to a corporate manslaughter will be such that a degree of human culpability may be almost inevitable.

1.122 It may be appropriate for derivative individual liability to be dependent on a conviction of the corporation. If all defendants were tried simultaneously and the company was acquitted this would mean that the defendants to the dangerous management charge would also be acquitted. The precise nature and scope of the liability of complicit managers is discussed in Chapter 3 below.<sup>169</sup>

1.123 *The Commission recommends that corporate managers who are culpable in the commission of corporate manslaughter should be secondarily liable.*

## **I Statutory or common law offence?**

1.124 The Consultation Paper provisionally recommended that corporate killing would be established as part of a statutory regime but left the question open and particularly invited submissions on this point.<sup>170</sup>

1.125 It was felt that at the Commission’s Seminar on Corporate Killing<sup>171</sup> there was a perception that corporate killing was to be, in some

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<sup>168</sup> See above at paragraphs 1.88-1.97.

<sup>169</sup> See below at paragraphs 3.10-3.45.

<sup>170</sup> See Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 7.18-7.19.

<sup>171</sup> Held at the Commission’s offices on 1 December 2004.

way, an extension of health and safety regulation and not a criminal offence in the traditional sense. As was discussed above, there is a significant difference between a regulatory offence and gross negligence manslaughter.<sup>172</sup> The Commission is of the view that it is important to ensure that corporate liability for manslaughter is recognised as a serious criminal offence.

1.126 The Commission has considered whether a statutory mechanism to extend liability to corporations for the common law offence of manslaughter might prove effective in order to rectify this misunderstanding. However, seen in the context of the wider progress of law reform, a statutory mechanism for a common law offence would be regressive and may make it more difficult to explain the offence to a jury. It would be more coherent to provide for the offence as a whole by statute, rather than merely the means of attribution.

1.127 The misconception could be better addressed using terminology which adequately expresses the severity of the offence. The common law offence of manslaughter has a very well established meaning in the popular conception of criminal wrongdoing. Notwithstanding the Commission's goal of accurately labelling homicide crimes,<sup>173</sup> the title "corporate manslaughter" would convey a meaning that could be eclipsed if a new term were to be introduced. In the event that the common law offence of manslaughter is given a statutory expression and its name is changed, then it would be appropriate to similarly alter the title of corporate manslaughter at that stage.

1.128 *The Commission recommends that the offence be established by statute and be called 'corporate manslaughter'.*

## **J Application of the offence**

### **(1) Companies**

1.129 The offence will apply to any company incorporated under the *Companies Acts 1963-2003*. Companies represent a large proportion of economic activity in the state and as such their actions will affect many people. A number of the deaths considered above in the discussion of corporate causation of death involved companies.<sup>174</sup>

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<sup>172</sup> See above at paragraph 1.50.

<sup>173</sup> See Law Reform Commission Seminar Paper – *Homicide: The Mental Element in Murder* (LRC SP1-2001) at 7.

<sup>174</sup> See above at paragraphs 1.33 and 1.38.

1.130 In addition to companies, it may be appropriate to extend liability to other organisations. In the Consultation Paper, the Commission noted that limiting the scope of the offence to corporations might be perceived as unjust.<sup>175</sup> Furthermore, as was noted above, the problems with the current law are more acute in the case of large organisations than smaller ones. The size issue applies, not just to corporations but all bodies to be considered. A two person company is less likely to avoid liability because of the paradox of size than a large, publicly owned transport company.

1.131 Inclusion of unincorporated entities may also be necessary to meet Ireland's obligations under the European Convention on Human Rights. It has been suggested that excluding unincorporated bodies from liability for corporate manslaughter could be a breach of the European Convention.<sup>176</sup>

**(2) Public bodies**

1.132 Many of the incidents detailed above involved public sector bodies.<sup>177</sup> The activities and the organisation of the public sector are such that it would be appropriate to include them in liability for a statutory corporate manslaughter offence.

**(3) Unincorporated entities**

1.133 It may be arbitrary to exclude non-incorporated entities from the scope of the offence, as they are just as capable of committing the offence as are incorporated bodies. Non-governmental organisations (NGOs), trade unions and partnerships often share many of the organisational features of a company incorporated under the *Companies Acts 1963-2003*. It would be unjust to allow such organisations to avoid liability but extend it to similar sized companies.

1.134 Unincorporated entities do not have a separate legal personality in the manner that a public body or a company does. As they are not deriving a benefit from separate status it could be argued that it would be unfair to treat them as such for the purposes of legal liability. Recent draft legislation in England and Wales specifically excluded unincorporated bodies for that reason.<sup>178</sup>

1.135 However, the Commission is of the view that unincorporated entities are as likely to be culpable in the causation of death as incorporated

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<sup>175</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 7.20.

<sup>176</sup> See Coutino "How Will Corporate Manslaughter Change?" (2003) 155 (7192) *New Law Journal* 1344 at 1344-1345.

<sup>177</sup> See above at paragraphs 1.32 and 1.34-1.37.

<sup>178</sup> Draft *Corporate Manslaughter Bill 2005*.

bodies and so recommends that they should be included in the application of the offence.

**(4) Sub-contractors**

1.136 Where the actions of a sub-contractor are considered to be enough to make the sub-contractor liable for corporate manslaughter, there may also be circumstances where the main contractor should also be liable. In extreme cases highly dangerous activities could be sub-contracted to unincorporated entities formed precisely for the purpose of avoiding liability for corporate manslaughter.

1.137 In the English case of *R v Associated Octel Co Ltd*<sup>179</sup> the court held that under the *Health and Safety at Work Act 1974* the defendant was under a duty in relation to the conduct of his undertaking, which included the conduct of sub-contractors. If the organisational liability approach were to be used, specific provision may not be needed for sub-contractors. The Law Commission of England and Wales have suggested that in such circumstances it would be up to a jury to decide whether the failures of the sub-contractor can be attributed to the management failure of the defendant.<sup>180</sup>

**(5) Outside Advisors**

1.138 Undertakings regularly rely on the advice of outside specialists, such as architects, engineers or safety consultants. It is conceivable that in certain instances their advice may be a major contributing factor to the corporate manslaughter. In such circumstances it may be appropriate to hold them criminally liable. If the outside advisor has the requisite *mens rea* and *actus reus* for manslaughter then they will be liable as a principal in any event. It may be appropriate to include such advisors in under any derivative individual liability scheme that is devised.

**(6) Definition**

1.139 The issue of liability of entities other than companies was considered in some detail in the Consultation Paper.<sup>181</sup> The commission provisionally recommended that the offence should apply unincorporated entities. In defining the class of organisations that could be held liable the Consultation Paper recommended the use of the term ‘undertaking’<sup>182</sup> and a

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<sup>179</sup> [1996] 4 All ER 846.

<sup>180</sup> Law Commission of England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (LAW COM No 237) at paragraph 8.44.

<sup>181</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 7.20-7.31.

<sup>182</sup> *Ibid* at paragraph 7.31.

definition along the lines of the terminology used in the *Competition Act 2002* which defines an undertaking 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.”

1.140 The *Safety Health and Welfare at Work Act 2005* defines an undertaking as “an individual, a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service (whether carried on by him or her for profit or not)”. This modifies the *Competition Act* definition by specifically including non-for-profit activities.

1.141 The *Canadian Criminal Code*<sup>183</sup> defines the organisations to be liable as “an association of persons that: (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons”.

1.142 While the Canadian approach has its merits it lacks certainty in the category of what type of organisation may be included; inevitably the issue will be decided in court. The Commission favours a combination of the other two definitions, which will be wide enough in scope to include all relevant bodies while still allowing for a degree of certainty in the application of the offence.

1.143 *The Commission recommends that the offence of corporate manslaughter should apply to public and private corporate bodies and to unincorporated bodies. Such a body, to be known as an “undertaking” should 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 whether carried on for profit or not.”*

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<sup>183</sup> As amended by *Act to Amend the Criminal Code liability of organizations* C-45 2003.





## CHAPTER 2 CONSTRUCTION OF CORPORATE LIABILITY

### A Introduction

2.01 In this chapter the Commission will assess the construction of corporate liability. The relevant standard of culpability will be considered and the most appropriate formulation for applying that standard to an undertaking will be determined.

### B Standard of culpability

2.02 As was discussed in chapter 1, the standard of culpability for corporate manslaughter should most appropriately be that of gross negligence.<sup>1</sup> The test for gross negligence is objective and requires the accused to have failed to notice a very serious risk that would have been obvious to a reasonable person.<sup>2</sup> Gross negligence does not require an autonomous act in the way that a crime of recklessness or intent does. Ashworth characterises gross negligence as a crime, not of autonomy but of capacity, in the sense that a person can be guilty of manslaughter when they had the capacity required to take the care that would have avoided the harm caused.<sup>3</sup> Whether an undertaking can have the autonomy required to commit a conscious act need not be considered in the context of manslaughter. What is at issue is that it can be said to have the capacity to take the requisite level of care to avoid the commission of manslaughter.<sup>4</sup>

2.03 The Commission does not consider that undertakings should be held to a different standard than human persons and so the corporate offence should be equivalent in terms of culpability to the human offence. While the precise *means* of determining that culpability may differ slightly, in the Commission's view, the degree of culpability required should not.

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<sup>1</sup> See paragraph 1.42 above.

<sup>2</sup> See Charleton McDermott & Bolger *Criminal Law* (Butterworths 1999) at paragraph 7.121-7.127.

<sup>3</sup> Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 193-194.

<sup>4</sup> See Law Commission of England & Wales *Consultation Paper on Involuntary Manslaughter* (LAWCOM No. 135, 1994) at paragraph 5.77.

2.04 The test for gross negligence in Ireland is set out in *The People (Attorney General) v Dunleavy*.<sup>5</sup> The elements of the offence are as follows:

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

Point 1 considers the fact of negligence, point 2 considers causation and points 3 and 4 are focused on the question of the degree of negligence and whether it is sufficiently egregious to be deemed criminal.

2.05 More recently, the Court of Criminal Appeal considered gross negligence manslaughter in *The People (DPP) v Cullagh*.<sup>6</sup> The victim in that case was a young child who was killed on a fun-fair ride that was in a dangerous state of disrepair. In that case, the court found that the defendant owed a “very significant duty” to the deceased and those using his fun-fair ride in both civil and criminal law. The Court went on to add that the level of negligence required for a finding of manslaughter was “essentially a matter of degree”.

2.06 The leading case on gross negligence manslaughter in England is *R v Adomako*.<sup>7</sup> In that case Lord Mackay stated the test for gross negligence as follows:

“...the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether the 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 as a crime.”

2.07 The English test, like the Irish test, considers the fact of negligence, causation and the severity of the negligence as the three principle elements of gross negligence. Indeed in both *Adomako* and the earlier case of *R v Bateman*,<sup>8</sup> the courts held that the difference between tort negligence and criminal negligence was necessarily one of degree and not a

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<sup>5</sup> [1948] IR 95.

<sup>6</sup> Court of Criminal Appeal (Murphy, O’Higgins and Kelly JJ) 15 March 1999.

<sup>7</sup> [1995] 4 All ER 935.

<sup>8</sup> (1925) 19 Cr App Rep 8.

difference in the substance of the test. In the *Bateman* case Hewart LCJ stated that:

“To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”<sup>9</sup>

2.08 The US Model Penal Code Section 2.02(2)(d) states the elements of criminal negligence as follows:

“A person acts negligently with respect to a material element of an offense when he should be aware of 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 the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actors situation.”

This test can also be characterised as an assessment of negligence and then a consideration of whether that negligence was of a severity that requires criminal punishment.

2.09 The Commission has concluded that these elements of gross negligence manslaughter may be applied in the context of undertakings without major alteration. The Commission has concluded that the following formulation is appropriate:

- (a) The undertaking was negligent;
- (b) The negligence was of a sufficiently high degree to be characterised as ‘gross’ and so warrant criminal sanction; and
- (c) The negligence caused the death.

2.10 *The Commission recommends that these elements should form the basis of the test of corporate liability for manslaughter:*

- (a) *The undertaking was negligent;*
- (b) *The negligence was of a sufficiently high degree to be characterised as ‘gross’ and so warrant criminal sanction; and*
- (c) *The negligence caused the death.*

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<sup>9</sup> (1925) 19 Cr App Rep 8, 13.

## C The first element: negligence of the undertaking

### (1) *Basic elements of negligence*

2.11 The basic elements of a finding of negligence in the context of manslaughter are that the defendant owed the deceased a duty of care and that there was a failure to discharge that duty insofar as the defendant failed to meet the requisite standard of care.<sup>10</sup> The English *Draft Corporate Manslaughter Bill 2005* ('The English Draft Bill') uses the test of "duty and gross breach".

2.12 An undertaking can owe duties of care just as a human person can; for example, as an employer, as an occupier of land, as a provider of services or as a producer of goods.

2.13 The Irish position regarding the imposition of duties of care at common law was summarised by the Supreme Court in the civil case of *Glencar Exploration plc v Mayo County Council (No. 2)*.<sup>11</sup> In that case it was held that a duty should be imposed on the basis of a proximity between the parties and reasonable foreseeability of damage absent any factors which would make it fair and reasonable to relive the defendant of their duty.<sup>12</sup>

2.14 In addition to common law duties of care, undertakings also owe duties of care imposed by legislation. For example the *Safety Health and Welfare at Work Act 2005* places duties on undertakings as employers; the *Fire Services Act 1981* places duties on undertakings as occupiers of land; the *European Communities (General Product Safety) Regulations 2004* places duties on undertakings in relation to product safety and the *Regulation of Railways Acts 1842 & 1871*<sup>13</sup> place duties on undertakings in relation to the provision of services. All of these instruments provide for criminal liability for a breach of these duties.

2.15 *The Commission recommends that whether an undertaking owed a deceased a duty of care be established based on existing common law rules and statutory duties.*

2.16 It may be seen as appropriate to give a list of relevant duties of care for corporate manslaughter. For example, Section 4(1) of the English Draft Bill lists the relevant duties of care for the purposes of the offence of corporate manslaughter. These are: to employees, in its capacity as an

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<sup>10</sup> See *The People (DPP) v Cullagh* Court of Criminal Appeal (Murphy, O'Higgins, Kelly JJ) 15 March 1999. See also *R v Adomako* [1995] 4 All ER.

<sup>11</sup> [2002] 1 IR 84.

<sup>12</sup> [2002] 1 IR 84 *per* Keane CJ at 141.

<sup>13</sup> These are due to be updated by the *Railway Safety Bill 2001*.

occupier of land, in relation to the supply of goods and services or in relation to any other commercial activity. The English list is exhaustive.

2.17 While an exhaustive list might bring clarity, Ashworth comments that, at common law, the categories of duty for gross negligence manslaughter are not closed.<sup>14</sup> In the light of the seriousness of the crime of manslaughter the Commission has concluded that it would not be appropriate to limit the applicable duties of care.

2.18 While the Commission is satisfied that the existing law will suffice to establish whether an undertaking owed a deceased person a duty of care it is of the view that a non-exhaustive list will be helpful. The Commission expects that most corporate manslaughter offences will relate to unsafe workplaces, occupation of land and unsafe products and services.<sup>15</sup> The Commission therefore recommends that a non-exhaustive indicative list of duties of care be included and that it state these four duties.

2.19 *The Commission further recommends that a non-exhaustive, indicative list be included and that it refer to an undertaking's duties as an employer, as an occupier of land, as a producer of goods and as a provider of services.*

2.20 As was noted in chapter 1, corporate manslaughter is likely to take in situations involving independent contractors.<sup>16</sup> While subsidiaries and independent contractors may be very problematic when dealing with contractual relationships due to privity, this will not be as difficult in the case of gross negligence. Where a parent undertaking or the undertaking that engaged an independent contractor is found to have owed the deceased a duty of care it will not matter that they did not have a direct contractual relationship with the deceased. This occurred in the English case of *R v Associated Octel Co Ltd*<sup>17</sup> where a company was found to owe a duty under health and safety legislation and so was held liable for the actions of a sub-contractor. This was not based on a contractual relationship or vicarious liability but on the defendant's responsibility to take all reasonably practicable measures to ensure the safety of those affected by the undertaking.

2.21 The Commission is satisfied that the ordinary rules relating to duties of care will be adequate to cover cases involving subsidiaries and independent contractors.

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<sup>14</sup> Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 298.

<sup>15</sup> See above at paragraphs 1.27-1.41.

<sup>16</sup> See above at paragraphs 1.136-1.137.

<sup>17</sup> [1996] 4 All ER 846.

2.22 *The Commission recommends that the negligence of the undertaking be assessed as follows:*

*The undertaking shall be found to be negligent where:*

- (a) It owed the deceased a duty of care, and*
- (b) It breached that duty by failing to meet the required standard of care.*

**(2) *The Standard of care***

2.23 The standard of care for a human defendant charged with gross negligence manslaughter is that of the reasonable person.<sup>18</sup> Assessing the standard of care for a corporate defendant will necessarily be more difficult for a court than for a human defendant. What does, and does not, constitute reasonable behaviour for a human person conducting an everyday task should be readily apparent to a juror; the same can not be said of what constitutes reasonable corporate behaviour.

2.24 In the Consultation Paper, the Commission suggested that an organisational liability is vulnerable to the argument that “...there is no uniformly accepted notion of what constitutes the ‘reasonable undertaking’.”<sup>19</sup> The Commission acknowledges that such an argument can, indeed, also be levelled at the identification doctrine as there is no uniformly accepted notion of what constitutes the ‘reasonable high managerial agent’. In many cases the managerial agent’s professional responsibilities will be very specialised and will require a level of expertise that puts them beyond the assessment of a court unless the court has the benefit of expert testimony.

2.25 The Commission also accepts that while a notion of what constitutes the reasonable undertaking may not be uniformly accepted, that does not mean such an idea is not possible. The Commission acknowledges that there is a growing literature as to what constitutes good corporate governance to the extent that the standard of a reasonable undertaking may not be any more elusive than the standard of a reasonable engineer, architect or doctor. It is therefore clear that assessing what was reasonable conduct on the part of the undertaking is difficult in the same sense that assessing professional negligence is difficult. Both involve a level of understanding of the defendant’s professional existence that is likely to be beyond the average juror and both will necessarily involve expert testimony.

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<sup>18</sup> See *The People (Attorney General) v Dunleavy* [1948] IR 95, 102; in that case Davitt J characterised the standard of care as that of “a reasonable driver.”

<sup>19</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP-26 2003) at paragraph 7.38.

2.26 In two of the leading English cases on gross negligence manslaughter, the accused persons were medical doctors.<sup>20</sup> In the *Bateman* case, the standard of care was held to be “a fair and reasonable standard of care and competence”<sup>21</sup> and in the *Adomako* case the standard was that of “a reasonably competent doctor.”<sup>22</sup>

2.27 The Commission considers that it may be unhelpful to try to assess corporate negligence by direct analogy to the standards of the reasonable human person. Such a comparison will be, in many cases, a hypothetical impossibility because there are certain actions that can only be committed by a collective entity, never by an individual.<sup>23</sup> As was noted in Chapter 1, corporate decision making does not operate in a way that is analogous to human decision making and a corporate decision will often not be a precise parallel of any one human decision.<sup>24</sup> Therefore, a specific corporate test will be required which will look at the reasonableness of the conduct of the undertaking itself.

2.28 The ‘reasonable undertaking’ is one which takes cognisance of obvious risks to the lives of those to whom it owes a duty and takes steps to eliminate those risks in so far as is practicable. The Commission notes that this standard does not require an undertaking to eliminate *all* risks completely, what is required is that the corporation take reasonable steps to eliminate serious risks. The Commission considers that the standard of care should require the undertaking to take all reasonable measures to anticipate and prevent serious risks of death or serious personal harm.

2.29 The test of reasonableness should, in the Commission’s view take account of the circumstances of the undertaking. A two-person partnership cannot be expected to operate in the same manner as a multi-national corporation. It is appropriate that the standard of care for a corporate defendant should be have due regard to the undertaking’s size and circumstances.

2.30 *The Commission recommends that the standard of care should require the undertaking to take all reasonable measures to anticipate and prevent risks of death or serious personal harm, having due regard to the undertaking’s size and circumstances.*

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<sup>20</sup> *R v Bateman* (1925) 19 Cr App Rep 8 and *R v Adomako* [1995] 4 All ER 935.

<sup>21</sup> (1925) 19 Cr App Rep 8, 12.

<sup>22</sup> [1995] 4 All ER 935, 944.

<sup>23</sup> See French *Collective and Corporate Responsibility* (Columbia University Press 1984) at 19-30.

<sup>24</sup> See above at paragraphs 1.91-1.97.

2.31 Having regard to this analysis, the Commission has concluded that it is most appropriate to find a means of assessing the standard of care for the undertaking as a whole. Given the difficulties involved in such an assessment, the Commission is of the view that some form of statutory guidance will be appropriate.

**(a) Careless management/Management failure**

2.32 In the Consultation Paper, the Commission considered whether a “careless management” or “management failure” test would be an appropriate means of assessing corporate liability.<sup>25</sup> A management failure test was recommended by the Law Commission of England and Wales<sup>26</sup> and was proposed in the Irish private member’s *Corporate Manslaughter Bill 2001*. Both of these tests were based on management failure alone and did not set liability in terms of duty and breach. The Irish Bill did make reference to failure to meet a standard of care that it was reasonable to expect in the circumstances, although no further elaboration on the precise nature of that standard was given.

2.33 The two tests based liability on a failure to ensure the health and safety of human persons in the manner in which the undertaking was managed. Since a reasonable undertaking would operate in such a way, this is essentially a restatement of a ‘reasonable undertaking’ standard. In the Commission’s view, it lacks a structured consideration of the nature of corporate action and decision-making and would not tell a court much more about the standard of care than a bare ‘reasonable undertaking’ test would.

**(b) The English Draft Bill**

2.34 As was noted above, the English Draft Bill states the liability of the undertaking in terms of duty and gross breach. The standard of care in section 3(1) of the English Draft Bill is “what can reasonably be expected of the organisation in the circumstances.” This is the basic ‘reasonable undertaking’ standard of care.

2.35 The English Draft Bill refers to the way the company was run by the senior management. The explanatory notes accompanying the Bill indicate that this is intended to focus on the working practices of the organisation as a whole and is not limited to questions about the individual responsibility of senior managers.<sup>27</sup>

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<sup>25</sup> Law Reform Commission’s *Consultation Paper on Corporate Killing* (CP-26 2003) at paragraphs 7.35-7.44.

<sup>26</sup> Law Commission of England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (LAW COM No 237) at paragraph 8.19.

<sup>27</sup> Home Office *Corporate Manslaughter: The Government’s Draft Bill for Reform* (March 2005 HMSO Cm 6497) at paragraphs 27-28.



2.36 The English Draft Bill's duty and gross breach model is more substantial than a bare management failure test. Section 1 of the Draft Bill states that an offence is committed if the way in which the organisation's activities are managed or organised by its senior managers constitutes a gross breach of a duty of care. The 'senior managers' facet of this test is useful in that it ensures that a court will look to the liability of the corporate whole and how it was run from the top; the Commission agrees that to allow a court to convict on the isolated conduct of a junior employee would be unjust. As was noted in Chapter 1, corporate wrongdoing is infused with individual conduct and it must be examined with that in mind.<sup>28</sup>

2.37 The derivative individual offence outlined in Chapter 3 applies to 'high managerial agents' of an undertaking.<sup>29</sup> The Commission is of the view that it would be more consistent to look at how the undertaking was managed by 'high managerial agents' than 'senior management' since 'high managerial agent' will have a specific defined meaning within the context of corporate manslaughter.

2.38 *The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the way in which the organisation's activities are managed or organised by its high managerial agents.*

2.39 Section 3(2) of the English *Draft Corporate Manslaughter Bill 2005* ("The English Draft Bill") states that, when deciding whether there was a "gross breach" the jury should have regard to whether the organisation failed to comply with relevant health and safety legislation or guidance and if so that they should consider: the seriousness of that failure; whether the senior managers knew or ought to have known of that failure; and whether the senior managers were aware or ought to have been aware of the risk of death or serious harm posed by that failure.

2.40 As was discussed in Chapter 1, undertakings operate in very different regulatory environment to individuals.<sup>30</sup> Some account should be taken of this when assessing the reasonableness of the undertaking's conduct.

2.41 The English Draft Bill focuses very heavily on health and safety law. Safety and Health legislation, such as the Irish *Safety Health and Welfare at Work Act 2005* is framed largely in terms of employers' duties. Corporate manslaughter can occur outside employment, for example in relation to the production of dangerously defective products. If a court is to

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<sup>28</sup> See above at paragraphs 1.110-1.117.

<sup>29</sup> See below at paragraphs 3.26-3.32.

<sup>30</sup> See above at paragraphs 1.55-1.62.

be given factors to consider they should be applicable to all cases of corporate manslaughter, not merely those that involve health and safety law breaches. The Commission is of the view that the court should have regard to the regulatory framework affecting the undertaking generally, not merely health and safety law.

2.42 As was noted in Chapter 1, many undertakings also undertake self-regulatory corporate assurance systems.<sup>31</sup> The Commission is of the view that these should also be considered when assessing whether an undertaking has met the requisite standard of care.

2.43 *The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the regulatory environment in which that undertaking operates, including statutory duties to which it is subject. The Commission further recommends that the court should have regard to any corporate assurance systems that the undertaking subscribes to.*

2.44 Section 3(2) of the English Draft Bill makes reference to whether the senior managers sought to profit from a breach of duty. The Commission is of the view that a profit motive should not be a factor for a finding of gross negligence. The nature of the offence of gross negligence manslaughter is that the accused person failed to meet a required standard of conduct and death resulted. The motivation behind that failure is not at issue when establishing guilt. It may, however, be an issue for sentencing.

**(c) Corporate culture**

2.45 In order to elaborate fully on the standard of care the Commission considers that it is useful to look to the corporate culture. As was discussed above, an undertaking's culture will have a very significant impact on the decisions taken within the undertaking.<sup>32</sup> The Commission considers that the corporate culture will play a substantial role in whether or not a company meets the standard of care and that including indicators of corporate culture in the test should assist a court in making its finding of fact.

2.46 French identifies corporate intentionality in what he terms the "corporate internal decision" structures (CID structures).<sup>33</sup> He describes these as being made up of three elements; the organisational or responsibility flowchart; procedural rules and policies. He argues that because all activity

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<sup>31</sup> See above at 1.63-1.65.

<sup>32</sup> See above at paragraphs 1.91-1.97.

<sup>33</sup> French *Collective and Corporate Responsibility* (Columbia University Press 1984) at 48.

within the company is regulated by these three factors, they will have as much effect on eventual corporate decisions and actions as any individual human action.

2.47 The Commission agrees that these factors will have a significant impact on whether an undertaking meets the required standard of care. Accordingly the Commission recommends that they be included for consideration by a court when assessing corporate liability for gross negligence manslaughter.

2.48 *The Commission recommends when assessing whether a undertaking has met the standard of care , regard should be had to:*

- *The allocation of responsibility within the undertaking;*
- *The procedural decision making rules of the undertaking;*
- *The policies of the undertaking.*

2.49 Bucy also outlines a number of relevant factors which indicate the presence of what she called a ‘corporate ethos.’<sup>34</sup> Of particular relevance here are the education and monitoring of employees as to legal requirements and the undertaking’s response to previous incidents. As has been noted, the corporate ethos will have a dramatic effect on the actions of employees. Where the undertaking adequately educates and monitors those employees the corporate ethos can be said to be actively encouraging safety. Similarly, if an undertaking has taken remedial steps to remedy previous dangerous incidents that will go some way to showing that the undertaking is having due regard to risks to human life.

2.50 As was noted in the Consultation Paper, the Council of Europe *Convention on Corruption 1999* provides for corporate liability.<sup>35</sup> One of the factors listed in those conventions is whether there was a lack of supervision or control by a natural person which made possible the commission of an offence. This mirrors Bucy’s idea of monitoring. The Commission agrees that adequate supervision is a key element of the standard of care required of an undertaking and recommends that it be a factor for consideration when assessing whether that standard was met.

2.51 *The Commission recommends that when assessing whether a undertaking has met the standard of care, regard should be had to:*

- *The training and supervision of employees by the undertaking;*

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<sup>34</sup> Bucy “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability” (1991) 75 *Minnesota Law Review* 1095 at 1133. See above at paragraph 1.96.

<sup>35</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 4.26-4.29.

- *The response of the undertaking to previous incidents involving a risk of death or serious personal harm.*

2.52 Bucy further argues that corporate goals are a substantial indicator of corporate culture and that they play a considerable role in the operations of an undertaking.<sup>36</sup> She points out that in certain instances they may be ‘so unrealistic that they encourage illegal behavior.’<sup>37</sup> The Commission agrees with this argument and concludes that stated and actual corporate goals should be a relevant factor in assessing whether an undertaking has met the required standard of care.

2.53 *The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the undertaking’s stated and actual goals.*

2.54 A correlative aspect of a formal hierarchy and monitoring of employees is an adequate communication system. The communications networks in an undertaking will vary greatly as between organisations. It is easy to see how a failure in the communications system can lead to important safety information not being passed on or being disregarded. On this basis the Commission is of the view that a court should have regard to whether there were adequate communications systems when assessing whether an undertaking met the standard of care.

2.55 The Commission is of the view that regard should be had to whether adequate systems were in place for the communication of information to outside parties who are affected by the activities of the undertaking.

2.56 *The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the adequacy of the communications systems within the undertaking systems for communicating information by the undertaking to others affected by its activities.*

**(d) Government licences**

2.57 It was pointed out in submissions on the Consultation Paper that undertakings will frequently be operating in accordance with a licence or contract made or granted under legislation. It was suggested that operating within the terms of such a licence or contract might provide a complete defence to a charge of corporate manslaughter. While the Commission

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<sup>36</sup> Bucy “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability” (1991) 75 *Minnesota Law Review* 1095 at 1133.

<sup>37</sup> *Ibid* at 1133.

accepts the general merits of this proposition, it is not of the view that this should provide such an absolute defence as a scheme of work set out under a government licence or contract may turn out to be deficient. However the Commission is of the view that operating within such terms will go towards proving that the undertaking met the requisite standard of care and so recommends that it should be considered.

2.58 *The Commission recommends that when assessing whether a undertaking has met the standard of care, regard should be had to whether the undertaking was operating within the terms of a contract or licence made or granted under legislation.*

## **D The second element: the ‘gross’ nature of the negligence**

2.59 The second element of corporate liability for gross negligence manslaughter requires the prosecution to show that the negligence was of such an egregious nature as to deserve criminal punishment. The Commission considers that the differences between corporate and human defendants should be less problematic for this element than for the first element, as the corporate example does not differ as significantly from that of a human defendant. The degree of negligence will be a question of fact for a jury to decide.

2.60 There is a risk that the bare test for ‘gross’ can involve a certain circularity for a jury. Ashworth summarises the problem:

“...[I]f members of the jury ask how negligent D must have been if they are to convict of manslaughter, the answer is ‘so negligent as to deserve conviction for manslaughter.’”<sup>38</sup>

This difficulty was also alluded to by Davitt J in *The People (Attorney General) v Dunleavy*.<sup>39</sup>

2.61 The Commission considers that this potential circularity may be overcome if the law clarifies the factors that differentiate gross negligence from civil negligence rather than merely broadly characterising it as ‘criminal’. In the Dunleavy case the “grossness” test stated two factors for the court to consider: whether the negligence a) was of a very high degree and b) involved a high degree of risk or likelihood of substantial personal injury.

2.62 While it is important that a jury be given guidance on the distinction between civil and criminal negligence, an overly precise

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<sup>38</sup> See Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed Oxford University Press 2003) at 299.

<sup>39</sup> [1948] IR 95, 100.

definition may prove restrictive and confusing. As Davitt J pointed out in the *Dunleavy* case:

“The crime of manslaughter, and in particular manslaughter by negligence, does not very readily lend itself to the task of precise and concise definition.”<sup>40</sup>

The Commission has concluded that the two factors given in the *Dunleavy* case to distinguish gross negligence from civil negligence should provide adequate guidance for a court. The Commission recommends that the essential elements identified in that case be adopted in the context of corporate liability for gross negligence manslaughter

2.63 *The Commission recommends that the second element of gross negligence, the gross nature of the negligence, should be stated as:*

*The negligence will be characterised as ‘gross’ if it:*

- (a) *was of a very high degree; and*
- (b) *involved a significant risk of death or serious personal harm.*

## **E The third element: causation**

2.64 The general law of causation for homicide in Ireland is stated by Charleton McDermott & Bolger thus:

“The accused will legally have caused the death of the victim if his act, or acts, substantially contributed to the subsequent death, taking into account the time at which and the manner in which the death occurred.”<sup>41</sup>

2.65 The Consultation Paper recommended that the corporate acts should be “a cause” as opposed to “the immediate cause” of death.<sup>42</sup> This approach was also recommended by The Law Commission of England and Wales in its report *Legislating the Criminal Code Involuntary Manslaughter*<sup>43</sup> and in section 1(1)(c) of the Irish private member’s *Corporate Manslaughter Bill 2001*.

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<sup>40</sup> *The People (Attorney General) v Dunleavy* [1948] IR 95, 98.

<sup>41</sup> Charleton McDermott & Bolger *Criminal Law* (1999 Butterworths) at paragraph 7.23.

<sup>42</sup> Law Reform Commission *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 7.67-7.68. This recommendation was made in connection with the Commission’s provisional recommendation that the corporate offence be based on the identification doctrine.

<sup>43</sup> (LAW COM No 237).

2.66 The rationale for this change in the normal rules of causation is the concern that the actions of an employee might constitute a *novus actus interveniens* and break the chain of causation for the corporate offence.

2.67 The Commission accepts that this concern may have been overstated. First, courts are reluctant to make a finding of *novus actus interveniens*. As McAuley & McCutcheon state:

“...[I]t is clear that the law espouses an expansive concept of causation in which there is an evident reluctance to deny the existence of causal responsibility...[t]here is a marked resistance to classify subsequent voluntary conduct as *novus actus interveniens*.”<sup>44</sup>

2.68 Secondly, in the context of a corporate offence the corporate ‘but for’ test will necessarily have to take account of human conduct. Since a corporation will act through its constituent human members and employees, a corporate manslaughter offence will inevitably involve the conduct of another, human, person; it is the nature of corporate action that it is intertwined with human action. Insofar as an undertaking has the power to direct the actions of human persons and it directs them negligently, the undertaking’s negligence is a cause of any resulting death.

2.69 With this in mind, the Commission considers that undertakings must make allowances, as far as can reasonably be expected, for a certain degree of human fallibility in organising themselves. The Law Commission of England and Wales described this aspect corporate fault as follows:

“If a company chooses to organise its operations as if all its employees were paragons of efficiency and prudence, and they are not, the company is at fault; if an employee then displays human fallibility, and death results, the company cannot be permitted to deny responsibility for the death on the ground that the employee was to blame. The company’s fault lies in its failure to anticipate the foreseeable negligence of its employee, and any consequence of such negligence should therefore be treated as a consequence of the company’s fault.”<sup>45</sup>

2.70 Thirdly, it is also important to note that in the context of gross negligence, the cause is likely to be an omission rather than an act.<sup>46</sup> The

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<sup>44</sup> McAuley & McCutcheon *Criminal Liability* (2000 Round Hall) at 270-271.

<sup>45</sup> Law Commission of England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (LAWCOM No 237) at paragraph 8.37.

<sup>46</sup> For further commentary on causation and omissions see McAuley & McCutcheon *Criminal Liability* (2000 Round Hall) at 260-270.

Law Commission of England and Wales suggested that this may make tracing fault easier:

“It is in our view 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.”<sup>47</sup>

2.71 The standard rules of causation require a defendant’s conduct to have been more than a *de minimis* factor in causing the proscribed outcome.<sup>48</sup> The Commission is of the view that where a corporate defendant’s negligence has made such a contribution the undertaking will be liable on the normal rules of causation notwithstanding the fact that there was employee conduct involved.

2.72 The Commission accordingly recommends that the normal rules of causation should apply to corporate manslaughter.

2.73 *The Commission recommends that the normal rules of causation should apply to corporate manslaughter.*

## **F Procedural issues**

2.74 As the Commission has noted, manslaughter is one of the most heinous offences in the criminal calendar.<sup>49</sup> Therefore, the Commission of the view that it would be highly inappropriate for a manslaughter charge to be brought under summary jurisdiction. The offence of corporate manslaughter should be triable on indictment only, in order to mark the seriousness of the offence.

2.75 *The Commission recommends that the offence of corporate manslaughter should only be triable on indictment.*

2.76 As was noted in the Fennelly Report,<sup>50</sup> certain offences under the *Competition Act 2002* are now tried in the Central Criminal Court due to their complexity. Similarly, complex evidentiary issues are likely to arise in assessing corporate gross negligence. For this reason, it could be argued that it would be appropriate to try corporate manslaughter in the Central Criminal Court rather than in the Circuit Criminal Court, although human

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<sup>47</sup> *Consultation Paper on Involuntary Manslaughter* (LAWCOM No. 135, 1994) at paragraph 5.77.

<sup>48</sup> See Smith & Hogan *Criminal Law* (10<sup>th</sup> ed Butterworths 2002) at 44-45.

<sup>49</sup> See above at paragraphs 1.15-1.16.

<sup>50</sup> Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of The Courts* (Courts Service 2003) at paragraphs 427-430.



manslaughter charges are currently tried in the Circuit Criminal Court. However, on the other hand, the Commission is satisfied that the Circuit Criminal Court is already well equipped to deal with both homicide offences and offences involving complex organisations. Therefore, the Commission does not make any recommendation on this matter.

*2.77 The Commission does not make any recommendation on whether the offence of corporate manslaughter should be tried in the Circuit Criminal Court or the Central Criminal Court.*



## CHAPTER 3 INDIVIDUAL LIABILITY

### A Introduction

3.01 As was discussed in earlier chapters, the relationship between individual and corporate action and decision making can be interdependent and complex. Where an undertaking is held criminally liable for corporate manslaughter, it is highly likely that humans within that organisation will also be culpable to some extent. Some will be liable for gross negligence manslaughter in their own right; others may be culpable to a degree that warrants sanction without being liable for manslaughter. This chapter will assess both primary human liability for gross negligence manslaughter in parallel with the corporate offence and derivative liability of other culpable human persons.

### B Individual liability for gross negligence manslaughter

3.02 The introduction of a statutory formulation for corporate manslaughter is not intended to eclipse human liability for gross negligence manslaughter. Where a corporation and a human person have both contributed to the commission of manslaughter to the degree required to convict both, then both should be convicted. This is no different from a situation where two human defendants who have contributed substantially to an offence will be liable as joint perpetrators.<sup>1</sup>

3.03 As was noted in the Consultation Paper, where a murder is committed by an individual in the course of an undertaking's activities, individual liability for that will stand notwithstanding the fact that the undertaking cannot be liable for murder.<sup>2</sup>

3.04 It has been suggested in the United Kingdom that a significant reason for the lack of prosecutions of individuals is a lack of prosecutorial will to charge senior managers.<sup>3</sup> In the Commission's view it is critical that

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<sup>1</sup> See McAuley & McCutcheon *Criminal Liability* (2000 Round Hall) at 453-501.

<sup>2</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 7.60.

<sup>3</sup> See Rohan "Taking the Blame for Disaster" (2003) 100 (24) *Law Society Gazette* 28.

a statutory offence of corporate manslaughter will not distract prosecutorial attention away from the wrongdoing of individuals.

**(1) Construction of liability**

3.05 It could be argued that it would be more effective to frame human liability in terms other than those used by the general common law of gross negligence manslaughter. While the level of blameworthiness would not change, it may lead to greater clarity in the trial of the offence if the elements of gross negligence were re-stated in a fashion that countenanced liability in the specialised setting of a corporate manslaughter.

3.06 This would be achieved by bringing human liability for manslaughter in the corporate context under the statutory framework of the corporate offence. It would also be conducive to trying the human and corporate defendants as part of the same proceedings. The common law offence of gross negligence manslaughter would thus remain for non-corporate offences and it would not be possible for a person to be liable for both the statutory human crime and common law manslaughter.

3.07 However, this approach faces the difficulty that public perceptions of the statutory manslaughter offence may ultimately come to differ from the perceptions of the common law offence, even though they would be substantially the same.<sup>4</sup> The Commission has already noted, with regard to the corporate offence, that the perceived difference in severity between statutory and common law offences could be remedied through labelling.<sup>5</sup> This may not be as easy in this instance as it would involve the separation of the same human offence into two halves, one statutory and one common law. The statutory corporate manslaughter offence can be more easily seen as a clarification and is less likely to produce a two-tier understanding of the offences than with a splitting of the human offence. As was discussed in chapter 1, a very important purpose of the criminal law is public censure for wrongdoing and any dilution of the public message of a manslaughter conviction would be unhelpful.<sup>6</sup>

3.08 Furthermore, the Commission considers that any lack of clarity relating to the fact that the corporate offence is statutory and the human

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<sup>4</sup> For a discussion of the differing perceptions of statutory 'regulatory' crime and common law offences see Wells *Corporations and Criminal Responsibility* (2<sup>nd</sup> ed Oxford University Press 2001) at 5-8.

<sup>5</sup> See above at paragraphs 1.124-1.128.

<sup>6</sup> See above at paragraphs 1.15-1.16. See also *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 7.05-7.11.

offence is at common law may be short lived given the moves afoot to codify the criminal law in Ireland.<sup>7</sup>

3.09 *The Commission recommends that a corporate prosecution for manslaughter should not prevent a human prosecution. The Commission further recommends that the primary human liability should be left to the ordinary law of gross negligence manslaughter.*

### **C Derivative individual liability**

3.10 It is the nature of corporate action that it is interdependent and fused with individual human action. French illustrates this:

“...we can describe many events in terms of certain physical movements of human beings, and we also can sometimes describe those very events as done for reasons by the human beings, but further we can sometimes describe the same events as corporate and still further as done for corporate reasons that are qualitatively different from whatever personal reasons component members may have for doing what they do.”<sup>8</sup>

Certain human actions will contribute to the corporate action to a greater or lesser extent. In the case of manslaughter, some will contribute enough for the human person to be convicted of that crime, as was discussed above. There may also be human persons who are further down the scale of culpability but are still blameworthy enough to warrant a criminal sanction.

3.11 While such wrongdoing could be left to, for example, health and safety and product safety legislation, there is a strong case for introducing an intermediate offence, halfway between manslaughter and a regulatory offence to ensure that senior management take their duties seriously.<sup>9</sup> It has been argued that without individual managerial liability, corporate liability is of little value.<sup>10</sup> To convict an undertaking of manslaughter without

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<sup>7</sup> See *Codifying the Criminal Law* Report of the Expert Group on the Codification of the Criminal Law (McAuley Report) Department of Justice Equality and Law Reform, November 2004.

<sup>8</sup> French *Collective and Corporate Responsibility* (Columbia University Press 1984) at 47.

<sup>9</sup> This was recommended in the Victorian *Crimes (Workplace Deaths and Serious Injuries) Bill*. See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 6.26.

<sup>10</sup> See Rohan “Taking the Blame for Disaster” (2003) 100 (24) *Law Society Gazette* 28. Khanna goes further and argues that individual liability should be preferred to any corporate liability, see Khanna “Corporate Criminal Liability: What Purpose Does it Serve?” (1996) 109 *Harvard Law Review* 1477.

prosecuting any human members of that corporation may lead to the public perception that managers can shelter behind the corporate offence.<sup>11</sup> The Commission accepts the strength of this argument.

3.12 It should also be noted that, in addition to the statutory derivative mechanisms discussed below, the EU *Corpus Juris* Draft Code of European Criminal Law requires individuals with power or control within a business to be held criminally liable for offences committed as part of a legal organ. While the Code is only applicable to crimes against the financial interests of the EU and the EU has no jurisdiction to legislate for criminal law generally, derivative liability for individuals would be in keeping with the principles in the Code.<sup>12</sup>

3.13 In the Consultation Paper, the Commission recommended that managerial liability be addressed through the introduction of a derivative offence of ‘reckless toleration’.<sup>13</sup> The Commission sees no reason to depart from this recommendation.

3.14 *The Commission recommends that human persons within the undertaking who are culpable in the commission of the offence of corporate manslaughter should be criminally liable.*

**(1) Statutory derivative liability mechanisms already in place**

3.15 As was discussed in Chapter 1<sup>14</sup> and in the Consultation Paper<sup>15</sup> there are a number of statutory mechanisms currently in place which provide for liability of human officers of undertakings when the undertakings is convicted of an offence and the human officer has contributed to it.

3.16 The precise construction of the officer’s liability varies slightly as between these Acts. The most notable provisions on the construction of the officers’ liability are:

- Section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* grounds derivative human liability where the corporate 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” an officer or a person purporting to act as such.

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<sup>11</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.49.

<sup>12</sup> *Ibid* at paragraph 4.32.

<sup>13</sup> *Ibid* at paragraphs 8.49-8.57.

<sup>14</sup> See above at paragraph 1.03.

<sup>15</sup> *Op cit* fn11 at paragraphs 8.50-8.51.

- Section 9 of the *Prevention of Corruption (Amendment) Act 2001* grounds derivative human liability where the corporate offence is “committed with the consent or connivance of or to be attributable to any wilful neglect on the part of” an officer or a person purporting to act as such.
- Section 80(1) of the *Safety Health and Welfare at Work Act 2005* grounds derivative human liability where the corporate offence is proven to have been “authorised, or consented to by, or is attributable to connivance or neglect on the part of” an officer or person purporting to act as such.
- Section 8(6) of the *Competition Act 2002* grounds derivative human liability where the corporate offence is “committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by” an officer or a person purporting to act as such.

3.17 Of these four provisions, the *Criminal Justice (Theft and Fraud Offences) Act 2001* and the *Safety Health and Welfare at Work Act 2005* have the lowest threshold for managerial liability. While the *Prevention of Corruption (Amendment) Act 2001* requires, as a minimum, ‘wilful neglect’ and the *Competition Act 2002* requires authorisation of consent, the other two allow for managerial liability for mere ‘neglect’. With regard to the *Criminal Justice (Theft and Fraud) Offences Act*, it has been suggested that ‘neglect’ may mean a failure to check the “*actual conduct of the actual perpetrator of the misdealings*”<sup>16</sup> or the threshold may even be as low as “*failing to prevent an offence*”.<sup>17</sup>

3.18 While these mechanisms provide useful guidance for the construction of a derivative offence, they all provide for liability as a principal. Given the severity of the crime of manslaughter, the Commission concludes that it would not be appropriate to convict a human person, who was not ordinarily liable for that offence, on the basis of derivative liability.

3.19 Furthermore, they allow for liability as a principal for offences of intent, recklessness or strict liability, not gross negligence. As gross negligence is a separate standard, there will be a need to devise an independent scheme of derivative liability.

## **(2) *The Corporate Manslaughter Bill 2001***

3.20 Section 2(b) of the Irish private member’s *Corporate Manslaughter Bill 2001* provided for human liability for manslaughter where

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<sup>16</sup> *Irish Current Law Statutes Annotated* (Round Hall 2001) at 50-126.

<sup>17</sup> *Ibid* at 50-126.

the management failure that caused a death was “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”.

3.21 The Bill went on to define recklessness and gross negligence for the purposes of the offence. As was discussed in the Consultation Paper, these provisions involved a deviation from the established understanding of these terms in the context of homicide. If used to ground liability for manslaughter, these provisions would involve a redefinition of that offence in Irish law;<sup>18</sup> the Commission is of the view that this would be inappropriate. However the constructions used are informative for a derivative individual offence.

3.22 Recklessness was defined in section 3(a) as follows:

“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 and safety of others”.

Gross negligence was defined in section 3(b) as follows:

“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 actor or omission places others at serious risk of injury.”

3.23 The key elements in these definitions are the taking of substantial and unjustifiable risk and the failure to exercise foresight and prudence. The Commission is of the view that these are key elements of the type of bad managerial practice that can give rise to a corporate manslaughter. The Commission considers that these factors are informative as a basis for a derivative individual offence.

**(3) *The Victoria Crimes (Workplace Deaths and Serious Injuries) Bill 2001***

3.24 As was discussed in the Consultation Paper, the Australian state of Victoria’s *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* provided for derivative liability of officers of a body corporate that committed manslaughter.<sup>19</sup> 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 –

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<sup>18</sup> *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 2.92.

<sup>19</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 6.25-6.28.



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

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...”

3.25 The key elements of this test are: the existence of a failure to fulfil an organisational responsibility on the part of the human person; the existence of a substantial risk; the failure was unjustifiable; and the failure contributed to the corporate offence. The Commission is of the view that an unjustifiable failure to fulfil an organisational responsibility in relation to a serious risk is a culpable omission on the part of a manager of an undertaking. The Commission considers that these elements will be informative when formulating a derivative individual offence.

## **D A statutory derivative individual offence**

### **(1) *Application of the individual offence***

3.26 The derivative offence is designed to deter and punish human action that contributes to the commission of a corporate manslaughter. The Commission therefore considers that in order to contribute to the offence the human person in question must have some influence or responsibility within the undertaking. It would be unjust to hold a person with little or no influence or responsibility within the undertaking liable for this derivative offence even where it could be said that they were negligent and that this was a cause of death. If an employee at the operational level were to commit manslaughter then their personal liability would not be in question. Indeed, if an employee caused a death due to neglect falling short of gross negligence, the Commission considers that it would be more effective for this to be dealt with under other legislation providing for appropriate sanctions, such as the endangerment offence under section 13 of the *Non Fatal Offences Against the Person Act 1997* or as a breach of the duties of employees to other persons under legislation such as the *Fire Services Act 1981* or the *Safety Health and Welfare at Work Act 2005*.

3.27 On the other hand, the Commission considers that a test that rigidly follows stated management structures may not be sufficiently broad to include individuals who are genuinely culpable in the commission of the corporate offence. By limiting the individual liability to officers or directors, managers at lower levels or consultants engaged by the undertaking with significant authority may be excluded from liability. Furthermore, if the application followed the roles as stated by the undertaking, it would allow corporate officers to avoid liability by simply changing their job-title. The application should take account of the actual responsibilities of the human persons within the undertaking or external persons to whom the undertaking contracts out responsibility such as a consultant.

3.28 In the Consultation Paper, the Commission recommended that this derivative individual offence would apply to ‘high managerial agents’. High managerial agent was 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.”<sup>20</sup> While the Commission is of the view that this definition could provide an appropriate basis for the application of the individual offence the Commission notes that a number of statutory derivative mechanisms already in place use a different phrasing. For example, both the *Competition Act 2002* and the *Safety Health and Welfare at Work Act 2005* refer to ‘a person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity’. The Commission is of the view that it would be more consistent to base the definition of high managerial agent on these provisions.<sup>21</sup> By including the provision regarding persons who ‘purport’ to act in a managerial capacity the problems relating to stated management structures discussed above can be avoided.

3.29 As was noted in Chapter 1, undertakings regularly rely on the advice of outside specialists in the conduct of their activities.<sup>22</sup> In certain circumstances, the advice required may be so specialised that the undertaking may rightly act in reliance on the outside expert and may lack the ability to independently assess whether the expert’s advice is valid. Indeed, the purpose of seeking this specialist advice may be for the good reason that the undertaking lacks this expertise in the first place. The

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<sup>20</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 7.51. This test is based on the tests used in the US Model Penal Code and the Australian *Criminal Code Act 1995*.

<sup>21</sup> It is also worth noting that the Council of Europe *Convention on Corruption 1999* contains factors for assessing whether an individual was acting in a position of power or control. See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 4.26-4.29.

<sup>22</sup> See above at paragraph 1.138.

outside expert is therefore put in a quasi-managerial role, in that they provide advice which is implemented by the undertaking. In such circumstances, a failure by the outside expert could be a substantial contributing factor to the commission of a corporate manslaughter.

3.30 Where the advice of an outside advisor is implemented in this way by the undertaking the advisor can be said to be ‘purporting’ to act as a manager. The Commission is of the view that provision should be made for including persons not in the direct employment of the undertaking who are ‘purporting’ to act as managers in the definition of high managerial agent in order to include outside advisors.

3.31 The Commission recommends that the individual offence should apply to ‘high managerial agents’ defined as: “a person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity, whether or not that person has a contract of employment with the undertaking.”

3.32 *The Commission recommends that the individual offence should apply to ‘high managerial agents’ defined as: “a person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity, whether or not that person has a contract of employment with the undertaking.”*

**(2) Construction of the individual offence**

3.33 The Commission accepts that the individual offence will involve a lesser degree of culpability than either the corporate offence or gross negligence manslaughter at common law. As the individual offence is derived from the corporate offence, it will not be necessary for the high managerial agent to owe the deceased a duty of care directly, provided the corporation did.

3.34 The purpose of the individual offence is to prevent management sheltering behind the corporation and to deter management practices that lead to the commission of the corporate offence.<sup>23</sup> The Commission considers that the introduction of this offence will help to ensure that all persons of responsibility within the undertaking take cognisance of serious risks to life and health and take all reasonable steps to eliminate such risks.

3.35 The nature of the gross negligence standard is such that it cannot be ‘consented to’, ‘authorised’ or ‘connived at’; therefore much of the terminology used in the statutory derivative liability provisions discussed above is not applicable to corporate manslaughter. The corporate offence is based on a failure to regard a risk that would be obvious to the reasonably

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<sup>23</sup> See above at paragraph 3.11.

run undertaking. In order for the statutory offence to properly derive from the corporate offence, the Commission considers that it would be appropriate for the individual offence to be framed in terms of awareness of risk on the part of the high managerial agent and a failure to take measures to eliminate that risk.

**(a) Awareness of risk**

3.36 As the corporate offence and gross negligence manslaughter are based on an objective standard, it would be paradoxical to impose a higher, subjective standard for the individual offence. A subjective test would require that the high managerial agent have been actually aware of the risk. An objective test would assess whether a reasonable person in the high managerial agent's position would have been aware of the risk. Therefore, the Commission has concluded that the appropriate test for the individual offence is whether the high managerial agent was aware of or ought reasonably to have been aware of the risk. Whether or not the high managerial agent ought reasonably to have been aware will depend on what the agent's stated and actual organisational responsibilities were.

3.37 It is important that the threshold for the individual offence not be too low. High managerial agents are not expected to eliminate every remote risk. The risk should be a significant risk of death or serious personal harm, just as in the corporate offence. This mirrors the seriousness of the risk that gives rise to the corporate offence.

**(b) Failure to make reasonable efforts to eliminate the risk**

3.38 A high managerial agent should not be required to eliminate risks where that would be impossible. What is required is that they take all reasonable measures to eliminate the risk. Given that the individual offence is a homicide offence, the Commission is of the view that the failure involved should be more than mere inadvertence. The Commission therefore recommends that the failure in question should fall far below what could reasonably be expected in the circumstances.

3.39 When assessing whether reasonable steps were taken the jury should have regard to the actual responsibilities and authority of the high managerial agent. Where a high managerial agent has responsibilities relating to the risk and those responsibilities are not fulfilled, that will be probative of a failure to make reasonable efforts to eliminate the risk.

3.40 Regard should also be had to the responsibilities of the high managerial agent when assessing whether it was in his or her power to do anything towards eliminating the risk. It is important to avoid 'buck passing' in this regard. Therefore, if it was not in the high managerial agent's power to eliminate the risk they should be required to have informed others within the undertaking of the risk, so that appropriate action could

have been taken. A failure to do so will constitute a failure to eliminate the risk for the purposes of the individual offence. As was noted in Chapter 2, communication within the undertaking will play a central role in the prevention of corporate manslaughter.<sup>24</sup>

**(c) Causation**

3.41 With regard to the third element of the *Dunleavy* test, it is not necessary for the high managerial agent's failure to have eliminated the risk to have directly caused the corporate offence. It is necessary that it contributed to the commission of the corporate offence in more than a *de minimis* way.

3.42 Having constructed these various elements, the Commission can now set them out in the following way:

Where an offence of corporate manslaughter has been committed and a high managerial agent of the convicted undertaking:

- (d) knew or ought reasonably to have known of a substantial risk of death or serious personal harm,
- (e) failed to make reasonable efforts to eliminate that risk,
- (f) that failure fell far below what could reasonably be expected in the circumstances, and
- (g) that failure contributed to the commission of the corporate offence,

that person shall be guilty of an offence.

For the purposes of assessing whether a high managerial agent ought to have known of a risk, due regard should be had to the high managerial agent's actual and stated responsibilities.

For the purposes of assessing whether a high managerial agent failed to make reasonable efforts to eliminate a risk, due regard should be taken of whether it was within the high managerial agent's power to eliminate that risk. If it was not within the agent's power then they will have failed to take reasonable measures to eliminate the risk if they failed to pass on information of the risk to others within the undertaking who were in a position to eliminate the risk.

3.43 *The Commission recommends that the individual offence be formulated as follows:*

*Where an offence of corporate manslaughter has been committed and a high managerial agent of the convicted undertaking:*

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<sup>24</sup> See above at paragraphs 2.54-2.56.

- (h) *knew or ought reasonably to have known of a substantial risk of death or serious personal harm,*
- (i) *failed to make reasonable efforts to eliminate that risk,*
- (j) *that failure fell far below what could reasonably be expected in the circumstances, and*
- (k) *that failure contributed to the commission of the corporate offence,*

*that person shall be guilty of an offence.*

*For the purposes of assessing whether a high managerial agent ought to have known of a risk, due regard should be had to the high managerial agent's actual and stated responsibilities.*

*For the purposes of assessing whether a high managerial agent failed to make reasonable efforts to eliminate a risk, due regard should be taken of whether it was within the high managerial agent's power to eliminate that risk. If it was not within the agent's power then they will have failed to take reasonable measures to eliminate the risk if they failed to pass on information of the risk to others within the undertaking who were in a position to eliminate the risk.*

**(3) *Name of the individual offence***

3.44 Given the severity of a corporate manslaughter conviction it is important that human persons who are convicted of contributing to the corporate offence be denounced appropriately. The labelling of the individual offence must convey the requisite level of opprobrium. The Commission recommends that the individual derivative offence be called 'grossly negligent management causing death'.

3.45 *The Commission recommends that the individual offence be called 'grossly negligent management causing death'.*

**(4) *Procedural issues***

**(a) *Alternative verdicts for human defendants***

3.46 Where a high managerial agent is charged with gross negligence manslaughter as a principal and that prosecution fails it should be open to a jury to find them guilty of the derivative offence in the alternative. This follows from the difficult nature of the offence as a principal. Also, as the derivative offence of grossly negligent management causing death will be tried on the same set of facts as the human principal offence, the Commission considers it appropriate to give a jury an option of sanctioning lesser human culpability where the principal charge fails.

3.47 *The Commission recommends that the derivative offence should be available as an alternative verdict where a high managerial agent is charged with gross negligence manslaughter.*

**(b) Prosecution on indictment**

3.48 As was discussed above, the Commission is of the view that corporate manslaughter, given its severity, should be tried on indictment only.<sup>25</sup> The Commission is also of the view that the severity of a charge of grossly negligent management causing death is such that it should also only be prosecuted on indictment.

3.49 *The Commission recommends that the offence of grossly negligent management causing death should only be triable on indictment.*

**(c) Joint and separate trials**

3.50 In general, the same facts and evidence will be used for a trial of the corporate offence, the derivative individual offence and a human prosecution for gross negligence manslaughter. The Commission therefore considers that it would be desirable for all three to be tried as part of the same set of proceedings. There is a general preference for separate offences arising from the same incident to be tried together.<sup>26</sup> However, the trial judge has the power to separate the trials in the interests of justice.<sup>27</sup> For example, one accused may argue that joining proceedings will be prejudicial to them.

3.51 Since the derivative individual offence is dependent on the commission of the corporate offence, an acquittal for the undertaking will necessarily mean an acquittal for any high managerial agent charged with the individual offence. This could involve a waste of court resources if the prosecution of the high managerial agents was to go to a full trial only to be dismissed at the verdict stage because of a failure to convict a separate defendant. However, where the undertaking is convicted, and charges are then brought against high managerial agents, a second full trial will need to be held. The Commission is of the view that, as inefficiencies could be caused in either situation; the matter should remain at the discretion of the trial judge as is currently the case involving trials of individuals.

3.52 *The Commission recommends that whether or not to separate the trials of the undertaking and any individuals charged with manslaughter or grossly negligent management causing death should remain at the discretion of the trial judge.*

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<sup>25</sup> See above at paragraphs 2.74-2.75.

<sup>26</sup> See Walsh *Criminal Procedure* (Round Hall 2002) at 710-711.

<sup>27</sup> *Ibid* at 710-711.

**(d)        *Dissolution of undertakings***

3.53        While grossly negligent management causing death is contingent on the conviction of an undertaking, the Commission is of the view that this must not allow individuals to escape liability by dissolving the undertaking. Therefore, the Commission recommends that the dissolution of an undertaking should not prevent a prosecution of an individual for grossly negligent management causing death where it can be shown that the undertaking would have been in fact criminally liable for corporate manslaughter.

3.54        *The Commission recommends that the dissolution of an undertaking should not prevent a prosecution of an individual for grossly negligent management causing death where it can be shown that, prior to dissolution, the undertaking was in fact criminally liable for corporate manslaughter.*



## CHAPTER 4 SANCTIONS FOR UNDERTAKINGS

### A Introduction

4.01 This Chapter begins by looking at the differences between corporate and individual sentencing and at the use of pre-sanction reports by a sentencing court. The Chapter then goes on to consider a number of different sanctioning options and concludes by examining the issues of the spill-over effects of corporate sanctioning and at the problems presented by ‘phoenix companies’.

### B Differences between corporate and individual sentencing

4.02 The nature of corporations is such that they will respond differently to sanctions than a human defendant would. While the causes of human criminal behaviour are extremely complex and deeply rooted inside the psyche of the individual offender, the causes of corporate criminal behaviour are often far easier to analyse. Where production levels are institutionally prioritised over safety and a death ensues the situation can be remedied more easily than when a human murders another. As Braithwaite and Geis put it:

“...criminogenic organizational structures are more malleable than are criminogenic human personalities. A new internal compliance group can be put in place much more readily than a new superego.”<sup>1</sup>

Gobert argues that “[t]here are reasons to believe that the reformation of a company may be more feasible than the rehabilitation of an individual”.<sup>2</sup>

4.03 The traditional goals of a criminal justice system, discussed above,<sup>3</sup> can be far more easily served in this context. The rehabilitation of a

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<sup>1</sup> Braithwaite & Geis cited in Slapper & Tombs *Corporate Crime* (Longman 1999) at 214.

<sup>2</sup> Gobert “Controlling Corporate Criminality: Penal Sanctions and Beyond” [1998] 2 Web JCLI.

<sup>3</sup> See chapter 1 above. See also *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 1.13-1.25.

human offender may never be possible. As an undertaking's response to sanctions can be more easily anticipated, the rehabilitation of an undertaking can be achieved.

4.04 The Commission has already drawn attention to the impact that corporate culture can have on the commission of a corporate manslaughter. A number of aspects of corporate culture are considered in the recommended test to be used for assessing corporate guilt for manslaughter. Some of these factors, such as the corporate hierarchy, the communication networks in place and the procedural decision making rules can be manipulated by a court order. Slapper and Tombs, citing Braithwaite and Geis, give the example of a pharmaceutical company where the production manager has authority over the quality control manager and as a result, unsafe drugs are sold.<sup>4</sup> In such a situation the chain of responsibility could be altered which would go a long way towards ensuring that unsafe drugs are not sold again.

### **C Pre-sanction reports**

4.05 Bergman has argued that corporate convicts should be the subject of a detailed "corporate enquiry report" prior to sentencing.<sup>5</sup> In much the same way that a human convict is the subject of a pre-sanction report undertaken by the Probation and Welfare Service, an undertaking convicted of corporate manslaughter would also have their circumstances considered in detail.

4.06 For example, if the sentencing court were imposing a fine, it would be extremely useful to give the court a detailed assessment of the undertaking's means. This occurred in the *People (DPP) v. Roseberry Construction Ltd.*<sup>6</sup> In that case the Court of Criminal Appeal refused to reduce the fine imposed on the convicted company as there was evidence before the court that the company was able to pay the fine.

4.07 A pre-sanction report could also look at other aspects of the undertaking. Just as a report on a human offender will consider the offenders past convictions, cooperation with authorities etc. a pre-sanction report on an undertaking could consider the safety record, the degree to which the undertaking has cooperated with regulators in the past, and any prior convictions for safety related offences.

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<sup>4</sup> Slapper & Tombs *Corporate Crime* (Longman 1999) at 214.

<sup>5</sup> Bergman "Corporate Sanctions and Corporate Probation" (1992) (142) (6555) *New Law Journal* 1312.

<sup>6</sup> [2003] 4 IR 338.

4.08 The report itself could be undertaken by a government agency such as the National Authority for Occupational Safety and Health or, if it were deemed more efficient by the sentencing court, by a private consultant.

4.09 *The Commission recommends that before sentencing an undertaking convicted of corporate manslaughter, the sentencing court should order a pre-sanction report on the convicted undertaking.*

## **D Sanctions**

### **(1) Fines**

4.10 As was discussed in the Consultation Paper a fine is the most efficient means of sanctioning an undertaking.<sup>7</sup> In the Consultation Paper the Commission recommended that the fine available be unlimited, since the means of undertakings are likely to vary significantly.

4.11 The Commission did not recommend that fines be directly linked to turnover as this would have less effect on an asset-rich, low turnover undertaking or a non-commercial undertaking. It would be open to a court to look at the means of the undertaking, particularly as part of a pre-sanction report,<sup>8</sup> but the Commission is of the view that it would not be appropriate to require that the fine be linked to turnover.

4.12 While fines are efficient and swift, they suffer from a number of serious disadvantages. It was also noted in the Consultation Paper that a fined undertaking may be perceived to be ‘buying its way out’ of corporate manslaughter. Fisse notes that an “inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price.”<sup>9</sup>

4.13 Another difficulty with fines is the ‘deterrence trap.’<sup>10</sup> In certain cases the size of the fine required to act as an effective deterrent will be of such magnitude that a convicted undertaking will be unable to pay it. This problem was highlighted by Coffee: “[i]n short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation’s resources.”<sup>11</sup>

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<sup>7</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.03-8.12.

<sup>8</sup> See above at paragraphs 4.05-4.09.

<sup>9</sup> Fisse “Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1217.

<sup>10</sup> *Op cit* fn7 at paragraph 1.16.

<sup>11</sup> Coffee “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 386 at 390. See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 1.16.

4.14 A further limitation of fines arises in relation to non-commercial entities, in particular public sector bodies. While a heavy fine can be expected to have an impact on the behaviour of a for-profit entity such as a commercial company, it will affect a public sector body very differently. Many of the organisational deaths discussed in Chapter 1 involved public sector transport entities.<sup>12</sup> In such cases fines may be counter-productive; where safety budgets have been cut and death ensues, further financial penalties for the public undertaking are unlikely to be of much benefit in improving safety. Nonetheless, public bodies have been prosecuted and fined under Health and Safety legislation.<sup>13</sup>

4.15 While fines may be very efficient to administer, there are doubts about their rehabilitative value. Clough notes that:

“...fines are a blunt instrument for encouraging corporations to achieve internal change and prevent future offending. The corporation is simply required to pay the fine, and whether this will result in structural change, the scapegoating of individuals or have no effect at all is entirely up to the corporation.”<sup>14</sup>

4.16 Fisse argues that fines mistakenly leave the job of reform up to the convicted undertaking:

“In short, by imposing fines courts maximise corporate freedom by trusting corporations to exercise adequate internal control, but that trust is misplaced when the defendants, through their criminal acts, have proven to be untrustworthy.”<sup>15</sup>

4.17 Notwithstanding these criticisms, the Commission is of the view that fines are a very useful sanction for a convicted undertaking and that the difficulties discussed above can be addressed by including other sentencing options in addition to the fine, rather than eliminating the fine as a sanctioning option altogether.

4.18 *The Commission recommends that a court sentencing an undertaking convicted of corporate manslaughter should have the power to impose an unlimited fine.*

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<sup>12</sup> See above at paragraphs 1.34 and 1.35-1.37.

<sup>13</sup> See National Authority for Safety and Health Annual Reports 1998-2004.

<sup>14</sup> Clough “Will The Punishment Fit The Crime? Corporate Manslaughter And The Problem Of Sanctions” (2005) (8) *Flinders Journal of Law Reform* 113 at 123.

<sup>15</sup> Fisse “Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1217.

**(a) Equity fines**

4.19 Equity fines were first envisaged by Coffee. The equity fine requires the convicted undertaking to issue a certain amount of new shares which are then held by the state. Coffee argued that equity fines had many advantages over the cash fine in how they affected corporate and in particular managerial, behaviour.<sup>16</sup> While such fines may be very useful against a public company, the vast majority of the companies in Ireland are private companies, which necessarily have limitations on the transfer of shares. Furthermore they cannot be used at all against an unincorporated entity. Therefore, an equity fine could only be used against a very small number of potential defendants in this jurisdiction.

4.20 The Commission did not recommend the introduction of equity fines in the Consultation Paper<sup>17</sup> and sees no reason to depart from this view.

4.21 *The Commission does not recommend the introduction of equity fines.*

**(2) Remedial orders**

4.22 One sentencing option available to the court is a remedial order. This type of sanction has been described as ‘managerial intervention’<sup>18</sup> and is along the lines of the corporate probation system in operation in the United States under the Federal Sentencing Guidelines.<sup>19</sup>

4.23 In the Consultation Paper the Commission recommended that remedial orders be available as a sanction for an undertaking convicted of corporate manslaughter.<sup>20</sup> Remedial orders can potentially be excellent rehabilitative tools; by examining where the corporation went wrong a remedial order can require the undertaking to take the necessary steps to remedy the problem. In the Consultation Paper, the Commission suggested 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

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<sup>16</sup> See Coffee “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 386 at 413-424.

<sup>17</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.13-8.16.

<sup>18</sup> See Fisse “Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1221-1226.

<sup>19</sup> See United States Sentencing Commission, Guidelines Manual §8D1.

<sup>20</sup> *Op cit* fn17 at paragraphs 8.17-8.31.

internal control methods to focus more closely on safety and health procedures.

4.24 At present the National Authority for Occupational Safety and Health (“The HSA”) is empowered to impose prohibition notices and remedial orders. However this is done as part of a broader scheme of engaging with employers and attempting to foster compliance, which involves compromise. A sentencing court’s authority has more weight and so the conditions can be stricter.<sup>21</sup>

4.25 Remedial orders can, in many ways, be likened to probation. However, it must be stressed that in the corporate context they can be a punitive sanction in their own right and not merely an alternative to a sanction.<sup>22</sup> Corporate probation is a mechanism used in the United States under the federal sentencing guidelines.

4.26 *The Commission recommends that a court sentencing an undertaking for corporate manslaughter should have the option of imposing a remedial order.*

**(a) Pre-sanction information**

4.27 As with fines, a sentencing court may wish to have detailed information about the circumstances of the corporate offender prior to making a remedial order. However, unlike with a fine, where a court is examining the means of the offender, a court considering a remedial order will be seeking information about the effect corporate structures and work practices had on the commission of the offence. In many instances much of the relevant information will have been adduced at trial. However should a court require a further examination of the undertakings operations this should be included in the pre-sanction report. In the US, prior to the imposition of a corporate probation, a detailed corporate enquiry report is required.<sup>23</sup>

**(b) Statutory guidance on when to impose a remedial order**

4.28 Statutory guidance as to when a remedial order is appropriate may be useful for a sentencing court. The US guidelines list a number of circumstances. In the Consultation Paper the Commission noted four of these as being particularly appropriate for corporate manslaughter. They are where:

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<sup>21</sup> See Coffee “No Soul to Damn and No Body to Kick: An Unscandalised Enquiry into the Problem of Corporate Punishment” (1981) (79) *Michigan Law Review* 386 at 451.

<sup>22</sup> See Fisse “Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1223.

<sup>23</sup> See above at 4.05-4.09.

- (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.

4.29 The Commission is of the view that these guidelines should be amended slightly to take account of the particular circumstances of corporate manslaughter. The fact that the remedial order will only relate to criminal proceedings means that it will not be necessary to ensure payment of restitution, only payment of a fine. The compliance and detection programme is likely to be part of an assurance system<sup>24</sup> and the guidelines should take account of this. Assessing whether an undertaking has engaged in similar misconduct can be clarified by taking account of the regulatory environment the undertaking operates in and any statutory duties it is under.

4.30 *The Commission recommends that statutory guidance on when to impose a remedial order be provided by means of a non-exhaustive list which would include the following:*

- (a) whether a remedial order is necessary to secure the payment of a fine;*
- (b) whether the undertaking has any assurance programmes;*
- (c) the previous compliance by the undertaking with any relevant legislative duties;*
- (d) whether a remedial order is necessary to prevent the recurrence of the events which gave rise to the corporate manslaughter.*

**(c) *Statutory Guidance on types of conditions to be imposed***

4.31 In the Consultation Paper, the Commission provisionally recommended that statutory guidance should be provided for a sentencing court on the types of conditions a remedial order might contain.<sup>25</sup> The Consultation Paper outlined the statutory guidance in place in Australia and the US. These included: reform of the undertakings internal decision structures; development of a programme to prevent repeat offences; notification of employees of that programme; periodic reporting to the court; and submission to unannounced examinations. In the Consultation Paper, the Commission recommended that any such list should be non-exhaustive.

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<sup>24</sup> See above at paragraphs 1.63-1.65.

<sup>25</sup> *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.27-8.31.

4.32 The Commission also recommended in the Consultation Paper that the statutory guidance should be drawn up in consultation with the Health and Safety Authority.<sup>26</sup> The Commission is still of the view that the input of regulatory authorities is of great value. However, given the number of bodies with statutory regulatory authority that could be concerned with the activities of undertakings, the Commission is of the view that the relevant authority should liaise with the sentencing court and assist it in drawing up the specific conditions of a remedial order. The Commission considers that the expertise of regulatory bodies will be of great assistance to the court in this regard.

4.33 Fisse contends that the convicted undertaking should be afforded an opportunity to suggest its own reforms prior to the introduction of a remedial order.<sup>27</sup> Gobert comments that “It is the company that is most familiar with the intricacies of its operation and therefore best positioned to fashion remedies that take account of its particular situation.”<sup>28</sup> Where the court and any regulatory authority are satisfied that the proposed reforms will be sufficient then the convicted undertaking will be bound by court order to implement them.

4.34 In the event that the undertaking’s suggested reforms are unsatisfactory the court will need to design their own remedial orders. Coffee suggests that in this instance, management consultants or business school academics might be employed by the court to assess what changes might be made.<sup>29</sup> He also argues that an examination be undertaken by an independent investigator into the best means to improve internal discipline and that such an examination be at the convicted undertakings expense.<sup>30</sup> Gobert suggests that particular regard should be had to required changes in the policies of an undertaking, the establishment of effective internal monitoring systems and revision of the undertaking’s reward systems.<sup>31</sup>

4.35 The Commission does not consider that it will be necessary to involve an independent investigator in many instances because there will often be a statutory body with the required expertise.

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<sup>26</sup> *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.31.

<sup>27</sup> Fisse “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1226.

<sup>28</sup> Gobert “Controlling Corporate Criminality: Penal Sanctions and Beyond” [1998] 2 *Web JCLI*.

<sup>29</sup> Coffee “No Soul to Damn and No Body to Kick: An Unscandalised Enquiry into the Problem of Corporate Punishment” (1981) (79) *Michigan Law Review* 386 at 451.

<sup>30</sup> *Ibid* at 455-456.

<sup>31</sup> *Op cit* fn28.



4.36 After a remedial order has been made, the sentencing court will need periodic reports on the progress of the undertaking. These could be submitted by the undertaking itself or a regulatory agency.

4.37 *The Commission recommends that where a court is imposing a remedial order it should consult with and receive submissions from any relevant regulatory and enforcement authorities.*

4.38 *The Commission recommends that statutory guidance on the types of conditions to be imposed in a remedial order be provided by means of a non-exhaustive list which would include the following:*

- (a) a requirement that prior to imposition of the remedial order the undertaking submit to the court a detailed programme outlining the steps to be taken to remedy the problems that led to the corporate manslaughter;*
- (b) in the event of the programme submitted being found unsatisfactory to the court, a programme drawn up by the court in consultation with any relevant regulatory and enforcement authorities;*
- (c) a requirement on the undertaking to communicate to employees, or where appropriate others, or both, the details of the programme;*
- (d) a requirement on the undertaking to make regular reports on the implementation of the programme;*
- (e) a requirement on the undertaking to submit to regular unannounced inspections to assess the implementation of the programme for reform, without prejudice to any statutory powers of the court or of any regulatory and enforcement authorities.*

**(d) Enforcement**

4.39 Where the undertaking is not acting in good faith some further penalty should be triggered. For example, a substantial fine could be imposed and suspended pending the fulfilling of the remedial order. However, the fine will have all the drawbacks discussed above and may be of little rehabilitative value.

4.40 A more effective means of enforcing a remedial order would be some system of supervised management. This could also be applied in the case of a recidivist corporate offender. Gobert recommends that a court ordered ‘master’ should be appointed until such time as the court is satisfied that the undertaking has been rehabilitated to the requisite degree.<sup>32</sup>

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<sup>32</sup> Gobert “Controlling Corporate Criminality: Penal Sanctions and Beyond” [1998] 2 Web JCLI.

Supervised management already occurs under existing receivership rules,<sup>33</sup> however in this context the focus would not be on good financial management but instead on good safety management.

4.41 *The Commission recommends that where an undertaking has failed to implement a remedial order it should be open to the sentencing court to impose a fine or to impose supervised management on the undertaking until such time as the reforms are implemented.*

4.42 Supervised management is an extremely invasive sanction which will have a profound impact on the undertaking for the duration of the supervision period. The Commission is of the view that where supervised management is imposed, it would be appropriate for a relevant regulatory body to conduct that management.

4.43 Where there is no regulatory body with authority in the area, the court will need to appoint a person to manage the undertaking. They will need to be suitably qualified and they should not be closely linked to the convicted undertaking. They will need to report to the court at regular intervals.

4.44 *The Commission recommends that where supervised management is imposed to enforce a remedial order a relevant regulatory body should conduct that management. Where no such body exists, the person appointed to manage the undertaking should be suitably qualified and they should not be closely linked to the convicted undertaking; they should report to the court at regular intervals.*

**(e) Costs**

4.45 Remedial orders may be costly but, as was noted in the Consultation Paper, in many cases the convicted undertaking can be made to bear the expenses so that the cost does not fall on the state. In certain circumstances this may lead to severe hardship for the undertaking and so it should be at the discretion of the sentencing court not to impose the costs on the undertaking.

4.46 *The Commission recommends that all costs associated with the remedial order be borne by the convicted undertaking unless the sentencing court sees good reason to do otherwise.*

**(3) Community service orders**

4.47 In the Consultation Paper<sup>34</sup> the Commission considered whether community service orders would be an appropriate sanction for an

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<sup>33</sup> See Courtney *The Law of Private Companies* (LexisNexis 2002) 1275-1319.

<sup>34</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.32-8.39.

undertaking convicted of corporate manslaughter. The Commission provisionally recommended that they be introduced as they provide an avenue for the undertaking to contribute to the community it has wronged in a constructive manner.

4.48 One drawback of the community service order, averted to in the Consultation Paper,<sup>35</sup> is that, as an undertaking can only act through its servants and agents, it may be seen to be ‘buying its way out’ of the community service. In this regard the community service order does not function substantially differently from a fine. The United States Sentencing Commission stated the problem thus:

“An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction and therefore generally less desirable than a direct monetary sanction.”<sup>36</sup>

4.49 Another concern is the risk that community service orders will be used to promote ‘pet charities’ of the sentencing court or, indeed to subsidise government spending generally. Gobert illustrates the problem by asking “why build a hospital at public expense when one can recruit a convicted company to do the job?”<sup>37</sup>

4.50 For a community service order to be more beneficial than a fine and to avoid it being channelled into pet projects, there must be a link between the offence and the community service. In the Consultation Paper, the Commission recommended that community service orders be introduced along the lines of model proposed by the Australian Law Reform Commission. This model would require the community service project to ‘bear a reasonable relationship to the contravention.

4.51 This may go further than mere restoration of victims’ families; it could include research into the prevention of future deaths. Jefferson gives the example of a train operating company which he suggests could be “ordered to conduct research into improving safety standards on the railways in order to prevent train crashes in the future.”<sup>38</sup>

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<sup>35</sup> *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.34.

<sup>36</sup> United States Sentencing Commission, *Guidelines Manual* §8B1.3.

<sup>37</sup> Gobert “Controlling Corporate Criminality: Penal Sanctions and Beyond” [1998] 2 Web JCLI.

<sup>38</sup> Jefferson “Corporate Criminal Liability: The Problem of Sanctions” (2001) 65 *Journal of Criminal Law* 235.

4.52 Traditionally, investigations into how future disasters could be prevented have been conducted at the state's expense through public inquiries.<sup>39</sup> Gobert suggests that these could be conducted by the convicted undertaking as part of its community service.<sup>40</sup> It should be noted that this may call into question the independence of any such enquiry unless the investigation is debarred from considering fault and is solely focused on the means of preventing future disasters.

4.53 Community service orders also suffer from the disadvantage that they may not express the requisite level of public opprobrium. Gobert notes that in certain instances, the community service may in fact serve to enhance the undertaking's reputation in the community if the act of community service is higher profile than the offence was.<sup>41</sup> However, as was noted in the Consultation Paper, this difficulty could be offset by the imposition of an adverse publicity order.<sup>42</sup>

4.54 In the Consultation Paper the Commission recommended that community service orders be introduced along the lines of model proposed by the Australian Law Reform Commission. The recommended system would have the following features:

“(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

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<sup>39</sup> For example the *Buttevant* and *Cherryvale* inquiries discussed in detail in Chapter 1 above.

<sup>40</sup> Gobert “Controlling Corporate Criminality: Penal Sanctions and Beyond” [1998] 2 Web JCLI.

<sup>41</sup> *Ibid.*

<sup>42</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.36.

service the court should be required to consider what, if any, damage was suffered by 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.”

4.55 *The Commission recommends that a court sentencing an undertaking convicted of corporate manslaughter should have the power to impose a community service order.*

**(4) Adverse publicity orders**

4.56 In the Consultation Paper<sup>43</sup> the Commission recommended that adverse publicity orders be an available sanction for an undertaking convicted of corporate manslaughter. This would require the convicted undertaking to publicise the fact of a conviction for corporate manslaughter at its own expense; the undertaking might be required to write to shareholders and/or customers or it might be required to place an advertisement in a local or national newspaper. The precise content of such publicity would be set by the court.

4.57 The most immediately obvious effect of an adverse publicity order is that it might affect the income of a commercial undertaking. This begs the question, “why not simply increase fines to such a level that the same monetary loss can be inflicted?”<sup>44</sup>

4.58 As was noted in Chapter 1, an important advantage of criminal liability for corporate manslaughter over civil liability is that it expresses public denunciation of the wrongdoing. Meister notes that “[u]nlike monetary sanctions, stigmatization has the ability to express the social disapproval of corporate homicide. It has a unique denunciatory impact that is beyond the reach of monetary penalties.”<sup>45</sup>

4.59 Companies with very strong brand image might be considerably influenced by the possibility of an adverse publicity order. Meister

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<sup>43</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.40-8.44.

<sup>44</sup> Fisse, cited in Slapper & Tombs *Corporate Crime* (Longman 1999) at 216.

<sup>45</sup> Meister “Criminal Liability for Corporations that Kill” (1990) 64 *Tulane Law Review* 919 at 943.

comments that “[f]irms carefully cultivate a manicured public image that they strive to maintain for their creditors, stockholders, consumers and employees: they do not want this image sullied.”<sup>46</sup> An adverse publicity order is a very good means of expressing censure of an undertaking, particularly one with a strong brand image and a heavy reliance on corporate reputation.

4.60 Furthermore, as the offence would apply to non-commercial undertakings, the financial effect of the sanction may not be the only factor motivating the undertaking. For example, a not-for-profit organisation would be hit very hard by an adverse publicity order as it is very difficult for charities to function without the perception that they are somewhat virtuous.

4.61 As was noted in the Consultation Paper, adverse publicity orders are uncertain in effect.<sup>47</sup> Fisse comments that the “severity of the sentence would be determined by the fickle jury of public opinion.”<sup>48</sup> However, he goes on to argue that

“[i]f the ultimate impact of a sentence is considered the relevant yardstick, then courts would have to estimate the ultimate impact of the sanction. Some might contend that estimates of the ultimate impact of publicity sanctions would be less reliable than estimates of the ultimate impact of fines or other sanctions; but, given the unpredictability of the effects of fines upon corporations, this contention would rest upon a controversial empirical claim.”<sup>49</sup>

4.62 The uncertainty in the precise effect of the sentence is common to many sentences, including imprisonment. Meister notes that the precise duration of a custodial sentence may vary from convict to convict depending on good behaviour or parole.<sup>50</sup>

4.63 The uncertainty as to the effect of an adverse publicity order may in fact aid its efficacy. The possibility of a monetary fine can be quantified in advance and factored into corporate policy. As was noted above, this may give rise to a public perception of injustice in that the undertaking is buying its way out of wrongdoing. Harm to an undertaking’s reputation is difficult

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<sup>46</sup> Meister “Criminal Liability for Corporations that Kill” (1990) 64 *Tulane Law Review* 919 at 943.

<sup>47</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.42.

<sup>48</sup> Fisse “Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions.” (1983) 56 *Southern California Law Review* 1141 at 1230-1231.

<sup>49</sup> *Ibid* at 1231.

<sup>50</sup> *Op cit* fn46 at 945.

to assess in monetary terms and so an adverse publicity order should not suffer from this perception.

4.64 It could be argued that with a crime as serious as manslaughter there may be no need for an adverse publicity order, as the conviction itself will attract considerable attention. Slapper and Tombs cite the example of the Ford Pinto case.<sup>51</sup> The Company was never convicted of manslaughter but the case received massive publicity. Slapper and Tombs go on to point out that Ford is still one of the most successful motor companies in the world and does not seem to have suffered significant damage to its corporate reputation.

4.65 However, it is worth noting that the imposition of a court order requiring adverse publicity and adverse publicity incidental to the trial will have different weights. The latter is by its nature speculative, whereas the former would only be imposed after guilt had been conclusively proven.

4.66 Also, there is no guarantee that a corporate conviction will in fact be heavily publicised. Fisse notes that “Corporate convictions are often not publicized through either the news media or through the convicted corporation's own channels of communication.”<sup>52</sup> Although whether this would occur with a crime as serious as manslaughter is debateable.

4.67 Given the importance of adequately expressing public opprobrium for corporate manslaughter, the Commission recommends that a sentencing court should have the power to impose an adverse publicity order on an undertaking convicted of corporate manslaughter.

4.68 *The Commission recommends that a sentencing court should have the power to impose an adverse publicity order on an undertaking convicted of corporate manslaughter.*

#### **(5) Restraining orders and injunctions**

4.69 In the Consultation Paper the Commission considered the existing law of restraining orders and injunctions, in particular under the Council of Europe’s proposed sentencing regime for corporate offenders.<sup>53</sup>

4.70 The Commission did not recommend any change in the law in respect of restraint orders and injunctions given the sanctions already recommended in that Paper. By the same rationale, the Commission is of the

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<sup>51</sup> Slapper & Tombs *Corporate Crime* (Longman 1999) at 217.

<sup>52</sup> Fisse “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions” (1983) 56 *Southern California Law Review* 1141, at 1220-1221.

<sup>53</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 8.45-8.48.

view that the sanctions already recommended in this chapter are sufficient and it does not recommend any change in the law.

4.71 *The Commission does not recommend any change in the law in respect of restraint orders and injunctions.*

## **E Spill over effects of corporate sanctioning**

4.72 A significant drawback of sanctioning an undertaking is that other, potentially blameless, parties will necessarily be affected. Coffee outlines four levels of overspill in corporate punishment. First the shareholders are affected; secondly the creditors; thirdly employees and fourthly consumers.<sup>54</sup> In the case of a public body, the first level is the taxpayer rather than the shareholder.<sup>55</sup>

4.73 The fourth category, consumers, will only be affected if the convicted undertaking is a commercial entity with a significant amount of market control. Jefferson points out that:

“in a price-sensitive market consumers may not be affected at all because the company may not wish to pass on the loss because doing so would lower its market share. On the other hand, the efficacy of fines is particularly problematic when a company has a monopoly or virtual monopoly. Since it can pass on the whole of the fine to its customers without suffering any loss itself, there can be a complete spillover.”<sup>56</sup>

4.74 The Commission is satisfied that spill-over is not a sufficient reason not to sanction corporate offenders. First, any criminal law sanction will have knock-on effects, for example if a mother and wife is imprisoned her husband and children will be profoundly affected even though they are blameless. French argues that:

“[w]hen a natural person commits a felony and is convicted and punished his or her associates, often family members and dependents are frequently cast into dire financial straits...In many jurisdictions, little or no official interest is paid to these innocent sufferers. ... By analogy...for the most serious offenses,

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<sup>54</sup> Coffee “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 386 at 400-402.

<sup>55</sup> See Bergman “Corporate Sanctions and Corporate Probation” (1992) 142 (6555) *New Law Journal* 1312.

<sup>56</sup> Jefferson “Corporate Criminal Liability: The Problem of Sanctions” (2001) 65 *Journal of Criminal Law* 235.



particularly those involving loss of or threats to life, indirect harm to corporate associates should not defeat penalty.”<sup>57</sup>

4.75 Secondly, shareholders particularly, but also employees in certain circumstances, will benefit when a company saves money by failing to have regard to risks to human life. If the shareholders can potentially benefit from the commission of the offence then it is not unjust that they should suffer when the undertaking is punished for the offence.

4.76 The spill-over effects of sanctioning may also motivate shareholders to keep management in check. Bergman observes that “[t]he fear of decreased dividends might induce shareholders to scrutinise the safety records of the company in addition to its financial records before making investment decisions.”<sup>58</sup>

4.77 Thirdly, undertakings will be subject to many detrimental influences that are not the fault of the shareholders. If the undertaking is sued for large sums of money this will affect the shareholders. Similarly if the undertaking is very badly run the shareholders will be detrimentally affected. Shareholders put their faith in a corporation’s structures and management and where there are difficulties with either shareholders ought to scrutinise them or invest elsewhere.

4.78 The Commission is of the view that, where a sanction is likely to give rise to undue hardship for other parties, a sentencing court should take account of this. A pre-sanction report should assess the spill over effects of sentencing the undertaking.

4.79 *The Commission recommends that the potential spill-over effects of sentencing an undertaking should be assessed in the pre-sanction report and that the sentencing court should attempt to minimise hardship to other parties insofar as that is practicable.*

## **F Phoenix companies**

4.80 In the Consultation Paper, the Commission considered the issue of dissolution and reformation of companies to avoid liability.<sup>59</sup> This is a problem that will only arise in the case of companies incorporated under the *Companies Acts 1963-2003*.

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<sup>57</sup> French *Collective and Corporate Responsibility* (Columbia University Press 1984) at 189-190.

<sup>58</sup> Bergman “Corporate Sanctions and Corporate Probation” (1992) 142 (6555) *New Law Journal* 1312.

<sup>59</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraphs 2.14-2.17.

4.81 In the Australian case of *Queen v Denbo Pty and Nadenboush*<sup>60</sup> a convicted company went into liquidation and then re-formed in order to avoid the payment of a fine. It is important that undertakings convicted of corporate manslaughter not be permitted to avoid sanction in this manner.

4.82 The Courts have a common law power to lift the corporate veil where separate personality is being used to avoid existing legal obligations.<sup>61</sup> However, as was noted in the Consultation Paper, that power does not extend to avoidance of possible future liability.<sup>62</sup> It could therefore be open to a company to dissolve and reform in the wake of a corporate manslaughter but before indictment. However, it is likely that the Courts would be far quicker to pierce the corporate veil where there was an attempt to avoid criminal as opposed to civil liability. The Commission is of the view that statutory provision should be made to prevent companies from dissolving and re-forming to avoid liability for corporate manslaughter.

4.83 *The Commission recommends that statutory provision be made to allow a court to disregard separate legal personality where a company has dissolved and reformed and the court is satisfied that the purpose of that dissolution and reformation was to avoid criminal liability for corporate manslaughter.*

4.84 The Commission also noted in the Consultation Paper that where no new company is formed after dissolution it may be very difficult to place the blame on individuals connected with the dissolved company.<sup>63</sup> However, the use of individual prosecutions for manslaughter and the derivative offence outlined in Chapter 3 above will make it possible to prosecute individuals directly. The Commission is of the view that dissolution and reformation should not be used to avoid liability for the derivative offence, notwithstanding the fact that the offence is contingent on a corporate offence.

4.85 *The Commission recommends that the dissolution of a company should not prevent a prosecution of high managerial agents of that company for grossly negligent management causing death.*

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<sup>60</sup> Supreme court of Victoria 14 June 1994.

<sup>61</sup> See Courtney *The Law of Private Companies* (2<sup>nd</sup> ed Lexis Nexis 2002) at 5.038-5.047).

<sup>62</sup> *Op cit* fn59 at paragraph 2.16.

<sup>63</sup> *Op cit* fn59 at paragraph 2.15.

## CHAPTER 5 SANCTIONS FOR INDIVIDUALS

### A Introduction

5.01 This chapter will examine the sanctioning options available for individuals. First the punishment of individuals convicted of manslaughter will be looked at and then the punishment of individuals convicted of a derivative offence of grossly negligent management causing death. In addition to fines and custodial sentences, this chapter considers restriction and disqualification from holding managerial roles as sentencing options.

### B Sentencing for manslaughter

5.02 In Chapter 3 the Commission recommended that individual liability for gross negligence manslaughter should remain as it is. Where an individual is culpable to the degree required to be convicted of the common law offence in relation to their management of an undertaking then the common law offence should operate as it does at present.

5.03 The rationale behind the Commission's recommendation was that individual manslaughter should not be treated any differently in the corporate context than under the general law. By the same reasoning, sentencing for manslaughter should be the same in circumstances arising from the management of an undertaking. To introduce a separate sentencing mechanism would only dilute the impact of the conviction.<sup>1</sup> Currently there is no maximum sentence for common law manslaughter; therefore it can conceivably carry a life sentence or an unlimited fine.<sup>2</sup> The Commission is of the view that this should not be altered in any way for an offence arising out of a corporate manslaughter.

5.04 *The Commission recommends that sentencing for gross negligence manslaughter arising from a corporate manslaughter should remain the same as for gross negligence manslaughter generally.*

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<sup>1</sup> See discussion above at paragraphs 3.02-3.09.

<sup>2</sup> See O'Malley *Sentencing Law and Practice* (Round Hall, 2000) at 403.

## **C Sentencing for grossly negligent management causing death**

5.05 The individual offence of grossly negligent management causing death as outlined in chapter 3 is derived from the offence of corporate manslaughter by an undertaking. The Commission considers that it would be appropriate to set maximum sentence by statute for the derivative offence as it will involve lesser culpability than manslaughter. This would also differentiate this individual offence from primary liability for manslaughter.

### **(1) Custodial Sentence**

5.06 The degree of culpability as between individuals found to be liable for the individual offence may vary so the maximum should not be too low, so as to allow a sentencing court to recognise and punish culpable behaviour. The maximum sentence will need to be higher than the expected average sentence. Maximum sentences are envisaged to be used in only the most extreme cases, for the ‘absolute worst’ offences.<sup>3</sup>

5.07 O’Malley points out that the maximum sentences for new statutory offences are usually set with comparable offences.<sup>4</sup> Grossly negligent management causing death involves a lesser degree of culpability than manslaughter, for which there is no maximum sentence. O’Malley notes that sentencing for manslaughter in Ireland rarely exceeds 10 years, although a life sentence is available to a sentencing court.<sup>5</sup>

5.08 There are a number of other statutory derivative liability mechanisms in place in Ireland. These were considered in detail in Chapter 3<sup>6</sup>. The maximum sentences for these offences range from 2 years under the *Safety Health and Welfare at Work Act 2005* to 5 years under the *Criminal Justice (Theft & Fraud Offences) Act 2001*. As has been noted repeatedly in this Report, the culpable killing of a human being is one of the most serious offences in the criminal calendar. It would therefore be inappropriate to limit the maximum sentence to a level comparable with health and safety or theft offences. The Commission is of the view that the maximum sentence for grossly negligent management causing death should be higher than these other statutory offences.

5.09 A broadly comparable offence to grossly negligent management causing death would be dangerous driving causing death under section 53 of the *Road Traffic Act 1961*. O’Brien J defined the offence as “...driving in a manner which a reasonably prudent motorist, having regard to all the

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<sup>3</sup> O’Malley *Sentencing Law and Practice* (Round Hall, 2000) at 140.

<sup>4</sup> *Ibid* at 276.

<sup>5</sup> *Ibid* at 403.

<sup>6</sup> See above at paragraphs 3.15-3.19.

circumstances, would clearly recognise as involving a direct and serious risk of harm to the public”.<sup>7</sup> The maximum statutory sentence for dangerous driving causing death is 5 years.<sup>8</sup>

5.10 While dangerous driving causing death involves a death and is based in negligence, it could be argued that at its most extreme it is less culpable than grossly negligent management causing death at its most extreme. A high managerial agent’s negligence could lead to a great many deaths, whereas a dangerous driver’s is unlikely to cause more than a few. Therefore, the ‘absolute worst’ instance of grossly negligent management causing death will have more grave results than the ‘absolute worst’ instance of dangerous driving causing death. Homicide is a result offence and so a higher death toll should be taken into account in sentencing.

5.11 Endangerment under section 13 of the *Non Fatal Offences Against The Person Act 1997* involves the intentional or reckless creation of a risk of death or substantial personal harm. Endangerment carries a maximum penalty of 7 years imprisonment. As endangerment does not require that any harm actually result, it can be described as a less serious offence than grossly negligent management causing death.

5.12 False accounting under section 10 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* carries a maximum penalty of 10 years imprisonment. Given that the derivative offence involves a death, false accounting can also be described as a less serious offence than grossly negligent management causing death.

5.13 As was noted in the Commission’s Consultation Paper on Sentencing the principle of ordinal proportionality requires that sentences be set so that they reflect the level of wrongdoing relative to other crimes.<sup>9</sup> In the Consultation Paper on Corporate Killing, the Commission provisionally recommended that the individual offence should carry a maximum sentence of 5 years.<sup>10</sup> As this tariff is the same as a number of less culpable offences the Commission is now of the view that the maximum sentence for grossly negligent management causing death should be higher in order to reflect the seriousness of the wrongdoing.

5.14 *The Commission recommends that the maximum sentence of imprisonment for grossly negligent management causing death should be set at 12 years.*

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<sup>7</sup> Cited in Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 1.111.

<sup>8</sup> See Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 1.109.

<sup>9</sup> *Consultation Paper on Sentencing* March 1993 at paragraphs 4.83-4.84.

<sup>10</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.53.

**(2) Fines**

5.15 In the Consultation Paper, the Commission recommended that it be open to a sentencing court to impose an unlimited fine for the derivative offence.<sup>11</sup>

5.16 In relation to sentencing, O'Malley notes that "the most fundamental principle is that a sentence should be proportionate to both the gravity of the offence and the personal circumstances of the offender."<sup>12</sup> This principle was espoused by Denham J in *The People (DPP) v M.*<sup>13</sup>

5.17 The gravity of an offence of grossly negligent management causing death and the personal circumstances of those convicted of the may differ quite considerably. The degree of negligence and the number of deaths caused could vary significantly from case to case. Furthermore, the means of senior managers of large undertakings may be considerable; in such cases, it is important that the sanction have a substantial impact on the convicted persons. The Commission recommends that there be an unlimited fine available to a court sentencing for grossly negligent management causing death.

5.18 *The Commission recommends that there be an unlimited fine available to a court sentencing for grossly negligent management causing death.*

**D Restriction and disqualification**

5.19 Under the sections 150 and 160 of the *Companies Act 1990* ("The 1990 Act") persons involved in the running of a company who have engaged in wrongdoing may be disqualified from holding any managerial role in a company for a period of years or may be restricted to management of companies that are capitalised at more than a certain amount.

**(1) Disqualification**

5.20 Section 160 of The 1990 Act provides for the disqualification of persons involved in the management of a company.<sup>14</sup> Section 160(1) provides for automatic disqualification for a five year period where a person

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<sup>11</sup> See *Consultation Paper on Corporate Killing* (CP 26-2003) at paragraph 8.53.

<sup>12</sup> O'Malley *Sentencing Law and Practice* (Round Hall, 2000) at 9 see also 125-126.

<sup>13</sup> [1994] 3 IR 306, 316-317.

<sup>14</sup> See Courtney *The Law of Private Companies* (2<sup>nd</sup> ed LexisNexis 2002) at 697-718.

is convicted of an offence of fraud or dishonesty in relation to a company.<sup>15</sup> Section 160(2) provides that, in certain other circumstances where it is satisfied that a person has engaged in wrongdoing in relation to a company, a court may disqualify that person for such period of time as it sees fit.

5.21 The Commission is of the view that disqualification from holding senior management roles of persons convicted of grossly negligent management causing death would be an appropriate sentencing option. It could also be appropriate to disqualify someone convicted of gross negligence manslaughter arising out of a corporate offence and that option should be open to the courts. Disqualification is likely to have a profound deterrent effect on people whose livelihood is derived from corporate management.

5.22 Disqualification of individuals connected to a corporate homicide offence was recommended in the UK in 2000. The Home office recommended that persons who had “some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person’s death, should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain.”<sup>16</sup> In the case of the proposed Irish offence, disqualification orders would only be applicable to ‘high managerial agents’ as defined in Chapter 3.<sup>17</sup>

5.23 The 1990 Act provides for mandatory disqualification. While mandatory disqualification may be appropriate in relation to fraud offences committed by a manager, the Commission is not of the view that disqualification for grossly negligent management causing death should be mandatory. The precise degree of culpability under the test set out in Chapter 3 above may vary from convicted person to convicted person. Therefore mandatory disqualification would lead to injustice. Also, a person convicted of grossly negligent manslaughter causing death may be in prison for the duration of the disqualification order, which would render it paradoxical. The Commission recommends that it should be at the discretion of the sentencing court whether or not to impose a disqualification order. Additionally the Commission is of the view that the period of disqualification should be at the discretion of the sentencing court.

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<sup>15</sup> Section 162 of The 1990 Act allows the court to order a period other than 5 years on the application of the prosecutor.

<sup>16</sup> *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* Home Office May 2000 at paragraph 3.4.9. It should be noted that more recent corporate manslaughter proposals in the UK do not contain this recommendation.

<sup>17</sup> See above at paragraph 3.32.

5.24 Statutory public bodies generally require potential board members not to have been convicted of an indictable offence, or if they are convicted of such an offence while in office, require their removal.<sup>18</sup> Therefore a person convicted of gross negligence manslaughter or grossly negligent management causing death will be disqualified from holding such a position regardless of whether a disqualification order is made against them.

5.25 *The Commission recommends that where a high managerial agent is convicted of either gross negligence manslaughter or grossly negligent manslaughter causing death it should be open to the court to disqualify that agent from acting in a managerial capacity in any undertaking for such period as the court sees fit.*

5.26 The English *Companies Act 1984* contains similar provisions to those in the Irish 1990 Act. In the case of *Re Sevenoaks Stationers (Retail) Ltd*<sup>19</sup> the English Court of Appeal considered a graduated system for how long periods of disqualification imposed should be. While such guidance may be useful given the breath of offences for which a person can be subject to a disqualification order under the *Companies Act 1990*, the Commission is not of the view that guidance will be necessary in relation to disqualifications arising out of corporate manslaughter.

**(a) Enforcement**

5.27 As every company incorporated in the state under the *Companies Acts 1963-2003* must be registered with the Companies Registration Office it would seem relatively simple to enforce a disqualification order against a company. However, shadow directors, de facto directors and others with managerial responsibility do not necessarily have to notify any authorities of their stance in such roles. A Shadow Director is defined in section 27 of The 1990 Act as “a person in accordance with whose directions or instructions the directors of a company are accustomed to act” This is a far less rigidly assessable position in a company and so disqualification orders against them can be difficult to enforce.

5.28 Furthermore, it is not entirely clear exactly what it is that disqualified persons are disqualified from doing. The Act states that a person subject to a disqualification order shall not “...be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company...” Linnane notes that there is no

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<sup>18</sup> For example, Schedule 5 section 8 of the *Safety Health and Welfare at Work Act 2005*.

<sup>19</sup> [1991] 3 All ER 591.



definition in the Act of what constitutes management and what non-managerial work could be done after disqualification.<sup>20</sup>

5.29 The Commission has recommended that the offence of corporate manslaughter apply to ‘undertakings’ which would include many organisations that are not companies registered under the *Companies Acts 1963-2003*. This may present difficulties of enforcement. For example, it may be difficult to ensure that a disqualified high managerial agent did not subsequently become a member of a partnership or a manager of a sports club. However, these difficulties will not be any greater than the difficulties in enforcing section 160 of The 1990 Act discussed above.

5.30 The 1990 Act relies on a number of enforcement mechanisms. Any person acting in breach of a disqualification order will be disqualified for a further 10 years.<sup>21</sup> Any consideration paid to a person who acts in contravention of a disqualification order can be recovered by the company.<sup>22</sup> Where another person within the company acts on the instructions of a person subject to a disqualification order and they are aware of the order they will themselves be subject to a disqualification order.<sup>23</sup> The Commission is of the view that these penalties would be appropriate for enforcing a disqualification order arising from a corporate manslaughter.

5.31 In the context of Corporate Manslaughter, a breach of a disqualification order must be taken very seriously. The UK Home Office recommended in 2000 that such a breach should be punishable by a period of imprisonment and a fine. The Commission is in agreement with this view and recommends that a person acting in breach of a disqualification order arising out of corporate manslaughter should be liable for up to 2 years imprisonment and a fine of up to €1,000,000.

5.32 *The Commission recommends that where a person is found to be in breach of a disqualification order they should be guilty of an offence punishable by:*

- a) A period of imprisonment of not more than 2 years;*
- b) A fine of not more than €1,000,000;*
- c) A further period of disqualification of 10 years;*

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<sup>20</sup> Linnane “Restriction and Disqualification of Directors” (1994) 12(6) ILT 132 at 137.

<sup>21</sup> *Companies Act 1990* section 161(3).

<sup>22</sup> *Companies Act 1990* section 163(2).

<sup>23</sup> *Companies Act 1990* section 164.

5.33 *The Commission recommends that any remuneration paid to a person acting in breach of a disqualification order be recovered by the undertaking in question.*

5.34 *The Commission recommends that those acting on the instructions of someone they know to be subject to a disqualification order should be subject to a disqualification order themselves.*

**(2) Restriction**

5.35 Section 150 of the *Companies Act 1990* provides for the restriction of certain persons in their exercise of the role of directors. The restriction of directors is primarily designed as a safeguard for shareholders against the financial mismanagement of persons who have engaged in such mismanagement in the past.<sup>24</sup> The provision requires that such persons may only be directors of companies with a certain base amount of share capital.

5.36 The sanction was primarily devised to combat ‘phoenix syndrome’ which entails insolvent companies liquidating and then reforming but free of debt.<sup>25</sup> As corporate manslaughter is not a financial crime such a restriction would provide little protection against a further corporate offence. Therefore restriction is not appropriate as a sanction for high managerial agents convicted of the derivative individual offence.

5.37 *The Commission does not recommend that a high managerial agent convicted of grossly negligent manslaughter causing death be subject to a restriction order.*

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<sup>24</sup> See Courtney *The Law of Private Companies* (2<sup>nd</sup> ed LexisNexis 2002) at 667-697.

<sup>25</sup> These measures, which were introduced into the *Companies Act 1990*, are modelled on recommendations of the UK Cork Committee on Insolvency Law and Practice. See Linnane “Restriction and Disqualification of Directors” (1994) 12(6) *ILT* 132 at 133.

## CHAPTER 6 SUMMARY OF RECOMMENDATIONS

6.01 The recommendations made in this Report may be summarised as follows:

### Chapter 1

6.02 The Commission recommends that, as the current law of corporate liability for manslaughter does not provide a clear basis for constructing liability, a new basis, contained in legislative form, is necessary. [Paragraph 1.08]

6.03 The Commission is of the view that a statutory formulation for corporate killing should take account of different sizes of corporate entities to which the offence would apply. [Paragraph 1.12]

6.04 The Commission is of the view that criminal liability for manslaughter is an appropriate means of dealing with death caused by corporate wrongdoing. [Paragraph 1.26]

6.05 The Commission is of the view that negligent management and organisation within a corporate entity can be substantial factors in the causation of death. [Paragraph 1.41]

6.06 The Commission recommends that the mental element of corporate liability for homicide should be equivalent to the existing common law offence of manslaughter by gross negligence. [Paragraph 1.53]

6.07 The Commission recommends that in assessing the reasonableness of corporate behaviour, consideration should be given to the regulatory framework in which the corporate entity was operating and the assurance systems in place at the time of the death. [Paragraph 1.67]

6.08 The Commission recommends that corporate liability for manslaughter be based on a test of gross negligence, formulated around a breach of duty. While the test will be applied to the entity as a whole, regard should be had to the wrongdoing of individuals within the entity when assessing whether the corporate entity has breached its duty. [Paragraph 1.117]

6.09 The Commission recommends that corporate managers who are culpable in the commission of corporate manslaughter should be secondarily liable. [Paragraph 1.123]

6.10 The Commission recommends that the offence be established by statute and be called ‘corporate manslaughter’. [Paragraph 1.128]

6.11 The Commission recommends that the offence of corporate manslaughter should apply to public and private corporate bodies and to unincorporated bodies. Such a body, to be known as an “undertaking” should 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 whether carried on for profit or not.” [Paragraph 1.143]

## **Chapter 2**

6.12 The Commission recommends that these elements should form the basis of the test of corporate liability for manslaughter:

- (a) The undertaking was negligent;
- (b) The negligence was of a sufficiently high degree to be characterised as ‘gross’ and so warrant criminal sanction; and
- (c) The negligence caused the death. [Paragraph 2.10]

6.13 The Commission recommends that whether an undertaking owed a deceased a duty of care be established based on existing common law rules and statutory duties. [Paragraph 2.15]

6.14 The Commission further recommends that a non-exhaustive, indicative list be included and that it refer to an undertaking’s duties as an employer, as an occupier of land, as a producer of goods and as a provider of services. [Paragraph 2.19]

6.15 The Commission recommends that the negligence of the undertaking be assessed as follows:

The undertaking shall be found to be negligent where:

- (a) It owed the deceased a duty of care, and
- (b) It breached that duty by failing to meet the required standard of care. [Paragraph 2.22]

6.16 The Commission recommends that the standard of care should require the undertaking to take all reasonable measures to anticipate and prevent risks of death or serious personal harm, having due regard to the undertaking’s size and circumstances. [Paragraph 2.30]

6.17 The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the way in which the organisation's activities are managed or organised by its high managerial agents. [Paragraph 2.38]

6.18 The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the regulatory environment in which that undertaking operates, including statutory duties to which it is subject. The Commission further recommends that the court should have regard to any corporate assurance systems that the undertaking subscribes to. [Paragraph 2.43]

6.19 The Commission recommends when assessing whether a undertaking has met the standard of care , regard should be had to:

- The allocation of responsibility within the undertaking;
- The procedural decision making rules of the undertaking;
- The policies of the undertaking. [Paragraph 2.48]

6.20 The Commission recommends that when assessing whether a undertaking has met the standard of care, regard should be had to:

- The training and supervision of employees by the undertaking;
- The response of the undertaking to previous incidents involving a risk of death or serious personal harm. [Paragraph 2.51]

6.21 The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the undertaking's stated and actual goals. [Paragraph 2.53]

6.22 The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to the adequacy of the communications systems within the undertaking systems for communicating information by the undertaking to others affected by its activities. [Paragraph 2.56]

6.23 The Commission recommends that when assessing whether an undertaking has met the standard of care, regard should be had to whether the undertaking was operating within the terms of a contract or licence made or granted under legislation. [Paragraph 2.58]

6.24 The Commission recommends that the second element of gross negligence, the gross nature of the negligence, should be stated as:

The negligence will be characterised as 'gross' if it:

- (a) was of a very high degree; and

(b) involved a significant risk of death or serious personal harm. [Paragraph 2.63]

6.25 The Commission recommends that the normal rules of causation should apply to corporate manslaughter [Paragraph 2.73]

6.26 The Commission recommends that the offence of corporate manslaughter should only be triable on indictment. [Paragraph 2.75]

6.27 The Commission does not make any recommendation on whether the offence of corporate manslaughter should be tried in the Circuit Criminal Court or the Central Criminal Court. [Paragraph 2.77]

### **Chapter 3**

6.28 The Commission recommends that a corporate prosecution for manslaughter should not prevent a human prosecution. The Commission further recommends that the primary human liability should be left to the ordinary law of gross negligence manslaughter. [Paragraph 3.09]

6.29 The Commission recommends that human persons within the undertaking who are culpable in the commission of the offence of corporate manslaughter should be criminally liable. [Paragraph 3.14]

6.30 The Commission recommends that the individual offence should apply to ‘high managerial agents’ defined as: “a person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity, whether or not that person has a contract of employment with the undertaking.” [Paragraph 3.32]

6.31 The Commission recommends that the individual offence be formulated as follows:

Where an offence of corporate manslaughter has been committed and a high managerial agent of the convicted undertaking:

- (a) knew or ought reasonably to have known of a substantial risk of serious personal harm or death;
- (b) failed to make reasonable efforts to eliminate that risk;
- (c) that failure fell far below what could reasonably be expected in the circumstances; and
- (d) that failure contributed to the commission of the corporate offence;

that person shall be guilty of an offence.

For the purposes of assessing whether a high managerial agent ought to have known of a risk, due regard should be had to the high managerial agent’s actual and stated responsibilities.

For the purposes of assessing whether a high managerial agent failed to make reasonable efforts to eliminate a risk, due regard should be taken of whether it was within the high managerial agent's power to eliminate that risk. If it was not within the agent's power then they will have failed to take reasonable measures to eliminate the risk if they failed to pass on information of the risk to others within the undertaking who were in a position to eliminate the risk. [Paragraph 3.43]

6.32 The Commission recommends that the individual offence be called 'grossly negligent management causing death'. [Paragraph 3.45]

6.33 The Commission recommends that the derivative offence should be available as an alternative verdict where a high managerial agent is charged with gross negligence manslaughter. [Paragraph 3.47]

6.34 The Commission recommends that the offence of grossly negligent management causing death should only be triable on indictment. [Paragraph 3.49]

6.35 The Commission recommends that whether or not to separate the trials of the undertaking and any individuals charged with manslaughter or grossly negligent management causing death should remain at the discretion of the trial judge. [Paragraph 3.52]

6.36 The Commission recommends that the dissolution of an undertaking should not prevent a prosecution of an individual for grossly negligent management causing death where it can be shown that, prior to dissolution, the undertaking was in fact criminally liable for corporate manslaughter. [Paragraph 3.54]

#### **Chapter 4**

6.37 The Commission recommends that before sentencing an undertaking convicted of corporate manslaughter, the sentencing court should order a pre-sanction report on the convicted undertaking. [Paragraph 4.09]

6.38 The Commission recommends that a court sentencing an undertaking convicted of corporate manslaughter should have the power to impose an unlimited fine. [Paragraph 4.18]

6.39 The Commission does not recommend the introduction of equity fines. [Paragraph 4.21]

6.40 The Commission recommends that a court sentencing an undertaking for corporate manslaughter should have the option of imposing a remedial order. . [Paragraph 4.26]

6.41 The Commission recommends that statutory guidance on when to impose a remedial order be provided by means of a non-exhaustive list which would include the following:

- (a) whether a remedial order is necessary to secure the payment of a fine;
- (b) whether the undertaking has any assurance programmes;
- (c) the previous compliance by the undertaking with any relevant legislative duties;
- (d) whether a remedial order is necessary to prevent the recurrence of the events which gave rise to the corporate manslaughter. [Paragraph 4.30]

6.42 The Commission recommends that where a court is imposing a remedial order it should consult with and receive submissions from any relevant regulatory and enforcement authorities. [Paragraph 4.37]

6.43 The Commission recommends that statutory guidance on the types of conditions to be imposed in a remedial order be provided by means of a non-exhaustive list which would include the following:

- (a) a requirement that prior to imposition of the remedial order the undertaking submit to the court a detailed programme outlining the steps to be taken to remedy the problems that led to the corporate manslaughter;
- (b) in the event of the programme submitted being found unsatisfactory to the court, a programme drawn up by the court in consultation with any relevant regulatory and enforcement authorities;
- (c) a requirement on the undertaking to communicate to employees, or where appropriate others, or both, the details of the programme;
- (d) a requirement on the undertaking to make regular reports on the implementation of the programme;
- (e) a requirement on the undertaking to submit to regular unannounced inspections to assess the implementation of the programme for reform, without prejudice to any statutory powers of the court or of any regulatory and enforcement authorities. [Paragraph 4.38]

6.44 The Commission recommends that where an undertaking has failed to implement a remedial order it should be open to the sentencing court to impose a fine or to impose supervised management on the undertaking until such time as the reforms are implemented. [Paragraph 4.41]

6.45 The Commission recommends that where supervised management is imposed to enforce a remedial order a relevant regulatory body should conduct that management. Where no such body exists, the person appointed



to manage the undertaking should be suitably qualified and they should not be closely linked to the convicted undertaking; they should report to the court at regular intervals. [Paragraph 4.44]

6.46 The Commission recommends that all costs associated with the remedial order be borne by the convicted undertaking unless the sentencing court sees good reason to do otherwise. [Paragraph 4.46]

6.47 The Commission recommends that a court sentencing an undertaking convicted of corporate manslaughter should have the power to impose a community service order. [Paragraph 4.55]

6.48 The Commission recommends that a sentencing court should have the power to impose an adverse publicity order on an undertaking convicted of corporate manslaughter. [Paragraph 4.68]

6.49 The Commission does not recommend any change in the law in respect of restraint orders and injunctions. [Paragraph 4.71]

6.50 The Commission recommends that the potential spill-over effects of sentencing an undertaking should be assessed in the pre-sanction report and that the sentencing court should attempt to minimise hardship to innocent parties insofar as that is practicable. [Paragraph 4.79]

6.51 The Commission recommends that statutory provision be made to allow a court to disregard separate legal personality where a company has dissolved and reformed and the court is satisfied that the purpose of that dissolution and reformation was to avoid criminal liability for corporate manslaughter. [Paragraph 4.83]

6.52 The Commission recommends that the dissolution of a company should not prevent a prosecution of high managerial agents of that company for grossly negligent management causing death. [Paragraph 4.85]

## **Chapter 5**

6.53 The Commission recommends that sentencing for gross negligence manslaughter arising from a corporate manslaughter should remain the same as for gross negligence manslaughter generally. [Paragraph 5.04]

6.54 The Commission recommends that the maximum sentence of imprisonment for grossly negligent management causing death should be set at 12 years. [Paragraph 5.14]

6.55 The Commission recommends that there be an unlimited fine available to a court sentencing for grossly negligent management causing death. [Paragraph 5.18]

6.56 The Commission recommends that where a high managerial agent is convicted of either gross negligence manslaughter or grossly negligent manslaughter causing death it should be open to the sentencing court to disqualify that agent from acting in a managerial capacity in any undertaking for such period as the court sees fit. [Paragraph 5.25]

6.57 The Commission recommends that where a person is found to be in breach of a disqualification order they should be guilty of an offence punishable by:

- a) A period of imprisonment of not more than 2 years;
- b) A fine of not more than €1,000,000;
- c) A further period of disqualification of 10 years. [Paragraph 5.32]

6.58 The Commission recommends that any remuneration paid to a person acting in breach of a disqualification order be recovered by the undertaking in question. [Paragraph 5.33]

6.59 The Commission recommends that those acting on the instructions of someone they know to be subject to a disqualification order should be subject to a disqualification order themselves. [Paragraph 5.34]

6.60 The Commission does not recommend that a high managerial agent convicted of grossly negligent manslaughter causing death be subject to a restriction order. [Paragraph 5.37]

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**DRAFT CORPORATE MANSLAUGHTER BILL 2005**

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ARRANGEMENT OF SECTIONS

Section

1. Short Title
2. Interpretation
3. Offence of corporate manslaughter
4. Offence of grossly negligent management causing death
5. Prosecution of offences
6. Penalties
7. Pre-sanction reports
8. Remedial orders
9. Community service orders
10. Adverse publicity orders
11. Disqualification orders
12. Effect on prosecution for manslaughter by gross negligence
13. Disregarding separate legal personality

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**DRAFT CORPORATE MANSLAUGHTER BILL 2005**

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**BILL**

*entitled*

AN ACT TO CREATE THE INDICTABLE OFFENCE OF CORPORATE MANSLAUGHTER BY AN UNDERTAKING, TO CREATE THE INDICTABLE OFFENCE OF GROSSLY NEGLIGENT MANAGEMENT CAUSING DEATH BY A HIGH MANAGERIAL AGENT OF AN UNDERTAKING, AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACTAS AS FOLLOWS:

**Short title**

1.—(1) This Act may be cited as the Corporate Manslaughter Act 2005.

**Interpretation**

2.—(1) In this Act—

“court” means the Circuit Criminal Court;

“high managerial agent” means a person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity, whether or not that person has a contract of employment with the undertaking.

“undertaking” means 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 whether carried on for profit or not.

*Explanatory Note*

*See paragraphs 1.143, 2.77 and 3.32.*

**Offence of corporate manslaughter**

3.—(1) Where an undertaking causes the death of a human person by gross negligence that undertaking shall be guilty of an offence called corporate manslaughter.

(2) An undertaking causes death by gross negligence where —

- (a) it owed a duty of care to the deceased human person;
- (b) it breached that duty of care in that it failed to meet the standard of care in *subsection (3)*;

- (c) the breach of duty was of a very high degree and involved a significant risk of death or serious personal harm; and
- (d) the breach of duty caused the death of the human person.

(3) The standard of care required of the undertaking is to take all reasonable measures to anticipate and prevent risks to human life, having due regard to the size and circumstances of the undertaking.

(4) In assessing whether the undertaking owed the deceased human person a duty of care the court shall have regard to any common law or statutory duties imposed on the undertaking, and in particular shall have regard to whether the undertaking owed a duty as—

- (a) an employer;
- (b) an occupier of land;
- (c) a producer of goods; or
- (d) a provider of services.

(5) In assessing whether the undertaking breached the standard of care in *subsection (3)* the court shall have regard to any or all of the following—

- (a) the way in which the activities of the undertaking are managed or organised by its high managerial agents;
- (b) the allocation of responsibility within the undertaking;
- (c) the procedural decision-making rules of the undertaking;
- (d) the policies of the undertaking;
- (e) the training and supervision of employees by the undertaking;
- (f) the response of the undertaking to previous incidents involving a risk of death or serious personal harm;
- (g) the stated and actual goals of the undertaking;
- (h) the adequacy of the communications systems within the undertaking including systems for communicating information to others affected by the activities of the undertaking;
- (i) the regulatory environment in which the undertaking operates, including any statutory duties to which the undertaking is subject;
- (j) any assurance systems to which the undertaking has subscribed;
- (k) whether the undertaking was operating within the terms of a contract or licence made or granted under legislation.

Explanatory Note

See paragraphs 2.10, 2.15, 2.19, 2.22, 2.30, 2.38, 2.43, 2.48, 2.51, 2.53, 2.56, 2.58, 2.63 and 2.73.

**Offence of grossly negligent management causing death**

4.—(1) Where an undertaking has been convicted of corporate manslaughter and a high managerial agent of the convicted undertaking—

- (a) knew or ought reasonably to have known of a substantial risk of death or serious personal harm,
- (b) failed to make reasonable efforts to eliminate that risk,
- (c) that failure fell far below what could reasonably be expected in the circumstances, and
- (d) that failure contributed to the commission of the corporate offence,

that agent shall be guilty of an offence called “grossly negligent management causing death.”

(2) For the purposes of assessing whether a high managerial agent ought to have known of a risk the court shall have due regard to the actual and stated responsibilities of the high managerial agent.

(3) For the purposes of assessing whether a high managerial agent failed to make reasonable efforts to eliminate a risk, the court shall have due regard to actual responsibilities within the undertaking of the high managerial agent were and whether it was within the power of the high managerial agent to eliminate the risk.

(4) If it was not within the power of the high managerial agent to eliminate a risk then he or she will have failed to take reasonable measures to eliminate the risk if he or she failed to pass on information of the risk to others within the undertaking who were in a position to eliminate the risk.

(5) The dissolution of an undertaking shall not prevent a prosecution of high managerial agents of that company for grossly negligent management causing death.

Explanatory Note

See paragraphs 3.14, 3.43 and 3.45.

**Prosecution of offences**

5.—Prosecutions for the offence of corporate manslaughter or the offence of grossly negligent management causing death shall be on indictment.

Explanatory Note

See paragraphs 2.75 and 3.49.

**Penalties**

6.—(1) An undertaking convicted of corporate manslaughter shall be liable to a fine.

(2) A high managerial agent convicted of grossly negligent management causing death is liable to a fine or imprisonment for a term not exceeding 12 years.

Explanatory Note

See paragraphs 4.18, 5.14 and 5.18.

**Pre-sanction reports**

7.—(1) Before sentencing an undertaking convicted of corporate manslaughter, the court may order a pre-sanction report on the convicted undertaking.

(2) A pre-sanction report shall include information on—

- (a) the means of the undertaking;
- (b) the previous compliance by the undertaking with any relevant legislative duties;
- (c) the previous cooperation by the undertaking with relevant bodies having legislative enforcement or regulatory functions, and
- (d) the possible effects on other parties of imposing a fine or other order under this Act.

Explanatory Note

See paragraph 4.09.

**Remedial orders**

8.—(1) An undertaking convicted of corporate manslaughter may, in addition to or instead of any fine imposed, be ordered to remedy the matters which gave rise to the offence, in this section referred to as a remedial order.

(2) In assessing whether a remedial order is appropriate the court shall have due regard to all relevant circumstances, including—

- (a) whether a remedial order is necessary to secure the payment of a fine;
- (b) whether the undertaking has subscribed to any assurance programmes;
- (c) the previous compliance by the undertaking with any relevant legislative duties;

- (d) whether a remedial order is necessary to prevent the recurrence of the events which gave rise to the corporate manslaughter.
- (3) When imposing a remedial order the court may consult with and hear submissions from any relevant regulatory and enforcement authorities in determining the conditions to be imposed.
- (4) A remedial order may include the following—
- (a) a requirement that prior to imposition of the remedial order the undertaking submits to the court a detailed programme outlining the steps to be taken to remedy the problems that led to the corporate manslaughter;
  - (b) in the event of the programme submitted being found unsatisfactory to the court, a programme drawn up by the court in consultation with any relevant regulatory and enforcement authorities;
  - (c) a requirement on the undertaking to communicate to employees, or where appropriate others, or both, the details of the programme;
  - (d) a requirement on the undertaking to make regular reports on the implementation of the programme;
  - (e) a requirement on the undertaking to submit to regular unannounced inspections to assess the implementation of the programme for reform, without prejudice to any statutory powers of the court or of any regulatory and enforcement authorities.
- (5) Where an undertaking does not comply with the terms of a remedial order, the court may impose a fine or supervised management on the undertaking until such time as the order implemented.
- (6) Where supervised management is imposed it shall be conducted by a relevant regulatory or enforcement authority.
- (7) Where there is no relevant regulatory or enforcement authority the court may appoint a competent officer to manage the undertaking who shall—
- (a) be suitably qualified;
  - (b) not be connected to the convicted undertaking;
  - (c) report to the court at specified regular intervals.
- (8) The costs associated with the remedial order shall be borne by the convicted undertaking unless the court decides otherwise.

*Explanatory Note*

*See paragraphs 4.26, 4.30, 4.37, 4.38, 4.41, 4.44 and 4.46.*



### **Community service orders**

**9.**—(1) A court may impose a community service order on an undertaking convicted of corporate manslaughter, instead of or in addition to a fine.

(2) Prior to imposing a community service order the court shall require the undertaking to prepare a report containing the details of a community service project it could perform.

(3) If the convicted undertaking does not propose such a project, or the court rejects its proposal, the court shall specify a project to be undertaken.

(4) A community service project shall bear a reasonable relationship to the circumstances giving rise to the commission of corporate manslaughter.

(5) In determining the nature of a community service order the court shall consider what damage, if any, was suffered by the community as a whole as a result of the corporate manslaughter.

(6) Where a community service order requires more supervision than could be performed by the court, the court may appoint a competent officer to manage the undertaking who shall—

(d) be suitably qualified;

(e) not be connected to the convicted undertaking;

(f) report to the court at specified regular intervals.

(7) The competent officer of the court shall supervise compliance with the project and, if necessary, prepare reports on the proposed project.

(8) The fees incurred by the competent officer of the court shall be payable by the undertaking unless the court decides otherwise.

#### *Explanatory Note*

*See paragraph 4.55.*

### **Adverse publicity orders**

**10.**—(1) In addition to or instead of any fine that may be imposed, the court may order that an undertaking convicted of corporate manslaughter be made subject to an adverse publicity order.

(2) An adverse publicity order shall require the convicted undertaking to publicise the fact of its conviction for corporate manslaughter —

(a) in a specified broadcast or print medium;

(b) by signage or leaflets at the principal office or place of business of the undertaking;

- (c) by letters, emails or telephone to the customers of the undertaking or those affected by the conduct of the undertaking; or
- (d) by any other means, including electronic means, which the court considers appropriate.

Explanatory Note

See paragraph 4.68.

**Disqualification orders**

**11.—**(1) Where the court considers it appropriate, a high managerial agent convicted of grossly negligent management causing death may be disqualified from acting in a management capacity for a period not exceeding 15 years.

(2) A person found to be acting in breach of a disqualification order shall be guilty of an offence.

(3) A prosecution for an offence under this section shall be on indictment.

(4) A person convicted of an offence under this section is liable to fine not exceeding €1,000,000 or imprisonment for a term not exceeding 2 years or both.

(5) In addition to the penalties provided for, a person convicted of an offence under this section:

- (a) shall be subject to a further period of disqualification of 10 years; and
- (b) shall be required to return to the undertaking any remuneration paid to him or her while acting in breach of a disqualification order.

(6) Any person found to be acting on the instructions of another known to that person to be subject to a disqualification order shall be liable to a disqualification order.

Explanatory Note

See paragraphs 5.25, 5.32, 5.33 and 5.34.

**Effect on prosecution for manslaughter by gross negligence**

**12.—**(1) Nothing in this Act shall prevent the prosecution of any individual for the offence of manslaughter by gross negligence.

(2) Where a high managerial agent has been charged with manslaughter by gross negligence arising from an incident related to an undertaking and that prosecution fails, it shall be open to the court to convict of grossly negligent management causing death as an alternative verdict.

Explanatory Note

*See paragraphs 3.09 and 3.47.*

**Disregarding separate legal personality**

**13.**—A court may at its discretion disregard separate legal personality where an undertaking has been dissolved and re-formed and the court is satisfied that the purpose of that dissolution and reformation was to avoid criminal liability for corporate manslaughter or grossly negligent management causing death.

Explanatory Note

*See paragraphs 4.83 and 4.85.*



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