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SCOTTISH LAW COMMISSION

Discussion Paper on Criminal Liability of Partnerships

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The Honourable Lord Drummond Young, *Chairman*
Laura J Dunlop, QC
Professor George L Gretton
Patrick Layden, QC TD
Professor Hector L MacQueen.

The Chief Executive of the Commission is Malcolm McMillan. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

The Commission would be grateful if comments on this Discussion Paper were submitted by 12 August 2011.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

Mr Alastair Smith
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

Tel: 0131 668 2131

[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

Contents (cont'd)

Chapter 1 Introduction

Background to the project

1.1 This project forms part of the Scottish Law Commission's *Eighth Programme of Law Reform*.[1]

1.2 The purpose of the project is to consider the law relating to the criminal liability of partners and partnerships in the light of the decision of the High Court of Justiciary in *Balmer v HM Advocate*[2] — in which it was held that since the juristic personality of a partnership is extinguished upon dissolution, it is not competent to prosecute a dissolved partnership — and to propose appropriate reform.

1.3 There are many areas in which the present law of partnership would benefit from reform. Partnership was the subject of a major law reform project conducted jointly by this Commission and the Law Commission for England and Wales, which culminated in 2003 in the publication of the Joint Report on Partnership Law (henceforth "the Joint Report").[3] The Joint Report recommends a comprehensive package of reforms to the law of partnership, but does not focus particularly upon the question of criminal liability. The Joint Report reflects a widespread consensus that major reform of the law of partnership is necessary. Nevertheless, in the face of opposition from one section of the English legal profession, the Department of Trade and Industry (subsequently the Department for Business, Enterprise and Regulatory Reform; now the Department for Business, Innovation and Skills) decided that nothing should be done to implement the Joint Report's recommendations in relation to general partnerships.[4]

1.4 It remains the case that the law of partnership requires general reform and modernisation. The present law, based upon the common law and partly codified by a 19th century statute, the Partnership Act 1890 (the "1890 Act"), is full of uncertainties and anomalies. Other jurisdictions continue to update their law,[5] and it cannot be in the interests of the public, of business or of the wider economy that firms should continue to be governed by such an outdated statute. We think that the time is ripe for the Department for Business, Innovation and Skills to reconsider its previous view on the implementation of the Joint Report.

Scope of the project

1.5 This project is concerned with three issues. The first is the problem identified in *Balmer v HM Advocate*:[6] that the prosecution of a partnership may be frustrated by dissolution. We refer to this problem as the "dissolution issue". The second issue concerns

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[1] Scot Law Com No 220 (2010).
[2] [2008] HCJAC 44, 2008 SLT 799.
[3] Law Com No 283 / Scot Law Com No 192, Cm 6015 (2003).
[4] Although a number of the Joint Report's recommendations relating to limited partnerships under the Limited Partnerships Act 1907 were implemented by the Legislative Reform (Limited Partnerships) Order 2009 (SI 2009/1940).
[5] Jersey, for example, has recently introduced two new forms of partnership.
[6] [2008] HCJAC 44, 2008 SLT 799.

the circumstances in which partners might be held criminally liable, as individuals, for offences committed by the partnership. The third is what effect, if any, the dissolution of the partnership may (or should) have upon the prosecution of partners in respect of any such individual liability.[7]

The structure of this paper

1.6 Chapter 2 of this Discussion Paper briefly considers the decision of the High Court in *Balmer,* identifying what was and was not decided in that case.

1.7 Chapter 3 examines the existing law in relation to the prosecution of partnerships, considering both the general rules applying by virtue of the 1890 Act and the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") and the variety of particular rules established by various offence-creating statutes. It goes on to consider the various bases, in statute and at common law, upon which partners might be criminally liable, as individuals, for partnership offences.

1.8 Chapter 4 moves on to consider the options for reform. We identify three issues. The first is the dissolution issue*:* how might we prevent the dissolution of a partnership from frustrating its prosecution? The second concerns the bases upon which individual partners might be held criminally liable for offences committed by a firm. Are these sufficient to allow the prosecution of individuals in all appropriate circumstances? The third issue is the extent (if any) to which dissolution of the partnership might affect the individual criminal liability of partners. We conclude that dissolution of the partnership is unlikely to be a bar to the enforcement of any individual criminal liability which might have arisen, and that any remaining uncertainty would be removed by resolution of the dissolution issue.

1.9 Chapter 5 considers the dissolution issue. We note that the implementation of the Joint Report, with some minor amendments, would effectively address this issue. We then discuss a more limited reform, capable of being implemented in a small, free-standing Bill, which would similarly address the dissolution issue discretely, without any broader reform of partnership law.

1.10 Chapter 6 discusses the second issue, considering whether it might be appropriate to extend the circumstances in which partners might be prosecuted, as individuals, in relation to an offence committed by a partnership. This goes beyond addressing the dissolution issue, and should be seen, in the context of the present project, as an optional extra. Regardless of whether any of the proposals in Chapter 6 are adopted, the reforms suggested in Chapter 5 will remain necessary; and the rejection of the proposals in Chapter 6 need not, and should not, prejudice the acceptance of those in Chapter 5.

1.11 Chapter 7 contains a summary of our questions and proposals.

Legislative competence

1.12 The conclusion of the High Court in *Balmer* was that the jurisitic personality of a partnership ended on dissolution, with the consequence that an indictment directed against

[7] The same issues apply to limited partnerships under the Limited Partnerships Act 1907 as apply to general partnerships under the 1890 Act. Accordingly there is no need for this Discussion Paper to consider 1907 Act partnerships separately.

the dissolved partnership was incompetent. To alter this result would be to alter a fundamental aspect of the law of partnership, namely the circumstances and consequences of a partnership's dissolution. By virtue of section 29 of the Scotland Act 1998, it is outside the legislative competence of the Scottish Parliament to make any provision which relates to reserved matters, as defined in Schedule 5 to that Act, or which is in breach of the restrictions in Schedule 4.[8] Head C1 of Schedule 5 lists as a reserved matter "[t]he creation, operation, regulation and dissolution of types of business association", a "business association" being defined as "any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit . . ." A partnership is a "business association" in terms of this reservation, and it is clear that any amendment to the law regarding the dissolution of partnerships would be a reserved matter, capable of being carried out only by UK legislation.

1.13 There may, however, be aspects of the law relating to the prosecution of partnerships which lie within the legislative competence of the Scottish Parliament. To the extent that any legislative solution to the dissolution issue goes beyond addressing the consequences of dissolution of partnerships and addresses general questions of Scots criminal law, it may well contain provisions which would fall within the legislative competence of the Scottish Parliament, and which would require that Parliament's consent by way of a Legislative Consent Motion in terms of the Sewel Convention.

1.14 We should add, for completeness, that we do not consider that any of the proposals in this Discussion Paper raise questions of compatibility with EU law. We consider in Chapter 6 some aspects of the compatibility of that chapter's proposals with Article 6 of the ECHR; otherwise, no issues of compliance with Convention rights arise.

Impact assessment

1.15 The aim of any proposed amendment to the law regarding the prosecution of dissolved partnerships would be to ensure that the interests of justice could not be frustrated by the dissolution of a partnership, with the result that the alleged perpetrator of serious criminal wrongdoing could not be held to account. That being the case, it would clearly be a mistake to assess any such proposal principally in economic terms. However, as with all law reform proposals, the economic impact of any proposed changes must be taken into account. Our initial view is that any economic impact arising from our proposals in Chapter 5, whether upon partnerships, partners or the courts, will be minimal. We would, however, welcome any information or representations from interested parties in order to assist us in considering the economic impact of our proposals more fully in the report to follow upon this Discussion Paper.

1.16 Chapter 6 considers more radical and far-reaching reform of the way in which partnerships and partners are treated by the criminal law. The implications of this are explored in some detail in that chapter. For present purposes, we note that it is possible that any such change may have greater economic impact than the more limited reform suggested elsewhere in this Discussion Paper.

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[8] Scotland Act 1998, s 29(1), (2)(c) and (d).

Chapter 2 Prosecuting dissolved partnerships - the issue in *Balmer v HM Advocate*

2.1 In Scotland, a partnership, as a separate legal persona,[1] may in principle be subject to criminal prosecution.[2] Such prosecutions have, however, been very rare. Reports of summary prosecutions are infrequent, and we have identified only one reported attempt to prosecute a partnership on indictment.[3] It is of course possible that there have been other cases which have not found their way into the law reports.

2.2 Historically there has been some doubt as to the competency of proceeding against a partnership on indictment, since section 70 of the 1995 Act was drafted in terms which included bodies corporate but which appeared to exclude partnerships.[4] In the Joint Report on *Partnership Law,* we suggested that section 70 should be amended to make it clear that it was competent to prosecute partnerships on indictment as well as summarily.[5] This recommendation was implemented by sections 65 and 66 of the 2010 Act, which amend the 1995 Act to make consistent provision for the prosecution of "organisations" including partnerships.

2.3 Although the 2010 Act makes it clear that it is competent to prosecute a partnership on indictment, a number of aspects of the law relating to the prosecution of partnerships remain unclear. We address these in Chapter 3 below. In this Chapter, we examine the decision of the High Court in *Balmer v HM Advocate,*[6] which identifies the problem with which this paper is principally concerned, namely the effect of dissolution upon the criminal liability of a partnership. This is what we refer to in this Discussion Paper as the "dissolution issue".

THE DECISION IN *BALMER v HM ADVOCATE*

What *Balmer* decided

2.4 In *Balmer v HM Advocate,* the High Court of Justiciary addressed the question of the effect of dissolution of a partnership upon that partnership's legal personality. It was held that the legal personality of a partnership comes to an end immediately upon dissolution and that, consequently, an indictment directed at a dissolved partnership is incompetent.

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[1] That is, as a body having a separate legal, or juristic, personality from those of the individual partners of which it is comprised. See 1890 Act, s 4(2).
[2] A point recognised in the Joint Report at para 4.46, fn 50 and paras 13.25-13.26.
[3] It was this attempt which gave rise to the petition to the *nobile officium* of the High Court in *Balmer v HMA* [2008] HCJAC 44, 2008 SLT 799.
[4] Cf the analogous summary provision in s 143 of that Act, which makes specific provision in respect of partnerships.
[5] Joint Report, paras 13.25-13.26.
[6] [2008] HCJAC 44, 2008 SLT 799.

2.5 The relevant facts of *Balmer* may be briefly stated.[7] Thomas, Anne and Alan Balmer were the partners in Rosepark Nursing Home. On 31 January 2004 a fire occurred at the home. 14 of its residents were killed, four others were injured and the remaining 22 were evacuated. On 25 February 2005 the firm was dissolved by agreement, the business passing to a limited company, Balmer Care Homes Ltd. Thomas, Anne and Alan Balmer were each charged on indictment with a number of health and safety offences. Each of these offences could be committed only by an employer in terms of the Health and Safety at Work etc Act 1974 ("the 1974 Act"), and was a strict liability offence based upon failure to comply with relevant health and safety provisions. The indictments designed each of the Balmers as having been the employer at the relevant time. At a preliminary hearing before Lord Hardie, the Balmers challenged the relevancy of the charges against them, arguing that it was the partnership that had been the employer. Lord Hardie sustained this submission.

2.6 A further indictment was then brought against "Rosepark Care Home also known as Rosepark Nursing Home, a now dissolved firm". The High Court summarised the nature of the 17 charges directed against the firm:

> "[6] Each charge libelled against the firm is a charge of contravention of a statutory provision. All the charges against the firm proceed on an averment that the firm was at the material time an employer in terms of the Health and Safety at Work etc Act 1974 ("the 1974 Act"). It is unnecessary to set out the terms of the charges in detail. Charge 1 may be taken as an example. It libels that between 1 April 1996 and 31 January 2004 at the home the dissolved firm did carry on the business or undertaking of a residential care home registered to provide care and nursing for up to 43 residents in the categories of frail elderly, elderly with mild mental illness, terminally ill and young physically disabled, and being an employer in terms of the 1974 Act, did fail to conduct its undertaking in such a way as to ensure so far as was reasonably practicable that persons not in its employment who might be affected thereby were not thereby exposed to risks to their health and safety, and did fail to devise, institute, implement and maintain an adequate and effective system or strategy for fire safety at the home. There then follow averments giving further specification of the alleged failures. The narrative then sets out the occurrence of the fire on 31 January 2004, and the consequent death and injury of named residents. The charge concludes by stating that in these circumstances there was a contravention of ss 3 and 33(1)(a) of the 1974 Act ."[8]

2.7 The Balmers petitioned the *nobile officium* of the High Court, seeking *inter alia* declarator that the firm had not been competently indicted, its legal personality having been extinguished by the dissolution of the firm. The Advocate Depute submitted that the indictment was competent as the legal personality of the firm continued after dissolution for the limited purpose of winding up the business of the firm, which included defending criminal charges in relation to conduct of the partnership prior to dissolution. After reviewing the authorities, the High Court accepted the petitioners' view of the legal effect of dissolution, holding that the dissolved partnership did not have any continuing legal personality following dissolution and accordingly that the indictment to which the petitions referred was incompetent.[9]

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[7] For a fuller statement, see ibid, paras 1-11.
[8] Ibid, para 6.
[9] Ibid, para 83 (Opinion of the Court, per Lord Eassie).

2.8 A further attempt was made to prosecute the Balmers in their capacity as the whole surviving partners of the dissolved firm. This indictment was also held to be incompetent and irrelevant.[10] It having been established in the first proceedings that the employer was the partnership and not any of the partners as individuals, it appears to have been the intention of the Crown (in their second and third attempts to prosecute) to try to prosecute the partnership rather than any of the individuals. The second proceedings were, in terms, directed against the dissolved firm. This approach having been held incompetent, the third proceedings attempted – in substance – to achieve the same result, addressing the indictments to the individuals as the whole surviving partners of the dissolved firm in the same way that one might proceed in seeking to pursue civil proceedings against a dissolved firm.

What *Balmer* did not decide

2.9 In neither of the second nor third sets of proceedings did the Crown attempt to establish the criminal liability of Thomas, Anne or Alan Balmer as individuals. The High Court did observe, in passing, that section 36 of the Health and Safety at Work etc Act 1974, provided for the criminal liability of a person other than the employer where the commission of an offence by the employer was due to the act or default of that other person; but no such issue arose in any of the attempted Rosepark prosecutions. In Chapter 3 of this Discussion Paper, we shall discuss the various bases upon which partners may be criminally liable, as individuals, for offences committed by a partnership. For the moment, however, it is important to emphasise that the question of individual liability was not at issue in the indictments which were considered in *Balmer v HM Advocate.* While that case stands as authority that a partnership cannot be prosecuted after its dissolution, it does not represent authority that dissolution of the partnership will prevent the prosecution of individuals in appropriate circumstances. The question of what effect, if any, such dissolution may have upon the liability of individuals is considered in Chapter 3.[11]

The outcome

2.10 The final outcome of these proceedings was that despite the alleged commission of a number of serious health and safety offences, and the death of 14 individuals, no criminal proceedings could be brought against the partnership. The Fatal Accident Inquiry into the deaths commenced in November 2009, and final submissions were made in February 2011 before Sheriff Principal Lockhart. The Sheriff Principal's determination was given on 20 April 2011.[12]

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[10] The first and third indictments were dismissed at Preliminary Hearings. Both Lord Hardie (in the first proceedings) and Lord Matthews (in the third) produced Reports for the purposes of Crown appeals against these dismissals, but neither Report has been made publicly available.

[11] See paras 3.57-3.65 below.

[12] The full text of the determination may be found at http://www.scotcourts.gov.uk/opinions/2011FAI18.html.

Chapter 3 Prosecuting partnerships and partners: the current law in outline

3.1 In Scotland, a firm is a legal person distinct from the partners of whom it is composed.[1] This is a matter of substantive law, and not merely of interpretation: in Scotland, a partnership is a juristic person for all legal purposes.[2] As such, it is in principle capable of committing any offence which a person may commit.

3.2 In practice, however, it is unlikely that a partnership will often commit a common law offence. In this regard partnerships are similar to other juristic persons such as companies. For a juristic person to commit such an offence requires that the acts and states of mind (actus reus and mens rea) of one or more natural persons, the employees, agents or representatives of that body, be ascribed to the juristic person by some rule of attribution.[3] It is possible in principle for such attribution to take place in relation to common law offences committed by a partnership, just as it is for common law offences committed by a company; but the number of cases is likely to be exceedingly small, and the difficulties of proof formidable.

3.3 The question of the criminal liability of partnerships is much more likely to arise in the context of statutory offences. In this context, the liability of the partnership to prosecution, and the consequences of conviction for the partners, may depend upon the detailed terms of the statute which creates the offence. In this Chapter we consider the existing statutory regime governing the prosecution of partnerships and of partners. We first consider the various rules relating to the prosecution of partnerships, including those which determine the extent to which the partners may bear (civil) liability to meet any fines that might be imposed upon the firm. We then go on to consider the various bases upon which partners may bear individual criminal liability for offences committed by a partnership. Before examining the detail of the present law, it may be helpful briefly to summarise our conclusions:

- Where a partnership continues, it will generally be competent to enforce any fine imposed upon the partnership against the assets of the individual partners as well as those of the partnership.[4]

- There are certain statutes which depart from this general rule, limiting the payment of fines to partnership assets;[5] but this limitation does not apply to most serious offences, such as those at common law, offences under the Health and Safety at

[1] 1890 Act, s 4(2).
[2] Except where modified by statute, as for instance by the Agricultural Holdings (Scotland) Act 1991, Sch 2, Pt III, para 3(b) which provides for occupation of certain agricultural land by a partnership to be treated as occupation by each of the partners, or by s 119(2) of the Inheritance Tax Act 1984.
[3] See Gerald Gordon, *Criminal Law*, (3rd edn, 2000 by MGA Christie), at paragraph 8.105.
[4] See paras 3.7-3.16.
[5] See paras 3.17-3.27.

Work etc Act 1974, or offences of corporate homicide under the Corporate Manslaugher and Corporate Homicide Act 2007.[6]

- There are a number of bases upon which individual partners might be criminally liable in respect of offences committed by a partnership.[7]

- Where the grounds for such individual criminal liability exist, dissolution of the partnership is unlikely to be a bar to criminal proceedings directed against the individual partners.[8]

GENERAL PROVISIONS RELATING TO THE PROSECUTION OF PARTNERSHIPS

The 1995 Act provisions on prosecution of partnerships

Summary proceedings

3.4 Section 143 of the 1995 Act governs the summary prosecution of partnerships, associations, bodies corporate and bodies of trustees. It applies without prejudice to any other or wider powers conferred by statute, and provides (among other things) that proceedings may be taken against the partnership, association, body corporate or body of trustees "in their corporate capacity", and in that event any penalty imposed shall be recovered by civil diligence in accordance with section 221 of that Act.[9] Section 221 provides that where a fine falls to be recovered by civil diligence, there shall be added to the finding of the court imposing the fine a warrant for civil diligence in the prescribed form, and that such diligence may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause.

Solemn proceedings

3.5 Until recently, there was no explicit provision governing the solemn prosecution of partnerships, since section 70 of the 1995 Act bore to apply only to bodies corporate. This lacuna has been filled by amendments made by the 2010 Act.[10] Following these amendments, section 70 applies not merely to bodies corporate, but to "organisations", including partnerships. (The definition of "organisation" also includes bodies corporate and unincorporated associations.[11]) It applies generally to proceedings on indictment against an organisation,[12] making provision for the service of the indictment,[13] the appearance of the organisation by way of a representative[14] and the disposal of the case in the event that the organisation does not appear.[15] It also regulates the imposition of fines upon organisations, providing that:

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[6] See paras 3.28-3.35.
[7] These are explored at paras 3.36-3.56.
[8] See paras 3.57-3.65.
[9] 1995 Act, s 143(1), (2). The relevant provisions of the 1995 Act are set out in the Appendix to this Discussion Paper.
[10] The relevant sections of the 2010 Act came into force on 28 March 2010.
[11] 1995 Act, s 307(1), as amended by s 65 of the 2010 Act. The text of this provision is quoted in the Appendix.
[12] 1995 Act, s 70(1).
[13] Ibid, subs (2)-(3).
[14] Ibid, subs (4), (8)-(9).
[15] Ibid, subs (5)-(5A).

"(6) Where an organisation is sentenced to a fine, the fine may be recovered in like manner in all respects as if a copy of the sentence certified by the clerk of the court were an extract decree of the Court of Session for the payment of the amount of the fine by the organisation to the Queen's and Lord Treasurer's Remembrancer."

3.6 Following the amendment of section 70 of the 1995 Act by section 66 of the 2010 Act, there is no longer any doubt about the competence of prosecuting partnerships on indictment. The 1995 Act now contains detailed procedural provision governing the prosecution of partners under both solemn and summary proceedings.

WHO PAYS THE FINE?

3.7 The general rule, established by a combination of provisions in the 1890 and 1995 Acts, is that a fine imposed upon a partnership may be enforced against the assets of the individual partners. We start by considering this general rule, before going on to consider the way in which its application may be limited by more specific provisions in certain offence-creating statutes.

The general rule: availability of partners' assets

3.8 We have already mentioned that sections 70 and 143 of the 1995 Act provide for fines imposed upon a partnership to be enforced in the same way as decrees for payment of a civil debt owed by the partnership. In order to understand what this means, it is necessary to consider two provisions of the 1890 Act. The first and most important of these is section 4:

"4. Meaning of firm

(1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members."

3.9 Subsection (2) provides that a decree or diligence directed against the firm may be enforced against an individual partner, who will then have a right of relief against the partnership and against his or her fellow partners. This complements the provisions of sections 70 and 143 of the 1995 Act to which we have already referred, which provide for fines to be collected in the same way as decrees for payment of debts owed by the partnership. It also addresses one of the potential concerns surrounding the enforcement of fines against the assets of individual partners, by clearly stating that the individual partner will have a right of relief *pro rata* from the firm and the other members.

3.10 The second provision which should be mentioned is section 9:

"9. Liability of partners

Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration

for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

3.11 This section complements the right of relief conferred by section 4(2). Together these provisions, read with sections 70 and 143 of the 1995 Act, have the effect of imposing upon the partners civil liability to meet any fines imposed upon the partnership, with a right of relief against the firm and their fellow partners.

The effect of the general rule

3.12 Where a partnership is convicted, any fine will be imposed upon the partnership. In the absence of more specific statutory provision (discussed below), the consequences will be governed by either section 143(2) or section 70(6) of the 1995 Act. In each case, it is provided that a fine shall be enforced in the same way as a judgment in relation to a civil debt. Where the fine is imposed in summary proceedings, it may be enforced in the same way as if the proceedings were on an extract decree of the sheriff in a summary cause. Where the fine is imposed in solemn proceedings, it "may be recovered in like manner *in all respects* as if a copy of the sentence certified by the clerk of the court were an extract decree of the Court of Session for the payment of the amount of the fine by the organisation to the Queen's and Lord Treasurer's Remembrancer".[16] In effect, the fine, once imposed, is treated as another debt owed by the firm.

3.13 In the normal case, a partnership may be expected to pay the fine without the need for any formal enforcement measures. Even if diligence is required in order to enforce the fine, this will ordinarily be directed against partnership assets. Where the partnership is a going concern and the level of the fine is modest (as will usually be the case, given that the majority of prosecutions will be by way of summary proceedings), the question of whether it is competent to do diligence against the personal assets of the partners does not arise.

3.14 But there are two circumstances in which this question does arise. The first is insolvency of the partnership: if the assets of the partnership are insufficient to pay the fine, can the remainder of the fine be recovered from the assets of the individual partners? The second is where the partnership has been dissolved, in which case it follows that it cannot have any assets.[17]

3.15 Since both section 143(2) and section 70(6) of the 1995 Act provide for a fine to be recovered by civil diligence, the answer to the question of whether a fine can be enforced against the assets of the individual partners in either of the above circumstances should be the same as in relation to a decree for the payment of a debt. Each of these sections applies to an "organisation", as defined in section 307(1), and their effect will differ depending upon the nature of the organisation in question. In a limited company, the liability of members is limited. There can be no question of the personal assets of the members being subject to diligence to enforce a debt due by the company, and similarly no question of a fine being enforced against members' assets. The same is true of a body of trustees: a debt owed by a body of trustees, or a fine levied upon such a body, may be enforced only

[16] 1995 Act, s 70(6) (emphasis added).
[17] Since the firm, on dissolution, ceases to exist, and something which does not exist cannot have assets. What then of the assets of the firm immediately pre-dissolution? The correct analysis is probably that these are held in trust by the (former) partners for the benefit of the creditors of the former partnership and, after satisfaction of outstanding debts, for themselves.

against the trust assets and not against those of the individual trustees.[18] But the liability of partners is not so limited. An extract registered decree for payment by a partnership of a debt provides a proper warrant for diligence against the individual partners as well as against the assets of the firm.[19]

3.16 Accordingly – in the absence of over-riding statutory provision (discussed below) – it appears to us that wherever it is possible to prosecute a partnership, it should be possible to enforce any resulting fine either against the partnership assets or, where the partnership assets are inadequate (or indeed entirely absent), against the assets of the individual partners.

Statutory exceptions to the general rule

3.17 The general rule will not apply in all cases. Some offence-creating statutes make particular provision for the prosecution of partnerships, including provision which appears to limit liability for payment of fines to the partnership assets. Section 77 of the Health Act 2006 is a representative example:

> **"77. Offences committed by partnerships and other unincorporated associations**
>
> (1) Proceedings for an offence alleged to have been committed by a partnership shall be brought in the name of the partnership (and not in that of any of the partners).
>
> (2) Proceedings for an offence alleged to have been committed by an unincorporated association (other than a partnership) shall be brought in the name of the association (and not in that of any of its members).
>
> (3) Rules of court relating to the service of documents shall have effect as if the partnership or unincorporated association were a body corporate.
>
> (4) In proceedings for an offence brought against a partnership or an unincorporated association, the following provisions apply as they apply in relation to a body corporate—
>
> (a) section 33 of the Criminal Justice Act 1925 (c. 86) and Schedule 3 to the Magistrates Courts Act 1980 (c. 43);
>
> (b) sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995 (c.46);
>
> […]
>
> (5) A fine imposed on a partnership on its conviction for an offence is to be paid out of the partnership assets.
>
> (6) A fine imposed on an unincorporated association on its conviction for an offence is to be paid out of the funds of the association.
>
> (7) Subsections (1) and (2) are not to be read as prejudicing any liability of a partner, officer or member under section 76(4) or (6)."

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[18] *Aitkenhead v Fraser* [2006] HCJAC 51; 2006 JC 231; 2006 SLT 711; 2006 SCCR 411 at paras 9-10 (Opinion of the Court per Lord Drummond Young).

[19] 1890 Act, s 4(2); *Ewing & Co v McClelland* (1860) 22 D 1347; *The Laws of Scotland (Stair Memorial Encyclopaedia)*, Vol 8, para 128**.**

3.18 Subsection (5) provides that a fine imposed on a partnership on its conviction for an offence is to be paid out of the partnership assets. What does this mean? On one view, the unlimited liability of partners in respect of obligations owed by the firm is itself an asset of the partnership. But if this were regarded as part of the partnership assets, then subsection (5) would be effectively meaningless in the context of a Scottish partnership: it would merely state a truism. The other interpretation would be that where a statute says that a fine imposed upon a partnership is to be paid out of the partnership assets, it intends to draw a distinction between such assets and those of the individual partners, and to limit liability to the former class. This interpretation is supported by the decision of the (English) Court of Appeal in *R v W Stevenson & Sons (A Partnership)*.[20]

3.19 In that case, a partnership was charged on six indictments for failing to submit a sales note which accurately indicated the quantities and price at first sale of each fish species, contrary to Article 3(1)(d) of the Sea Fishing (Enforcement of Community Control Measures) Order 2000 (the "Control Order").[21] In refusing the firm's leave to appeal against conviction, the Court of Appeal held, as a matter of construction, that the Control Order placed the relevant obligations upon the partnership as such. The Control Order made specific provision for the individual liability of partners where it was shown that the individual had consented to, or been complicit in, the commission of the offence. From this, the Court of Appeal reasoned that it could not have been the intention of Parliament to impose individual liability upon partners except where consent or complicity had been shown. The Court went on to hold that where the partnership alone was indicted, any fine imposed could only be levied against the assets of the partnership. The Lord Chief Justice (Lord Phillips of Worth Matravers), giving the opinion of the court, said:

> "35. Most of the statutes to which we have been referred that make express provision for proceedings against partnerships also expressly provide that fines can only be imposed against partnership assets. We cite, by way of example, s 285(3) of the Copyright, Design and Patents Act 1988, s 143(4) of the Political Parties, Elections and Referendums Act 2000, s 403 of the Financial Services and Markets Act 2000, s 168C(2) of the Education and Inspections Act 2006 and s 1130(3) of the Companies Act 2006. It is only when we get to a series of Orders relating to fishery protection, culminating with the Order that has given rise to this prosecution, that we find an absence of such a provision. We are inclined to think that this absence must be by accident rather than by design.
>
> 36. Whether we are correct in that surmise is nothing to the point. We have already observed that the effect of the Order is that proceedings can only be brought against an individual partner if that partner is complicit in the offence committed by the partnership. We consider that *it necessarily follows that, where a partnership alone is indicted, any fine imposed can only be levied against the assets of the partnership. If fines could be levied against the assets of individual partners who were not complicit in the offence committed by the partnership, this would largely negate the legislative scheme under which they cannot be made defendants unless complicit.* We would add that, if individual partners were at risk of being subject to criminal penalties in respect of offences committed by a partnership, then we consider that justice would demand that the criminal process should contain provisions designed to enable individual partners to challenge the alleged liability of the partnership."[22]

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[20] [2008] EWCA Crim 273, [2008] Cr App R 14.
[21] SI 2000/51.
[22] Emphasis added.

3.20 The Court of Appeal not only identifies the effect of statutory provisions providing for payment of fines from partnership assets as being to *limit* liability to payment from such assets, but goes on to infer such a limitation from the existence of "consent and connivance" provisions. We discuss "consent and connivance" provisions later in this Chapter. For the moment, we observe that we do not find Lord Phillips' argument to be compelling. There is a difference between making partners bear the financial consequences of a fine levied on the partnership and making the individual partners criminally liable. Civil liability should not be confused with criminal liability. Wherever an organisation is penalised, that penalty will inevitably be felt to a greater or lesser degree by the natural persons who form part of that organisation; but that does not mean that it is the individuals who are penalised. Where the partnership alone is prosecuted, the partners are not themselves accused of having broken the law. The conviction of the partnership is not equivalent to the conviction of the partners as individuals: the individual partners will not acquire a criminal record, and nor will they attract the stigma which rightly attaches to those convicted of serious criminal wrongdoing.[23]

3.21 There is no incompatibility between regarding the partnership, and not the partners, as the appropriate target of prosecution and the possibility that a fine imposed upon the partnership will be enforced against the assets of the partners. This is the default position for Scottish partnerships, as set out in the 1995 Act, and it is clear that (whatever the case may be in England and Wales) no inference can be drawn in Scotland from the presence of a consent and connivance provision to the effect that the partners' liability to meet fines levied upon the partnership is limited. On the other hand, where, as in the other statutory examples referred to by Lord Phillips in the passage above, there is provision that fines shall be imposed against partnership assets, that would appear to supersede the general rule referred to above.

3.22 While we are not persuaded by Lord Phillips' inference from the presence of "consent and connivance" provisions, we do note that the Court of Appeal had no difficulty in assuming that the effect of providing that fines should be paid out of partnership assets was to prevent such fines from being enforced against the individual assets of the partners.

The purpose of providing that fines be paid out of partnership assets

3.23 Given that partnerships generally have unlimited liability, and that the 1890 Act and the 1995 Act together provide that fines may be enforced, in the same way as civil debts, against the assets of individual partners, what is the purpose of providing that fines must be paid out of partnership assets?

3.24 While it can only be a matter of speculation, we suspect that the aim of these provisions was to ensure that fines ordinarily came out of the assets of the partnership or unincorporated association. Their principal purpose was not (we speculate) to *limit* liability to those assets, but to answer the question of what assets were available to meet a fine imposed upon a body – the English partnership – which had no separate legal personality. In Scotland, it is clear that the partnership assets will always be available to meet a debt or a fine imposed upon the partnership as a body: either it will be enforced directly against those

[23] Cf the prosecution of bodies of trustees, where the criminal record will show the conviction of each of the named trustees, but only in his or her capacity as trustee: see *Aitkenhead v Fraser* [2006] HCJAC 51; 2006 JC 231; 2006 SLT 711; 2006 SCCR 411 at para 14 (Opinion of the Court per Lord Drummond Young).

assets, or enforced against the assets of a partner who, by virtue of section 4(2) of the 1890 Act, has the right to recover *pro rata* from the firm and from his or her fellow partners.

3.25 But section 4(2) applies only to partnerships in Scotland. While it is obvious that the partnership assets will be available to satisfy a fine imposed in Scotland, and that partners will have a right of recovery from the firm and between themselves, this result may not follow in a jurisdiction where section 4(2) does not apply. We strongly suspect that the original purpose of providing that fines would be paid out of the assets of the partnership was to ensure that the assets of the firm were available as a target of enforcement, and that the effect of limiting the liability of the partnership to those assets was a side-effect. While provisions limiting the payment of fines to partnership assets may be found in a number of UK statutes which extend to Scotland, we have been unable to identify any such provision in Scotland-only legislation.

The effect of limiting fines to partnership assets

3.26 It is instructive to consider what would follow from the proposition that fines may be levied only against *partnership* assets. Effectively, the result would that partnerships (and indeed unincorporated associations) must be treated in the same way as limited liability companies. Where the partnership had few assets (and leaving aside the possibility of personal liability via a consent and connivance provision or via the doctrine of art and part) the partners would have no incentive to instruct the defence of any criminal proceedings. If the partnership assets were insufficient to meet the fine, then the fine would not be met. The consequence might be the insolvency of the partnership (as an entity), but there would be no direct financial consequences for the partners, beyond the loss of any share in the partnership assets. No natural person would suffer directly.

3.27 Where the consequences of the crime were particularly serious, this effective limited liability might well give rise to public concern. We have suggested that the effect of sections 70(6) and 143(2) of the 1995 Act is that a fine levied on a partnership may be enforced not only against the assets of the partnership, but also against those of the individual partners. This seems to us to follow from a direct reading of the statute and, moreover, to be consistent with the status of the partnership as an unlimited liability vehicle. But where the statute which creates the offence provides that any fine shall be met from the partnership assets, then this provision must be given effect.[24]

Enforcement of penalties for the most serious offences

3.28 It is helpful at this point to consider which of the rules considered above would apply in relation to particular serious offences.

Common law offences

3.29 Although theoretically possible, it is most unlikely that a partnership will ever be charged with a serious common law offence. Such offences (murder, culpable homicide, rape etc) are invariably offences of commission rather than of omission. All require mens

[24] This is certainly so where the offence-creating statute post-dates the general provisions in the 1995 Act, or in relation to summary prosecution (since s 143(1) expressly provides for that section to apply without prejudice to other statutory provision). It is most likely the case in any event, by application of the maxim *generalia specialibus non derogant.*

rea. In any case in which a partnership might possibly be accused of such an offence, it could only be on the basis either that the partnership was vicariously liable for the offence of one of its agents or servants, or that the acts and mental state of the natural person who committed the offence could be identified as those of the partnership.[25] In any such case, the offence will need to be proved against the individual as a precondition for liability of the partnership, and it may be in fact that justice would be served by the prosecution of the individual alone. If the partnership were to be convicted, any fine would be subject to the general rule set out in section 70(6) of the 1995 Act and, as such, enforceable against the personal assets of the partners as well as against the partnership assets (if any).

Health and safety

3.30 The Rosepark nursing home case, which formed the spur to the present project, concerned attempted prosecutions under the Health and Safety at Work etc Act 1974 in relation to alleged failures by a partnership to conduct its undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in its employment were not thereby exposed to risks to their health or safety.

3.31 The only provision which the 1974 Act makes in relation to the prosecution of juristic persons is made in relation to bodies corporate. Read together with section 53 of the 2010 Act, this permits partners to be found liable for partnership offences on the basis of consent, connivance or neglect.[26] But there is no provision in the 1974 Act which would limit the payment of any fine to partnership assets. Accordingly, it seems that the general rule would apply, and that any fine which might be levied upon a partnership could be enforced against the assets of individual partners in the same way as an extract registered decree of the Court of Session for payment of a debt to the Queen's and Lord Treasurer's Remembrancer.

Corporate homicide

3.32 In response to the difficulty inherent in convicting a juristic person of murder or culpable homicide, Parliament has enacted specific provision in relation to corporate homicide. This is contained in the Corporate Manslaughter and Corporate Homicide Act 2007 ("the 2007 Act"). Section 1 creates the offence of corporate homicide, committed by an organisation if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.[27] There is substantial overlap between the section 1 offence and offences under the 1974 Act.

3.33 The penalty on conviction of an offence under section 1 of the 2007 Act is an unlimited fine.[28]

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[25] *Tesco Supermarkets v Nattrass* [1972] AC 153 (Lord Reid); *Purcell Meats (Scotland) Ltd v McLeod* 1987 SLT 528; *Transco PLC v HMA* 2004 JC 29. See, more generally, *SME Reissue Criminal Law,* paras 108-9 and Gordon, *Criminal Law* (3rd edn, 2000) vol I, para 8.89 ff.
[26] We discuss such individual liability at paras 3.49-3.53 below.
[27] Ss 1 and 2 of the 2007 Act are set out in the Appendix.
[28] Corporate Manslaughter and Corporate Homicide Act 2007, s 1(6).

3.34 In contrast to the 1974 Act, the 2007 Act does make express provision in relation to partnerships:

> **"14. Application to partnerships**
>
> (1) For the purposes of this Act a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate.
>
> (2) Proceedings for an offence under this Act alleged to have been committed by a partnership are to be brought in the name of the partnership (and not in that of any of its members).
>
> (3) A fine imposed on a partnership on its conviction of an offence under this Act is to be paid out of the funds of the partnership.
>
> (4) This section does not apply to a partnership that is a legal person under the law by which it is governed."

3.35 It is axiomatic that "[i]n Scotland a firm is a legal person distinct from the partners of whom it is composed".[29] So the effect of subsection (4) of section 14 is that the section does not apply to Scottish partnerships. Such prosecutions would fall to be governed by the general rule whereby a fine imposed upon the partnership may be enforced, like a decree for payment, against the partnership assets or those of the individual partners, with those partners then having a right of relief *pro rata* against the firm and their fellow partners.

INDIVIDUAL CRIMINAL LIABILITY OF PARTNERS

3.36 Having briefly outlined the existing law relating to the criminal liability of partnerships, we now consider the individual criminal liability of partners. We start by considering the various bases upon which individual criminal liability might arise, before going on to consider what effect (if any) the dissolution of the partnership might have upon such liability.

General bases of individual criminal liability

Vicarious liability?

3.37 In Scotland a partnership is a legal person distinct from the partners of whom it is composed.[30] Where an offence is committed by the partnership, therefore, it is committed by another person than the partners. Except in very limited circumstances, the criminal law rejects the imposition of vicarious liability, on the sound principle that one should only be held criminally responsible for one's own criminal wrongdoing and not that of others.[31] Statutory exceptions to this principle do arise in the context of delegation, most commonly in relation to licensing;[32] but where vicarious criminal liability has been held to arise, it has done so in the context of employers being liable for offences committed by their agents.[33] Partnerships are not agents of the partners, and in the absence of express statutory provision to the contrary there is no mechanism by which partners may be held vicariously

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[29] 1890 Act, s 4(2).
[30] 1890 Act, s 4(2).
[31] *Mitchell v Morrison* 1938 JC 64, 1938 SLT 201; *Duguid v Fraser* 1942 JC 1, 1942 SLT 51.
[32] See, eg, *Stainton v McNaughton* 1993 SLT 119; *Simpson v Gifford* 1954 SLT 39.
[33] For a recent example, see s 18A of the Wildlife and Countryside Act 1981, as inserted by s 24 of the Wildlife and Natural Environment (Scotland) Act 2011.

liable for offences committed by the partnership, any more than directors might be held vicariously liable for offences committed by a company.

Liability under section 9 of the 1890 Act?

3.38 Section 9 of the 1890 Act provides that every partner in a firm in Scotland is jointly and severally liable with the other partners for all debts and obligations of the firm incurred while a partner. We have already noted that this section, read together with section 4(2) of the 1890 Act and sections 70 and 143 of the 1995 Act, will generally make a fine imposed upon the partnership enforceable against the assets of individual partners as well as against those of the partnership.[34] But it is also worth considering whether section 9, by imposing joint and several liability "for all debts and obligations of the firm" might have the effect of imposing upon partners, as individuals, criminal liability for offences committed by the firm. The argument would be that since obligations imposed by statute upon a partnership are "obligations of the firm", and since section 9 makes every partner jointly and severally liable for all such obligations, then partners must also be jointly and severally liable to prosecution in respect of offences of failing to comply with these obligations. The upshot of this would be that section 9 would expose partners to individual criminal liability in respect of statutory offences committed by a partnership.

3.39 There are a number of reasons for thinking that section 9 does not have this effect. First, the 1890 Act is silent on the question of criminal liability, and it is clear that elsewhere in the Act what is meant by the term "obligations" is civil obligations. Second, if this were the effect of section 9, then it would have the general effect of rendering each of the partners criminally responsible for offences committed by the partnership. This would be contrary to the general principle, fundamental to the criminal law, that one should be punished only for one's own criminal wrongdoing and not for the crimes of others. Of course such a result *could* be achieved by statute, but it would be surprising to reach such a radical conclusion unless compelled to do so by express wording. In the absence of clear language suggesting its extension to criminal liability, the better view is that section 9 applies only to the civil debts and obligations of the firm (including, by virtue of sections 70 and 143 of the 1995 Act, fines imposed upon the firm) and does not operate to extend criminal liability from the firm to the partners.

Art and part

3.40 Potentially, individual partners might be prosecuted on the basis that they were art and part perpetrators of the offence committed by the partnership. This possibility, already available at common law, is expressly provided for in section 293 of the 1995 Act:

> **"293 Statutory offences: art and part and aiding and abetting**
>
> (1) A person may be convicted of, and punished for, a contravention of any enactment, notwithstanding that he was guilty of such contravention as art and part only.
>
> (2) Without prejudice to subsection (1) above or to any express provision in any enactment having the like effect to this subsection, any person who aids, abets, counsels, procures or incites any other person to commit an offence against the

[34] See paras 3.7-3.11 above.

provisions of any enactment shall be guilty of an offence and shall be liable on conviction, unless the enactment otherwise requires, to the same punishment as might be imposed on conviction of the first-mentioned offence."

3.41 The doctrine is potentially a broad one, encompassing conduct ranging from assisting in the preparation of an offence to full participation in its commission.

3.42 In any case it is necessary to show that the person accused art and part shared a common criminal purpose with the principal offender. This arguably limits the application of the doctrine in relation to statutory offences in two regards. First, even if the statutory offence is one of strict liability, general principle suggests that it will be necessary to prove the mens rea of the individual in order to demonstrate that that individual shared the criminal purpose of the partnership. Second, and perhaps more importantly, it presupposes the existence of such a criminal purpose. There are some very serious statutory offences which are not only offences of strict liability, but also offences of omission: so, for instance, the Rosepark case concerned alleged offences of failing to conduct a partnership's undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not employed by the partnership were not thereby exposed to risks to their health or safety. The consequence of this alleged breach of statutory duty was the loss of 14 lives. Nevertheless, it is not clear that the commission of the offence (if "commission" is indeed the correct term in this context) required the formation of any criminal purpose which was capable of being shared by a partner or any other person or – in the absence of a provision placing obligations directly upon individuals – what might have counted as participation in the actus reus of the offence.

3.43 There has also been some doubt about whether it was competent to charge a person as art and part guilty of an offence which could only be committed in a special capacity (as employer, licensee etc) which that person did not possess. One line of authority, stemming from a 19th Century decision concerning the Debtors (Scotland) Act 1870,[35] held that such a prosecution would not be competent. More recent authority has adopted the contrary position, regarding lack of special capacity as no bar to art and part guilt.[36] In *Vaughn v HM Advocate*, [37] the appellant was held capable of being art and part guilty of incest despite the fact that he was not himself within the prohibited degree of relationship; while in *Reid v HM Advocate,*[38] a woman was art and part guilty of knowingly living on the earnings of prostitution, an offence which, in terms of the relevant statute,[39] applied to a "male person". In that case, Lord Justice Clerk Cullen observed that section 293(1) of the 1995 Act "is expressed in general terms and is not stated to be subject to a contrary intention appearing in the terms of any statutory offence."[40] The general rule, in light of the High Court's comments in *Reid,* is that a lack of the relevant special capacity is no bar to art and part guilt in terms of section 293(1). It is still possible for art and part liability to be excluded by

[35] *Robertsons v Caird* (1885) 5 Coup 664.
[36] In *Cochrane or Templeton v HMA* 1987 SCCR 697 at 697, Lord Justice Clerk Ross characterised *Robertsons v Caird* as turning upon the particular terms of the Debtors (Scotland) Act 1870 rather than as laying down any general rule concerning the scope of the art and part doctrine.
[37] 1979 SLT 49.
[38] 1999 JC 54.
[39] Criminal Law (Consolidation) (Scotland) Act 1995, s 11(1)(a).
[40] 1999 JC 54 at 55.

statute,[41] but unlikely that such liability could be excluded except by clear and specific language.

Statutory liability for aiding and abetting

3.44 The topic of art and part liability for statutory offences was considered by this Commission in its 1985 Report on *Art and Part Guilt of Statutory Offences.*[42] At the time of that Report, prior to the decision of the High Court in *Reid v HM Advocate,* the Commission considered that there was still some doubt about whether lack of special capacity would bar art and part guilt. The Commission also recognised that there could be difficult issues regarding whether the alleged art and part perpetrator shared the mens rea necessary for the commission of the principal offence. In order to circumvent these issues, the Commission recommended the enactment of what is now section 293(2) of the 1995 Act, which creates a separate offence of aiding, abetting, counselling, procuring or inciting another person to commit an offence against the provisions of any enactment, which was intended to be capable of commission even in cases where that person lacked the special capacity, or the specific mens rea, required for commission of the principal offence.[43] It is not clear from reported cases what use, if any, the Crown has made of section 293(2).

Specific statutory provisions

3.45 The preceding paragraphs have considered principles and provisions which might potentially apply in relation to any partnership and – in the absence of more specific provision – in relation to any statutory offence. The position is complicated by the existence of a number of statutes which make specific provision for the criminal liability of partners in certain circumstances. There is a significant amount of variation in the statutory treatment of partnerships and of partners, and the policy reasons underlying this variation are hard to discern. In addition to particular statutes which pursue their own, very specific, approaches to the criminal liability of individuals, it is possible to discern two general models of individual guilt of partnership offences. The first of these is liability on the basis of consent, connivance or neglect; the second involves a more general imposition upon the partners of guilt for partnership offences. We start by discussing two specific statutory regimes, before considering these two more general models. We do so against the background that section 293(2) of the 1995 Act is expressly stated to be "[w]ithout prejudice to … any express provision in any enactment having the like effect to this subsection." Accordingly, it appears that any specific enactment to the same broad effect as section 293(2) will trump that provision.

The Corporate Manslaughter and Corporate Homicide Act 2007

3.46 The 2007 Act expressly provides, in section 18(2), that

> "[a]n individual cannot be guilty of aiding, abetting, counselling or procuring, or being art and part in, the commission of an offence of corporate homicide."

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[41] Perhaps the clearest example being s 18(2) of the Corporate Manslaughter and Corporate Homicide Act 2007, discussed at para 3.46 below.
[42] Scot Law Com No 93.
[43] Ibid, para 40; draft Bill cl 1.

Since the section 1 offence can only be committed by organisations – including partnerships which are employers – it is not possible for any individual to be prosecuted or convicted under the Act.

The Health and Safety at Work etc Act 1974

3.47 While the majority of offences under the 1974 Act are specific to employers, there is provision, in section 36, for the prosecution of others:

> **"36. Offences due to fault of other person**
>
> (1) Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-mentioned person."

3.48 The test in section 36 is explicitly one of causation: the prosecution must show that the employer's commission of the offence was "due to" the act or default of the other person. Proving this may pose a very significant evidential challenge, particularly in a case in which the offence was constituted – as health and safety offences often will be – by a series of individually minor defaults leading, cumulatively, to a culpable failure to comply with relevant health and safety precautions.

3.49 The 1974 Act also has provision, in section 37, for the attribution of individual criminal liability on the basis of consent, connivance or neglect. At the time of the Rosepark fire, this provision extended only to a director, manager, secretary or other similar officer of a body corporate, and not to partners. This restriction has now been addressed by amendments made by the Criminal Justice and Licensing (Scotland) Act 2010, which have the effect of extending the "consent and connivance" provisions of the 1974 Act to partners.

The first general model: liability on the basis of "consent and connivance"

3.50 A number of statutes provide for the individual guilt of partners where an offence is committed by the partnership with their consent and connivance. Many also extend such liability to partners where the partnership's offence is attributable to their neglect. A typical example is section 76(4) of the Health Act 2006:

> "**76. Offences by bodies corporate etc.**
>
> […]
>
> (4) If an offence committed by a partnership is proved—
>
> (a) to have been committed with the consent or connivance of a partner, or
>
> (b) to be attributable to any neglect on his part,
>
> the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly."

3.51 Some statutes, including the 1974 Act, contained "consent and connivance" provisions which were limited to bodies corporate. This restriction is now addressed by

section 53 of the 2010 Act, which extends such "corporate offences" to partnerships and partners:

> **"53 Offences: liability of partners**
>
> (1) A partner of a partnership (other than a limited liability partnership) is guilty of a corporate offence where—
>
> (a) the partnership is guilty of the corporate offence, and
>
> (b) it is proved that the corporate offence committed by the partnership—
>
> (i) was committed with the consent or connivance of the partner (whether alone or among others), or
>
> (ii) was attributable to the neglect of the partner (whether alone or among others).
>
> (2) In subsection (1), a "corporate offence" is an offence in relation to which an enactment has the effect that where—
>
> (a) a body corporate is guilty of the offence, and
>
> (b) it is proved that the offence—
>
> (i) was committed with the consent or connivance of a director (whether alone or among others), or
>
> (ii) was attributable to the neglect of a director (whether alone or among others),
>
> the director (as well as the body corporate) is guilty of the offence.
>
> (3) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.
>
> (4) Subsection (1) does not apply in relation to a corporate offence if an enactment (other than subsection (1)) makes provision in relation to the offence having the same effect as that subsection."

3.52 What do such provisions add to the existing rules of art and part guilt? It may be that such provisions are slightly easier for the prosecution to satisfy. The Law Commission of England and Wales considered the meaning of consent or connivance in their Consultation Paper on *Reforming the Law of Bribery*.[44] They concluded that the consent or connivance formula represented a slight broadening of the existing common-law liability on the basis of complicity:

> "9.34 Perhaps the key difference between, on the one hand, the 'consent and connivance' doctrine, and, on the other hand, complicity and assisting and encouraging, is the need with the latter to show that the person in question - whether by omission in breach of duty or otherwise - actually influenced the perpetrator in committing the offence (whether through help or encouragement). Such influence may be hard to prove beyond reasonable doubt where one is concerned with the

[44] LC CP 185 (2007).

complex structure of many corporate decision-making procedures. No such influence need be shown when the question is simply whether the high-ranking employee or director 'connived' at the actions of his or her company in committing the offence."

3.53 We think that a similar analysis would apply in Scotland as regards partnerships and art and part liability. In the case of many partnerships, particularly small partnerships which are run on an informal basis, the difficulties of proof may arise not from complex internal structures, but rather from the *lack* of such structures and record-keeping. But it will still be necessary, in order to make out a case of art and part liability, to show that the acts or omissions of the partner influenced the commission of the offence. As in England and Wales, it appears that the "consent and connivance" basis of liability is somewhat wider than the complicity-based doctrine of art and part.

3.54 Where the "consent and connivance" provision extends liability to partners on the basis of neglect, it will clearly allow liability to be established in circumstances where neither art and part, nor statutory aiding and abetting under section 293(2) of the 1995 Act, would apply. Each of these doctrines requires that the accused should have participated (however indirectly) in the commission of the offence, whereas neglect-based liability may be established merely by proving that the accused was under a relevant duty to act and failed to do so.

The second general model: concurrent liability of partnership and partners

3.55 We have identified a second general model of partners' liability, by which concurrent liability is placed upon the partners and the partnership. Although we describe it as a general model, we have found only two related examples: the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994.[45] Section 101 of the 1994 Act and section 285 of the 1988 Act are in substantially identical terms. Section 285 provides:

> **"285. Offences committed by partnerships and bodies corporate**
>
> (1) Proceedings for an offence under this Part alleged to have been committed by a partnership shall be brought in the name of the partnership and not in that of the partners; but without prejudice to any liability of theirs under subsection (4) below.
>
> (2) The following provisions apply for the purposes of such proceedings as in relation to a body corporate—
>
> (a) any rules of court relating to the service of documents;
>
> (b) [procedural provision for England, Wales and Northern Ireland].
>
> (3) A fine imposed on a partnership on its conviction in such proceedings shall be paid out of the partnership assets.
>
> (4) Where a partnership is guilty of an offence under this Part, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly.

[45] Arguably 3, since s 101 of the 1994 Act is applied by s 10 of the Olympic Symbol etc (Protection) Act 1995.

(5) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly."

3.56 This provision, and particularly subsection (4), appears at first sight to impose upon the individual partners vicarious liability for offences committed by the firm. But on closer analysis, this is not the case: subsection (4) differs from the commonly-encountered consent or connivance-based provisions only inasmuch as it shifts the burden of proof from the prosecution to the partners. In terms of this provision, it is for the partners to show that they did not consent or connive. There may be issues regarding the compatibility of such reverse burdens with Article 6(2) of the ECHR;[46] we consider this in more detail in Chapter 6, where section 285 of the 1988 Act and section 101 of the 1994 Act are considered as the starting point for a potential model of reform of the law as applying to the prosecution of partnerships.

THE EFFECT OF DISSOLUTION UPON INDIVIDUAL CRIMINAL LIABILITY

3.57 What effect, if any, will dissolution of the partnership have upon the individual criminal liability of partners on any of the bases identified in the preceding section of this Chapter? As we have already observed, the issue did not arise for decision in any of the Rosepark proceedings. We are aware of no Scottish cases which are directly in point. Despite this, we think that a reasonably clear answer may be arrived at on the basis of general principles. The answer thus arrived at also draws support from statutory provisions applying in specific contexts and from English case law.

Dissolution occurs after the commission of the offence

3.58 If the necessary criteria for individual liability apply, a partner commits an offence at the same time that the offence is committed by the partnership. As a matter of principle, an offence once committed cannot be un-committed. If the partner is guilty, the subsequent dissolution of the partnership cannot have the effect of removing the partner's guilt. The only question with which we need be concerned is whether the dissolution of the partnership bars that guilt from being proved.

Does dissolution prevent proof of individual guilt?

3.59 In order to establish the guilt of a partner on any of the bases which we have set out, it is necessary to establish that the partnership committed an offence. Does the dissolution of the partnership represent a bar to such proof? Although the issue has not arisen for decision, we think it highly likely that a Scottish court would conclude that dissolution of the partnership does not raise any bar to the prosecution of individual partners where the relevant requirements are met.

3.60 While it might be inappropriate to seek to prove the guilt of any person, including a partnership, except in criminal proceedings directed against that person, this objection does

[46] The criteria to be applied in analysing a provision's compatibility with Art 6(2) were suggested by Lord Hope in *R v DPP ex parte Kebilene* [2000] 2 AC 326 at 384-5. See too, Clayton and Tomlinson, *The Law of Human Rights* (2nd edn, 2009) at paras 11.255-11.261 and authorities there cited.

not apply where that person has ceased to exist. Consider a hypothetical example: B and C are charged with murdering V. The indictment narrates that B and C hatched the murder plan together, with C supplying the gun and B pulling the trigger. Does C escape prosecution for murder if, before the trial (and whether before or after B is placed on indictment), B dies? Surely not. B's death does not prevent the prosecution from proving his commission of the murder for the purposes of C's prosecution. A similar analysis would apply in relation to the prosecution of individuals in relation to offences where the principal offender, the partnership, has been dissolved.

3.61 We are aware of one specific statutory context in which the competency of such a prosecution would be beyond doubt. That is a prosecution under section 36 of the 1974 Act, which makes explicit provision for the prosecution of a person whose act or default causes the commission of an offence, regardless of whether proceedings are taken against the principal offender:

> **"36. Offences due to fault of other person**
>
> (1) Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, *and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-mentioned person.*"

3.62 It was recognised by the High Court in *Balmer* (albeit necessarily *obiter*) that the dissolution of the partnership would not have represented a bar to the prosecution of individuals under section 36 of the 1974 Act, and that it could also be competent in appropriate circumstances to prosecute individuals, after dissolution, as art and part. Lord Eassie, giving the Opinion of the Court, said:

> "[82] We are of course very conscious of the undesirability of prosecution of the commission by a partnership of a criminal offence being frustrated by the partnership's ability to dissolve itself, or by its susceptibility to dissolution by other events, particularly if by dissolution the partners are also to be exonerated. However, we would observe that, as was pointed out by counsel for the petitioners, matters are not as stark or extreme as might appear at first sight. In the case of most common law crimes and many statutory offences the individual partner responsible for the act or omission will be readily identifiable and can be prosecuted in his personal capacity. In the present case there is s 36 of the 1974 Act which creates individual responsibility for an offence committed by the employer. We appreciate that the evidential challenge facing the prosecutor in establishing individual responsibility under s 36 (and equivalent provisions in other health and safety or consumer protection legislation) may be different and possibly greater than that involved in establishing criminal responsibility on the part of the employer. But it will normally be capable of being met, particularly if the principles of art and part involvement are borne in mind. Finally, as the advocate depute herself canvassed in her argument, there may be other forms in which an indictment may be brought against the partners of a dissolved partnership in their capacity as former partners. We have however, as already indicated, come to the view that it would not be appropriate to express any concluded opinion on other possible forms of indictment in the absence of an actual indictment with which it is proposed to proceed. As we have already stated, these

petitions, and the argument, have been directed at the particular indictment in which the purported accused is a dissolved partnership."[47]

3.63 Further support for the view that the dissolution of a partnership will not bar the prosecution of individual partners may be found in the English case of *R v Wakefield.*[48] That case concerned a prosecution under section 101 of the Trade Marks Act 1994. As we have already seen,[49] that provision, like section 285 of the Copyright, Designs and Patents Act 1998, provides that where a partnership is guilty of an offence under the Act, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly. Wakefield and his co-defendant Purseglove had been trading together as a partnership selling bootleg CDs. The partnership was charged, together with each of the partners, with six counts of unauthorised use of trade marks contrary to sections 92(1) and 101(4) of the 1994 Act. Prior to the trial, the partnership was dissolved (and the charges were amended to reflect this fact). Wakefield and Purseglove were each convicted and sentenced to terms of 4 months' imprisonment. On appeal against conviction, they argued that the indictments had been inept, since section 101(4) required there to have been a conviction of the partnership before the partners themselves could have liability, by reason of the wording of the Act. The Court of Appeal had no difficulty in dismissing this argument:

> "[14] In the present case the partnership did not exist at the time of the trial. Accordingly, no proceedings could be pursued at the date of trial against the partnership. Nonetheless, the prosecution were entitled to, and did, proceed on the basis that the partnership could be said to have been guilty of the offence under section 92 at the time the offence was committed. The consequence of that was that the appellants were liable pursuant to the provisions of section 101(4) if the prosecution established that the partnership was guilty."[50]

3.64 Care should of course be taken in applying English authority in criminal cases, and still more so in criminal cases concerning partnerships. English law is not our law, and, generally speaking, English partnerships lack legal personality. But *Wakefield* is concerned with the interpretation of a UK statute, and Scottish partnerships lose their personality on dissolution. We do not see any reason why a Scottish court would be unable to arrive at a similar result.

3.65 In conclusion, while dissolution of a partnership will prevent the prosecution of the partnership, we consider it unlikely that dissolution would be any bar to the prosecution of individual partners in appropriate circumstances.

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[47] *Balmer v HM Advocate* [2008] HCJAC 44; 2008 SLT 799 at para 82.
[48] [2004] EWCA Crim 2278; (2004) 168 JP 505; (2004) 168 JPN 780.
[49] Para 3.55 above.
[50] [2004] EWCA Crim 2278; (2004) 168 JP 505; (2004) 168 JPN 780 at para 14.

Chapter 4 Options for reform

THE ISSUES

4.1 The survey in Chapter 3 provides us with a clearer view of the problems and uncertainties which surround the criminal liability of partnerships. These fall into three categories: problems regarding the competency of criminal proceedings against dissolved partnerships (the dissolution issue); problems concerning the extent of partners' individual criminal liability for partnership offences; and uncertainties regarding the effect of dissolution upon the enforcement of such individual liability.

The dissolution issue

4.2 The problem identified by the High Court in *Balmer v HM Advocate*[1] was that where a partnership was dissolved, it was no longer possible to prosecute the partnership. In that case, the relevant offences were ones which could only be committed by an employer, and the employer was the partnership and not the individual partners.

4.3 It should be noted (as indeed the High Court did in *Balmer*) that the problem may not arise in many contexts. In the context of common law crimes, or those which require the attribution of mens rea to the partnership, any prosecution will necessarily depend upon identifying and prosecuting the individual who is directly responsible for the commission of the offence. In such a case, it may be that the question of whether it remains possible, in addition, to attach vicarious liability to the partnership will be of little significance. It may indeed be that the dissolution issue is only likely to arise in the context of strict liability offences; but some such offences – for instance, certain breaches of health and safety legislation – are exceedingly serious.

4.4 It is instructive to compare the position of companies established under the Companies Acts to those of partnerships. Companies too may be dissolved and, unless restored to the register, cannot then be prosecuted. The difference is that while a lengthy process must be pursued in order to dissolve a company, during which the company's legal personality is preserved up until its removal from the register of companies, partnerships die suddenly. The obvious concern is that partners might take the cynical decision to dissolve the partnership in order to avoid prosecution.[2] But it should be remembered, as this Commission and the Law Commission for England and Wales pointed out in the *Joint Report on Partnership Law*, that partnerships may end suddenly and unpredictably for other reasons, the most obvious being the death of one or more partners.

A drastic approach: removing separate legal personality

4.5 It might be supposed that the dissolution issue could be resolved by removing the separate legal personality of partnerships. This would represent a fundamental alteration to

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[1] [2008] HCJAC 44; 2008 SLT 799.

[2] If the firm were to be dissolved for the purpose of avoiding prosecution, this might amount to an offence of attempting to frustrate the ends of justice; but such a charge, even if relevant, would be exceedingly difficult to prove.

the nature of partnership in Scotland, and would seem on its face to be a disproportionate response to the problem of prosecuting dissolved partnerships, particularly bearing in mind that it will often be possible to prosecute guilty individuals in any case. Such an approach would also be contrary to the strong recommendations of the Joint Report, in which the Law Commissions' stressed the advantages of separate legal personality for partnerships. We accordingly do not discuss it further in this Paper.

A better approach: preserving legal personality to allow prosecution

4.6 A better approach may be to learn from the comparison with companies. What is required is not the removal of separate legal personality, but some means of either preventing the "sudden death" of partnerships, or providing that whatever the legal effect of such sudden death in other contexts, it does not render the prosecution of the dissolved partnership incompetent. We consider these two closely related options in Chapter 5 below.

4.7 If the dissolution issue is resolved and it becomes technically competent to prosecute a dissolved partnership, will it be possible to enforce any penalty? If not, then there may be no point in a prosecution: first, because (at least in the absence of convictions against individual partners) nobody can be punished and, second, because since nobody can be punished, nobody will have a practical interest in defending the charge.

4.8 As our survey of the existing law in Chapter 3 has shown, provided that the effects of section 4(2) of the 1890 Act are preserved, there should generally be no bar to enforcing a fine which might be imposed upon a partnership (dissolved or otherwise), even where the partnership itself has no remaining assets. The general Scots law is that any such fine may be enforced against the individual partners, who will then have a right of relief against the partnership (should it have sufficient assets) and against their fellow partners.[3]

4.9 But our survey has also shown that there are a number of statutes which limit the liability for the payment of fines to partnership assets. In these cases, if there are no partnership assets (as, for instance, where the partnership has been dissolved), then it may be that no fine can be imposed (or, at least, collected).

4.10 Is this a significant problem? In relation to existing partnerships, it is unlikely to be an issue other than in truly exceptional cases, since the partnership assets will generally be capable of satisfying any fine imposed. Even in cases where the statute authorises the imposition of very significant fines, it will be the rarest of cases in which a sentencing judge will think it appropriate to impose a fine so great as to lead directly to the insolvency of a business: we would expect ability to pay to be a factor which a sentencing judge would take into account, just as he or she would do in sentencing a natural person. Further, the payment of a fine out of the partnership assets will have an immediate and marked effect on the individual partners, whose income derives directly from those assets.

4.11 The issue is likely to arise, however, where the accused partnership is no longer trading, and perhaps dissolved. One might ask what point there might be in prosecuting in circumstances where there is nobody against whom a fine might be enforced. Such a prosecution may nevertheless be worthwhile where its real object is be to fix the individual partners with personal liability on the basis that the partnership's offence was committed with

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[3] See paras 3.12-3.16 above.

their consent or connivance, or as a result of their neglect. It may often be the case that liability can only attach to the individual partners if it can be shown that the partnership committed the offence. If the dissolution issue is resolved, and the partnership remains in existence (whether generally or for the limited purposes of criminal prosecution), then establishing such guilt will generally require that the partnership be prosecuted along with the partners, but will not require that any penalty should be enforceable against the partnership itself.

4.12 Furthermore, as we have seen, the most serious statutory offences likely to be committed by partnerships – those under the Health and Safety at Work etc Act 1974 and the Corporate Manslaughter and Corporate Homicide Act 2007 – do not contain any such limitation applying to the prosecution of Scottish partnerships.[4] Whether or not the limitation of fines to partnership assets is, in the context of Scottish partnerships, undesirable, it seems unlikely to arise in the most serious and high-profile cases.

4.13 It is nonetheless worth considering whether it could ever be appropriate to limit the payment of fines to partnership assets. We ask the question:

1. Should it be provided in statute that provisions limiting the payment of any fine levied upon a partnership to the partnership assets do not apply to partnerships prosecuted in Scotland?

The individual criminal liability of partners

4.14 Regardless of the answer to this question, there may be a case for reforming the law regarding the individual criminal liability of partners. It seems wrong that in a case in which a serious offence is committed, those responsible should be able to avoid liability by taking shelter behind the separate juristic personality of a partnership. While there are a number of bases upon which individual partners might be liable for partnership offences, it is arguable that the nature of the partnership as a separate juristic person, coupled with the lack of formality required in order to constitute and operate a partnership, will often leave the prosecution with an excessive evidential challenge in showing which of the partners were implicated in the partnership's offence. We investigate the options for addressing this concern in Chapter 6.

The effect of dissolution on individual criminal liability

4.15 We have suggested, in the final section of Chapter 3, that dissolution of a partnership should not present any bar to the prosecution of individual partners where the conditions of personal liability are met, whether on the basis of art and part, statutory aiding and abetting under section 293(2) of the 1995 Act, or on a statutory basis such as "consent and connivance". So far as prosecutions under section 36 of the 1974 Act are concerned, the statutory wording puts this beyond doubt by providing that a person who causes the commission of an offence may be prosecuted regardless of whether proceedings are taken against the principal offender. Other statutes provide no direct guidance, and we have not

[4] And, as the English Court of Appeal noted in *R v W Stevenson & Sons (A Partnership)* [2008] EWCA Crim 273, [2008] Cr App R 14 (discussed at para 3.44 above), nor do a series of Orders regulating sea fisheries, which also feature exceptionally high maximum penalties.

identified any Scottish court decisions which are directly in point. While we are confident in our reasoning from general principles, there may remain some room for doubt.

4.16 Would it be appropriate to legislate to remove any remaining doubt? It would be possible to provide in statute that for the purpose of criminal proceedings against a partner, and where the partnership has been dissolved, the partnership's guilt may be proved without proceedings being brought against the partnership. The advantage of such a provision would be to remove any remaining doubt in relation to the competency of prosecuting partners in such circumstances.

4.17 It seem to us that the answer to any remaining doubt lies in resolving the dissolution issue. If the partnership is still in existence at the time of the prosecution (whether generally or for the limited purpose of criminal proceedings) then it would generally be appropriate, in proving the guilt of the partnership for the purpose of establishing the guilt of a partner, to prosecute the partnership as well as the partner. Once the dissolution issue is resolved, the issue of whether dissolution of the partnership bars prosecution of the partners cannot arise.

4.18 On the other hand, it is worth considering whether it should be possible to prosecute a partner without prosecuting the partnership, even where the partnership has not been dissolved. There is precedent for this in section 36 of the 1974 Act, and it would be possible to extend a similar provision to other contexts. We ask the following question:

2. Would it be appropriate to provide that individual partners may be prosecuted, in circumstances in which they might be individually liable for offences committed by the partnership, regardless of whether proceedings are brought against the partnership (and regardless of whether the partnership continues in existence)?

Chapter 5 Resolving the dissolution issue

5.1 As we noted in Chapter 1, there are two, related, options for addressing the dissolution issue. The first involves a much-needed comprehensive reform of the law of partnership, based upon the Law Commissions' *Joint Report on Partnership Law*. The second would leave the law of partnership untouched except in relation to the criminal liability of dissolved partnerships.

THE FIRST APPROACH: COMPREHENSIVE REFORM

Background to the Joint Report

5.2 On 24 November 1997 the Minister of State at the Department of Trade and Industry requested the Law Commission and the Scottish Law Commission to undertake jointly a review of partnership law. The terms of reference were:

> "To carry out a review of partnership law, with particular reference to: independent legal personality; continuity of business irrespective of changes of ownership; simplification of solvent dissolution; a model partnership agreement; and to make recommendations. The review is to be conducted under the present law of partnership, namely the 1890 Act and the Limited Partnerships Act 1907."

5.3 The Commissions published a Joint Consultation Paper on *Partnership Law* in September 2000[1] and a Joint Report and draft Partnership Bill in November 2003.[2] Despite the considerable scale of the project, little specific consideration was given to criminal liability. The Joint Report suggested that section 70 of the 1995 Act should be amended so as clearly to allow the prosecution of partnerships on indictment as well as on complaint,[3] but otherwise made no recommendations in relation to the criminal liability of Scottish partnerships.[4]

The Joint Report on dissolution

5.4 The Joint Report did, however, propose a significant change to the law governing the dissolution of partnerships and the extinction of their separate legal personality. The Commissions suggested a new process for the winding up of partnerships. The first stage, termed "break up", would bring an end to the ability of the partnership to trade as such.[5] There would then follow a period of winding up, during which the partnership persisted as a

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[1] Consultation Paper No 159; Discussion Paper No 111 (2000).
[2] Law Com No 283; Scot Law Com No 192 (2003).
[3] Ibid, paras 13.25-13.26.
[4] The Joint Report noted that whether a partnership governed by English law could commit a criminal offence was rather obscure and that there were judicial dicta which indicated that it could not. (Para 4.43). The criminal liability of English partnerships was viewed as raising questions of criminal law policy upon which the Commissions had not consulted, and the Joint Report recommended, as a "workable holding position pending a more thorough consideration of the criminal law in relation to partnerships" (para 4.46) that except so far as provided by or under any enactment, an English partnership should not be capable of committing an offence. The footnote to para 4.46 said simply "We do not propose to make provision for Scotland where the partnership already has a form of separate personality and is capable of committing certain criminal offences."
[5] As an act which is effective immediately upon agreement of the partners, and which has as a consequence the inability of the partnership to carry on further business except to the extent required for the purpose of winding up, "break up" is the draft Partnership Bill's closest analogue to dissolution under existing law.

legal entity, with power to carry on the partnership business only so far as is necessary for the beneficial winding up of the partnership. Dissolution, and the extinction of the partnership's legal personality, would be postponed to the completion of the winding up. At para 7.32 of the Joint Report, the Commissions said:

> ". . . We recommend that the personality of a partnership should continue after the break up until all of the assets of the partnership have been distributed and all the liabilities of the partnership discharged or extinguished. We think that this is a much simpler way of providing for the full winding up of a partnership. [. . .] Thus once the partners (or a third party such as the partnership liquidator) have wound up the partnership and distributed all of the assets, the partnership will continue to exist as an entity so long as any liability (including a liability which only emerges in the future) remains undischarged or has not been extinguished by the passage of time."

5.5 This recommendation was carried into the draft Partnership Bill. Clause 38 set out the events which would break up a partnership. Clause 39 provided:

> **"39 Effects of break up**
>
> (1) Once a partnership breaks up, the partnership business may be carried on only in so far as permitted under—
>
> (a) section 43 (winding up of partnerships by partners),
>
> (b) Schedule 4 (winding up of partnership by liquidator), or
>
> (c) Schedule 5 (functions of provisional liquidator).
>
> (2) But a partnership which has broken up is not dissolved as a legal person until the conditions in section 45 are satisfied."

5.6 Clause 45 said:

> **"45 Dissolution**
>
> (1) A partnership which has broken up is dissolved when six conditions are satisfied.
>
> (2) The first condition is that all partnership property has been distributed to the persons entitled to it.
>
> (3) The second is that any trust property has been transferred to –
>
> (a) the person entitled to it, or
>
> (b) a trustee for that person.
>
> (4) The third is that there are no outstanding liabilities (or contingent liabilities) of the partnership.
>
> (5) The fourth is that there is no risk of the partnership incurring any liabilities in the future as a result of any past acts or omissions.
>
> (6) The fifth is that there are no outstanding claims by or against the partnership.
>
> (7) The sixth is that, if a liquidator has been appointed under section 50, the liquidator has ceased to hold office without being replaced.

(8) "Claims" means claims made in legal or arbitral proceedings."

5.7 The explanatory note to clause 45 said:

> "The effect of this clause is that a partnership will continue in existence until it is no longer needed for any of the purposes for which it was created. In particular, the effect of subsection (2) is that it will never be a defence to a claim by a partnership that the partnership has been dissolved; and the effect of subsection (5) is that it will never be a defence to a claim against a partnership that the partnership has been dissolved. As a result of these two features, it has not been necessary to provide in the draft Bill either a mechanism for reinstatement of a dissolved partnership, or for transfer of assets and liabilities from a dissolved partnership to the partners. . ."

The effect of the draft Partnership Bill provisions

5.8 It is arguable that were these provisions in force, a situation such as that in *Balmer* would be unlikely to arise in practice. The effect of clause 45(5) – which prevents the extinction of a partnership's legal personality while there is a risk of the partnership's incurring any liabilities in the future as a result of past acts or omissions – would be that a partnership would not lose its legal personality until at least the expiry of the prescriptive period required to extinguish any obligations which might have been incurred by the partnership prior to its break up. Indeed, the Joint Report contemplated a much longer period within which the partnership would remain in existence.[6] But even a post-break up life limited to 5 years would generally allow enough time for a criminal prosecution to be pursued against the partnership. The only exception that might arise is a case in which the partnership committed a criminal offence which did not come to the attention of the prosecutor until after all of the other liabilities of the partnership had been discharged or extinguished by the passage of time; but such a situation is hard to imagine.

5.9 It may be suggested, therefore, that the enactment of the Commissions' proposed Partnership Bill would effectively address the dissolution issue.

5.10 There is, however, at least one area of doubt that arises in relation to the draft Partnership Bill as it stands. That is that the references to "liabilities" in clause 45 do not include (or at least are not certain to include) liability to criminal prosecution.

5.11 There are a number of interpretative factors which point to this construction of the draft Bill. The whole focus of the Bill is upon the civil, rather than the criminal, law and it may be argued that "liabilities" falls to be interpreted in this context. While clause 45 applies to England and Wales as it does to Scotland, clause 8 of the draft Bill explicitly states that except so far as is provided by or under any enactment (whether expressly or by implication) an English (or Welsh) partnership is not capable of committing an offence. Accordingly, so far as England and Wales are concerned, "liabilities" in clause 45 cannot include liability to prosecution; and in the absence of provision to the contrary, it may be that the same construction should be given to this term so far as applying to Scotland. A further factor

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[6] As the Joint Report recognised, subsection (5) could apply to liabilities arising many years after the partnership ceases to do business, where the partnership has acted negligently but the loss only arises at some later date. The example cited is that of a solicitors' firm which negligently drafts the will of a testator who survives for many years after that will is made, and which then faces a claim from a disappointed beneficiary: Joint Report, para 12.17, citing *White v Jones* [1995] 2 AC 207. Under the draft Partnership Bill, old partnerships do not die suddenly, but fade away to nothing over time.

pointing away from including liability to prosecution within the "liabilities" referred to in clause 45 is the imprescriptible nature of criminal liability. Liability to prosecution for serious criminal offences is not extinguished by the passage of time,[7] and so it might be argued that if "liabilities" in clause 45 included liability to prosecution, it would never be possible to say with certainty that a partnership had ceased to exist, since there would always be the risk of criminal liability in respect of the acts or omissions of the partnership prior to its break up.

5.12 We therefore consider that the better view is that "liabilities" in clause 45 of the draft Partnership Bill does not include liability to criminal prosecution.

5.13 If this is correct, does it matter? There are three senses in which it might. The first is that the absence of specific reference to criminal liability might open the door to an argument that the effect of clause 45 is to preserve the legal personality of the partnership only for the purposes contemplated in that clause, and that it would still be a good objection to an indictment directed against the partnership that the partnership had, for the purposes of criminal liability, ceased to exist.

5.14 While such an argument might well be advanced, there does not appear to be any principled justification for treating a partnership which otherwise remains in existence as non-existent for the purposes of the criminal law, as the only consequence of so doing would be to frustrate the prosecution of partnerships for offences allegedly committed during their (undoubted, trading) existence. This was acknowledged by the High Court in *Balmer* to be an undesirable outcome. Nor does it seem likely that the courts would adopt the view that a partnership subsisted for certain purposes but not for others, unless compelled to do so by express statutory wording. In response to the Advocate Depute's submission that the legal personality of a partnership persisted beyond dissolution for the limited purpose of winding up, including answering for any criminal charges, the High Court in *Balmer* opined that:

> "While it is no doubt possible for a person, whether natural or juristic, to have limitations on his or its powers or capacities, the notion of some limited degree of personality is not readily understandable in juridical terms and, importantly, has no support in any of the authorities to which we were referred. In our view, in principle, there is either a person or there is not a person. Personality, whether natural or juristic, is not created or extinguished in instalments." [8]

5.15 The second sense in which it might matter if "liabilities" in clause 45 were limited to civil liabilities is that it might then be necessary, in any case in which a challenge was made to the competency of an indictment directed against a partnership, for the prosecution to show that there existed civil liabilities (or at least the risk of such liabilities) in order to establish the continuing existence of the accused partnership. This the prosecution might be ill-equipped to do. Moreover, if the relevant point of principle is that partnerships should not be able to escape criminal liability by resorting to dissolution, there is something strange about having to give effect to this principle by reference not directly to criminal liability but to

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[7] Minor statutory offences are different: s 136(1) of the 1995 Act provides that in the absence of provision to the contrary in the statute creating the offence, proceedings in respect of a statutory offence which is triable only summarily must be brought within 6 months of the date of the contravention.

[8] [2008] HCJAC 44, 2008 SLT 799 at paragraph 79 (Opinion of the Court, per Lord Eassie).

[9]

5.16 It should be borne in mind, however, that clause 45 as drafted will prevent the extinction of a partnership until at least five years after its break-up, since the requirement of clause 45(5), "that there is no risk of the partnership incurring any liabilities in the future as a result of any past acts or omissions" cannot be met until at least the expiry of the prescriptive period applicable to any potential claim against the partnership. In practice, therefore, it is unlikely that the prosecution would ever have to do more than to show that fewer than five years had elapsed since the date of the break up.

5.17 The third sense in which the exclusion of criminal liability from the definition of "liabilities" in clause 45 might matter is that there might conceivably be a case in which a partnership commits an offence, in a special capacity such as that of employer under the 1974 Act, breaks up, distributes all of its assets and discharges all of its outstanding liabilities, and fails to come to the attention of the prosecution authorities until sufficient time has passed that it is no longer at risk of incurring civil liability in respect of acts or omissions relating to the period prior to the break up. While this possibility cannot be excluded, such cases are inherently unlikely to occur: the kind of case in which an employer might be prosecuted generally involves significant harm to employees or to members of the public, and is unlikely to escape the attention of the prosecutor for a period of years.

A possible section based upon clause 45 of the Partnership Bill

5.18 In order to ensure that any Act resulting from the draft Partnership Bill would effectively address the dissolution issue, we are persuaded that it would be prudent to provide, in the section equivalent to clause 45, that in Scotland reference to “liabilities” includes liability to criminal prosecution. If it is generally important that the law should be clear, this is particularly so in the case of criminal liability.

5.19 We therefore ask:

3. Would it be appropriate for any Act resulting from the draft Partnership Bill, in the section equivalent to clause 45 of the Bill, to make specific provision in relation to the criminal liability of Scottish partnerships?

5.20 It is of course the case that the draft Partnership Bill has not been enacted despite the obvious need for reform of partnership law. Assuming that it is enacted, there would have to be a significant period – the Joint Report recommends two years[10] – between the enactment of the Bill and its application to existing partnerships. This suggests that even if the existing draft provisions would effectively address the dissolution issue (with or without some minor amendment), it would be appropriate to enact some interim provision to deal specifically with that issue, pending the enactment and entry into force of the Partnership Bill.

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[9] As for example in relation to offences under the Health and Safety at Work etc Act 1974 (see s 47(1) of that Act).

[10] Para 3.40; draft Bill cl 79.

THE SECOND APPROACH: A LIMITED SOLUTION

5.21 We consider that the appropriate long-term solution to the dissolution issue is a comprehensive reform of the law relating to the dissolution of partnerships, as proposed in the Joint Report. Nevertheless, it may be appropriate to consider some limited solution to that issue, pending the coming into force of such comprehensive reform, or if – contrary to our recommendations – such comprehensive reform is not to be undertaken, to serve as a free-standing solution.

5.22 An appropriate limited solution to the dissolution issue may be to provide in statute that a partnership shall be treated, for the purposes of the criminal law only, as having a continued legal personality notwithstanding dissolution. This could be expressed as applying only during a limited period after dissolution, or indefinitely (on the understanding that the provision would be superseded by that in the draft Partnership Bill when enacted).

5.23 Such an approach would unambiguously address the dissolution issue, inasmuch as dissolution could no longer be an answer to the competency of an indictment directed against the former partnership. It would not affect the criminal liability of partners in partnerships which had not been dissolved, nor would it do violence to any of the varied statutory provisions governing the circumstances in which corporate liability may attach to an individual. It should also be capable of enactment in a very short, freestanding Bill, which, being limited to plugging a loophole by which the alleged perpetrators of serious offences may escape prosecution, one might expect to attract widespread support.

5.24 The only concern which we have about this approach is that it would conflict with the principled approach to the nature of legal personality which was adopted by the High Court in *Balmer v HM Advocate.* We recall Lord Eassie's comment that "in principle, there is either a person or there is not a person. Personality, whether natural or juristic, is not created or extinguished in instalments."[11] But while Lord Eassie's remarks represent the correct approach to the current law, there is nothing which would prevent an Act of Parliament from providing for the separate personality of partnerships to endure for certain purposes and not for others, provided always that the terms of the statute were clear and unambiguous.

5.25 We invite comments on this proposed approach. In particular, we would welcome responses to the following proposals and questions:

4. **Limited provision should be made to address the dissolution issue, by means of a Bill in the UK Parliament.**

5. **This should be an interim provision, pending the enactment and coming into force of the draft Partnership Bill.**

6. **It should be provided that the legal personality of the partnership persists after dissolution for the limited purpose of establishing criminal liability.**

7. **Should such legal personality persist indefinitely, or for a limited period? If for a limited period, for how long?**

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[11] [2008] HCJAC 44, 2008 SLT 799 at paragraph 79 (Opinion of the Court, per Lord Eassie).

8. Is there any other limited solution which would be preferable?

Chapter 6 Broadening individual liability

THE CURRENT LAW

6.1 Either of the changes suggested in the preceding chapter would effectively bring the criminal liability of individual partners on to the same footing as that of company directors. In the absence of proof of individual involvement, partners would bear no individual criminal liability for offences committed by the partnership. But in some circumstances it would be possible to prosecute partners (or indeed company directors) in an individual capacity. We discussed these circumstances in Chapter 3, under the heading of "Individual Criminal Liability Of Partners". It may be useful at this point briefly to recap the various bases upon which individual liability might attach to partners.

Special statutory provision – eg the 1974 Act

6.2 In relation to offences under the 1974 Act, section 36 of that Act allows prosecution on a similar basis to art and part liability. Section 36 imposes liability on an individual where it can be shown that an offence under the Act was committed "owing to" the act or omission of that person. This appears to be a test of causation: but, as with causation in the criminal law more generally, it does not require that the act or omission of the individual should have been the sole or principal cause of the commission of the offence. In accordance with general principles it is sufficient that the act or omission in question be shown to have made a material contribution to the causation of the offence in question. Nevertheless, as with art and part liability, it is necessary to show that the act or omission of the individual played a part in the commission of the offence, something which may often be difficult to prove.

Art and part, or statutory aiding and abetting

6.3 Where it could be shown that the individuals directed the commission of the offence by the partnership, or otherwise played an active part in the preparation or commission of the offence, they might be liable on the basis of art and part.[1] Alternatively, they might be liable on the basis of section 293(2) of the 1995 Act, which creates an offence of aiding, abetting, counselling or procuring the commission of a statutory offence.

Liability on the basis of consent, connivance or neglect

6.4 Many statutes provide for the liability of individual directors or partners on the basis of their "consent or connivance" in the commission of the offence.

6.5 While "consent and connivance" may be a broader basis of liability than "art and part", the two doctrines have this in common: each is subjective; that is, it is likely that each requires that it be proved that the *individual* had knowledge of the offence and either assisted or encouraged it, or consented and connived in it.

6.6 A test based upon neglect is objective. Rather than applying the test of what the individual knew (and was proved to have known), it relies upon a test of what the individual

[1] 1995 Act, s 293; see paras 3.40-3.43 above.

ought to have known, and/or ought to have done. In order to hold a partner liable on the basis of neglect, it is enough to show that the partner had a relevant duty which he or she failed, through inaction, to discharge. It is not necessary to show that the partner was aware of the duty, or of the consequences of failing in its discharge. It is, in this sense, an offence of strict liability. It is, however, necessary to show that offence was attributable to the neglect: or, in other words, that the neglect was a cause of the offence.

6.7 This neglect-based liability has been criticised by the Law Commission for England and Wales in its Consultation Paper on *Criminal Liability in Regulatory Contexts*[2] as involving a morally significant extension of individual liability. The criticism is on two grounds. The first is that it is sometimes applied to offences which require mens rea on the part of the organisation. In such cases, while the commission of the offence by the organisation requires proof of mens rea (or, in the Law Commission's terms, a "subjective fault element"), the individual to whose neglect the commission of the offence is attributable may be convicted without any proof of his or her subjective fault.[3] The second is that the neglect basis of liability may have the effect of rendering individuals liable, without proof of individual subjective fault, for highly stigmatic offences.[4] The Law Commission suggested that wherever the individual liability of one person depends on the commission of an offence by another person, the minimum requirement for conviction of the first person should be proof that he or she was aware of, or assented to, the wrongdoing engaged in by the other person.[5] They went on to suggest that, rather than allowing individuals to be convicted, on the basis of neglect, of an offence committed by an organisation, it would be better if statutes provided for a separate offence of negligently failing to prevent the commission of an offence.[6]

A NEED TO GO FURTHER?

6.8 While the changes suggested in Chapter 5 would effectively place partners in the same position as company directors vis-à-vis their personal liability for corporate offences, it is arguable that this does not go far enough. There may still be cases in which it is impossible – as a matter of evidence – successfully to prosecute any individual.

6.9 Statute regulates a vast range of conduct on the part of legal persons, and there is a correspondingly wide range of sanctions for failure to comply with the relevant rules. In many cases there will be no need to seek to attribute responsibility or blame to a natural person. In others it will be appropriate to provide that criminal responsibility is dependent upon complicity at one level or another. We conjecture that this is the reason why different statutes adopt different tests for attributing liability to company directors etc. To the extent that this differentiation of liability in respect of different regulatory regimes represents a conscious position adopted by Parliament, we consider that this is a reasonable position for Parliament to adopt.

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[2] LC CP No 195 (2010).
[3] The Law Commission gives the example of s 397(1) of the Financial Services and Markets Act 2000: ibid, para 7.40.
[4] The example given is of a director of a photographic company which, unknown to him, committed the offence of taking indecent photographs of children, contrary to s 1 of the Protection of Children Act 1978. S 3 of that Act makes directors liable for offences attributable to their neglect; and on this basis, the individual might be convicted, and placed on the sex offenders' register, without any individual wrongdoing.
[5] Ibid, para 7.46.
[6] Ibid, paras 7.47-7.52.

6.10 The institution of legal personality, and in particular corporate personality, has been and is of immense benefit to society as a whole and to the very many people who, but for, for example, the institution of limited liability companies, would not have ventured capital in commercial enterprises. Nor are the benefits of legal personality confined to profit making activities. We pointed out in our Report on *Unincorporated Associations*[7] the advantages which would accrue to a very wide range of non-profit-making activities if legal personality were to be conferred upon those involved in them. And it is proper that the legal fiction which creates and preserves that personality should be recognised and protected by the courts.

6.11 Nevertheless, the great increase in the volume of activity by legal persons, and the increase in measures designed to regulate their activities, and to protect those affected by their operations, raises a question as to whether and in what circumstances it should be proper to look behind the "corporate veil" and identify the natural persons who are actually responsible for the operations of the enterprise, and whose neglect may have caused some breach of some statutory or other duty. It is, from the point of view of the public at large, profoundly unsatisfactory when a serious incident occurs, causing death or injury to those affected, and, while the legal person involved may be found liable, and pays a fine, it proves impossible to attribute responsibility to the natural persons involved in running the business.

6.12 No doubt most partnerships have adequate procedures in place for securing that statutory duties are complied with. And even those which do not will not normally deliberately neglect such duties. But there are cases – and the Rosepark incident may be an example of this – where it may reasonably be inferred that there were serious failings, and it is nevertheless not possible to find a natural person who has the responsibility.

6.13 It appears to us that there are two related deficiencies in the present position. The first is that there may be no-one who can be held responsible when something has gone wrong. The second, and more serious, may be that unless an individual carries a clear responsibility for securing compliance with statutory duties, then there is an increased risk that compliance will be neglected.

6.14 Before considering options in detail, it is appropriate to ask a general question:

9. Should it be possible to hold partners criminally liable for offences committed by partnerships on a broader basis than at present?

Broadening individual criminal liability

6.15 A possible solution would be to legislate so as to make it clear that all of the partners were responsible, along with the partnership itself, for breaches of statutory duties. This would be balanced by a defence of due diligence, so that an individual partner who was not actually involved could establish that in court. A possible model would be section 285(4) of the Copyright, Designs and Patents Act 1998, which represents an example of what we described in Chapter 3 as the second general model of individual liability:

> "(4) Where a partnership is guilty of an offence under this Part, every partner, other than a partner who is proved to have been ignorant of or to have attempted to

[7] Scot Law Com No 217 (2009).

prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly."

6.16 Such a provision might be generalised to all offences committed by partnerships.

6.17 This may appear at first sight to be a radical suggestion, since the effect of the provision might be thought to be to transfer liability from the partnership to the individual partners – making the partners vicariously liable for the offences of the partnership. But when one bears in mind the existing doctrine of art and part, and the commonly-encountered statutory basis of individual liability on the basis of consent, connivance or neglect, then the proposed provision appears much less radical than it might at first seem. Partners are already exposed to personal criminal liability in cases in which they participate in the commission of an offence by the partnership. They are, in many statutory settings, exposed to personal criminal liability where the offence is committed with their consent or connivance, or where its commission is attributable to their neglect.[8] So rather than rendering partners vicariously liable for offences committed by the firm, the effect of a generalised provision based upon section 285(4) would merely be to provide a more straightforward manner of prosecuting partners in respect of a criminal liability that they already face in terms of the doctrines of art and part, or of consent, connivance and neglect. The novel element is the reversal of the burden of proof: rather than requiring the prosecution to demonstrate that a given partner took part in the commission of the offence, or consented to or connived in it, the partner would be required to show that he or she was not so involved.

6.18 This would effectively deal with the situation in which it was impossible to show which of the partners were personally involved in the commission of an offence by the partnership. By allowing the defence that the individual partner did not know of the commission of the offence (which might be broadened to a more general defence of due diligence), it would address the criticism that – at least in large partnerships – not every partner can be expected to know about every aspect of the business: the partner responsible for the office in Wick should not be held criminally liable for the health and safety defects of the partnership's office in Campbeltown. Coupled with a defence of due diligence, it would also provide a robust incentive for partnerships to have clear structures in place for ensuring compliance with statutory obligations, since it would be in the interests of each of the partners to be able to demonstrate that he or she had shown due diligence in meeting them. Where there was a clear internal division of responsibility for compliance with statutory obligations, those partners who were not designated as responsible for ensuring compliance with particular statutes would find it easier, should any prosecution be brought, to demonstrate their lack of personal culpability.

Convention compliance with reverse burdens

6.19 Statutory reversal of the burden of proof in criminal trials requires consideration of whether the provision is Convention compliant. Article 6(2) of the Convention provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law".[9] While the European Court of Human Rights has declined to interpret article 6(2) as imposing a blanket ban on the reversal of the burden of proof it was held in

[8] See Chapter 3.
[9] Article 6(2) European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950.

Pham Hoang v France that Contracting States should limit the use of reverse burdens, confining them within reasonable limits taking into account the "importance of what is at stake" and the maintenance of fair trial rights for the defence.[10]

6.20 There is little Scottish jurisprudence that addresses the issue of compatibility of reverse burdens with Convention rights,[11] however the leading English authority *Sheldrake v DPP,*[12] adopts and expands the principles set out in the *Pham Hoang* case. In *Sheldrake* the House of Lords stated that the correct task for the court was an assessment of whether the reverse burden unjustifiably infringed the presumption of innocence. To this end the House of Lords stated that material considerations should include: whether the defence would have the opportunity to rebut the presumption; the difficulty the defence is likely to experience in discharging the burden; the fairness of the proceedings as a whole; flexibility in application, whether a persuasive or a mandatory presumption is created; the importance of what is at stake; and the difficulty for prosecutors if a reverse burden did not exist.[13]

6.21 As noted in paragraph 6.15 above, the proposal for extending individual criminal liability of partners through the introduction of a strict liability provision would be balanced by a defence of due diligence, thereby providing an opportunity to rebut the presumption of guilt. The presumption could easily be rebutted if the defence produced evidence to show that the illegitimate practice was not within the remit of the accused, or that the firm had established an appropriate process to achieve compliance with the statutory obligation. Both routes to the due diligence defence should be capable of being supported through the production of partnership records, and thus the defence should not be overly burdensome to establish. Furthermore, should the option to proceed using section 285 as a model be adopted, the persuasive as opposed to mandatory nature of the presumption would be included within any potential provision. Finally, in terms of the importance of the matter at stake; the matter at stake is compliance with statutory obligations in order to prevent potentially serious consequences (including, in some cases, the risk of fatalities).

6.22 We ask the question:

10. Should statute provide for the personal criminal liability of a partner for an offence committed by the partnership unless the partner is able to discharge an evidential burden of showing that he or she was ignorant of the commission of the offence, or showed due diligence with a view to preventing its commission?

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[10] *Pham Hoang v France* ECtHR Application no 13191/87, dated 25 September 1992, paragraph 33.

[11] Much of the Scottish case law to date has centred on Civil Recovery Applications. The European Court of Human Rights has held that such proceedings are not concerned with a determination of guilt and therefore article 6(2) can have no application – *Phillips v United Kingdom* ECtHR Application no 41087/98, dated 5 July 2001.

[12] *Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

[13] This approach is in line with the distinction drawn between mandatory and discretionary burdens in *R v DPP, ex p Kebilene* [2000] 2 AC 326, 379 where Lord Hope explained that mandatory burdens would always breach article 6(2) ECHR, whilst a persuasive burden would require deeper analysis to determine Convention compliance. The approach to assessing the compatibility of a persuasive burden was set out in *R v Killen* 1974 NI 220. The Court of Appeal in *Killen* held that discretionary burdens should not be used to convict unless the Court is satisfied, beyond a reasonable doubt, of the accused's guilt.

Another potential solution: nomination

6.23 An alternative or additional route would be to require or enable every partnership to nominate a partner who will bear individual criminal liability for any offence committed by the partnership. This would have the virtue of ensuring that there was always some natural person who could be prosecuted in relation to an offence, so avoiding the possibility of justice being frustrated by guilty parties hiding behind the separate legal personality of the firm. It could also have a salutary effect upon compliance with statutory obligations, since the nominated individual would have a very clear and direct incentive to ensure that the partnership complied with the law. It might also avoid the need for difficult enquiries into the state of knowledge of individual partners, or the causal contribution made by individual partners' acts and omissions to the commission of the offence by the partnership.

6.24 There are a number of possible variations upon such a scheme. One would be to provide that for partnerships below a certain size (perhaps, say, of five partners or fewer), each partner would be individually liable for offences committed by the partnership, while larger partnerships were required to nominate one or more individuals who would each bear a similar personal liability. Another would be to require any partnership, regardless of size, to nominate a single partner who would be responsible for all offences committed by the partnership. Yet another would be to require an individual partner to be nominated in respect of each of the statutory regimes to which the partnership is subject, giving rise to the possibility of different partners being nominated as responsible for offences in connection with health and safety and (say) the reporting of landings of sea fish.

Strict and vicarious liability

6.25 A nomination scheme, to be effective, would involve placing upon the nominated partner strict and vicarious liability for the offences of the partnership: strict, because there would be no need to show that the nominated partner had any mens rea; vicarious, because there would be no need to show that the nominated partner was personally involved in the commission of the offence – the nominated partner would automatically be liable for any offence proved against the partnership.

6.26 This might be criticised on the ground of proportionality, since the nomination scheme might require the prosecution of the nominated partner for offences in relation to which he or she may, in fact, have had no role. This is true vicarious liability: the nominated partner would be liable to prosecution and punishment not for his or her own wrongs but for the criminal conduct of another person, the firm. With very narrow exceptions, which are generally limited to the context of delegation, the criminal law rejects vicarious liability as a matter of general principle. This is partly because it would be unfair to hold one person liable for the crimes of another, and partly because to do so would be unsatisfying: justice may require punishment, but it requires punishment only of the guilty.

6.27 Many of these difficulties would be largely, if not wholly, answered by the provision of a defence of due diligence, which would enable the nominated partner to demonstrate that he or she had in fact done all that was reasonable. In addition, the consideration of the extent to which the nominated partner was personally liable would be informed by the fact that he or she would have been nominated. It would be difficult for the nominated partner to claim ignorance of that fact.

Enforcement of the nomination requirement

6.28 One would also need to consider the enforcement of the nomination requirement. To be effective, the nomination would have to be made prior to the commission of the offence. Practical issues may arise concerning the recording of nominations and the enforcement of the nomination requirement. One possible approach would be to provide that, in the absence of a nominated partner, each partner would be personally responsible. This would provide a clear incentive for partners to nominate one of their number to bear responsibility for ensuring compliance with statutory requirements. Alternatively, a separate sanction might apply for failure to make the required nomination. But these are questions of detail which need not be considered here.

6.29 While a nomination requirement would address the difficulties identified at the start of this chapter, it would also introduce an administrative overhead for partnerships in maintaining a list of nominated partners and (depending upon the detailed scheme) a similar overhead upon whatever authority is charged with ensuring compliance with the nomination requirement. It may be that the benefits of such a scheme would be no greater than those of the more straightforward reform suggested earlier in this Chapter, whereby partners might be required to show that they were personally uninvolved, or had shown due diligence, in order to avoid personal criminal liability for the offences of the firm.

6.30 We nevertheless ask the questions:

11. Should partnerships be required or enabled to nominate one or more partners to bear personal criminal responsibility for the offences of the partnership?

12. If there is to be a requirement, how should this be enforced?

13. Should any nomination require to be recorded on some public register?

Economic impact

6.31 We remarked in Chapter 1 that the likely economic impact of the proposals in Chapter 5 would be minimal: by preventing the dissolution of a partnership from frustrating prosecution, we would be doing nothing more or less than was required in order to ensure that the partnership – and, by extension, the partners – could be held accountable for offences committed during the subsistence of the partnership. Where dissolved partnerships were prosecuted, this would of course have an economic impact upon the partners. But in relation to other partnerships, the costs of our proposals would be minimal.

6.32 In order to assist in our assessment of the likely impact of the proposals in this chapter, we seek consultees' views on the following question:

14. What would be the likely impact, in terms of cost to business and / or the public, were it to be made easier to prosecute individual partners for offences committed by a partnership?

Chapter 7 Questions and responses

1. Should it be provided in statute that provisions limiting the payment of any fine levied upon a partnership to the partnership assets do not apply to partnerships prosecuted in Scotland?

(Paragraph 4.13)

2. Would it be appropriate to provide that individual partners may be prosecuted, in circumstances in which they might be individually liable for offences committed by the partnership, regardless of whether proceeding are brought against the partnership (and regardless of whether the partnership continues in existence)?

(Paragraph 4.18)

3. Would it be appropriate for any Act resulting from the draft Partnership Bill, in the section equivalent to clause 45 of the Bill, to make specific provision in relation to the criminal liability of Scottish partnerships?

(Paragraph 5.19)

4. Limited provision should be made to address the dissolution issue, by means of a Bill in the UK Parliament.

(Paragraph 5.25)

5. This should be an interim provision, pending the enactment and coming into force of the draft Partnership Bill.

(Paragraph 5.25)

6. It should be provided that the legal personality of the partnership persists after dissolution for the limited purpose of establishing criminal liability.

(Paragraph 5.25)

7. Should such legal personality persist indefinitely, or for a limited period? If for a limited period, for how long?

(Paragraph 5.25)

8. Is there any other limited solution which would be preferable?

(Paragraph 5.25)

9. Should it be possible to hold partners criminally liable for offences committed by partnerships on a broader basis that at present?

(Paragraph 6.14)

10. Should statute provide for the personal criminal liability of a partner for an offence committed by the partnership unless the partner is able to discharge an evidential burden of showing that he or she was ignorant of the commission of the offence, or showed due diligence with a view to preventing its commission?

(Paragraph 6.22)

11. Should partnerships be required or enabled to nominate one or more partners to bear personal criminal responsibility for the offences of the partnership?

(Paragraph 6.30)

12. If there is to be a requirement, how should this be enforced?

(Paragraph 6.30)

13. Should any nomination require to be recorded on some public register?

(Paragraph 6.30)

14. What would be the likely impact, in terms of cost to business and/or the public, were it to be made easier to prosecute individual partners for offences committed by a partnership?

(Paragraph 6.32)

Appendix Extracts from legislation

THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

70 Proceedings against organisations.

(1) This section applies to proceedings on indictment against an organisation.

(2) The indictment may be served by delivery of a copy of the indictment together with notice to appear at—

(a) in the case of a body of trustees—

(i) the dwelling-house or place of business of any of the trustees, or

(ii) if the solicitor of the body of trustees is known, the place of business of the solicitor,

(b) in the case of any other organisation, the registered office or, if there is no registered office or the registered office is not in the United Kingdom, at the principal place of business in the United Kingdom of the organisation.

(3) Where a letter containing a copy of the indictment has been sent by registered post or by the recorded delivery service to any place, an acknowledgement or certificate of the delivery of the letter issued by the postal operator shall be sufficient evidence of the delivery of the letter at that place on the day specified in such acknowledgement or certificate.

(4) An organisation may, for the purpose of—

(a) stating objections to the competency or relevancy of the indictment or proceedings; or

(b) tendering a plea of guilty or not guilty; or

(c) making a statement in mitigation of sentence,

appear by a representative.

(5) Where at the trial diet the organisation does not appear as mentioned in subsection (4) above, or by counsel or a solicitor, the court may—

(a) on the motion of the prosecutor; and

(b) if satisfied as to the matters specified in subsection (5A) below,

proceed with the trial and dispose of the case in the absence of the organisation.

(5A) The matters referred to in subsection (5)(b) above are—

(a) that the organisation was cited in accordance with section 66 of this Act as read with subsection (2) above; and

(b) that it is in the interests of justice to proceed as mentioned in subsection (5) above.

(6) Where an organisation is sentenced to a fine, the fine may be recovered in like manner in all respects as if a copy of the sentence certified by the clerk of the court were an extract decree of the Court of Session for the payment of the amount of the fine by the organisation to the Queen's and Lord Treasurer's Remembrancer.

(7) Nothing in section 77 of this Act shall require a plea tendered by or on behalf of an organisation to be signed.

(8) In subsection (4) above, "representative" means—

(a) in the case of a body corporate (other than a limited liability partnership), the managing director, secretary or other person in charge, or locally in charge, of its affairs;

(b)in the case of a limited liability partnership, a member of the partnership;

(ba) in the case of a partnership (other than a limited liability partnership), a partner or other person in charge, or locally in charge, of the partnership's affairs;

(bb) in the case of an unincorporated association, the secretary or other person in charge, or locally in charge, of the association's affairs;

(c) in the case of any other organisation, an employee, officer or official of the organisation duly appointed by it for the purposes of the proceedings.

(9) For the purposes of subsection (8)(c) above, a statement—

(a) in the case of a body corporate (other than a limited liability partnership), purporting to be signed by an officer of the body;

(b)in the case of a limited liability partnership, purporting to be signed by a member of the partnership;

(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner;

(d) in the case of an unincorporated association, purporting to be signed by an officer of the association;

(e) in the case of a government department or a part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,

to the effect that the person named in the statement has been appointed as the representative for the purposes of any proceedings to which this section applies is sufficient evidence of such appointment.

143 Prosecution of companies, etc.

(1) Without prejudice to any other or wider powers conferred by statute, this section shall apply in relation to the prosecution by summary procedure of an organisation.

(2) Proceedings may be taken against the organisation in its corporate capacity, and in that event any penalty imposed shall be recovered by civil diligence in accordance with section 221 of this Act.

(3) Proceedings may be taken against an individual representative of a partnership, association or body corporate as follows:—

(a) in the case of a partnership or firm, any one of the partners, or the manager or the person in charge or locally in charge of its affairs;

(b) in the case of an association or body corporate, the managing director or the secretary or other person in charge, or locally in charge, of its affairs,

may be dealt with as if he was the person offending, and the offence shall be deemed to be the offence of the partnership, association or body corporate; and in paragraph 3(b) of this subsection references to the managing director or the secretary, in relation to a limited liability partnership, are to any member of the limited liability partnership.

(4) An organisation may, for the purpose of—

(a) stating objections to the competency or relevancy of the complaint or proceedings;

(b) tendering a plea of guilty or not guilty;

(c) making a statement in mitigation of sentence,

appear by a representative.

(5) In subsection (4) above, "representative" means—

(a) an individual representative as mentioned in subsection (3) above; or

(b) an employee, officer or official of the organisation duly appointed by it for the purpose of the proceedings.

(6) For the purposes of subsection (5)(b) above, a statement—

(a) in the case of a body corporate (other than a limited liability partnership), purporting to be signed by an officer of the body;

(b) in the case of a limited liability partnership, purporting to be signed by a member of the partnership;

(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner of the partnership;

(d) in the case of an association, purporting to be signed by an officer of the association,

[…]

to the effect that the person named in the statement has been appointed as the representative for the purposes of any proceedings to which this section applies is sufficient evidence of such appointment.

(7) Where at a diet (apart from a diet fixed for the first calling of the case) an organisation does not appear as mentioned in subsection (4) above, or by counsel or a solicitor, the court may—

(a) on the motion of the prosecutor or, in relation to sentencing, of its own accord; and

(b) if satisfied as to the matters specified in subsection (8) below,

proceed to hear and dispose of the case in the absence of the organisation.

(8) The matters referred to in subsection (7)(b) above are—

(a) that citation has been effected or other intimation of the diet has been received; and

(b) that it is in the interests of justice to proceed as mentioned in subsection (7) above.

(9) The reference in subsection (7) above to proceeding to hear and dispose of the case includes, in relation to a trial diet, proceeding with the trial.[1]

221 Fines: recovery by civil diligence.

(1) Where any fine falls to be recovered by civil diligence in pursuance of this Act or in any case in which a court may think it expedient to order a fine to be recovered by civil diligence, there shall be added to the finding of the court imposing the fine a warrant for civil diligence in a form prescribed by Act of Ad journal which shall have the effect of authorising—

(a) the charging of the person who has been fined to pay the fine within the period specified in the charge and, in the event of failure to make such payment within that period,

(i) the execution of an arrestment;

(ii) the attachment of articles belonging to him; and

(iii) the execution of a money attachment,

and, if necessary for the purpose of executing the attachment or the money attachment, the opening of shut and lock fast places;

(b) an arrestment other than an arrestment of earnings in the hands of his employer,

and such diligence, whatever the amount of the fine imposed, may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause.

(2) Subject to subsection (3) below, proceedings by civil diligence under this section may be taken at any time after the imposition of the fine to which they relate.

(3) No such proceedings shall be authorised after the offender has been imprisoned in consequence of his having defaulted in payment of the fine.

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[1] S 67 of the Criminal Justice and Licensing (Scotland) Act 2010 amended s 143 to substitute "organisation" for "partnership, association, body corporate or body of trustees". This drafting change has no effect on the application of s 143 to partnerships, which are contained in the definition of "organisation" inserted into s 307(1) of the 1995 Act (interpretation) by s 65 of the 2010 Act.

(4) Where proceedings by civil diligence for the recovery of a fine or caution are taken, imprisonment for non-payment of the fine or for failure to find such caution shall remain competent and such proceedings may be authorised after the court has imposed imprisonment for, or in the event of, the non-payment or the failure but before imprisonment has followed such imposition.

307 Interpretation

(1) […]

"organisation" means—

(a) a body corporate;

(b) an unincorporated association;

(c) a partnership;

(d) a body of trustees;

(e) a government department;

(f) a part of the Scottish Administration;

(g) any other entity which is not an individual;"[2]

THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

1. The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are—

(a) a corporation;

(b) a department or other body listed in Schedule 1;

(c) a police force;

(d) a partnership, or a trade union or employers' association, that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act—

[2] Definition inserted by s 65 of the 2010 Act.

(a) "relevant duty of care" has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) "senior management", in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

(5) The offence under this section is called—

(a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;

(b) corporate homicide, in so far as it is an offence under the law of Scotland.

(6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.

(7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

2. Meaning of "relevant duty of care"

(1) A "relevant duty of care", in relation to an organisation, means any of the following duties owed by it under the law of negligence—

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with—

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing.