CORPORATE HOMICIDE

EXPERT GROUP REPORT

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SCOTTISH EXECUTIVE

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Scottish Executive, Edinburgh 2005

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CORPORATE HOMICIDE EXPERT GROUP REPORT

1. Introduction

1.1 On 15 April Cathy Jamieson, the Minister for Justice, set up the Expert Group on Corporate Homicide. The Group's remit was "to review the law in Scotland on corporate liability for culpable homicide and to submit a report to the Minister for Justice by the summer, taking into account the proposals recently published by the Home Secretary."

1.2 The Expert Group consisted of representatives from the business, trade union, legal, public and academic sectors:

Dr Richard Scott, Scottish Executive Justice Department, (Chair)
Jim Brisbane, Deputy Crown Agent, Crown Office and Procurator Fiscal Service
Stewart Campbell, Director, Health and Safety Executive, Scotland
Michael P. Clancy, OBE, Director, Law Reform, Law Society of Scotland
Professor Hazel Croall, Professor of Criminology, Glasgow Caledonian University
John Downie, Federation of Small Businesses (resigned w.e.f. May 2005)
Karen Gillon, MSP
Professor Russel Griggs, representing the CBI
Patrick McGuire, STUC legal advisor
Scott Steven, representing Scottish Chamber of Commerce (joined July 2005)
Ian Tasker, Health and Safety Officer, STUC
Dr Dave Whyte, lecturer in sociology and criminology at Stirling University

1.3 John Downie resigned from his position with the Federation of Small Businesses in May 2005. The Federation decided not to take up the offer of recommending another representative. An additional business representative, Scott Steven, was nominated by the Scottish Chamber of Commerce and appointed in July 2005.

1.4 The Group has considered this complex area very carefully. We have taken evidence from a range of stakeholders and other experts. We are also aware of developments in a number of other countries similarly seeking to address the issue of the criminal liability of organisations for the unintentional death or serious injury of employees or members of the public. This is an area of the law which has proved particularly challenging for other jurisdictions, particularly those with laws based on the identification or controlling mind principle. We found no model from these other jurisdictions which we consider could be simply adapted for Scotland, although there are aspects of the approaches taken in Australia and Canada which are of interest. However, many of these models remain untested, either because legislation has not yet been forthcoming, or because where legislation has been enacted there is limited experience of its use. The Group therefore acknowledges that there is a lack of empirical evidence of how changes to legislation in this area would affect the working practices of organisations and lead to a reduction in the number of deaths.

1.5 This report sets out our initial findings. On a number of issues there were significant differences among members on the best way forward. The report reflects these[1].[2]

2. Background

2.1 In Scotland, over the nine years to March 2005, an average of 30 workers (employees and self employed) each year are killed at work. On average a further 9 members of the public die each year as a result of work-related activities. These figures do not include deaths on the railways, many of which are suicides. Other work related deaths will include cases of mesothelioma related to past asbestos exposure; deaths as a result of fires at the place of work; deaths from food poisoning associated with "commercial" sources of food; deaths involved in the sea fishing industry and road deaths while a person is at work. These can amount to several hundred each year although clearly not all these deaths will fall into the category of corporate killing.

Culpable homicide

2.2 An organisation[3] can be convicted of a common law crime in Scotland. If circumstances warrant it, an organisation may be prosecuted on a charge of culpable homicide. The crime of culpable homicide applies where the perpetrator might not have intended to kill the victim but nonetheless behaved so recklessly and with such complete disregard or indifference to the potential dangers and possible consequences that the law considers there is responsibility for the death. However, there has only been one prosecution of a company in Scotland for the crime of culpable homicide - the Transco case[4] - and that particular charge was subsequently dismissed by the Appeal Court as being irrelevant in law. Transco was subsequently successfully prosecuted for the alternative statutory offence of a contravention of sections 3 and 33 of the Health and Safety at Work Act 1974. The court imposed a fine of £15m. This was the highest penalty imposed under these provisions by some considerable degree.

2.3 The original Transco case highlighted the key problem with the current common law - that while in theory it is possible to prosecute a complex organisation for culpable homicide there are practical difficulties in doing so. In reaching its decision in the Transco case, the Criminal Appeal Court examined the current common law on corporate culpable homicide in Scotland and, in particular, considered three main issues:

- the scope of the mental element or guilty mind (*mens rea*) necessary to establish culpable homicide.
- the competency of charging a company with this offence.
- the relevance of the allegations which the prosecution had identified to demonstrate the company's guilt.

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[1] Where use of the word 'majority' has been made in the report this denotes that more members of the Group, as constituted, held a particular view than not.

[2] Any views expressed by the Deputy Crown Agent in the course of discussions are not to be taken as being those of his Department or the wider Executive.

[3] Criminal law normally refers to 'persons', which can include legal persons such as companies, corporations and partnerships. The wider term 'organisation' is used throughout this Report in order not to pre-judge the scope of any new offence

[4] Transco PLC v HMA, 2004 SCCR 1.

2.4 The Court found that it was competent to charge a company with culpable homicide. However, drawing on previous case law, the Court confirmed that the crime of culpable homicide requires proof of *mens rea*. In the case of companies, it is necessary to identify the involvement of an individual (or group of individuals) who constitutes the "controlling mind" of the company. In other words, an individual of sufficient seniority (i.e. whose acts and state of mind can be said to represent that of the company) must be found to be criminally responsible for the offence, that is, possessing the necessary guilty mind. It is this guilty mind which is then attributed to the company. This is known as the 'identification principle'.

2.5 There are a number of problems associated with this identification principle. For example, the attribution of liability is associated with the conduct and states of mind of individuals. In organisations with complex, dynamic and diffuse organisational structures, it may be difficult to identify individuals at a senior level who are sufficiently directly involved to enable their state of mind to constitute the *mens rea* of the organisation. This makes it difficult when prosecuting an offence at common law to pinpoint the controlling mind in any but the very simplest type of organisation. It is further complicated by the fact that corporate structures, the make-up of groups and the positions held by individuals, inevitably change over the course of time. The Court considered that the relevant individuals must be the same throughout the commission of the offence.

2.6 In addition, in considering the allegations which the prosecution had identified as demonstrating Transco's guilt, the Court expressly stated that the law of Scotland does not recognise the principle of 'aggregation', whereby conduct and states of mind of a number of people over a period of time, none of whom individually could be said to have possessed the necessary *mens rea*, might nonetheless be accumulated so that they collectively could provide the necessary *mens rea* which is then attributed to the corporate body.

2.7 The implication of the Appeal Court judgement in the Transco case is, therefore, that complex organisations cannot in practice be prosecuted for culpable homicide. The Group considers that this gap in the criminal law needs to be addressed and that the law should be amended to enable such organisations to be prosecuted for culpable deaths arising from their activities. A number of observers have suggested that the outcome of the case against Transco on health and safety charges - in particular the record fine imposed by the Court - shows that health and safety legislation is strong and effective. They therefore question the need for a change in the law on culpable homicide. Most members of the Group, however, do not feel that the Transco verdict and sentence obviate the need to amend the law in this area. This view also seems to be reflected in public opinion. This is discussed further below.

Health & Safety legislation

2.8 In addition to the existing common law offence of culpable homicide, employers, the self employed, individual employees and individual directors can also be prosecuted for health and safety offences brought under the Health and Safety at Work etc Act 1974 and the regulations made thereunder. The Act places duties on employers to ensure so far as reasonably practicable the health and safety of employees and others who may be affected by their undertaking. (N.B. A number of regulations made

under the Act do not allow a defence based on what is 'reasonably practicable'). The Act makes no distinction between failures which cause death and failures which do not cause death and therefore there is no specific offence under this Act regarding death in the workplace.

2.9 Most health and safety prosecutions are against organisations, as breaches usually result from a chain of decisions and are rarely the fault of one person, although individual workers and directors can be, and are, prosecuted when appropriate. There is no *mens rea* in relation to health and safety offences. Organisations are considered vicariously liable for the physical acts of their employees which give rise to a breach regardless of intent and regardless of whether the breach arises from the actions of one or more employees. The maximum penalty following conviction of an organisation is an unlimited fine, although lesser maximum penalties apply for particular offences. Individuals convicted of certain offences can be jailed for up to 6 months, although this has almost never happened in Scotland.

3. Draft Bill for England and Wales

3.1 The Group considered a number of models of addressing corporate liability for culpable homicide in other jurisdictions. We paid particular attention to the proposals by the Home Secretary for the creation of a new statutory offence of corporate manslaughter in England and Wales[5]. We consider that it would, in principle, be desirable for the approaches of the UK jurisdictions to be aligned, although we note that the existing law on manslaughter/culpable homicide is not aligned. The HSE representative considered that alignment would be helpful for operational reasons. The business representatives felt strongly that alignment of legislation across the UK was the overriding factor in order to avoid deterring companies from investing in Scotland. However, the majority of members feel that alignment is secondary to getting the law right for Scotland. We all agree that alignment need not be on the basis of the current Home Office proposals, on which we have a number of reservations. Indeed, the Group believes that the approach which we outline below provides a useful basis for amending the law in all UK jurisdictions, not just in Scotland.

3.2 The Home Secretary's draft Bill proposals for England and Wales would essentially put the existing common law of manslaughter on a statutory basis insofar as it applies to organisations, while addressing problems with identification (including the inability to 'aggregate' conduct). An organisation would be guilty of the new offence if the way in which its "senior managers" managed or organised its activities caused a person's death and there was a gross breach of a duty of care which the organisation owed that person as their employer or the occupier of land, or in supplying goods or services or performing a commercial activity. A "senior manager" is someone who either manages or organises a whole or substantial part of an organisations' activities, or makes decision about how they are managed or organised. The offence would be reserved for a management failure that fell far below what could be reasonably expected. The draft Bill provides a framework for assessing the organisation's conduct and includes a clear link with standards imposed by health and safety

[5] "Draft of a Bill to create, and make provision in connection with, a new offence of corporate manslaughter", Home Office, March 2005.

legislation and guidance on how these should be discharged. This principle of duty of care, which is drawn from the civil law of negligence, is familiar to the English law of manslaughter. However, the 'duty of care' does not feature in the Scottish criminal law of culpable homicide.

3.3 The draft Bill was published for pre-legislative scrutiny and Home Office hopes it will be introduced into the House of Commons later this session.

3.4 The Group feels strongly that the draft Bill for England and Wales is not an appropriate model for a number of reasons:

- the proposed Home Office offence is based on the English offence of manslaughter by gross negligence which applies where a duty of care is owed at common law. This is materially different from the common law offence of culpable homicide in Scotland. While it might be possible to import the concept of a 'duty of care' into Scots criminal law this would not be as straightforward as it would be in England
- the proposed offence relies on the way in which "the organisation's activities are managed or organised by its **senior managers**" (emphasis added). The Group considers that the use of "senior managers" could perpetuate the identification problem inherent in the current law since it could be argued that in order for an organisation to be considered responsible it would still be necessary to identify an individual or individuals who were the "controlling mind" of the organisation. In addition the focus on "senior managers" could encourage organisations to avoid potential responsibilities by transferring management decisions to those at a lower level in the corporate structure who would fall outwith the statutory definition
- whether senior managers sought to cause the organisation to profit from that failure should not be relevant to whether an offence had been committed, although it could be reasonably taken into consideration at the sentencing stage
- a majority considers that a secondary offence covering individual directors/managers should be included
- any offence should apply equally to public and private sector bodies: there should be a more extensive removal of Crown immunity
- a range of penalties other than fines and remedial orders should be available.

4. Purpose

4.1 The Group has identified a number of drivers for legislative change, which include:

- to contribute to improved safety by helping to encourage companies and their employees to take active steps to manage and reduce the risks to the public and staff arising from their activities and to deter them from reckless behaviour
- to achieve the interests of justice and to respond to the desire of victim's families and of the public for improved social justice, including a greater degree of condemnation in respect of such offences
- to ensure that organisations can be prosecuted for causing death
- to provide appropriate means of punishment by providing a wider range of penalties.

5. Mode of change

5.1 The Group has identified three main routes for delivering the change to the law required to achieve the aims set out in the preceding section:

i) *introduce legislation which would amend the existing common law offence of culpable homicide to ensure that criminal liability can be effectively attributed to organisations*
This would involve altering the application of the current offence of culpable homicide so as to make it possible to aggregate the collective knowledge of various individual minds at various times and places and that collective knowledge (or guilty mind) would be attributed to the organisation. This would tackle the specific issue raised in the Transco judgement.

ii) *introduce a new statutory offence of corporate liability for causing death/serious injury*
This would involve the creation of a new stand-alone offence specifically designed to tackle instances where organisations are criminally responsible for the death of a worker or a member of the public.

iii) *change Health & Safety legislation*
This would involve amending the statutory provisions under the Health and Safety at Work Act to create an offence of causing death of a worker or a member of the public by dangerous conduct.

Consideration

5.2 The Group considers that the first option, while addressing the particular problem of aggregation raised in the Transco trial, would potentially retain the need to identify individuals and to establish their intentions in order to aggregate and attribute the mental element to the organisation, with its concomitant difficulties of investigation and proof. The Group considers that proof of *mens rea* - which involves a subjective test - should not be a component of the offence. Rather we consider that there should be an objective test of "recklessness" such as that proposed in "A Draft Criminal Code For Scotland with Commentary" [6], based on whether 'the person knew or ought to have known' of the risk arising from their actions. This is discussed in more detail later in the report. Moreover, by continuing to base the offence on the common law, an opportunity would be missed to set out on the face of statute a clear and unambiguous offence. That, of course, is the key advantage of the second option – to replace the common law with a statutory offence for all organisations- which is the Group's preferred way forward. The components of that offence are discussed in detail in the following sections.

5.3 Transco received a record fine and significant public opprobrium following their conviction on health and safety offences. As a result a number of commentators have questioned the need for a change to the law in relation to culpable homicide. However, most members of the Group consider that health and safety offences - even

[6] p.3, section 10, "A Draft Criminal Code for Scotland with Commentary", Clive, Ferguson, Gane and McCall Smith, Scottish Law Commission. The Draft Code goes on to make it clear that offences should apply to 'legal persons' meaning any body or entity (such as a company or a Scottish partnership) which has a separate legal personality, not only to natural persons.42-43 section 16.

those which result in death - are seen by the public as being of lesser severity than offences prosecuted under the common law of culpable homicide. Lord Osborne, in his Opinion on the Transco Appeal also acknowledged that there was particular opprobrium associated with a culpable homicide conviction which was not associated with a conviction under the Health and Safety at Work Act[7]. Most members therefore consider that amending health and safety legislation would not in itself meet the public demand for justice in relation to such incidents. Nor did most members consider that changes to health and safety legislation alone would provide as strong an incentive for organisations to take health and safety seriously compared to the threat of prosecution for an offence of corporate killing combined with a broader range of penalties. Nevertheless, introducing a new statutory offence would not rule out some further tightening of health and safety legislation. The Group considers that reform of the criminal law and reform of health and safety legislation in this area are not necessarily mutually exclusive and that there might be advantage in a combined approach.

5.4 One method of achieving this, proposed by the Centre for Corporate Accountability, would be by explicitly providing in the new statutory offence that management failure would include gross breaches of specified statutory duties, in particular those under sections 2 to 6 of the Health and Safety at Work Act. Sections 2-6 impose duties on employers, suppliers and those in control of premises to take reasonably practicable steps to ensure the safety of their employees and others affected by their activities. Linking these duties into a corporate killing offence would provide greater clarity to organisations regarding their responsibilities in this area and could provide greater certainty in the application of the law.

6. The way forward

6.1 The following sections contain a detailed discussion of the way in which we consider the new offence should be structured. In order to assist consideration it might be helpful to set out our overall approach at this stage. The starting point is where there has been the death of an employee or of a member of the public and that death has been caused by recklessness as defined by the Draft Code (see 7.3) on the part of a person or persons within the organisation. The acts of individuals should be capable of aggregation in order to establish the physical elements of the offence. The offence would be attributed to the organisation on the basis of vicarious liability of the organisation for those physical acts. Having established the vicarious liability of an organisation for the reckless acts or omissions of its employees, it would then be necessary for the prosecution to establish an element of corporate fault before the organisation can be convicted of the proposed new offence. That corporate fault would be based on evidence of failures in the organisation's management systems or corporate culture that led to the death. At the same time individual directors and senior managers should be individually liable to prosecution where there is clear evidence that they have a direct responsibility for the death.

6.2 The whole thrust of our proposals is to move away from the identification principle and the need to attribute *mens rea* to a controlling mind within the organisation. Instead the proposed offence would allow aggregation in establishing the commission

[7] Para 25, p.32, Appeal No XC392/03, Opinion of Lord Osborne in appeal by Transco against HMA.

of a blameworthy criminal act, and in attributing those acts to an organisation it would focus very clearly on whether or not proper and comprehensive management and health and safety systems were in place and, most importantly, were enforced throughout the workplace.

7. Substantive offence

'Negligence', 'gross negligence' and 'recklessness'

7.1 Corporate homicide falls within the category of culpable homicide which is sometimes referred to as 'involuntary lawful act culpable homicide', that is it is unintentional and can arise from a lawful activity such as the running of a business. (An activity is considered 'lawful' even if the way in which it is being undertaken at the time can give rise to a statutory offence, for example under Health and Safety legislation.) In relation to the common law offence of culpable homicide it is necessary to prove that a person was guilty of 'recklessness' or 'gross negligence' 'Gross negligence' has been defined as "criminal indifference to consequences"[8]. The Transco judgement confirmed that in this context 'gross negligence' and 'recklessness' are now essentially interchangeable terms and that both amount to "criminal indifference to consequences". The court in Transco did not find the use of the term "negligence" - which is essentially an English civil law concept - to be helpful.

Consideration

7.2 The Group discussed whether the proposed new offence should continue to be based on these existing common law concepts. We consider that it would be preferable to specify in statute the tests and standards which a judge or jury would be required to apply. This would provide greater clarity both to organisations and to juries.

7.3 One model which we consider promising is that identified in "A Draft Criminal Code for Scotland" which defines "recklessness" for the purposes of criminal liability as follows:

"a) something is caused recklessly if the person causing the result is, or ought to be, aware of an obvious and serious risk that acting will bring about the result but nonetheless acts where no reasonable person would do so;

b) a person is reckless as to a circumstance, or as to a possible result of an act, if the person is, or ought to be, aware of an obvious and serious risk that the circumstance exists, or that the result will follow, but nonetheless acts where no reasonable person would do so;

c) a person acts recklessly if the person is, or ought to be, aware of an obvious and serious risk of dangers or of possible harmful results in so acting but nonetheless acts where no reasonable person would do so."[9]

The Commentary further explains that recklessness embraces both the "deliberate risk-taker, the person who knows that his or her conduct presents certain risks, or is

[8] Paton v HM Advocate 1936 JC 19 where Justice-Clerk Aitchison observed at p.22: "it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved".

[9] op cit, p31, section 10..

aware that certain circumstances may be present. But it also embraces the person who is not aware of the risks, but who judged by certain objective standards, *ought to be aware*". This is important. "Ought to be" brings in an objective standard. The court will not need to establish that the state of mind of a person was wilfully reckless or negligent but only that the person should have realised that their conduct would give rise to risks that were "obvious and serious".

7.4 The Group considers that "recklessness", along the lines set out in the Draft Code, should be a key component of the proposed new offence.

8. Duty of care

8.1 For the sake of completeness the Group also considered the concept of a 'duty of care' which forms part of the common law offence of gross negligence manslaughter in England and Wales, The draft Bill proposals for England and Wales incorporate this concept. The concept of 'duty of care' is not currently part of the Scots law of culpable homicide or of the criminal law more generally in Scotland. However, it does exist in civil law where it is considered to be the duty to avoid doing or omitting to do something which may have as its reasonable and probable consequence injury to others. The duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

Consideration

8.2 The Group feel strongly that, as far as Scotland is concerned there are no particular advantages to importing the concept of 'duty of care' into a criminal offence of corporate homicide. We also have some general concerns about adopting wholly civil concepts into criminal law, which could have unintended consequences.

9. Method of attributing liability

9.1 As discussed above, the main problem with the common law on culpable homicide in relation to organisations is the means of attributing liability for the offence to the organisation which in turn is caused by the inherent difficulties in ascribing *mens rea* to an organisation. As highlighted by the Transco case, in practice the existing law requires the identification of a controlling and guilty mind which embodies the company as a prerequisite for a prosecution against their organisation. This section considers alternative models of attributing liability in order to overcome this problem.

Strict liability

9.2 There are a large number of statutory offences involving strict liability. Historically, they have tended to apply to fairly minor offences, such as breaching the requirements of a licence. However, strict liability offences have increasingly been used to deal with more serious criminal acts. The wording of individual statutes that impose strict liability varies but in every case, the statute will set out the physical act which, if done, leads to criminal liability. So the idea of a strict liability offence which focuses simply on the fact that a death has occurred in the workplace would be unprecedented insofar as there is no obviously identifiable blameworthy physical act or omission.

The death could be due to a heart attack and, as such, could be something over which an employer and/or employees have no control whatsoever.

9.3 The Group considered the offence of causing death by dangerous driving set out in section 1 of the Road Traffic Act 1988 (as amended) as a possible model for liability where proof of *mens rea* is not required. It is again clear that the offence focuses on the blameworthy actions of the individual who is thought to have caused the death.

> "1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

Section 2A goes on to flesh out the meaning of dangerous:

> "2A (1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)-
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous."

9.4 The case law on this offence has made it clear that, unlike culpable homicide, the offence does not necessarily involve an inquiry into the state of mind of the person who has caused death. But the physical act involves driving which, viewed by the objective person, is dangerous and falls far below what would be expected.

9.5 In the context of corporate killing, the physical act of causing death must involve wrongdoing on the part of some person or persons. The Group wishes to move away from the difficulties surrounding *mens rea* which are involved in a subjective viewing of wrongdoing to an approach where the physical acts, viewed objectively, can lead to a *prima facie* charge of corporate killing.

9.6 From this perspective, the dangerous driving example can point to the type of physical acts that could be taken into account – engaging in some form of activity dangerously or recklessly, in a way that falls far below what would be expected of a competent and careful person who is engaging in that activity, and in a way that would be obvious to a competent and careful person that the activity was dangerous or reckless.

9.7 However, the example of causing death by dangerous driving – an example of an offence that does not involve *mens rea* - only takes us so far. It does not assist with the problems of identification that arise in the organisational context. The identity of the driver of a motor vehicle will normally be obvious. In an organisational context, how can liability be attributed to the organisation rather than an individual?

Vicarious liability/Agency

9.8 One way of dealing with the identification problem is to adopt the concept of vicarious liability or agency. Vicarious liability or agency involves the imputation of

liability on one person for the wrongful acts or omissions of another person. The person to whom liability is imputed must of course be connected to the other, such as an employer and employee relationship. So in the context of corporate killing, the organisation would be vicariously liable for the blameworthy acts or omissions of its employees, or agents, provided these actions are within the scope of their actual or implied employment or authority. But standing alone, vicarious liability has limitations, particularly in circumstances in which no single employee or other agent can be identified as responsible for the death. For example, scaffolding erected by a company's employees collapses causing death, or a fatal train crash is caused by the condition of the tracks. In these cases, there may be no one individual employee or clear group of employees for whom the employer can assume vicarious liability. However, if the acts and omissions of a range of employees and agents can be aggregated and attributed to the employer then that would deal with a wider range of situations.

Aggregation

9.9 In terms of the new offence, we consider that an organisation should be vicariously liable for the wrongful acts, both of omission and commission, of any agent of the organisation - such as an employee, officer or director - acting within the actual or apparent scope of their employment or authority. Where appropriate, the acts or omissions of a number of different individual employees or agents, over time where relevant, should be capable of being aggregated to establish the physical element of the offence.

Consideration

9.10 The Group considers that the substantive offence should be causing death by the recklessness conduct of an employee or employees of an organisation, these physical acts being established where necessary by aggregation of a number of employees over a period of time. We consider that the approach taken under the Australian Criminal Code Act 1995 which makes employers liable for the "physical element of an offence [if it] is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority"[10], could be an appropriate model. However, having established the vicarious liability of an organisation for the reckless acts or omissions of its employees, it is necessary to be able to establish an element of corporate fault before the organisation can be deemed liable for the proposed new offence. The Home Office approach is that the organisation breached the duty of care it owed its employees or members of the public. We prefer an approach which is based on management failure.

10. Management Failure

10.1 The purpose of focusing on whether management systems are in place, on the prevailing culture within an organisation and on the extent to which health and safety obligations were complied with in theory and in practice, is to establish that the reckless acts or omissions of different individuals and groups over a period of time

[10] Section 12.2, Australian Criminal Code 1995.

within the organisation should be imputed to the organisation itself. In other words, to establish that there was corporate fault. This approach seeks to move away from the notion of liability arising from the intent of individual senior managers - or any group of individuals - towards an approach which focuses on the organisation's effectiveness in managing its activities and operations. Rather than seeking to identify a controlling mind with all the current difficulties associated with the identification principle and proving *mens rea*, the focus would be on the 'how' of an organisation's management rather than the 'who'.

10.2 The Law Commission for England and Wales in their review of corporate manslaughter law[11] recommended a management failure approach whereby a corporation would be liable for a death where "it is caused by a failure, in the way the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities".[12] The Commission considered that a failure could involve a failure to ensure a safe system of work, or a failure to provide safe premises or equipment, or competent staff.[13] This could also be linked into the statutory duties set out in sections 2-6 of the Health and Safety at Work Act (see para 5.4 above).

10.3 In the context of a criminal trial, how could it be established that there was a management failure within an organisation? One approach would be to require the prosecution to demonstrate - as an essential component of the offence - that there was a failure to ensure that adequate policies, systems and practices were in place and were communicated to relevant persons. The organisation would, of course, have the opportunity to lead evidence that it did have appropriate systems in place.

10.4 Alternatively a new statutory offence could provide that once the Crown has established that the physical element of an offence had been committed by a person or persons for whom the organisation is vicariously liable, the organisation must argue that it had acted with 'due diligence'. This might involve them showing that they had all reasonable policies, systems and procedures in place - perhaps including an actively enforced corporate compliance programme - which should have prevented the offence from happening.

10.5 An approach along these lines could simply impose an 'evidential burden' on the organisation. That is, the organisation would be expected to raise issues in support of the proposition that they had acted with due diligence. This would not reverse the legal burden of proof as the burden of proving a lack of due diligence - together with all other aspects of the offence - would remain with the Crown.

10.6 Alternatively, the provision could be drafted so as to reverse the burden of proof and require the employer to prove on the balance of probabilities that they had acted with due diligence. Members noted that under s 40 of the Health and Safety at Work etc Act 1974 it is for the accused to prove that it was not reasonably practicable for them to do more than was in fact done to satisfy particular requirements of the Act. The Group recognises that there are potential human rights issues associated with reverse

[11] "Legislating the Criminal Code: Involuntary Manslaughter. Item 11 of the Sixth Programme of Law Reform: Criminal Law", The Law Commission for England and Wales, 4 March 1996.
[12] ibid, p110.
[13] op cit, p109-110.

burdens of proof which would have to be considered carefully. However, if these could be overcome, a due diligence defence with a reverse burden of proof - which clearly places the onus on the organisation to prove that it had acted with due diligence - would be our preferred approach.

'Corporate Culture'

10.7 One aspect of 'management failure' - though not the only one - would be allowing a 'corporate culture' to exist which encourages or tolerates behaviour which results in a death, or in failing to promote a corporate culture which mitigates against such behaviour. One definition of 'corporate culture', adopted in the Australian Criminal Code Act 1995, is "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[14] Thus for an organisation to have a written set of policies and regulations would not be sufficient in itself; the culture of the organisation would have to be such that a proper emphasis was put on informing employees and contractors of the rules and ensuring their implementation and enforcement. If the organisation either allowed a corporate culture to exist which directly encouraged, tolerated or led to practices which resulted in a death - or if it failed to take all reasonable steps to prevent such a culture existing - it would be liable.

11. The proposed new offence - Summary

11.1 The Group concludes that –

- the physical element of the offence should be one of an employee or agent of the organisation causing death through recklessness, along the lines set out in "A Draft Criminal Code"
- organisations should be vicariously liable for the acts and omissions of their employees, agents and contractors provided these actions are within the scope of their actual or implied employment or authority
- in establishing an organisation's liability, the acts or omissions of a number of employees or groups of employees should be able to be aggregated
- an organisation should be liable where it fails to put policies, practices and systems in place to ensure the health and safety of its employees and those affected by its activities. This may include allowing, or failing to take all reasonable steps to prevent a corporate culture to exist which encourages, tolerates or leads to an offence taking place.
- a due diligence defence would be available to an organisation if they could demonstrate that they had all reasonable policies, systems and procedures in place, which should have prevented the offence taking place.

12. Individual Liability

12.1 At present any individual can be prosecuted for the common law offence of culpable homicide, including directors/managers of organisations. However, in practice prosecutions against directors or managers are rare. Individuals can also be prosecuted under section 37 of the Health and Safety at Work Act, but again there

[14] ibid, Section 12.3.

have been few prosecutions. The Group notes that there is significant public dissatisfaction in Scotland with the lack of prosecutions against individuals. Furthermore there is a strong groundswell of public and stakeholder opinion in favour of a new offence specifically for individual directors/managers whose actions or omissions were a significant factor in the death of an employee or member of the public. This is reflected in the submissions received by the Group. Such individual liability could be established either through a stand alone offence, or through a secondary offence, or both.

Stand alone offence

12.2 As indicated a stand alone offence already exists by way of the common law of culpable homicide. In the case of a death arising from an individual's work activities the person could be individually liable, regardless of whether the organisation by which they are employed, or on whose behalf they were acting, was successfully prosecuted. The common law offence, which will of course remain, extends to any individual who is responsible for a death and is not restricted to directors or senior managers. As discussed in paragraph 7.1 above, in relation to the common law offence of culpable homicide it is necessary to prove "criminal indifference" to consequences. An alternative would be to create a new offence of corporate homicide applying to individuals for deaths arising specifically from individuals' workplace activities, with a lower threshold of liability than the common law offence, for example, 'recklessness' as defined in the Draft Code (see para 7.3 above).

Consideration

12.3 The Group feels strongly that any individual who is responsible for a death in the workplace should be liable to prosecution regardless of their position within the organisational hierarchy. However, we are divided on whether a new stand alone offence for individuals is necessary. A majority favour a new offence which mirrors the standard of 'recklessness' which we are proposing for the corporate offence. A stand alone offence would cover offences which would fall short of culpable homicide, but which many of us consider should be prosecutable. We believe this would assist in ensuring the successful prosecution of individuals who are directly responsible for causing death and that it would help to overcome the apparent limitations of culpable homicide prosecutions. Others of us feel that it would be wrong in principle to have a lower legal threshold simply because the death occurred in a work-related situation and moreover that any new statutory offence would not have the same public opprobrium as culpable homicide. We are all agreed that the charge of culpable homicide should be more vigorously pursued in appropriate cases and that it would be preferable to prosecute individuals for culpable homicide, rather than a new stand alone offence, where possible.

Art & part/Secondary offence

12.4 Under section 293 of the Criminal Procedure (Scotland) Act 1995 it is possible that, unless the provision stated otherwise, the proposed new offence for organisations

would allow an individual - including a director or a senior manager - to be prosecuted on an 'art and part'[15] basis. Section 293 provides that;

> "(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 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."

Liability would be attributed in relation to the principal offence, not as a secondary offence.

12.5 A specific secondary offence, however, could be introduced which would apply where an organisation has been successfully convicted of the proposed new offence and the prosecution could also prove that an individual director/senior officer's actions were a significant contributory factor to the death of the employee or member of the public.

Consideration

12.6 The Group noted that under section 293 directors and senior managers could potentially be convicted on an 'art and part' basis in relation to the principal offence and agreed that this option should be retained. Nevertheless most of the Group consider that a specific secondary offence for directors/senior managers is desirable where their actions or omissions clearly and directly contributed to the death. The Group believes that liability for this offence should be limited to those directors/senior managers with responsibility to ensure appropriate systems are in place and functioning properly. It should not apply below this level. A majority of us considers that the creation of such a secondary offence would help focus the minds of directors and senior managers on health and safety issues.

Summary

12.7 The Group is agreed that individuals, at any level in an organisation, should face criminal charges if they can be shown to be responsible for a death. The Group considers that the most effective way of achieving this is through a combination of both an individual offence and a secondary offence. This would mirror existing Health and Safety legislation which includes both a stand alone offence, applicable to any employee, under section 7, and a secondary offence under section 37 where a "director, manager, secretary or other similar officer" has contributed to a corporate offence. The individual offence would apply to any person who causes a death through their work, without requiring that the organisation which employs them is also guilty of corporate killing. The majority of the Group considers that the most effective way of achieving this is through a new stand alone offence for individuals, based on the Draft Code standard of 'recklessness'. A charge of culpable homicide

[15] Art and part guilt is where all persons who participate in the commission of a crime (be it instigating the crime, providing technical assistance or actual participation in the carrying out of the crime) together are equally responsible for the crime irrespective of the particular role played by each individual in its commission.

could continue to be brought in appropriate cases. The Group agrees that a new secondary offence would be desirable to allow the prosecution of an individual director/senior manager (following successful prosecution of the organisation), where his or her acts or omissions directly contributed to the death.

12.8 The business representatives amongst us feel that a possible consequence of providing additional offences for individuals (beyond culpable homicide) is that it could inhibit people taking up senior posts or indeed new investment in Scottish industry if Scots law in relation to individual directors/senior officers were significantly more stringent than in other jurisdictions, including the rest of the UK. They feel that a balance has to be struck between protecting the health and safety of workers and the public and ensuring that the responsibilities did not act as a disincentive to organisations and talented directors/managers locating and working in Scotland. The HSE representative considers that most failings leading to death are organisational, not individual and therefore that there is a danger that an individual offence could lead to scapegoating of individuals within organisations. However, most members consider that clearly establishing individual liability would encourage directors and managers to take health and safety more seriously and therefore promote good management. They believe that good managers would not be deterred by health and safety requirements.

13. Scope and Jurisdiction

13.1 The Group considered the scope and jurisdiction of any offence in the following respects:

Fatal Serious Injury/Occupational Illness

13.2 The Group were clear that the new offence would cover any death caused by recklessness, whether that death results from an immediate injury or whether it is the outcome of a long-term industrial illness. This reflects the present legal position.

Non-Fatal Serious Injury/Occupational Illness

13.3 The Group discussed whether the proposed new offence should be extended to include serious injury and occupational ill-health which may be severely debilitating but which does not result in death. The Group notes that the draft Bill for England and Wales does not include this type of injury or illness.

Consideration

13.4 The Group is heavily divided on whether the offence should be extended to incidents causing serious injury or long-term ill-health which is non-fatal. Some members feel strongly that in practice the severity of the outcome of any incident could simply be a matter of chance and that if an organisation's reckless actions lead to serious injury or occupational illness then they should be punished. Other members consider extending the offence in this way could lead to dilution of the corporate killing offence and could potentially over-stretch investigative and enforcement resources. However we are agreed that this is a complex issue with possible implications for health and safety legislation and that further consideration should be given to it.

Unincorporated bodies

13.5 The Group considered whether the scope of any new offence should also include unincorporated bodies such as business partnerships, schools and clubs. This is particularly important given the level of sub-contracting involved in certain sectors, such as the construction industry, where many work-related deaths take place.

Consideration

13.6 A majority of the Group recognises that there may be some practical difficulties in applying an offence to unincorporated bodies due to their lack of legal personality and the appropriateness of prosecuting a body with no separate status and with a potentially changing membership for an offence that seeks to identify failings within the organisation that can be considered as failings of the body itself. However, these are not insuperable. Indeed the HSE representative indicated that they have not experienced problems in relation to unincorporated bodies, which are covered by health and safety legislation. Many unincorporated bodies are in practice indistinguishable from other organisations and their liability for fatal incidents should be the same.

Jurisdiction

13.7 Under the Home Office proposals the offence will apply if the death occurs in England and Wales even if the organisation is based abroad, but will not apply if the organisation is based in England and Wales but the death occurs abroad. In other words, the scope of the draft Bill for England and Wales does not apply the new offence of corporate manslaughter to UK companies that cause death abroad, as the Government considers there would be practical difficulties in doing so.

Consideration

13.8 The Group notes that the extraterritoriality of criminal law is evolving and that in relation to individuals culpable homicide already applies to offences committed abroad[16]. It is also understood that the Scotland Act 1998 does not exclude the possibility of creating extra-territorial offences and a number have been created under Acts of the Scottish Parliament. A majority considers that it is important for the proposed new offence to apply to situations where the management failure took place in Scotland but the death took place abroad, otherwise organisations could evade responsibility for deaths of their overseas workers. Some members consider it is inappropriate to apply UK health and safety standards to operations in other countries with different standards[17]. A number think that the practical difficulties in

[16] Under the Criminal Procedures Act 1995 "any British citizen or British subject who in a country outside the United Kingdom does any act or makes any omission which if done or made in Scotland would constitute the crime of murder or culpable homicide shall be guilty of the same crime and subject to the same punishment as if the act or omission had been done or made in Scotland".

[17] They also noted that consideration was being given under the draft European Service Directive to including a derogation on the country of origin principle in relation to health and safety legislation. This would mean that within the EU organisations would be subject to the health and safety requirements of the country (or countries) in which they are operating rather than those of their home country.

investigating offences committed overseas by Scottish-based organisations would be almost insurmountable. However, most members feel that the practical problems can be exaggerated and should not mean that deaths occurring overseas are excluded from the scope of the law. Moreover organisations should apply the same standards to their operations whether in Scotland or in other countries. On balance, therefore, the Group considers that the offence should cover both foreign organisations operating in Scotland and Scottish companies operating overseas.

14. Crown Immunity

14.1 The current common law on culpable homicide in Scotland already applies to a wide range of public bodies such as local authorities, health boards and non-departmental public bodies as well as private organisations. However, Crown bodies such as Government Departments and a number of Government agencies are currently exempt from prosecution.

14.2 Under the Home Office proposals, there will be no general Crown Immunity from prosecution for the new offence. Where a Crown body such as a Government Department owes a duty of care as an employer or occupier of land, or where it is supplying goods or services, or engaged in other commercial activities (for example mining or fishing), it should be subject to the law of corporate homicide. However, the Home Office draft Bill specifically exempts certain functions that might be regarded as core public functions. These are activities performed by the Government under the prerogative or those that are a type of activity (whether performed by a private or public sector body) that requires a statutory or prerogative basis. The Home Office proposals consider that organisational failings in these areas are more appropriately matters for wider forms of public and democratic accountability such as public inquiries, Parliamentary scrutiny, judicial review etc.

Consideration

14.3 The Group considers that the removal of Crown Immunity should be more extensive than the Home Office proposal not least because the term 'exclusively public function' could be interpreted very widely. We believe that when a death is caused by the recklessness of agents of a public authority then the authority should assume vicarious liability for that death. The prosecution would then be required to establish that there was management failure within the public authority. The Group appreciates that public policy decision making raises sensitive questions but as long as public bodies have systems in place to ensure that decision-makers take into account relevant factors and these systems are followed, then there would be no prosecution.

15. Penalties

15.1 The current penalty for organisations convicted of culpable homicide is an unlimited fine, the same penalty available under health and safety legislation. The sentence handed down to Transco - a fine of £15 million - shows that Scottish courts are prepared to issue heavy fines to those found guilty of serious health and safety breaches. However, in passing sentence, Lord Carloway noted that the only disposal available to him was that of a fine. The Group considers that there is a strong need for a wider range of penalties than simply fines, both in order to punish offending

organisations more appropriately and to reduce the likelihood of further offences being committed. Most of the evidence received by the Group was also strongly in favour of a wider range of penalties.

15.2 The Group considered a wide variety of alternative penalties for organisations convicted of the new offence, including:

- fines based on turnover or profit, or equity fines which reduce the value of shares in the company (thus preventing the costs of large fines being passed on to workers, consumers etc)
- disqualification of the organisation from activities associated with the offending
- corporate probation, involving implementing changes within the organisation to prevent re-offending
- community service orders, requiring the organisation to undertake projects which benefit the community
- adverse publicity orders involving publication of the offender's conviction
- appointment of an independent H&S administrator until improvements implemented
- requiring directors to attend court during sentencing
- notifying convictions to the Registrar of Companies

These options are considered in further detail in a paper by Professor Hazel Croall attached at Annex B.

15.3 The Group also considered possible penalties for individuals convicted of an individual offence, such as disqualification and imprisonment.

Consideration

15.4 The Group believes that there is considerable scope to broaden the range of available penalties for organisations beyond simple fines and considers that this would respond to public demand for social and restorative justice. We are particularly drawn to community service and corporate probation orders as possible sanctions as both contain an element of social justice. Corporate probation could also involve organisations taking steps which might help to prevent possible future incidents. Any fines which are imposed should be profit-based and consideration should be given to using the confiscation powers under the Proceeds of Crime Act 2002 in appropriate cases. Non-financial penalties will be particularly appropriate for public sector or not-for-profit organisations.

15.5 We consider that providing a suite of possible penalties would provide the courts with the flexibility to respond to the many and various circumstances of the cases which may come before them. Penalties could be based on consideration of the seriousness of the offence, including the number of people affected and the severity of the recklessness involved. The nature and record of the organisation involved, such as whether they are profit-making and whether it was a first offence, could also be taken into account. In order to enable the court to determine which penalty, or combination of penalties, would be appropriate in each individual case a background report should be provided detailing any previous convictions of the organisation or its senior staff,

the organisation's health and safety record and outlining its financial position. The Group considers this report should be prepared at the organisation's own expense.

15.6 The Group also agrees that a range of penalties should be available for individuals convicted for contributing to a death through their workplace actions/omissions, including disqualification and imprisonment.

16. Investigation & prosecution

16.1 The Group considers the creation of a new offence of corporate killing to be the most effective means to address the problems inherent in the current law of culpable homicide as it applies to organisations. However we also recognise that the creation of a new offence will not in and of itself be sufficient. In order for any legislative change to be effective it will also be necessary to ensure that sufficient resources are made available to enable the appropriate authorities to vigorously investigate and prosecute what are often highly technical and complex cases. The forthcoming protocol on work-related deaths in Scotland should help to facilitate closer coordination and liaison between the HSE, the police and the Procurator Fiscal's office in investigating and prosecuting such incidents. At the same time the Health and Safety Executive must also continue to be properly resourced in order to carry out its important prevention work with organisations, to avoid deaths occurring in the first place.

17. Conclusion

17.1 The Group considers that a new statutory offence of corporate killing should be introduced for organisations guilty of recklessness which results in the death of employees or members of the public. While there would be advantages in a uniform approach across the UK, most members do not consider this an overriding factor. What is important is to get the law right for Scotland. We hope, however, that other UK jurisdictions will consider the content of these proposals.

17.2 The Group recommends an offence which makes organisations responsible for actions or omissions by their agents which result in death. An organisation should be liable where it fails to put policies, practices and systems in place to ensure the health and safety of its employees and those affected by its activities. This may include allowing, or failing to take all reasonable steps to prevent a corporate culture to exist which encourages, tolerates or leads to an offence taking place.

17.3 Organisations would have a due diligence defence if they could show that they had policies and procedures in place which should have prevented such an incident taking place and that they ensured a corporate culture which reinforced these policies and procedures.

17.4 A majority of us considers that a new stand alone offence is desirable to deal with individuals who are directly responsible for the death of employees or members of the public. However, we agree that where possible prosecutions on the common law offence of culpable homicide should be sought in preference to prosecutions on any new stand alone offence. A majority of us considers that there should be a secondary

offence for individual directors/senior managers whose actions/omissions significantly contributed to death(s).

17.5 We agree that the offence should cover unincorporated bodies and should extend - as far as practicably possible - to all Crown bodies.

17.6 A majority of the Group considers that the legislation should apply equally to deaths in Scotland caused by organisations based outside Scotland, and to deaths caused outside Scotland by organisations based within Scotland.

17.7 We believe that further consideration needs to be given as to whether the scope of the offence should be limited to death or should be extended to cover serious injury and occupational illness.

17.8 The Group believes a wide range of penalties should be available to the Court to enable sentences for organisations to reflect appropriately the specific circumstances of each case, including corporate probation, equity fines and community orders. We also consider that penalties for individuals should include disqualification and imprisonment.

17.9 The Group stresses that adequate resources need to be made available to ensure full investigation and enforcement of any new legislation. This should not be at the detriment of existing HSE, police and local authority resources devoted to preventative work.

17.10 We consider it essential that government monitors the practical impact of any legislative changes to ensure that they have the intended result.

ANNEX A

LIST OF ORGANISATIONS AND INDIVIDUALS WHO PROVIDED EVIDENCE TO THE EXPERT GROUP

The Expert Group are very grateful for the evidence they received. Those who provided the Group with evidence were:

Transport and General Workers Union
Scottish Hazards Campaign Group
Professor Harry Glasbeek
Association of Personal Injury Lawyers
Professor Andrew Watterson, Stirling University
Phase Two (Injured Semiconductor Workers Group)
Amicus
Union of Construction, Allied Trades and Technicians (UCATT)
Confederation of British Industry, Scotland
UNISON
Ms Jenifer Ross, Strathclyde University
Centre for Corporate Accountability
OILC (Offshore Industry Liaison Committee)
Communication Workers Union
Michelle Paterson, Director of Health and Safety, South Australia
Nick Cowdery, Director of Public Prosecutions, New South Wales
The Law Society of Scotland

ANNEX B

PENALTIES FOR CORPORATE HOMICIDE

Paper prepared for the Scottish Executive Expert Group on Corporate Homicide
August 17th 2005, by Professor Hazel Croall

Introduction

Increasing the range of penalties is an essential part of reforming the law on corporate homicide. The problems of viewing companies, as opposed to individuals, as 'guilty' of criminal offences are mirrored in the difficulties of 'punishing' the corporation, characterised as having 'no soul to damn, no body to kick' (Coffee 1981; Croall and Ross 2002). Corporations cannot be sent to prison, the most serious penalty for individual offenders, and are most often given a Fine which may seem inadequate to reflect the seriousness of cases resulting in a homicide conviction.

This paper will start by outlining the arguments for an alternative range of sentences before describing and evaluating a range of options widely recommended for corporate offenders such as more severe monetary sentences, forms of incapacitation, corporate probation, corporate community service and publicity orders, along with suggestions for the introduction of 'corporate inquiry reports'.

Why is a wider range of penalties desirable?

The fine, as currently used in regulatory cases, is widely seen to have serious limitations, particularly as it is generally the only penalty used. The following arguments have been directed against such a reliance on fines:

The level of fines:

Fines are often described as 'derisory' particularly where large corporations are concerned. While there has been an overall increase in Fine levels in the UK (Slapper and Tombs 1999) levels continue to be regarded as too small, particularly in Scotland where, in 1998-9, the average Fine for companies following the death of a worker was £7,083 in Scotland West, the lowest average in Britain, and £23,607 in Scotland East (Unison/ CCA 2002). Following major injuries, the average Fine was £2,655 pounds in Scotland West and in Scotland East, £4,908 pounds. In 2003/4 the average Fine for cases following a death in Britain was £43,113, a 27% increase on the previous year (www.hse.gov.uk/enforce/off03-04/statistics.htm). These are often seen to be small in relation to the company's resources, their potential deterrent effect and also in relation to the seriousness of the offence.

There was also widespread criticism of the Fines of £1,500 and £750 given to John Barr & Sons in January 1998 for selling meat unfit for human consumption and breaches of hygiene regulations. This followed the death of 21 elderly people in Central Scotland in the outbreak of E.coli associated with the firm's hygiene practices. While the Sheriff took into account the 'notoriety and financial loss' which led to the loss of 40% of the firm's business and balanced this against the duty of the court to 'mark its displeasure' (*The Herald* 21/1/98), the fines were widely seen as too low, particularly in view of the butcher's initial failure to co operate and the large number of deaths.

Other sentences have been publicly criticised. In May 1998, British Gas was fined £10,000 after admitting having failures in the servicing of a central heating system in Dunfermline which led to a death. The parents of the deceased, who were also injured, commented that the fine was 'just peanuts' to the company (*Herald* 6/5/98). Following the death of an oil rig worker, Shell was fined £2,000 and Expro, a contractor, £1,000. The relatives' solicitor was extremely critical commenting that it was almost impossible to relate the impact of the fines to the devastating loss to the man's family (*The Herald* 19/08/98).

The 'deterrence trap'

The size of fines is limited by what is often called the 'deterrence trap'. This refers to the problem that too high a fine might threaten the survival of a business, particularly a small one and might lead to a *'spillover'* effect. It might therefore harm those assumed to 'innocent', such as shareholders, whose investment income is threatened, employees whose jobs are placed in jeopardy, and consumers who may have to pay more. Surrounding communities may also be economically damaged if a major business has to close down or cut back its operations.

The unequal impact of fines

Fines may have a more severe impact on the smaller company, whose operations are more vulnerable to a monetary penalty. Even a very large fine for a major corporation may however be regarded as a 'slap on the wrist', and as carrying little deterrent value. This adds to the inequity in prosecutions where it easier to prosecute a smaller company.

Fines, and monetary penalties in general, are largely based on a deterrent rationale. This too has important limitations and the following section will explore how alternative sentencing objectives can be applied to corporate offenders.

Rationales for alternative approaches

Deterrence is often seen as the primary justification for sentencing companies as they are assumed to be 'amoral calculators' who will seek to avoid offending if its costs are seen to exceed any benefits. It has also been widely assumed to be difficult to apply other sentencing objectives, such as retribution, incapacitation or denunciation to companies as opposed to 'guilty' individuals. There is now, however, a considerable literature arguing that these sentencing principles can be applied to companies and that they may be more effective than monetary penalties in preventing future offending and expressing moral disapproval[18].

In addition to the limitations of the fine outlined above, there are problems with the assumption of deterrence theory that corporations are motivated primarily by economic reasoning. Not all offences are the result of economic calculations – indeed offences so serious as to lead to death or injury could be regarded as economically damaging. Corporate structures and cultures which condone and indeed encourage law breaking and unsafe practices may develop. Deterrent sentences on their own do little to address these underlying factors. Furthermore, they may not address the interests of victims nor do they reflect moral disapproval or condemnation of offences. Indeed a strong argument against fines is that they can, by suggesting that offenders can 'pay' for their crimes, trivialise the gravity of offences

[18] Good summaries of these arguments, and of the different sentencing options can be found in Slapper and Tombs 1999; Croall 2001; Jefferson 2001; Croall and Ross 2002; Gobert and Punch 2003. The Law Reform Commission of New South Wales (2003) contains a thorough review of these options along with an extensive bibliography.

and diminish the significance of any non economic harm caused, particularly in cases involving death, injury or serious environmental damage (Law Reform Commission, NSW 2003).

Nonetheless few dispute that deterrence remains a major sentencing objective for corporate offenders or that it can be effective (Law Reform Commission, NSW 2003; Croall and Ross 2002). Some of its limitations can be overcome by increasing the deterrent value of monetary sentences and by combining monetary penalties with others. Increased fines could therefore be combined with publicity orders or punitive orders which would constitute a greater deterrent. Combining fines with probation orders could add a dimension of rehabilitation and prevention, and combining them with community service orders could add elements of retribution and restitution.

A major criticism of monetary penalties is that may be seen as not containing sufficient *retribution* and do not 'fit' the gravity of the crime, particularly in cases such as homicide where some form of corporate fault is involved. In these kinds of circumstances it could be argued that sentences should be more punitive. This might involve considering how fines can be substantially increased by, for example, using equity fines, punishing the company more severely by restricting its operations or even implementing 'corporate capital punishment' by dissolving the company. The punishment can also be made to 'fit' the crime by ordering companies to contribute in some way to benefit the community.

The penalties at the more severe end of the range also involve elements of *incapacitation*. While companies cannot be sent to prison, often seen as the main incapacitative sentence, dissolving them or restricting their operations does incapacitate although, as will be seen below, spillover effects are associated with these options.

Many argue that companies can also be subject to *rehabilitation*, company procedures being easier to change than individual psyches (Braithwaite 1984; Fisse and Braithwaite 1993). This would also have preventative value as probation orders or punitive injunctions are specifically directed at changing the situations in which offences have occurred, thus preventing further offending.

Companies are also 'shameable' (Braithwaite and Drahos 2002), suggesting the utility of 'naming and shaming', *denunciatory* or expressive penalties. A considerable volume of research and literature confirms that companies place high value on their reputations as seen in contributions to charities or 'image' advertising (Cowan 1992). Moreover they often spend considerable sums defending themselves in prosecutions, even though the eventual fine may not be a major economic consideration, suggesting their concern with prestige and reputation. Senior executives are generally believed to care about their ethical reputation among their family, friends and peer group, suggesting that shaming strategies be carefully targeted and should involve individuals as well as companies (Braithwaite and Drahos 2002; Levi 2002). These arguments suggest options such as publicity orders, community service orders and requirements that senior executives attend sentencing hearings.

A final criticism of many sentencing options for both 'conventional' and corporate offenders is that they do little for the victim of crime. While victims can pursue civil cases and compensation in various forms is already a part of sentencing, taking account of victims could be enhanced, particularly for cases where there may be no direct victim, by penalties involving direct reparation or those which more indirectly seek to recompense the

'community', such as remedial or community service orders. These, along with probation orders may contain elements of restorative justice, which some argue can be a useful strategy for corporate offenders, and may involve conferences between senior personnel of companies and victims before appropriate remedies are agreed (Braithwaite 2002).

A wide range of alternative penalties can therefore be justified by applying a wider range of sentencing rationales, often in combination, as is the case for individual offenders. These approaches are particularly relevant to corporate homicide, where a fine on its own can be widely criticised as inappropriate given the seriousness of the outcome and the situation underlying the offence. Regulatory fines are additionally limited by their focus on the breach, rather than the outcome, a crucial difference between criminal and regulatory prosecutions (Croall and Ross 2002).

A wider range of penalties has been used or suggested in other jurisdictions. In the United States many of the above approaches have been available to courts under the guidelines of the Federal Sentencing Commission for Organizations since the early 1990s. Some are used in regulatory offences in Australian states and a recent report by the Law Reform Commission of New South Wales (Law Reform Commission, NSW 2003), following an extensive investigation of alternative options, recommended their adoption in that state. The following sections will outline these options.

Strengthening Monetary Penalties and Fines

Despite their limitations, most agree that monetary penalties remain an essential sentencing option for companies. In addition to being strongly related to the economic interests of the company, they are easy to impose and collect (Jefferson 2001; Gobert 1998). Determining an appropriate level of fine, ensuring consistency and considering their potential spillover effect are major issues to be considered, and it has been suggested that the factors to be taken into account are spelt out more clearly, that fines be related to profits or turnover and that equity fines be introduced.

Sentencing guidelines and cases

In England and Wales, the case of *R v F Howe* (*R v Howe and Son (Engineers) Ltd* [1999] 1 All ER 249) set out level of Fine guidelines. Factors which a sentencing court should take into account included the relation of the offence to the required legal standards; whether a death occurred; whether there had been a deliberate breach of legislation with a view to profit; the degree of risk and extent of danger involved; whether the breach was isolated or continued over a period of time; the defendant's resources and the effect of the fine on the business. It also indicated particular aggravating and mitigating factors:

- *aggravating factors* include a failure to heed warnings; deliberately profiting from failing to take necessary health and safety steps; specifically running a risk to save money.

- *mitigating factors* include prompt admission of responsibility; steps taken to remedy deficiencies; a good safety record.

In stating that the fine should take account of offenders' circumstances it concluded that a fine needs to be large enough to send a message to managers and shareholders and, although

in general the court accepted that the fine should not endanger the earnings of employees or risk bankruptcy, 'there may be cases where the offences are so serious that the defendant ought not to be in business', thus suggesting that the survival of a business may not be seen as essential (Croall and Ross 2002). While this outlines appropriate factors to be taken into account, the *Howe* ruling has been criticised by the Centre for Corporate Accountability (CCA) for ruling out arguments that the fine should be related to the company's turnover or net profit (CCA 1999).

In the Scottish case *Topek (Bur*) (*Topek (Bur) Ltd v H.M.A.* [1998] SCCR 352), the High court of Justiciary upheld a £20,000 fine amounting to half of the net annual profit of the company. The sheriff felt that this was appropriate as blame attached to the company and a fatality had been involved. The High court agreed without discussion (Croall and Ross 2002). In another case, one of the largest fines in a Scottish Court at the time, £25,000, was imposed on Royal Ordnance following an explosion which seriously injured a worker and in which a 'sad history' of neglecting safety was revealed. Lord Dawson stated that the fine would fall on 'innocent shareholders' and that he trusted they would take action to prevent a similar accident re occurring (*The Herald* 27/2/1998).

Fines could, therefore, be related to profits or turnover – a principle incorporated into British law under the Competition Act of 1998, and which has received some support from the CCA (1999). They cite the Criminal Bar Association's argument that the maximum penalty for a corporate offender should be expressed as the greater of either a percentage of the average corporate profit in the 3 years preceding the offence or a percentage of the corporation's turnover during the same period. The CCA suggested a formula for calculating fines for Environmental offences which would involve:

- setting a percentage range reflecting the seriousness of the offence – the sentencing court could use 'culpability' and 'harm' criteria to assess a percentage level which could range from 5% - 15%;
- multiplying the percentage level chosen with a 'measure' reflecting the company's means which might take account of factors such as turnover; profitability and liquidity.

Other models for calculating fines have been considered. An 'optimal penalties model' aims to enhance deterrence by calculating the level of harm in conjunction with the probability of detection and conviction. It is however extremely difficult to develop an objective economic calculation of either harm or the chances of detection and applying the model potentially produced 'astronomical' fines. It was rejected, following business representations, by the US Federal Sentencing Commission (Etzioni 1993) and the Law Reform Commission of New South Wales also ruled it out (Law Reform Commission NSW 2003).

An alternative model was adopted by the US Federal Sentencing Commission in its organizational sentencing guidelines (Law Reform Commission, NSW 2003; Joseph 1998). This involves determining a base fine which takes account of a prescribed minimum for the offence, the organization's pecuniary loss or gain from the offence and the extent to which the offence was caused intentionally, knowingly or recklessly. This is then calculated against a 'multiplier' – a culpability score which takes aggravating and mitigating factors into account. These include the size of the organization, its prior criminal history, violations of court orders, attempts to obstruct justice, the presence of an effective program to prevent violations of law and whether or not the company reported the offence, co operated with the authorities and accepted responsibility. The fine may also be reduced if it is likely to impair

the organization's ability to make restitution or jeopardises the existence of the organization. These guidelines have been associated with higher levels of compliance and with the development of compliance systems (Law Reform Commission, NSW 2003; Joseph 1998). These guidelines are mandatory, can arguably lead to rigidity and threaten judicial independence, reasons given by the Law Reform Commission of New South Wales for rejecting such an approach. Its applicability to other jurisdictions may therefore be questioned, a consideration likely to be relevant in Scotland.

Equity fines

Equity fines, sometimes referred to as share dilution, require the convicted company to issue new shares, possibly to a state victim compensation fund with the value of shares equalling the cash fine considered appropriate. This would water down the company's value and is seen as a more punitive option.

The many advantages of such a system include (Law Reform Commission NSW 2003; Coffee 1981; Jefferson 2001).

- Spillover is avoided as the corporation's capital is relatively unaffected.
- It can be used to compensate victims whereas cash fines go to the Government.
- It can enhance deterrence as shareholders may demand internal reforms and a substantial fine could make the corporation vulnerable to a takeover, thus threatening managers.
- It may have an impact on those responsible for the offence particularly in situations where managers are also shareholders.

At the same time equity fines have attracted criticism. Issues raised include:

- They could lessen a potential fine as courts could take the impact on shareholders into account.

- They may have an unfair effect on shareholders and fail to distinguish between shareholders who have little control over corporate activities and those who do – although against this it could be argued that shareholders voluntarily expose themselves to risk.

- Although in theory a deterrent impact is assumed, it is not guaranteed as they do not involve any specific intervention and shareholders may not complain particularly if their investment is a small one.

- As is the case for all monetary penalties they may not reflect the seriousness of the offence and may be more appropriate for regulatory offences.

- It could be difficult to calculate the appropriate amount and they may be difficult to administer.

- They are limited in application, not being appropriate for private companies or public bodies.

These limitations lay behind the rejection of equity fines by the Law Reform Commission for New South Wales, although their punitive nature and their potential for enabling larger fines with fewer spillover effects means that they continue to attract support. Objections that they aim primarily at deterrence can be resolved by combining them with other penalties.

Monetary fines can therefore be strengthened by more consistency and by imposing higher amounts by using equity fines and/or relating fines to profit or turnover. Spillover remains an issue particularly in relation to potential effects on shareholders, employees or consumers, although it can be argued that sentences for individual offenders also have a spillover effect as happens for example when the family of an offender who is sent to prison suffers (Law Reform Commission, NSW 2003; Jefferson 2001). Considerable debate also surrounds the extent to which shareholders should be penalised and whether they should be seen as 'innocent'. On the one had it is a common objection that it is unfair in principle to penalise shareholders who may be remote from the actions leading for example to a death or injury and who may have little power to affect day to day management. On the other hand there are strong arguments that shareholders have voluntarily taken a risk by investing, may well profit from offences, should be encouraged to ask more questions and do have an impact on management decisions (Croall and Ross 2002; Slapper and Tombs 1999). These factors may vary across companies and it could be argued that such variations could be taken into account by the sentencing court.

Incapacitative penalties

While companies cannot be sent to prison (although individual managers who have been found guilty can, and many argue, should be), they can be incapacitated by being disqualified from carrying out some activities or, in more extreme cases, by being dissolved.

Disqualification

The Law Reform Commission for New South Wales identifies the following ways of restraining companies' activities. Orders can be imposed which:

- Require corporations to cease certain commercial activities for a particular period;
- Require corporations to refrain from trading in a specific geographic region;
- Revoke or suspend licences for particular activities;
- Disqualify the corporation from particular contracts;
- Freeze the corporation's profits;

Disqualifications, sometimes described as 'quarantine,' can be seen as analogous to imprisonment with the time period of an order being equivalent to the length of a prison sentence. They are punitive and retributive and can be regarded as reflecting the seriousness of an offence. A number of limitations have been associated with these strategies (Law Reform Commission of New South Wales 2003; Miester 1990) including:

- Spillover: Disqualification orders will very often have an impact on shareholders and more particularly on employees if the order involves the company closing down part of its operations.

- They are primarily punitive and deterrent and may leave little scope for rehabilitation.

- They may be difficult to implement, particularly for companies with extensive operations.

- Revocation of licences is only appropriate when a licence is required.

Freezing a company's profits may be less harsh as it limits spillover and allows them to continue with their legitimate activities. The Law Reform Commission of New South Wales recommended that provisions should enable disqualification orders and the denial of corporate profits for a fixed period of time equivalent to a period of imprisonment.

Dissolution

Likened to 'corporate capital punishment' (Braithwaite and Geis 1982), is the strategy of dissolving the corporation and placing its assets into the hands of receivers (liquidation) or the government (nationalisation). Its main advantage is stopping the operations of companies which pose a serious threat to safety or health, and where other penalties are considered inappropriate. It is also recommended for primarily criminal organisations such as those involved in trafficking illegal drugs or people.

Dissolution is associated with severe problems. It would almost always involve issues of spillover and those involved in a dissolved company can reincorporate. Moreover, while in theory it may pose a higher deterrent, it is likely to be used so rarely that any deterrent value would be lessened. Despite these disadvantages it may be appropriate in cases of homicide and the Law Reform Commission of New South Wales recommended that it should be provided for but used only for homicide and for 'criminal' corporations.

Corporate Probation

Corporate probation, based on largely rehabilitative arguments, is widely recommended. It generally involves the court making an order requiring action in relation to organizational features associated with offences such as developing and implementing a 'compliance' programme which might involve changing methods of production, changes in personnel, education and training of staff, making sure that compliance procedures are adequately monitored or other provisions connected with the commission of the offence (Law Reform Commission NSW 2003; Gruner 1993). Companies can be invited to present proposals to the court and to implement programmes, all at their own expense (Jefferson 2001). Orders can be enforced by specially appointed 'experts' drawn from appropriate professional groups.

Corporate or organizational probation is possible under regulatory statutes in Australia and was strongly recommended by the Law Reform Commission of New South Wales. It is mandatory under the US Federal Sentencing guidelines which stipulate that it must be given where:

- an organization with 50 or more employees does not have a programme to prevent and detect violations of the law;
- it is necessary to ensure that changes are made to reduce the likeliehood of future criminal conduct;
- it is necessary to accomplish one or more of the purposes of sentencing.

The duration of an order is 1-5 years for a felony and no more than five years for all other offences.

It has been suggested by research that these provisions have helped to deter future offending and have led to an increased attention to compliance (Law Reform Commission NSW 2003; Joseph 1998).

In England and Wales, the Law Commission was criticised for rejecting corporate probation in its early corporate killing proposals in 1994 and for its optimistic assumption that the stigma of conviction would be such that no respectable company would not take action against the systems or people responsible for offences (Jefferson 2001). Its later draft bill included proposals for a 'remedial order' which could be applied for by the prosecution and/or the HSE, and is contained in the current proposals.

Many advantages are associated with corporate probation including that it:

- is interventionist, unlike many other options;
- aims at reform, rehabilitation and prevention of future occurrences;
- is flexible and can be directed at the features of organizations; associated with the offence;
- can be combined with a fine or other options;
- is particularly appropriate for smaller companies;
- has few problems of spillover;
- can encourage regulatory innovation and companies may be more willing to comply with requirements that they participated in determining;
- can be paid for by companies themselves;
- is directed at non financial values;
- can enhance deterrence.

A number of potential limitations have been identified, although most are readily countered by its advocates. These include:

- In some jurisdictions Probation is available only as an alternative to sentencing but this can be overcome by legislation;
- Probation officers or, in Scotland, Criminal Justice Social Workers, are not well equipped to supervise or enforce orders. This can be overcome by appointing suitable 'experts' such as auditors, accountants, management specialists, academics or others with appropriate knowledge.
- As is the case for other offenders, probation might be seen as a 'soft' sentencing option, particularly relevant to cases involving death or serious injury. On the other hand, it can be combined with other, more punitive, options.
- It might be costly. This objection can be overcome by requiring those companies who have the resources to bear the cost themselves.
- It could have some adverse impact on shareholders or those employees who might bear the burden of carrying out the orders. Spillover problems are however seen as considerably less for this option than for others.

Punitive injunctions

"Punitive injunctions", a term used by the Law Reform Commission for New South Wales (2003) are often seen as a form of probation, albeit a more punitive option. These set out conduct that the corporation must not engage in or specify actions that the corporation must undertake. They may also identify particular personnel responsible for offences. For environmental offences for example, they may contain provisions that the company must

prevent or control any harm to the environment associated with the offence and/or to make good any resulting damage, or to prevent a recurrence of the offence. Failure to comply with such an order would be an offence. These are similar to the remedial orders proposed in the legislation on corporate killing in England and Wales which would require corporations to take steps to remedy whatever 'management failure' had caused the death in question.

These have the advantage that they:

- underline the unacceptable nature of offences;
- can be associated with prevention, rehabilitation and deterrence along with restitution and redress;
- can be more effective than monetary penalties particularly for small companies;
- are more tightly focussed than probation orders.

These may overlap with community service orders, to be discussed below, and can also be associated with disqualification. The concept has much in common with regulatory orders, such as prohibition notices and improvement notices under the Health and Safety at Work etc. Act 1974. Under that Act these are issued by the HSE to employers in breach of the Act and it is a criminal offence to fail to comply with such notices. A more general provision could be provided. The Law Reform Commission for New South Wales recommended the introduction of these 'punitive injunctions' which would, in Scotland, more properly be referred to as an 'interdict' (the equivalent of an injunction to stop someone doing something) or a 'specific implement' (to require someone to do something). These are enforced by proceedings for contempt of court. Being more punitive than probation they might be seen as particularly appropriate in cases of corporate homicide.

Community Service Orders

Community Service Orders involve a corporate offender undertaking a project which benefits the community or sections of it, or contributing to projects relating to the offence (Law Reform Commission, NSW 2003; Croall and Ross 2002). Companies can be ordered to undertake work, or, as with probation, could suggest appropriate schemes to the court for approval (Jefferson 2001). In this way the technical or professional expertise of the company could be used to benefit the community or to repair the damage caused by the offence. Like community service for individual offenders they have reparative, rehabilitative, deterrent and retributive elements along with having the potential to express moral condemnation of the offence.

Many advantages are associated with community service orders (Croall and Ross 2002; Croall 2001; Jefferson 2001; Law Reform Commission, NSW 2003) including that they:

- have a considerable symbolic value, which emphasises the social unacceptability of the offence;
- can be tailored to fit the circumstances of the offence and the offender;
- have limited spillover effects;
- can be used for companies where a punitive fine would threaten survival;
- can considerably benefit the community;
- require the corporation to exert time and effort which may also have a rehabilitative and deterrent potential;

- are particularly appropriate when an offence affects a community as opposed to an individual victim.

Community service orders have been used in the United States where for example the Danilow Pastry Corporation, found guilty of price fixing, was ordered to supply goods to organizations assisting the needy. In this case Fines would have bankrupted the company and caused unemployment. In other cases companies were ordered to contribute to charities or make endowments. These latter kinds of orders attracted criticism on the grounds that courts could favour 'pet charities' and that merely requiring companies to make some financial contribution was similar to a cash fine and did not require management or employees to internalise the seriousness of offences. The subsequent US Federal Sentencing Guidelines limited community service to cases where it was designed to repair the harm caused by the offence. Others have argued that where possible, high level personnel should be involved in implementing orders as attitudes of managers are less likely to be affected if they can delegate orders to lower level employees and they may also have a more skills to offer (Gruner 1993). In Australia orders are used particularly in cases involving environmental protection, and courts have ordered companies to fund relevant social projects. The Law Reform Commission of New South Wales recommended that orders should bear a reasonable relationship to the offence.

As is the case with other options, a number of issues have been raised in connection with corporate community service orders including arguments that they:

- Do not guarantee corporate reform. They can however be used in combination with other penalties.

- May not reflect the seriousness of offences or might be regarded as a 'soft option' – again an objection which can be overcome by combining community service with other orders.

- Might incur costs to the company exceeding those of fines. This can be countered by requirements that the cost should not exceed the maximum amount of the fine applicable to the offence.

- Create problems in connection with supervision. As for probation orders, this can be overcome by the appointment of appropriate persons.

- Might not attract sufficient public reaction (Slapper and Tombs 1999; Croall and Ross 2002). This could be overcome where necessary by combining them with publicity orders.

- Companies could benefit from community service orders by using them to attract favourable publicity. This would be most likely negated by the adverse publicity attracted by the initial offence or by a publicity order.

Overall, therefore, community service orders have attracted considerable support particularly for offences without direct victims such as environmental offences which have a more direct impact on local communities. This has led to some questioning their applicability to corporate homicide which does have direct victims (Miester 1990). Others however argue that they can be appropriate. One suggestion is for example that transport or rail companies could be ordered to undertake research into ways that 'disasters' could be prevented in future rather

than such research being carried out at the taxpayers expense (Gobert 1998; Jefferson 2001). Suitably devised orders could therefore be a useful addition to monetary penalties.

Publicity Orders

Publicity orders involve the publication of the offender's conviction and other details of the offence such as its consequences for either a specific group or for the general public (Law Reform Commission NSW 2003; Fisse and Braithwaite 1983). Their rationale is primarily denunciatory although a deterrent effect is also possible. They have been used throughout the ages for commercial offences – offenders against weights and measures acts could, for example, be placed on the stocks to be publicly shamed and during the 19th Century, Bread Acts required that convictions of offenders be made public. As seen above there have been many arguments that companies do worry about their image and adverse publicity can lead to loss of business. An example often cited is the returning, by thousands of consumers, of Exxon credit cards following the 1989 Exxon oil spill (Law Reform Commission NSW 2003; Curcio 1996).

Publicity orders are argued to:

- be more deterrent than a Fine as corporations value their reputation highly;
- adversely affect consumer confidence;
- compromise the corporation's autonomy;
- threaten morale within the company – requiring positive action

Publicity orders are allowable under the US Federal Sentencing Commission Guidelines for Organizations and in Australia they are provided for under Trade Practices legislation, as they are argued to be particularly appropriate for crimes where consumers might avoid or boycott the company's products. A number of issues have been raised in connection with these orders including:

- They may become routine and the public might not pay sufficient attention to them. This can be overcome by targeting orders to audiences where they will attract maximum attention. Orders could require for example that companies place details of the conviction on their prospectus.
- The exact effects of orders may be uncertain – they have been described as a 'loose cannon'. This means that their impact is difficult to calculate.
- They might lead to serious losses which could cause considerable spillover. Research indicates however that this was likely to be the exception rather than the rule and no evidence of an adverse effect on workers was found (Fisse and Braithwaite 1983).
- Companies might use counter publicity to negate the impact. Research suggests however that this would be an exception and found that the majority of companies felt that counter publicity risked generating further bad publicity (Fisse and Braithwaite 1983). Courts can however be given powers to restrain any counter publicity.

There is widespread support for publicity orders, and the Law Reform Commission of New South Wales, in an attempt to answer some of the above issues, suggested that they would be most appropriate in cases where:

- The judge has reduced a monetary penalty due to the corporation's financial circumstances but it is considered that an additional penalty may help to express the community's reprobation.

- The corporation has a poor record of compliance in which case it may be used in combination with a probation order.
- It is considered that the corporation's customers, creditors and shareholders should know about the conviction or where news coverage is likely to be insufficient.

In addition they argue that the courts should have the power to stipulate a target audience, the content of the publicity, the consequences of the offence, the nature of any punishment and any other information which the court feels is appropriate.

It might be argued that most cases of corporate homicide would attract publicity although this is by no means guaranteed particularly where individual as opposed to multiple deaths are involved. Indeed one writer argues that even opponents of publicity orders accept their usefulness in cases involving homicide (Miester 1990) and it could be seen as particularly appropriate in cases where little publicity might otherwise be expected.

Requiring senior officer(s) to attend sentencing

While not a penalty as such, denunciatory arguments also underlie proposals that the Chief Executive Officer and/ or other senior officers should be required to be present during sentencing as 'the company' cannot physically be present in court (Law Reform Commission, NSW 2003; Barnard 1999). In this way the court would be able to express community disapproval and underline the seriousness of the offence to a senior representative of the company. It could also act as a deterrent as senior officers might wish to avoid what has been described as a 'shaming ceremony'.

In the United States, under the Federal Sentencing Guidelines, the sentencing judge may require the CEO to appear in court personally. This serves three main purposes (Barnard 1999):

- to impress on the CEO the gravity of corporate wrongdoing
- to signify to the community that the leadership of the corporation has accepted responsibility for the crime
- to extract some indication that the corporation intends to comply with the law in the future.

It further ensures that the conviction does come to the attention of corporate management rather than being left to lawyers. In the US the provision is discretionary and limited to cases where the corporation has pled guilty and thereby accepted its responsibility. Those who plead not guilty and are subsequently convicted are not eligible and it only applies to the CEO rather than members of the Board. These, it has been argued, are important limitations.

It has been suggested that these proceedings play a symbolic and retributive role and should include an expression, by the sentencing judge, of community abhorrence, an exploration with the CEO of how the offence occurred along with a discussion about the response of the organisation, an assurance that similar offences will not recur and an acceptance by the judge of this assurance followed by an admonition (Barnard 1999).

In Scotland, in a case involving the Prison Service, the Court of Session considered who would be the appropriate person to attend court to make an apology for contempt of court. While no penalty was being imposed it considered that a finding of contempt is a matter of

great importance and that it should make an order for appearance "so that the court can make a formal finding of contempt in open court". It further stated that it should order the appearance of the Chief Executive of the Scottish Prison Service and the Governor in charge of HMP Peterhead. The Chief Executive is "the civil servant who should be regarded for present purposes as representing the *alter ego* of the respondents", and the Governor is "responsible for the failure to take reasonable steps to ensure that the respondents' undertaking was complied with" (*William Beggs v Scottish Ministers* 2005 CSIH25 available at http://www.scotcourts.gov.uk/opinions/2005CSIH25.html).

A provision to require senior officers to attend court for sentencing was recommended by the Law Reform Commission of New South Wales, who suggest that the court should be able to compel persons acting as chief executive to be present regardless of whether a corporation pled guilty or not and that the option of compelling Directors should also be introduced – both provisions designed, they argue, to achieve improved internal accountability (Law Reform Commission, NSW 2003). As it may not always be easy to identify the chief executive or highest ranking officer nor might it always be desirable to single out the chief officer, it further recommended that the court should have the discretion to decide which corporate officers, such as directors, the company secretary and executive officer, would be most appropriate, depending on the circumstances of the case. It could further be argued that these kinds of requirements are particularly appropriate in cases of homicide, where there is fault on the part of the organization and where a more expressive form of condemnation is seen as appropriate.

The above represent the main alternative options for sentencing corporate offenders. In order to assist the court in making decisions as to which options are most appropriate and to calculate if necessary the amount of any monetary penalty it has also been suggested that a form of 'corporate inquiry report' should be introduced, which is discussed below, followed by a brief consideration of how penalties can be enforced.

The provision of Inquiry reports

The court regularly receives background information on individual offenders by whereas it may receive only haphazard information on company accounts, sometimes based on solicitors version of 'draft' accounts as happened in the *Topek (Bur)* case cited above. It was further recognised in *Howe* that it was difficult to obtain 'timely and accurate' information about the defendant's means. Information provided by the company is more likely to be in the context of mitigation and is more likely to stress its poor position than to provide full details of assets (Croall and Ross 2002). In the United States a Federal Law officer undertakes an investigation into each convicted corporation. There have accordingly been suggestions (Bergman 1992; CCA 1999; Law Reform Commission, NSW 2003) that courts should routinely receive a form of Corporate Inquiry Report and should, where necessary, have powers to appoint a relevant expert to provide a professional assessment, paid for where appropriate by the company itself.

The Law Reform Commission of New South Wales received positive responses in their consultation about this suggestion. Suggestions as to which information should be provided (Law Reform Commission NSW 2003; Bergman 1992; Jefferson 2001) include details of:

- any prior convictions;
- any new compliance systems implemented to prevent repetitions of the offence;

- what existing compliance systems were already in place;
- the previous positive and negative record of the corporation;
- any attempts at reparation;
- any prior convictions of high level personnel of the corporation.
- Financial information such as the company's turnover and annual profits;
- the history of the company's relationships with regulators and in for example, safety cases, its general health and safety record.

The Enforcement of orders

Any legislation introducing such orders would require some mechanism to deal with offenders who do not comply and who fail to pay fines such as further penalties or, as happens in the United States, making any breach subject to 'contempt of court'. This is necessary as corporations, unlike individual offenders, cannot be imprisoned. In addition the order could be continued or extended. The New South Wales Law Reform Commission recommended that in the event of a breach the following would apply:

- Continue or extend the term of the order
- Impose additional or more restrictive conditions
- Revoke the orders and re sentence the corporation.

On re sentencing a court should be able to take into account the extent to which the corporation had complied with the order before failure. For default of fines it recommended the option of heavier sentences including incapacitation.

Summary and Conclusions:

It is widely accepted that monetary penalties alone are insufficient for corporations or organizations convicted of serious offences such as homicide or causing serious injury. By applying sentencing principles widely used for individual offenders such as retribution, incapacitation, rehabilitation and denunciation a wide range of innovative penalties have been advocated and used in other jurisdictions, all of which are relevant for cases of corporate homicide.

All of these options also apply to a wide range of corporate and regulatory offences. While considering their broader application lies outside the remit of the Expert Group and this paper, their potential application in for example Health and Safety, Environmental or Consumer legislation should be stressed.

It should also be stressed that while the emphasis of this paper has been on penalties for corporations, they are also appropriate for individual managers found guilty of offences involving death or serious injury. Individuals can be imprisoned and it is widely argued that potential imprisonment acts as a deterrent for managers. Sentences other than monetary penalties may also bring home the seriousness of offences, and as seen above, it is considered to be important that senior management are involved in the implementation of community service orders. Managers are also 'shameable' and may fear adverse publicity.

While not always seen as relevant in cases of homicide, elements of restorative justice can be a feature of corporate sentencing, and can involve senior executives. Restorative justice by means of conferences with employees, management and regulators can be a part of regulatory strategies. It can also form part of shaming or denunciatory strategies. In one Australian case,

senior executives of an insurance company which had deceptively sold policies to remote Aboriginal communities were sent to the communities to negotiate a settlement. Executives reported that they experienced considerable remorse (Braithwaite 2002).

Monetary penalties remain an important feature of any proposed range of penalties and it has been argued that they could be considerably strengthened by introducing the options of equity fines and calculating fines taking into account the profits and turnover of the company. Monetary penalties can also be usefully combined, in appropriate cases, with a range of other options which may add elements of retribution, denunciation and incapacitation.

As convictions for corporate homicide will only be taken where there is evidence of some form of corporate 'fault', it would seem appropriate that penalties are directed at these underlying circumstances. A number of innovative strategies can be introduced through enabling corporate probation or community service and other orders. Probation orders or punitive injunctions, appropriately renamed, are appropriate to meet these circumstances and are particularly relevant in cases where the circumstances of the organization limit the size of a fine, as would be the case for example with a small company or a public organization where a large fine would fall on the taxpayer. Community service orders are also appropriate to meet further demands that some reparation be made or that penalties symbolically reflect some element of moral disapproval. This is also the case with publicity orders, which may additionally enhance the deterrent impact of a sentence and be appropriate where a large fine is not possible. In the most serious cases, where the organization's activities are particularly threatening to health and safety, incapacitation may be seen as an appropriate step.

A broad range of options is also necessary to take account of the wide variety of circumstances likely to be found in both the offence and the offending organization. Probation, community service and other orders add an important dimension of flexibility in which the penalty can be seen to 'fit' the 'crime' and can be tailored in accordance with the circumstances of the individual case. This is particularly relevant to the contrasting circumstances of a smaller or larger company.

It can therefore be argued that all of the above options be adopted and they were widely supported in evidence submitted to the Expert Group. They could be regarded, as the CCA suggest in their response to the proposals in England and Wales, as essential to any new law whose impact would be lessened without tough sanctions. In addition, an inquiry report should precede sentencing in order that full information is available to the sentencing court to assist the determination of the most appropriate penalty.

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