

'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS

Prepared by Allens Arthur Robinson for the United
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The research for and preparation of
this report was primarily undertaken by
Megan Donaldson and Rupert Watters
of Allens Arthur Robinson.

For further information on this report,
please contact Craig Phillips, Partner,
Allens Arthur Robinson at
craig.phillips@aar.com.au

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Part 1: Scope of Paper and Overview

1. Introduction

1.1 Changing Dimensions of Corporate Criminal Liability

In recent years there has been an increasing focus on the ways in which corporate policies and conduct interact with the environment, government and communities, as well as the lives and rights of individuals. In particular, many States have examined whether, and how, corporations can be held criminally liable for wrongful conduct. States have tended to be most concerned about responding to offences against occupational health and safety, labour, antitrust and corruption laws, and about compliance with international treaties requiring effective laws against bribery and terrorist financing. However, consideration of the basis on which corporations may be criminally liable is also relevant to other laws and norms, including those protecting human rights.

The key conceptual problem of corporate criminal liability is forging a coherent link between the corpus of criminal law — which has been developed in the context of natural persons, and to reflect the psychology of human beings — and the realities of the corporate form, which is a complex fabric of human actors, on one hand, and corporate hierarchies, structures, policies and attitudes on the other. Corporations can only ever act through human beings, yet the actions of human employees or agents always occur within the matrix of these hierarchies, structures, policies and attitudes.

In a legal sense, the question is whether, and to what degree, particular acts, necessarily committed by human beings, may constitute crimes committed by the corporation.

In most systems, criminal offences have a physical element and a mental or fault element. Generally, the physical element of offences can be imputed fairly easily to a corporation. The real difficulty arises in relation to the fault element. When can the state of mind of particular human beings be imputed to the corporation, such that the corporation itself may be said to have the state of mind — knowledge or recklessness, for example — that (together with the physical element) constitutes an offence? And can the corporation have a fault element in its own right?

The traditional approach to corporate criminal liability has focused on the relation between the corporation and its employees and agents, and developed a legal fiction that the state of mind of employees and agents can be said to be the state of mind of the corporate entity. There are two main variations to this approach. Under the 'identification' model that is used in, for example, the UK and Canada, the corporation is held directly liable for wrongful conduct engaged in by senior officers and employees on the basis that the state of mind of the senior employee was the state of mind of the corporation. Under the vicarious liability model that is used in the US, the corporation is indirectly liable on the basis that the state of mind of the individual is, in certain circumstances, imputed to the corporation.

There are several difficulties to the traditional approach from a prosecutorial perspective. It provides for 'derivative' liability in the sense that corporations can only be culpable if the

liability of an individual is established. From a practical perspective, it can be very difficult to identify the employee who committed the wrongful act or had the culpable state of mind. From a conceptual perspective, this approach does not reflect the complex interactions between human actors and the corporate matrix.

Recently, some jurisdictions have contemplated a new basis for criminal liability – 'organisational liability' – that has the potential to address this interaction more squarely. Australia, in particular, has introduced provisions holding corporations directly liable for criminal offences in circumstances where features of the organisation of a corporation, including its 'corporate culture', directed, encouraged, tolerated or led to the commission of the offence.

This discussion paper:

- evaluates the 'corporate culture' concept in Australian law, in terms of the accountability and predictability issues associated with the 'corporate culture' provisions;
- undertakes some comparative analysis to illustrate the strengths and weaknesses of various different approaches with regard to issues of accountability and predictability; and
- discusses the merits of applying the 'corporate culture' concept at the liability / prosecution stage, as opposed to the damages / sentencing stage.

1.2 Structure of Discussion Paper

Part 1 of this discussion paper gives a very general overview of how various different legal systems deal with the question of corporate criminal liability.

Part 2 examines in more detail a few systems which incorporate, to some degree, 'corporate culture' and like concepts. Part 2A provides a close examination of some of these systems, and Part 2B gives brief information about other systems about which it has been harder to obtain detailed information.

Part 3 undertakes an analysis of how corporate culture provisions intersect with other characteristics of civil and common law legal systems, what issues of accountability and predictability they raise, and how their effect differs when called upon at the liability, as opposed to the sentencing, stage of criminal proceedings.

1.3 Issues Beyond the Scope of Discussion Paper

Owing to constraints of time and expertise, this discussion paper does not deal with a number of issues that would impact upon the choice to adopt 'corporate culture' provisions, and on the effect of those provisions on corporate liability. These issues include:

- **Rationales for criminal liability.** Countries differ in their understandings of the underlying justification for criminal liability and punishment. Systems that emphasise the retributive dimension of criminal law, rather than, for example, deterrence, will likely have less incentive to embrace approaches such as the 'corporate culture' model, in which the corporation is directly liable, because the corporation itself cannot suffer, and the brunt of any punishment of the corporation is likely to filter

through to shareholders and employees. This discussion paper assumes that countries are intending their criminal law to operate, inter alia, to deter the commission of offences in the first place.

- **Policy choices between pursuing individual and corporate liability.** Either on the basis of legal principle, or empirical evidence (or both), countries may choose to focus on the liability of individuals who commit crimes within corporate structures. This discussion paper does not address the merits of focusing on corporate liability as opposed to individual liability: it merely comments on some of the implications of opting for a particular form of corporate liability over, or as a complement to, other forms.
- **The 'corporate veil'.** Given the complex and global structure of many businesses today, one key aspect of 'corporate culture' provisions may be the way in which they could operate to undermine formal distinctions between legal entities within the same corporate group. For example, the 'corporate culture' set by the parent company in one country might be said to foster the commission of an offence by an overseas subsidiary. This effect may assist effective prosecutions in cases where the parent company is exposed to political and media scrutiny in its home country, and / or legal proceedings against the subsidiary company in the country in which it operates would be hampered by a weak legal system. However, the ability to use 'corporate culture' provisions in this way would depend on the jurisdiction of courts involved, the corporations law of relevant countries, and many other factors. Given their complexity, the discussion in Part 3 of the implications of 'corporate culture' provisions for the corporate veil does not address all these factors, and is confined to conceptual analysis only.
- **Criminal procedure.** The impact of 'corporate culture' provisions is likely to depend a great deal on the applicable rules of evidence and criminal procedure. These issues are beyond the scope of this paper.

2. General Overview of Corporate Criminal Liability Regimes

2.1 Overview of Approaches to Corporate Criminal Liability

Corporate criminal liability is not a universal feature of modern legal systems. Some countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognise any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees.

The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability.

The most common models could be characterised as involving 'derivative' liability, in which the corporation is liable for the acts of individual offenders.

One common variant of this is vicarious liability, or *respondeat superior*, the model found in US federal criminal law and in South Africa. Under this model, the offences of individual employees or agents are imputed to the corporation where the offence was committed in the course of their duties, and intended at least in part to benefit the corporation.

Another variant is the 'identification' model found in the United Kingdom and other British Commonwealth nations. Under this model, the offences of individual senior officers and employees are imputed to the corporation on the basis that the state of mind of these senior officers and employees (and their knowledge, intention, recklessness or other culpable mindset) is that of the corporation. Who constitutes a senior officer or employee, however, varies between the jurisdictions applying this approach.

In addition to 'identification' *simpliciter*, there is what could be described as the 'expanded identification' approach. Found primarily in continental Europe, this approach retains the focus on the actions of high level officers and employees, but also incorporates a duty of supervision, although whether that duty is owed by the corporation or its officers individually varies from country to country.

Recently, there has been increased focus on an alternative model of liability, focused on the acts or omissions of the corporation itself. Under this model, rather than the corporation being liable for the acts of individual offenders, a corporation is liable because its 'culture', policies, practices, management or other characteristics encouraged or permitted the commission of the offence. Australia is a prime example of this 'organisational' liability model.

The various models of corporate liability are summarised in the table overleaf. Of course, many countries draw on combinations of the various models. Moreover, concepts such as 'corporate culture' are used in different aspects of criminal law: in the US, while organisational liability is not the main form of liability, 'corporate culture' considerations are a major factor in the exercise of prosecutorial discretion to pursue corporations, and in sentencing.

It should be noted that this discussion paper focuses on the criminal liability of "commercial" corporations. There is no detailed consideration of the kinds of entities to which this liability would extend. In most cases, the laws discussed would apply to all entities that would be recognised as companies in the Anglo-American legal system. However, in many countries they also apply to partnerships, unincorporated associations and even governmental and municipal agencies.

Systems in which corporations can bear criminal liability		Systems in which corporations cannot bear criminal liability
Systems of 'derivative' corporate liability		<p>Examples of legal systems that do not recognise criminal liability for corporations include: Brazil, Bulgaria, Luxembourg, Slovak Republic.</p> <p>Examples of legal systems that (while not recognising corporate criminal liability per se) nevertheless have a regime of administrative penalties that apply to corporate wrongdoing include: Germany, Greece, Hungary, Mexico and Sweden.</p>
The vicarious liability approach	Systems of 'organisational' liability	
<p>Although the requirements for establishing vicarious criminal liability differ across systems, the basic components of the liability are that:</p> <ul style="list-style-type: none"> • an agent of the corporation commits a crime; • the crime is committed while the individual is acting within the scope of their employment; and • the crime is committed with an intent (not necessarily the sole intent) of benefiting the corporation. <p>Examples of legal systems adopting the vicarious liability approach include US federal criminal law.</p>	<p>On the 'identification' approach, directors and senior managers are the corporation's 'directing mind and will' and their conduct and state of mind is thus the conduct and state of mind of the corporation itself.</p> <p>Examples of legal systems adopting the identification approach include the English, Australian and Canadian common law systems.</p>	
		<p>'Organisational' liability is focused squarely on the liability of the corporation in its own right. It is concerned with corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate 'cultures' that tolerate or encourage criminal offences. So-called 'corporate culture' provisions fall within the rubric of 'organisational' liability.</p> <p>Examples of 'organisational' liability include provisions in Part 2.5 of the Australian <i>Commonwealth Criminal Code</i> and art 102(2) of the Swiss <i>Penal Code</i>.</p>

2.2 Impetus for Changing Approaches

Changes to laws providing for corporate criminal liability have been triggered by both domestic and international developments.

In the domestic sphere, particular accidents or disasters have focused attention on the need for stronger regulation of corporations, and driven legislative change. This is the case with, for example, the corporate manslaughter laws in the UK and the Australian Capital Territory.

In the international sphere, one significant factor motivating the growth in corporate criminal liability in civil law legal systems has been the increase in international instruments requiring such provisions. A typical example of this trend is the UN *Convention against Transnational Organized Crime*,¹ article 10(1) of which provides:

Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

Similarly, the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention)*² requires States to establish the liability of legal persons. Article 2(1) states:

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Two European instruments go beyond merely mandating the implementation of corporate liability to require a specific method of attribution. The operative language of article 18 of the Council of Europe's *Criminal Law Convention on Corruption* 1999³ and article 3 of the European Union's *Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests* 1997⁴ is almost identical. Parties and/or EU Member States are required to adopt measures

to ensure that legal persons can be held liable for [the relevant offences] committed for their benefit by any [COE: natural] person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

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

as well as for involvement of such a [COE: natural] person as accessory or instigator in [the relevant offences].

Additionally, signatories of the relevant Convention must take steps to

¹ Opened for signature 12 December 2000, [2004] ATS 12 (entered into force 29 September 2003).

² Opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999).

³ Opened for signature 27 January 1999, ETS 173 (entered into force 24 January 2003).

⁴ Adopted 19 July 1997.

ensure that a legal person can be held liable where the lack of supervision or control by a [COE: natural] person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

Both Conventions then mandate what might be described as the 'expanded' identification approach which allows prosecution both for the acts of leading persons and for a 'lack of supervision or control', albeit in these formulations the lack of supervision or control must also be attributable to leading persons.⁵ We do not consider, however, that the requirements of either convention would prevent a party from taking a broader approach to corporate criminal liability. It is likely the articles are intended to set a minimum standard, rather than require a single uniform approach.

One significant difference between the two treaties is that the Second Protocol does not use the phrase 'natural person' in article 3. Potentially, the decision not to use 'natural person' might be taken to indicate that the article encompasses both legal and natural persons fitting the relevant description, e.g. if a parent company is a 'shadow director' of a subsidiary. It is unclear whether this is the case, however. The assumption that 'person' includes legal and natural persons is a statutory presumption in most common law countries, which is not necessarily replicated in civil law countries.

It should be observed, however, that none of these conventions go so far as to mandate corporate *criminal* liability. In three cases, either explicitly or implicitly, the convention seems to permit the signatory to implement criminal, civil or administrative liability regimes for legal persons.⁶ Pieth, in the context of the OECD Bribery Convention, suggests that there may be a trend in international instruments in favour of corporate criminal liability. He observes:

[M]ore recent international legal sources are increasingly moving towards a primary requirement of corporate criminal liability. See for example the Revised Forty Recommendations of the [Financial Action Task Force], which merely allow for administrative corporate liability on a secondary level.⁷ Furthermore, evaluation task forces give those countries favouring non-criminal liability a far more thorough screening, mainly because corporate liability might not be pursued with the same rigour as in criminal law. It may be assumed, therefore, that the pressure towards criminal liability in public international law will only grow further in the years ahead.⁸

⁵ See Mark Pieth, 'Article 2 – The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2006) 9, available at <<https://www.oecd.org>> at 13 October 2007 (page numbers refer to the electronic version).

⁶ See Art 10(2), *Convention against Transnational Organized Crime*; Item 20 of the Commentary on the OECD Bribery Convention, available at <<http://www.oecd.org>> at 13 October 2007; Paragraph 86 of the Explanatory Report on the *Criminal Law Convention on Corruption*, available at <<http://conventions.coe.int>> at 13 October 2007. The *Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests* does not seem to explicitly address this issue, but Pieth states that it does not mandate corporate criminal liability: Pieth, 'Criminal Responsibility of Legal and Collective Entities: International Developments' in Albin Eser, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 113, 114.

⁷ This statement may be open to debate, as the FATF Recommendations plainly indicate that corporate criminal liability is to be preferred to civil or administrative liability, but do not appear to mandate either (as they are non-binding recommendations). See Recommendation 2 b) of the 40 Recommendations on Money Laundering, available at <<http://www.fatf-gafi.org>> at 7 November 2007.

⁸ Pieth, above n 5, 21.

It remains to be seen, however, whether this view is proven correct. It is worth noting that arguably the major international criminal instrument, the *Rome Statute of the International Criminal Court*,⁹ does not allow for corporate criminal liability.

Article 25 of the Rome Statute is headed 'Individual Criminal Responsibility' and paragraph 1 provides 'The Court shall have jurisdiction over natural persons pursuant to this Statute.' Ambos observes that the principle of individual criminal responsibility in international criminal law predates the Rome Statute and appears in the jurisprudence of the Nuremburg Tribunal, where it was said:

Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who permit such crimes can the provisions of International Law be enforced.¹⁰

Article 28 of the Rome Statute allows for the punishment of superiors for the acts of subordinates, both military, art 28(a), and civilian, art 28(b). Nothing in the text, however, seems to indicate that a corporation could be considered a superior for the purposes of the article.¹¹ As such, it appears that a manager at a corporation could be held personally liable for offences under the Rome Statute, but the corporation itself may not be punishable.

⁹ Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

¹⁰ Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 475, n 1.

¹¹ Indeed, there are textual indicia to the contrary, e.g. the reference to crimes 'within jurisdiction' which would presumably be read subject to article 25 and the use of the phrase 'his or her' in the article itself, apparently excluding legal persons.

Part 2A: Corporate Criminal Liability in Particular Legal Systems

3. Australia

3.1 Overview of Corporate Criminal Liability in Australia

Australia is a federal system in which the Commonwealth, under the Constitution, only has legislative power in respect of certain specified matters. These matters do not include general criminal law. Accordingly, most criminal law in Australia is State law, and federal criminal offences are confined to those enacted in relation to matters in respect of which the Commonwealth does have legislative power. State criminal law varies across the jurisdictions: some Australian States have comprehensive criminal codes and others rely upon a combination of statute and the common law.

In Australia, Courts initially relied on principles of vicarious liability, but have largely followed the identification approach since it was developed in the UK in the 1940s (see section 4 below).¹² The most significant aspect of Australia's corporate criminal liability regime is the statutory provisions providing for organisational liability in relation to federal offences, including on the basis of 'corporate culture'. These provisions are 'arguably the most sophisticated model of corporate criminal liability in the world'.¹³ There are also various provisions in individual statutes setting out models of corporate liability applying to particular offences.¹⁴

Unlike the US, and despite having a nuanced model of organisational liability, Australia has not developed corresponding systematic principles of sentencing to deal with

¹² See, e.g., discussion in *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 (relying on the UK decision in *Tesco Supermarkets Pty Ltd v Natrass* [1972] AC 151); *Entwells Pty Ltd v National and General Insurance Co Ltd* (1990-91) 5 ACSR 424.

¹³ See Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (2002) p138.

¹⁴ See, e.g., s84 of the *Trade Practices Act 1974* (Cth) (**TPA**):

- 1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA, IVB, V, VB or VC applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.
- 2) Any conduct engaged in on behalf of a body corporate:
 - a. by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
 - b. by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

organisational liability.¹⁵ In 2006, the Australian Law Reform Commission (**ALRC**) recommended that the Government expand the range of possible penalties for corporations to include orders for corrective action, community service and publicisation of the offence committed. The ALRC also recommended that s16A(2) of the *Crimes Act 1914* (Cth), which sets out factors to be taken into account in sentencing, be amended to include:

the type, size, financial circumstances and internal culture of the corporation; [and]
the existence or absence of an effective compliance program designed to prevent and detect criminal conduct.¹⁶

The ALRC recommendations have not yet been implemented.¹⁷

3.2 Genesis of Organisational Provisions

Australia's statutory organisational liability provisions were just one outcome of a long-term systematisation of the criminal law.

In July 1990, a Review of Commonwealth Criminal Law recommended that the statutory framework of Commonwealth offences be completely overhauled. A Model Criminal Code Officers Committee (**MCCOC**) was established under the Standing Committee of Attorneys-General to undertake broad consultation and draft a model law that came to be the basis of the *Criminal Code Act 1995* (Cth) (**CCA**).

From the beginning of the drafting process, it was envisaged that the model law would include provisions on corporate criminal liability. As it happened, the provisions remained

¹⁵ Although such provisions do exist in particular statutes. For example, s86C(2)(b) of the *TPA* allows for the making of 'probation orders' pursuant to which corporations can be required to:

establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct;

...

establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

... revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

¹⁶ Australian Law Reform Commission, *Same Crime, Same Time: The Sentencing of Federal Offenders* (tabled 13 September 2006), Recommendation 30, available at <<http://www.austlii.edu.au>> at 13 October 2007; see similar recommendations in NSW Law Reform Commission, *Sentencing: Corporate Offenders* (2003), [4.52]-[4.53] available at <<http://www.lawlink.nsw.gov.au>> at 13 October 2007.

¹⁷ Many civil regulatory regimes contain provisions stipulating that factors such as the deliberateness of the breach, the seniority of those involved, and the corporation's approach to compliance are relevant to the determination of an appropriate penalty; even where such provisions are not expressly applied, courts tend to take these factors into account. See, e.g., *Trade Practices Commission v Dunlop Australia* (1980) 30 ALR 469 at 484-5; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 41-43; *Environment Protection Authority v Energy Services International Pty Ltd* [2001] NSWLEC 59 at [22]-[35]; *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440 at [57]-[58].

very similar throughout the drafting process, and the provisions currently contained in the CCA mirror closely the provisions contained in the final draft of the Model Criminal Code.¹⁸

In light of this continuity in the drafting, some understanding of the intended scope and effect of the organisational liability provisions can be gleaned from the reports of the MCCOC; the Explanatory Memorandum to the Criminal Code Bill 1994 (*CC Bill*),¹⁹ the Second Reading Speech,²⁰ and the report of the Senate Committee charged with reviewing the CC Bill.

In its Final Report, the MCCOC concluded that the identification approach was no longer appropriate as a basis for corporate criminal liability, given the "flatter structures" and greater delegation to relatively junior officers in modern corporations.²¹

Among the options that the MCCOC considered was a general reversal of the onus of proof, such that, where a director, servant or agent engaged in conduct, both the conduct and the state of mind of the relevant individual would be deemed to be the conduct of the body corporate, and the body corporate would only have a defence if it could prove, on the balance of probabilities, that it exercised due diligence to avoid the conduct.²²

The MCCOC ultimately rejected this approach. The MCCOC stated that its objective

was to develop a scheme of corporate criminal responsibility which as nearly as possible adapted personal criminal responsibility to fit the modern corporation. The Committee believes that the concept of 'corporate culture' ... supplies the key analogy. Although the term 'corporate culture' will strike some as too diffuse, it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. There is a close analogy here to the key concept in personal responsibility – intent. Furthermore, the concept of 'corporate culture' casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.²³

The MCCOC appears to have relied quite heavily on academic commentary in formulating the corporate culture provisions. The Final Report drew on academic writing to outline the justification for corporate culture provisions, noting that:

The rationale for holding corporations liable on [a corporate culture] basis is that '... the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as

¹⁸ See Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Discussion Draft: Chapter 2 – General Principles of Criminal Responsibility* (July 1992) 94-98; Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2 – General Principles of Criminal Responsibility* (December 1992) 104–108 (*Final Report*).

¹⁹ In Australia, bills are routinely supported by Explanatory Memoranda outlining the import and operation of the new legislation.

²⁰ In Australia, Second Reading Speeches set out the main operative provisions of bills, and their merits.

²¹ *Final Report*, above n 18, 105.

²² *Ibid.*, 107.

²³ *Ibid.*

authoritative within the corporation.' (see Field and Jorg, 'Corporate Manslaughter and Liability: Should we be Going Dutch?' [1991] *Crim LR* 156 at 159).²⁴

The CC Bill was considered by the House Standing Committee on Legal and Constitutional Affairs. The corporate culture provisions received some criticism in submissions and evidence to the Standing Committee. Chief Justice Gleeson of the Supreme Court of New South Wales (as he then was) commented that it seemed anomalous to hold corporations criminally liable for 'permitting' conduct,²⁵ which he understood to involve no more than failing to prevent such conduct, when the criminal law would not generally hold individuals liable for this.²⁶

His Honour's submission also expressed concern at the vagueness of 'corporate culture' as a foundation for criminal liability. The evidence of a senior commercial litigation solicitor raised the question of how a 'corporate culture' might be ascribed to a company operating various different businesses, with a fragmented management structure.²⁷

In response, the Attorney-General's Department noted that the 'corporate culture' concept had already been used successfully in the US, in relation to sentencing. The NSW Attorney-General emphasised that the 'corporate culture' concept allows corporate criminal responsibility to mirror, as closely as possible, the fault element of personal criminal responsibility.²⁸

Despite concerns about the drafting of corporate criminal responsibility provisions, among others, the Senate Committee concluded that the CC Bill 'provide[d] a thorough, workable, logical and balanced compromise', and recommended that it be passed.²⁹

The Explanatory Memorandum to the CC Bill restates much of the material in the MCCOC's Final Report:

[The corporate culture provisions] extend[] the *Tesco Supermarkets v Natrass* [1972] AC 153 at 173 rule which recognises that corporations can be held primarily responsible for the conduct of very senior officers. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company.

It extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's written rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (for example, by removing safety

²⁴ Ibid, 111. There are other references to Brent Fisse, 'Corporate Criminal Responsibility' (1991) 15 *Criminal Law Journal* 166 at 173; Brent Fisse, 'Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095.

²⁵ See CCA s12.2.

²⁶ Evidence of Hon Chief Justice Gleeson, excerpted in Senate Legal and Constitutional Committee, *Criminal Code Bill 1994 and Crimes Amendment Bill 1994* (December 1994) 31 (**Senate Committee Report**).

²⁷ Ibid.

²⁸ Ibid, 31–32.

²⁹ Ibid, 38.

guards or equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (for example, recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.³⁰

The Senate Second Reading speech is to similar effect:

The Code introduces the concept that criminal responsibility should attach to bodies corporate where the corporate culture encourages situations which lead to the commission of offences. The provisions make companies accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.

In speaking about this part I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.

At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. For example, the Government is not planning to water down the requirements of section 65 of the Ozone Protection Act 1989 in regard to the matters covered by that act. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.³¹

Section 12 has not been amended since the enactment of the CCA.

3.3 Scope of Organisational Liability Provisions

Section 12.3 of the CCA (see Appendix 1) sets out a form of organisational liability for corporations.

Section 12.3, in its current form, was part of the CCA as made. Section 12 applied to all offences in the CCA as of 16 March 2000, and to all other offences in federal statutes from 15 December 2001.³²

³⁰ Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44; see also Alice Belcher, 'Imagining How a Company Thinks: What is Corporate Culture?' (2006) 11 *Deakin Law Review* 1, 7–8.

³¹ Commonwealth, *Parliamentary Debates*, Senate, 30 June 1994, 2379, 2381 (Senator Crowley, Minister for Family Services) available at <<http://parlinfoweb.aph.gov.au>> at 13 October 2007.

³² Under s2 of the CCA as made, s12.3 was to commence, like the rest of the CCA, on a day to be fixed by proclamation or, if not earlier, within five years from the date of assent (15 March 1995).

The Commonwealth fell behind its anticipated timetable for implementing the new Commonwealth criminal law, and in 2000 passed the *Criminal Code Amendment (Application) Act 2000* (Cth) (*Application Act*). The Schedule to the Application Act provided that s2.2(2) of the CCA was repealed and replaced, with the effect that it read:

2.2 Application

- (1) This Chapter applies to all offences against this Code.
- (2) Subject to section 2.3 [intoxication], this Chapter applies on and after 15 December 2001 to all other offences.
- (3) Section 11.6 [interpretation of 'offences'] applies to all offences.

Despite applying to all Commonwealth offences, s12.3 is limited in scope (the bulk of criminal law is State law, and the CCA itself only contains a limited range of offences, including, for example, bribery of foreign public officials, offences against UN personnel, international terrorist activities and people-smuggling, and some federal statutes are specifically exempt from s12.3).³³

Although the scope of s12.3 is limited by these factors, there is no conceptual barrier to the application of such organisational liability provisions to a broader array of offences.

3.4 Operation of Organisational Liability Provisions

Under s12, where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment, or within their actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed also to the body corporate (s12.2).

If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate if that body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence' (s12.3).

Authorisation or permission for the commission of an offence may be established on, inter alia, the four bases set out in s12.3(2):

- 'the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence';
- 'a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence';
- 'a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'; or
- 'the body corporate failed to create and maintain a corporate culture that required compliance'.

Sections 12.3(2)(a) and (b) (regarding the conduct of a corporation's board of directors or 'high managerial agents')³⁴ essentially maintain the 'identification' approach (although the fact that the physical element of offences committed by any employee, agent or officer, rather than only a senior officer, is attributable to the corporation, is a departure from the identification approach as applied in the UK). Sections 12.3(2)(c) and (d), however,

The effect of this amendment is not clear from the Explanatory Memorandum and Second Reading Speech of the Application Act, but appears to have been that Chapter 2 of the CCA applied to all offences in the CCA as of 16 March 2000, and to all other Commonwealth offences from 15 December 2001.

³³ For example, the consumer protection offences in the *TPA* (see s6AA(2)) and taxation offences in the *Taxation Administration Act 1953* (Cth) (see s8ZD(3)).

³⁴ Defined as employees, agents or officers having 'duties of such responsibility that [their] conduct may fairly be assumed to represent the body corporate's policy': s12.3(6) CCA.

represent a new approach to corporate criminal liability, in that they are founded on the corporation's own wrongdoing, in the form of deficiencies in its 'corporate culture'.

'Corporate culture' is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.

There are also specific provisions that apply where the fault element of an offence is negligence. Essentially, that fault element is the same for a corporation as it is for an individual. However, for the purposes of assessing whether a corporation was negligent:

- negligence may be evidenced by the fact that the commission of the offence was substantially attributable to 'inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers', or 'failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate' (s12.4(3)); and
- the corporation may be found to have the requisite fault element, even though no one individual had that fault element, by viewing the conduct of the corporation 'as a whole' (i.e., by 'aggregating the conduct of any number of its employees, agents or officers') (s12.4(2)).

3.5 Consideration of Provisions

(a) Judicial consideration

Section 12.3 does not appear to have been subject to any judicial consideration to date.

(b) Other commentary

The Australian organisational liability provisions have been noted with interest in many international commentaries.³⁵ Within Australia, the New South Wales Law Reform Commission has recommended that consideration should be given to adopting similar provisions into the law of the State of NSW.³⁶

However, there are difficulties with the provisions.

It may be that corporate liability cannot be established under the provisions unless there is also the conviction of an individual offender.³⁷ Although ss12.3(2)(c) and (d) refer to the 'culture' of a corporation in its own right, they are merely grounds on which it can be established that a body corporate 'authorised or permitted the commission of [an] offence'. Accordingly, in order for a corporation to be liable under these provisions it may first be necessary to establish that an individual has committed an offence. In circumstances in which it is difficult to prosecute an individual, either because the individual is not identifiable, or is out of the jurisdiction, or for some other reason, it is not clear how the provisions might operate.

³⁵ See, e.g., Pieth, Low and Cullen, above n 5, [1.2].

³⁶ New South Wales Law Reform Commission, above n 16, Recommendation 1, available at <http://www.lawlink.nsw.gov.au> at 13 October 2007.

³⁷ Clough and Mulhern, above n 13, 144.

The provisions have also been criticised for blurring the fault element of offences. Under the provisions, a corporation will be liable if it merely 'authorised or permitted' the offence. 'Authorising or permitting' an offence is different to the fault element of the offence itself as it would apply to an individual (for example, intention or recklessness). This is particularly problematic because s12 deals uniformly with different fault elements (intention, knowledge and recklessness), reducing them all to the same 'authorised or permitted' threshold for corporations.³⁸ However, this is an almost inevitable corollary of the fact that corporations do not have the mental capacities of natural persons, and the "corporate" state of mind is not amenable to the same distinctions.

Many aspects of how the provisions will operate in practice remain unclear. Areas of uncertainty include how 'corporate culture' is to be ascertained, and the scale on which 'corporate culture' will be assessed, particularly in circumstances in which the 'corporate culture' of a particular corporate group or entity was acceptable, but the culture in particular business divisions or office sites was deficient.

It may be very difficult to obtain evidence of a corporation's 'culture', and particularly to pinpoint the corporation's 'culture' at a particular moment in time.

As regards the scale of organisational deficiencies, 'corporate culture' is defined as attitudes, policies, rules and so on existing within the body corporate generally 'or in the part of the body corporate in which the relevant activities takes place'. Accordingly, the provisions of s12.3 leave the way open for corporations to be held criminally liable in circumstances where the corporation overall is law-abiding, but one aberrant business unit or site may be permitting the commission of offences. However, this is not necessarily problematic as a matter of legal principle. Liability could arise in similar circumstances under the vicarious liability approach taken in the US.

³⁸ Clough and Mulhern, above n 13, 145-6. However, see s12.3(5), which provides that:

If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

4. United Kingdom

4.1 Overview of Corporate Criminal Liability in the UK

The United Kingdom has, since the 1940s, dealt with corporate criminal liability on the basis of the doctrine of 'identification'.

The doctrine had its origins in a civil case, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,³⁹ in which Viscount Haldane noted

[A] corporation is an abstraction ... its active mind and directing will must consequently be sought in the person ... who is really ... the very ego and centre of the personality of the corporation.⁴⁰

In the 1940s, a series of cases under statutory offence provisions moved away from the then-current model of vicarious liability to find that corporations were directly liable for offences committed by employees. In 1971, the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass (Tesco)*⁴¹ clarified that corporations would be directly liable for wrongdoing committed by persons sufficiently senior to constitute the corporation's 'directing mind and will', on the basis that the actions and culpable mindset of such individuals were the actions and mindset of the company itself.

Since *Tesco*, there has been some shift in the scope of the class of persons considered sufficiently senior to constitute a corporation's 'directing mind and will'. In *Meridian Global Funds Management Asia Ltd v Security Commission*,⁴² the Privy Council held that, in the case of statutory offences, the language of the provisions, their content and policy, served to indicate the persons whose state of mind would constitute the state of mind of the corporation. Accordingly, in order to identify these persons, it is necessary to engage in a rather circular inquiry into whether they have 'the status or authority in law to make their acts the acts of the company'.⁴³

Although the identification doctrine remains the cornerstone of corporate criminal liability in the UK, the recently passed *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) (**Corporate Manslaughter Act**) provides for a form of organisational liability in relation to the offence of manslaughter.

4.2 Genesis of Organisational Liability Provisions

In 1994 the Law Commission published proposals for reforming the law on involuntary manslaughter, and in 1996 issued a report that recommended, inter alia, abolition of the existing offence of unlawful act manslaughter, its replacement by new offences of 'reckless

³⁹ [1915] AC 705.

⁴⁰ At 713.

⁴¹ [1972] AC 153.

⁴² [1995] 2 AC 500.

⁴³ Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2003), 66.

killing' and killing by gross carelessness', and the institution of a new offence of 'corporate killing'.⁴⁴

The government did not introduce any legislation on the strength of the Law Commission's recommendations. Following a ruling in 1999 that the company whose negligence had led to the Southall train disaster, in which seven people had died, could not be convicted of manslaughter by gross negligence unless an individual who constituted a 'directing mind and will' of the company had the requisite mens rea, the Attorney-General referred to the Court of Appeal a question as to whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of a known individual. The Court of Appeal held that the 'identification' model in *Tesco v Natrass* still served as the basis for corporate criminal liability.⁴⁵

In May 2000 the government issued a consultation paper based on the Law Commission's recommendations (**2000 Consultation Paper**). The 2000 Consultation Paper accepted the thrust of Law Commission recommendations that liability should be based on failures in the management or organisation of a corporation's activities.

A draft Corporate Manslaughter Bill was published by the Government on 23 March 2005 (**Draft Bill**). It accepted the notion of failure in the management or organisation of activities as a basis for liability, but inserted a requirement that these failures be referable to senior management.

The Home Affairs and Work and Pensions Committees conducted an examination of the Draft Bill. The Committees made comments on a range of issues, but most relevantly they:

- took issue with removal of a clause clarifying the common law position on causation by providing that management failure could still be the cause of death regardless of whether the immediate cause was the act or omission of an individual;⁴⁶
- advocated the removal of limitations to circumstances in which an organisation would owe a duty of care in negligence, and also limitations to certain specific duties owed;⁴⁷
- commented that it ought to be possible under the Draft Bill to prosecute parent companies where a gross management failure in the parent company had caused a death in a subsidiary, and was concerned by evidence that it might not be possible to do this on the basis of the current law of negligence;⁴⁸ and

⁴⁴ England and Wales Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (1995–96) available at <http://www.lawcom.gov.uk/lc_reports.htm> at 13 October 2007, 127-131.

⁴⁵ *Attorney-General's Reference (No 2 of 1999)* [2000] 3 All ER 182.

⁴⁶ Home and Affairs and Work and Pensions Committees, House of Commons, Parliament of the United Kingdom, *Draft Corporate Manslaughter Bill: First Joint Report of Session 2005 - 06*, vol 1, 25-26 (**House of Commons Committee Report**) available at <<http://www.publications.parliament.uk>> at 13 October 2007.

⁴⁷ *Ibid*, 29-30.

⁴⁸ *Ibid*, 31-32.

- noted that although some witnesses advocated the Canadian or Australian 'corporate culture' approach, it was 'too late to start to consider an entirely new model', and recommended including 'corporate culture' as a separate factor that juries might consider when assessing whether there had been a gross breach of a relevant duty of care.⁴⁹

The Committees were concerned that inclusion of a 'senior management' requirement would:

- encourage delegation of OHS responsibilities to lower-level employees;
- reintroduce the practical obstacles to prosecution posed by the identification approach; and
- apply unevenly, such that a person performing a particular role (eg safety manager of a site) might count as a senior manager in a small company, but not qualify as a senior manager in a larger company, with several sites.⁵⁰

The Committees recommended that:

a test should be devised that captures the essence of corporate culpability. In doing this, we believe that the offence should not be based on the culpability of any individual at whatever level in the organisation but should be based on the concept of a "management failure", related to either an absence of correct process or an unacceptably low level of monitoring or application of a management process.⁵¹

In its response to the House of Commons Committee Report, the Government said that:

- it was confident that the state of case law was such that courts would be able to hold that a management failure was a cause of death, even if the death was more directly caused by another phenomenon, including the acts or omissions of a particular individual;⁵²
- it would be undesirable to institute free-standing criminal liability without any point of reference for what organisations should have done, and too difficult to draft a new set of standards for the requisite standard of conduct, such that the best approach was to retain reliance on the common law duties of care identified in the Draft Bill;
- the liability of parent companies for deaths should be subject to the same test as that of any other company, notably the existence of a relevant duty of care (subject to the stipulation that parent companies will only owe duties to employees and customers of subsidiary companies in 'a narrow group of circumstances')⁵³, and a

⁴⁹ Ibid, 35-36, 51.

⁵⁰ Ibid, 37-41.

⁵¹ Ibid, 44.

⁵² Secretary of State for the Home Department, *Draft Corporate Manslaughter Bill: Government Reply to the First Joint Report from the Home Affairs and Work and Pensions Committees Session 2005-06*, 8 <<http://www.official-documents.co.uk/document/cm67/6755/6755.pdf>> at 13 October 2007.

⁵³ Ibid, 11.

death both referable to senior management and resulting from a gross breach of the relevant duty of care.

- 'corporate culture' was potentially a useful factor to which a jury should be directed in determining whether there had been a gross breach of a relevant duty of care; and
- the Draft Bill moved away from the identification doctrine in that it focused on the way in which a corporation managed or organised its activities, and the 'senior management' limb was necessary to ensure that the Draft Bill did not have the effect of holding organisations liable in circumstances where failings had really only occurred at a low level.

4.3 Scope of Organisational Liability Provisions

The Corporate Manslaughter Act comes into force on 6 April 2008.

Obviously, the organisational liability provisions contained in the statute apply to only the particular offence of manslaughter. However, they might theoretically be adopted in relation to other offences.

4.4 Operation of Organisational Liability Provisions

Prior to the enactment of the Corporate Manslaughter Act, the offence of involuntary manslaughter by gross negligence required:

- that the defendant owe the deceased a duty of care;
- that the defendant have breached that duty of care;
- that the breach caused the death; and
- that the breach of the duty was so bad that it amounted, when viewed objectively, to gross negligence of an order that warranted a criminal conviction.⁵⁴

The existing regime for corporate liability for manslaughter by gross negligence required the identification of an individual sufficiently senior to constitute the 'directing mind and will' of the corporation and who had the requisite mens rea.⁵⁵ No large corporation had ever been successfully prosecuted for manslaughter by gross negligence, and, of the 34 prosecutions for work-related manslaughter brought since 1992, only seven had been successful.⁵⁶ In most cases, the companies were of a size and structure in which it was very easy to identify a 'directing mind and will'.⁵⁷

The Corporate Manslaughter Act abolishes the common law offence of manslaughter by gross negligence as it applies to 'organisations' (defined to include, inter alia, corporations,

⁵⁴ See *R v Adomako* [1995] 1 AC 171 at 183 – 185 and cases cited there.

⁵⁵ *Attorney-General's Reference No 2 of 1999* [2000] 3 All ER 182.

⁵⁶ House of Commons Committee Report, above n 46, vol 1, 7-8

⁵⁷ E.g., in *R v Kite and OLL Ltd* (unreported, Winchester Crown Court, 8 December 1994) where the defendant company had only two directors: discussed in England and Wales Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (1995–96), 82–3, available at http://www.lawcom.gov.uk/lc_reports.htm at 13 October 2007

government departments and police forces), and institutes a statutory regime for corporate criminal liability in relation to manslaughter by gross negligence (extracted in Appendix 2).

Relevantly, the effect of the Corporate Manslaughter Act is as follows:

- An organisation is guilty of the offence of 'corporate manslaughter' ('corporate homicide' in Scotland) where
 - the way in which its activities are managed or organised
 - causes the death of a person; and
 - amounts to a gross breach of a relevant duty of care owed to the deceased; and
 - the way in which the organisation's activities are managed or organised by its 'senior management' is a 'substantial element' of the gross breach of the relevant duty of care.

A 'relevant duty of care' is defined in s2(1) as any one of a circumscribed list of duties owed under the law of negligence (regardless of any statutory schemes displacing liability in negligence, or any common law rules that prevent a duty of care to persons engaged in joint unlawful conduct, or who have accepted a risk of harm). These duties include:

- (a) a duty owed to ... employees or to other persons working for the organisation or performing services for it;
- (b) a duty owed as occupier of premises;
- (c) a duty owed in connection with-
 - (i) the supply by the organisation of goods or services (whether for consideration or not),
 - (ii) the carrying on by the organisation of any construction or maintenance operations [further defined in s2(7)],
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or
 - (iv) the use or keeping by the organisation of any plant, vehicle or other thing;

A 'gross breach' of a duty of care arises if the conduct alleged 'falls far below what can reasonably be expected of the organisation in the circumstances'.

Section 8 provides that, where it is established that an organisation owed a relevant duty of care to a person, and it falls to a jury to decide whether there was a gross breach of that duty, the jury must consider whether the evidence establishes that there was a failure to comply with any OHS legislation that related to the alleged breach and, if so, how serious the failure to comply was, and how much of a risk of death it posed. The jury may also consider, among any other matters it considers relevant, any health and safety guidance that relates to the alleged breach, and 'corporate culture' factors:

the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any ... failure [to comply with OHS legislation related to the alleged breach], or to have produced tolerance of it[.]

'Senior management' is defined as:

the persons who play significant roles in:

- (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or
- (ii) the actual managing or organising of the whole or a substantial part of those activities.

There are exceptions to the regime under the Corporate Manslaughter Act that apply to certain acts or decisions of public authorities, or in the exercise of 'exclusively public functions' (s3); military activities (s4); policing and law enforcement (s5); emergencies (s6); and child protection and probation functions (s7).

Where an organisation is convicted of corporate manslaughter a court may, on an application by the prosecution specifying the terms of the proposed order, make a 'remedial order' requiring the organisation to take specified steps to remedy the breach of a relevant duty of care, and other related matters or deficiencies. The prosecution is required to consult with enforcement authorities in relation to the formulation of the proposed order. A court may also make a 'publicity order' requiring the fact of conviction and certain other matters to be publicised in a specified manner (s10). Failure to comply with a remedial order or a publicity order is itself an offence (ss9(5), 10(4)).

Interestingly, under s18, an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.

4.5 Consideration of Provisions

As the provisions are not yet in force, there has been no judicial commentary on their operation.

5. Canada

5.1 Overview of Corporate Criminal Liability in Canada

Like Australia, Canada is a federal system, but unlike Australia and the US, the criminal law is exclusively a federal responsibility (though provincial legislatures do have power to enact penal provisions in order to enforce provincial legislation).

Corporations are included within the definition of 'persons' who may commit offences under the Canadian *Criminal Code*,⁵⁸ but the actual attribution of liability to corporations occurs on the basis of the identification doctrine found in the UK (see section 4 above).⁵⁹

Canadian criminal law distinguishes between 'mens rea' offences (requiring a culpable state of mind), 'strict liability' offences (for which a defendant will be liable unless it can be established that the defendant used due diligence to avoid the commission of the offence) and 'absolute liability' offences (for which a defendant will be liable regardless of their state of mind).

In the case of absolute and strict liability offences, no question arises as to the corporation's state of mind. Despite judicial statements that corporate criminal liability under the identification approach is direct, rather than vicarious, it seems that the physical element of these offences is imputed on the basis of standard vicarious liability, such that commission of the physical element of the offences by a corporation's employee or agent will engage corporate criminal liability.⁶⁰

In the case of mens rea offences, the identification doctrine applies as it would in the UK. However, the Canadian decisions may admit a wider class of individuals as the 'directing mind and will' of the corporation.⁶¹ The emphasis in Canada is less on the office held by the individual in question than the question of whether the individual is the directing mind and will in their particular area of responsibility.⁶² The Supreme Court has held that

[The] key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy.⁶³

There has been consideration in Canada of an approach based on organisational liability, but the most recent reform of the criminal law applying to corporations, in 2003, retained the basic identification approach, while providing that liability could arise if the 'directing

⁵⁸ See Revised Statutes of Canada, C-46, s2.

⁵⁹ *Canadian Dredge and Dock Co v The Queen* [1985] 1 SCR 662.

⁶⁰ Gerry Ferguson, 'The Basis for Criminal Responsibility of Collective Entities in Canada' in Albin Eser, Günter Heine & Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 165-7.

⁶¹ See *The Rhone v The Peter A B Widener* [1993] 1 SCR 497.

⁶² *Canadian Dredge and Dock Co v The Queen* [1985] 1 SCR 662 at 676.

⁶³ *The Rhone v The Peter A B Widener* [1993] 1 SCR 497 at 526. However, this test gives rise to difficulties of application: the Ontario Court of Appeal appears to have applied it more strictly in *R v Safety-Kleen Canada Inc* (1997) 114 CCC (3d) 214 than in *R v Church of Scientology of Toronto* (1997) 116 CCC (3d) 1.

mind and will' of the corporation had failed to take proper steps to avoid the commission of an offence.

5.2 Consideration of a New Basis for Corporate Criminal Liability

Prior to the 2003 reforms, the issue of corporate criminal liability had been examined in several previous reviews of legislation and law reform projects, but none of these reviews had given rise to draft legislation.

The Westray Mine incident of May 1992, in which 26 miners lost their lives as a result of an explosion, provoked renewed interest in corporate criminal liability. The report of a public inquiry into the accident, released in 1997, concluded that mismanagement had 'created unsafe working conditions in the mine that directly contributed to the tragedy', and recommended that the Canadian Government examine the accountability of corporate executives for wrongful and negligent acts of corporations, and introduce any legislative amendments necessary to ensure that executives are held accountable for workplace safety.

Interestingly, the report drew attention to a number of 'corporate culture' factors in assessing the causes of the incident:

complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity, and neglect ... Many of the incidents that now appear to fit into the mosaic might at the time, and of themselves, have seemed trivial. Viewed in context, these seemingly isolated incidents constitute a mind-set or operating philosophy that appears to favour expediency over intelligent planning and that trivializes safety concerns ... a story of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference.⁶⁴

... management did not instil a safety mentality in its workforce. Although it stressed safety in its employee handbook, the policy it laid out there was never promoted or enforced. Indeed, management ignored or encouraged a series of hazardous or illegal practices, including having the miners work 12-hour shifts, improperly storing fuel and refuelling vehicles underground, and using non-flameproof equipment underground in ways that violated conditions set by the Department of Labour — to mention only a few.⁶⁵

... many instances of hazardous and illegal practices encouraged or condoned by Westray management demonstrate its failure to fulfil its legislated responsibility to provide a safe work environment for its workforce. Management avoided any safety ethic and apparently did so out of concern for production imperatives ... The unsafe use of torches underground was a common practice at Westray. Management was aware of the practice, condoned the practice, and reprimanded those who condemned it. In so doing, management sent a clear message to the underground workers. Management's unsafe mentality was, in effect, filtering down to the Westray workforce.⁶⁶

Recommendation 73 provided:

⁶⁴ Justice K Peter Richard (Commissioner), *The Westray Story: A Predictable Path to Disaster: Report of the Westray Mine Public Inquiry* (1997), Executive Summary (**Westray Inquiry Report**) available at <<http://www.gov.ns.ca>> at 13 October 2007.

⁶⁵ Ibid, Summary.

⁶⁶ Ibid, Consolidated Findings.

The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.⁶⁷

In response to Recommendation 73, the federal Minister of Justice agreed to examine the issue of corporate criminal liability.

A Private Member's Bill (**Bill C-284**) was drafted proposing a new provision on corporate criminal liability, which would have read in part:

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

...

(b) the act or omission was tolerated, condoned or encouraged by the policies or practices established by or permitted to subsist by the management of the corporation, or the management of the corporation could and should have been aware of but was wilfully blind to the act or omission,

(c) the management of the corporation had allowed the development of a culture or common attitude among its officers and employees that encouraged them to believe that the act or omission would be tolerated, condoned or ignored by the corporation ...

The question of corporate criminal liability was referred to the Standing Committee on Justice and Human Rights. A Discussion Paper prepared by the Department of Justice was used as the basis for deliberations, and public hearings were held. On 10 June 2002, the Standing Committee on Justice and Human Rights presented its Fifteenth Report to the House of Commons, recommending

that the Government table in the House legislation to deal with the criminal liability of corporations, directors, and officers.⁶⁸

The Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights noted that the Westray incident had made obvious that 'regulations, no matter how effective on paper, are worthless when they are ignored or trivialized by management'.⁶⁹ The Government Response also observed the 'stark contrast' between the detailed recommendations made by the Commissioner as regards regulation, corporate policies and practices, and the limited recommendation that the Government should study 'the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation'.⁷⁰

⁶⁷ Ibid, Consolidated Recommendations.

⁶⁸ Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Fifteenth Report (2002).

⁶⁹ Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights (November 2002) (**Government Response**), Background, available at <<http://www.justice.gc.ca>> at 14 October 2007.

⁷⁰ Quoted *ibid*, Background.

The Government Response observed that criminal law 'must be an instrument of last resort', and should in most cases be secondary to regulatory legislation.⁷¹ The Government Response noted that public consultation by the Standing Committee on Justice and Human Rights had indicated little support for the vicarious liability system that characterised US law. The Government stated that it shared concerns that 'it would be wrong in principle to impose the stigma of a criminal offence on a corporation when its actions are not morally blameworthy'.⁷² The creation of specific offences for corporations, such as corporate manslaughter (similar to proposals in the UK and Victoria) attracted mixed responses.

The Australian 'corporate culture' approach was canvassed in some detail. However, there was concern about its consistency with the *Canadian Charter of Rights and Freedoms*.⁷³ Further, the Government noted that:

"corporate culture" will not necessarily simplify the investigation of alleged corporate crime. It is still necessary to determine the facts. Determining whether the directors and officers of a corporation tolerated lax procedures would probably require the same investigation as determining whether they directed certain acts or omissions.⁷⁴

Ultimately, the Government concluded that:

Corporate culture is at this moment an untested basis for criminal liability. The Government is conscious of the need for clarity in the law and considers that 'corporate culture' is too vague to constitute the necessary corporate *mens rea*.⁷⁵

The Government opted to retain the basic 'identification' model for corporate criminal liability. However, in recognition of the fact that the modern structure of corporations necessarily leaves managers below board level a great deal of responsibility in implementing policies, the Government sought to expand the class of persons who could constitute the 'directing mind and will' of the corporation for the purposes of imputing fault.

5.3 Operation of Current Provisions on Corporate Criminal Liability

Bill C-45 amended the *Canadian Criminal Code* with effect from 31 March 2004. The new provisions codified the liability of corporations for offences with a fault element (thus, not strict or absolute liability offences).

Section 21 of the *Criminal Code* (see Appendix 3) defines 'party to an offence' to include persons actually committing the offence, persons abetting the offence, and persons doing or omitting to do anything for the purpose of aiding any person to commit the offence.

Under s 22.1, a corporation will be a party to an offence with a fault element of negligence if either a 'representative' (an employee, agent or contractor), or two or more

⁷¹ Ibid, Background.

⁷² Ibid, The Vicarious Liability Model.

⁷³ Corporations may enjoy the rights set out in the *Charter*, although the scope of the rights as they apply to corporations will depend, inter alia, on the nature of the right in question: *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927; *Canada (Attorney-General) v JTI McDonald Corp* [2007] SCC 30.

⁷⁴ Government Response, above n 69, Corporate Culture Approach and C-284.

⁷⁵ Ibid.

representatives whose conduct is aggregated, acting within the scope of their duty, are parties to the offence, and the 'senior officer' responsible for the relevant aspect of the corporation's activities 'departs markedly' from the standard of care that could reasonably have been expected to prevent a representative of the corporation from being a party to the offence.

Under s22.2, a corporation will be a party to an offence with a fault element other than negligence when one of its 'senior officers', having an intention at least in part to benefit the organisation:

- acts within the scope of their authority and is themselves a party to the offence;
- acts within the scope of their authority, has themselves the mental state required to be a party to the offence, but directs other representatives of the corporation to actually commit the offence; or
- knows that a representative of the corporation is or will be a party to the offence, but fails to take all reasonable measures to prevent this.

In their structure, the provisions on offences with a fault element other than negligence remain close to the identification doctrine. However, the provisions extend beyond the orthodox identification approach in that the 'senior officer' ('a representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities') is more expansive than the class of persons who could constitute the 'directing mind and will' of a corporation in the UK.

The 2004 amendments to the *Criminal Code* also moulded probation orders to the circumstances of corporate offenders, providing that orders for probation against corporate defendants could include, inter alia, requirements that the corporation establish policies and procedures to reduce the likelihood of the corporation committing a subsequent offence, communicate those policies and procedures within the corporation, and report to the Court on their implementation.

We have not been able to identify any cases to date in which the new provisions were applied.

6. United States

6.1 Overview of Corporate Criminal Liability

Like Australia, the US has criminal law at both the state and federal level. The majority of prosecutions are brought under State criminal laws.

The liability of corporations under federal criminal law is based on the doctrine of *respondeat superior*, or vicarious liability.

The position in relation to State criminal laws is more complex. Some states have adopted more sophisticated statutory provisions concerning corporate liability, based, in some cases, on the *Model Penal Code*.⁷⁶

Despite the relatively simple approach to corporate criminal liability at the federal level, the US has advanced much further than Australia, the UK or Canada in developing sentencing regimes that are adapted to corporate defendants. Under the *Federal Sentencing Guidelines Manual*, 'corporate culture' considerations are taken into account in assessment of the appropriate fine and other orders to be imposed on corporate defendants.

However, the Department of Justice is increasingly relying on 'deferred and non-prosecution agreements', which allow corporate defendants to avoid indictment at all by taking a range of steps, which usually include payment of a monetary penalty, and, more importantly for present purposes, making changes to their corporate governance.⁷⁷

6.2 Liability under Federal Law – *Respondeat Superior*

Corporations may be criminally liable for the illegal acts of officers, employees or agents, provide that it can be established that:

- the individual's actions were within the scope of their duties; and
- the individual's actions were intended, at least in part, to benefit the corporation.

As regards the first requirement, obviously it is not the individual's illegal actions which need to be within the scope of their duties in order for corporate liability to be attracted. Instead, it is sufficient that the individual commits an offence in the course of pursuing objectives or undertaking tasks which are authorised or required by virtue of their position. Even the fact that a superior officer has given express instructions that the individual should not engage in the conduct constituting an offence does not prevent that conduct from being within the scope of the individual's duties.

The test was discussed recently in *US v Potter* 463 F 3d 9 (1st Cir, 2006), a case in which a general manager had paid a bribe to the Speaker of the Rhodes Island House of Representatives, despite the President of the company having considered the proposed course of action and ordered him not to proceed. The Court of Appeals observed:

⁷⁶ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (2003) 59.

⁷⁷ Peter J Henning, 'The Organizational Guidelines: R.I.P.?' (2007) 116 *Yale Law Journal Pocket Part* 312.

For obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized ... The principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal. ... despite the instructions [the individual in question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable even if he overstepped those instructions.⁷⁸

As regards the requirement that the individual's actions be intended to benefit the corporation, all that this requires is that benefit to the company be *one* motivation of the individual's conduct. The test appears to be relatively undemanding. In *US v Sun-Diamond Growers of California* 138 F 3d 961 (DC Cir, 1998), the vice-president for corporate affairs, responsible for lobbying for the company's interests, also happened to be friends with the Secretary of Agriculture. The Secretary of Agriculture requested the individual to assist in retiring the Secretary's brother's debts accrued in running for the Senate. The vice-president for corporate affairs arranged to transfer \$5000 of the company's money towards this debt, disguising it as a payment to a third party communications agency. The Court of Appeals held that, although the acts could be interpreted as acts of friendship for the Secretary, they could also have been intended to benefit the company by consolidating its relationship with the Secretary of Agriculture, despite the fact that the illegal acts effectively defrauded the company.

6.3 Liability under State Laws

State criminal laws vary in their approach to corporate criminal liability.

Some States have provisions based on the *Model Penal Code*, which, while preserving a mechanism for imputing liability that is very similar to the vicarious liability model existing in federal criminal law, also allows a corporation to be convicted of an offence if the offence was

authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial agent acting on behalf of the corporation within the scope of his office or employment.⁷⁹

6.4 'Corporate Culture' Factors in Sentencing

Chapter 8 of the *Federal Sentencing Guidelines Manual* sets out extremely detailed guidelines for the sentencing of 'organizations'⁸⁰ convicted of federal felonies and Class A misdemeanours and, insofar as it provides for implementation of 'compliance and ethics programs', is clearly intended to foster reform of the 'corporate culture' of defendants.

⁷⁸ At 42 – 43.

⁷⁹ American Law Institute, *Model Penal Code* (1981 revision) §2.07(1)(c).

⁸⁰ 'Organization' in this context means a person other than an individual, and includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

Chapter 8 was first introduced in 1991 after several years of research and debate about the best approach to sentencing corporate defendants.⁸¹

'Corporate culture' considerations are particularly prominent in two aspects of Chapter 8, namely the assessment of appropriate fines, and as an aspect of corporate 'probation'.

For the purposes of calculating a fine range, Chapter 8 provides that Courts should determine a 'culpability score' on the basis of certain aggravating and mitigating factors.

One aggravating factor is 'involvement or tolerance of criminal activity', said to arise where:

- (A) the organization had 5,000 or more employees and
 - (i) an individual within high-level personnel of the organization participated in, condoned, or was wilfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the offense was committed had 5,000 or more employees and
 - (i) an individual within high-level personnel of the unit participated in, condoned, or was wilfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit.⁸²

In 2006, involvement in or tolerance of wrongdoing was taken into account as an aggravating factor in the determination of a 'culpability score' in just over 60% of sentences under Chapter 8.⁸³

Another aggravating factor is the absence of an 'effective compliance and ethics program'.

In 2006, such absence of a compliance program was an aggravating factor in the determination of a 'culpability score' in 100% of sentences under Chapter 8.⁸⁴

⁸¹ Diana E Murphy, 'The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics' (2002) 87 *Iowa Law Review* 697, 701-2; Richard S Gruner, 'Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform' (1994) 36 *Arizona Law Review* 407, 411-14.

⁸² United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (2006) §8C2.5(b)(1) (**Sentencing Guidelines**) available at <<http://www.ussc.gov>> at 14 October 2007. Parallel provisions exist for organizations having more than 1000, 200, 50 and 10 employees. These provisions have clearly been designed with careful attention to corporate structures and empirical evidence as to how corporations behave. The 'background' notes:

The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are wilfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or wilful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement..

⁸³ United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (11th ed., 2006), Table 54 (**Sentencing Sourcebook**) available at <<http://www.ussc.gov>> at 14 October 2007. The report covers US fiscal year 2006, i.e. 1 October 2005 to 30 September 2006).

Mitigating factors include the existence of an 'effective compliance and ethics program' (defined in some detail below), although this does not apply if

- the organisation unreasonably delayed reporting the offence to the authorities;⁸⁵ or
- an individual within high-level personnel of the organisation, a person within high-level personnel of the unit of the organisation within which the offence was committed where the unit had 200 or more employees, or an individual with either overall responsibility or day-to-day operational responsibility for the compliance and ethics program itself, participated in, condoned, or was wilfully ignorant of the offence.⁸⁶

There is a rebuttable presumption that the organisation did not have an effective compliance and ethics program if an individual

- within high-level personnel of an organisation having fewer than 200 employees; or
- within substantial authority personnel, but not within high-level personnel, of any organisation;

participated in, condoned, or was wilfully ignorant of, the offence.

Under the *Federal Sentencing Guidelines Manual*, the Court is required to order a term of 'probation' for corporations (for a period not exceeding five years⁸⁷) where this is necessary, inter alia, to 'ensure that changes are made within the organization to reduce the likelihood of future criminal conduct'.⁸⁸ Probation terms may include requirements to develop and submit to the Court an effective compliance and ethics program, make periodic reports as to compliance with the program, and submit to audits and interviews of employees, conducted at the corporation's expense by the probation officer or court-appointed experts.⁸⁹ The US Sentencing Commission records that in 2006, a period of probation was ordered in 197 cases of the 217 cases (90.8%) decided pursuant to the 'organizational sentencing' chapter of the *Federal Sentencing Guidelines Manual*.⁹⁰ In 41 of 217 cases (19.8%), the defendant was ordered by the Court to develop a compliance and ethics program.⁹¹

The *Federal Sentencing Guidelines Manual* sets out in some detail the parameters of a the 'effective compliance and ethics program' that may be relevant to a corporate defendant's 'culpability score' and / or its probation terms. The relevant provisions are set out in Appendix 4 and have clearly been drafted with close attention to the structures of modern corporations.

⁸⁴ Ibid.

⁸⁵ *Sentencing Guidelines*, above n 82, §8C2.5(f)(2).

⁸⁶ Ibid, §8C2.5(b)(3)(A).

⁸⁷ Ibid, §8D1.2.

⁸⁸ Ibid, §8D1.1(a)(6).

⁸⁹ Ibid, §8D1.4(c).

⁹⁰ *Sentencing Sourcebook*, above n 83, Table 53.

⁹¹ Ibid.

6.5 'Corporate Culture' Factors and Prosecutorial Discretion

Corporations have typically constituted only a tiny percentage of defendants sentenced for federal offences. Fewer than 1 per cent of federal sentences imposed between 1996 and 2000 were imposed on organisations as opposed to individuals.

Moreover, as noted above, there is increasing reliance by federal prosecutors on 'deferred or non-prosecution agreements' under which corporations avoid indictment in exchange for undertaking certain obligations, often including payment of a monetary penalty and / or reforms of their corporate governance regime.

The 'Principles of Federal Prosecution of Business Organizations' issued by the US Deputy Attorney-General provide guidance on the basis on which prosecutors should decide whether to bring charges against corporate defendants, and decide which matters should be addressed in plea agreements.⁹²

The McNulty Memorandum provides that, in deciding whether to bring charges against corporations, prosecutors generally apply the same factors as they would for an individual defendant, but that, as a result of the special position of corporate defendants, some additional considerations may be relevant. The nine specified additional considerations include:

The pervasiveness of wrongdoing within a corporation, including the complicity in, or condonation of, the wrongdoing by corporate management.

[and]

The existence and adequacy of the corporation's pre-existing compliance program.⁹³

The McNulty Memorandum goes on to stipulate that, of the issues going to 'pervasiveness of wrongdoing', 'the most important is the role of management ... management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged'.⁹⁴ As regards compliance programs, the McNulty Memorandum emphasises the importance of assessing whether the compliance program is merely a 'paper program' or is actually being implemented and enforced.⁹⁵

In circumstances where a plea agreement is reached, the McNulty Memorandum specifies that it will be appropriate to require corporate wrongdoers to comply with an adequate compliance program.⁹⁶

⁹² The current version of the Principles is that issued by Deputy Attorney-General Paul McNulty in December 2006 (*McNulty Memorandum*). The McNulty Memorandum supersedes the previous version of the Principles issued by Deputy Attorney-General Larry D Thompson in 2003.

⁹³ McNulty Memorandum, 4, available at <<http://www.usdoj.gov>> at 14 October 2007.

⁹⁴ Ibid, 6.

⁹⁵ Ibid, 14.

⁹⁶ Ibid, 19.

7. Switzerland

7.1 The Genesis of the Swiss Corporate Criminal Liability Provisions

It has been possible for several years to punish corporations for tax evasion and related offences under Swiss tax law, and to impose administrative penalties directly on corporations whose activities have resulted in the commission of an infraction, where an investigation to identify the physical person responsible would require excessive resources.⁹⁷ However, prior to the 1980s, it had been assumed that the Swiss system, heavily influenced by the principle *societas delinquere non potest*, could not accommodate generalised criminal liability for corporations.

In the 1980s, the Swiss Conseil fédéral considered introducing provision for corporate criminal liability alongside provisions dealing with organised crime, and reinforcing powers of confiscation in cases of money-laundering. The introduction of criminal liability for corporations proved controversial and was abandoned.

The advent of the *Convention against Transnational Organized Crime*, the European Union's *Convention on the Protection of the Environment through Criminal Law* and the OECD Bribery Convention, all of which require States to introduce measures for the effective punishment of corporations committing certain offences, forced Switzerland to reconsider corporate criminal liability.

The Conseil fédéral⁹⁸ submitted to Parliament a proposal for the introduction of provisions on corporate criminal liability, in the context of a general revision of the Penal Code. The focus at this stage was on the importance of providing for corporate criminal liability in cases in which the physical persons responsible for the offence could not be identified. This provision would become article 102(1) of the Swiss Penal Code.

The Conseil des Etats,⁹⁹ influenced in part by the requirements of the OECD *Convention on Combating Bribery of Foreign Public Officials* added a provision that is now art 102(2), allowing a corporation to be directly liable, regardless of whether particular physical persons could be held liable, in relation to certain limited offences.

7.2 An Overview of the Corporate Liability Provisions of the Swiss Penal Code

As a result of its somewhat convoluted historical and legislative origins, art 102 (extracted in Appendix 5) of the Swiss Penal Code provides two alternative bases of corporate criminal liability which will be examined in more detail below.

Article 103 provides for the calculation of fines against corporations found guilty under art 102 on the basis of several factors, including the 'organisation' of the company, a factor

⁹⁷ Peter Müller, 'Petite histoire législative: Societas delinquere potest' (June-July 2003) *L'Expert-comptable Suisse spéciale: La punissabilité de l'entreprise* 11; E Stauffacher, 'La Criminalisation du comportement collectif: Suisse' in Hans de Doelder and Klaus Tiedemann (eds), *La Criminalisation du Comportement Collectif* (1996) 347.

⁹⁸ The Conseil fédéral, or Federal Council, is a seven-person body that acts as the head of the Executive. It is approximately equivalent to the US President or the English or Australian Prime Ministers.

⁹⁹ The Conseil des Etats, or Council of States, is the upper house of the Swiss legislature. 'States' refers to the country's 26 cantons, 20 of which send two members to the Conseil and six of which send one member for a total of 46 members.

that would seem to invoke notions of corporate culture and is discussed further below in relation to art 102.

(a) Article 102(1)

Article 102(1) provides:

A crime or a misdemeanour that is committed in a corporation¹⁰⁰ in the exercise of commercial activities conforming to its objects is imputed to the corporation if it cannot be imputed to an identified physical person by reason of the lack of organisation of the corporation. In such a case, the corporation shall be punished with a maximum fine of five million francs.

A number of elements emerge. Plainly, art 102(1) provides for corporate criminal liability only in the alternative to the liability of an identified natural person. Two additional criteria seem to exist: the offence must be committed 'in' the corporation in question and it must be 'in the exercise of commercial activities conforming to [the corporation's] objects'.

The OECD Examiners who visited the country to assess whether Switzerland was in compliance with its obligations under the Bribery Convention considered these requirements. In relation to the requirement that an offence be committed in a corporation, they observed:

The Swiss authorities note that the notion ... implies the existence of a certain organisational or hierarchical link between the individual and the enterprise. On that basis, they conclude that the agent may be a *de jure* or *de facto* body, an employee occupying a senior managerial function, or a mere employee with no particular powers. With regard to outside agents, they consider that all external agents fall within the definition of Article [102(1)] but Swiss commentators appear to be divided on this question.¹⁰¹

The Examiners noted, however, that law was susceptible to narrower interpretation.¹⁰² In discussing the requirement that the offence be committed in line with the objects of the corporation, they noted:

Swiss prosecutors and judges considered that the notion could be interpreted as applying to acts within the enterprise's sphere of activity, the purpose being to exclude private acts by employees of the enterprise.¹⁰³

It has also been suggested that that this stipulation merely seeks to bring within art 102(1) situations in which corporations pursue legitimate ends by illegal means (for example, operate industrial or nuclear facilities while failing to take requisite steps to protect the environment).¹⁰⁴

¹⁰⁰ Corporation here is used as equivalent to *entreprise* as defined by article 104.

¹⁰¹ OECD, *Switzerland: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2004) 37 - 38 (**Switzerland Report**)

¹⁰² *Ibid*, 37.

¹⁰³ *Ibid*, 38. See also Robert Roth, 'Une responsabilité sans culpabilité: L'entreprise, la "faute d'organisation" et le droit pénal' (June-July 2003) *L'Expert-comptable Suisse spéciale: La punissabilité de l'entreprise* 18-19.

¹⁰⁴ Roth, *ibid*, 18 – 19.

The meaning of 'lack of organisation' was also considered by the OECD Examiners, who considered it raised significant practical difficulties for the prosecution. They observed that it would be difficult to carry out a general assessment of the organisation of a large enterprise¹⁰⁵ and that the position was further complicated in the case of corporate groups.¹⁰⁶ In the circumstances, the Examiners appeared to suggest that it might be appropriate to reverse the burden of proof, stating '[t]he enterprise is much more familiar than the judiciary with the nature of its own internal organisation, its qualities and its defects'.¹⁰⁷

Critics of the laws have pointed out that art 102(1) may encourage persons responsible for taking decisions in a corporation to deliberately blur the lines of responsibility in order to escape personal liability and ensure any prosecution is brought against the corporation instead.¹⁰⁸

(b) Article 102(2)

Article 102(2) provides:

In the case of a breach referred to in [the specified articles of the Penal Code] the corporation is punished independently of the culpability of physical persons if the corporation can be said to have not taken all reasonable and necessary organisational measures to prevent such a breach.

Article 102(2) provides for a finding of corporate guilt on, essentially, the basis of negligence. Unlike, art 102(1), it establishes a form of direct criminal liability on the part of the corporation, which is not conditioned upon the identification or conviction of any natural person. Also, unlike art 102(1) which appears to be of general application, art 102(2) is specifically restricted to six offences.¹⁰⁹

It is not entirely clear what restrictions, if any, exist on liability under art 102(2). It may be that the fact that one of the listed offences has been committed by someone affiliated with the corporation is sufficient to make the corporation liable for failure to prevent that offence, but this would seem unlikely. The Examiners suggest that art 102(2) is subject to the requirement from art 102(1) that the offence be committed 'within' the corporation.¹¹⁰ They make no observation as to whether it must meet with the requirement of being in conformity with the corporation's objects. It does appear that it applies to offences committed by an employee or agent at any level of the corporation.¹¹¹

¹⁰⁵ *Switzerland Report*, above n 101, n 91.

¹⁰⁶ *Ibid*, n 93.

¹⁰⁷ *Ibid*, 39. The Swiss authorities responded by suggesting that any reversal of the burden of proof in criminal proceedings would contravene art 6 of the European Convention on Human Rights. *Quaere* whether this is correct.

¹⁰⁸ Vincent Jeanneret, 'Une loi bâclée? Les nouvelles dispositions seront-elles vraiment appliquées?' (June-July 2003) *L'Expert-comptable Suisse spéciale: La punissabilité de l'entreprise* 6.

¹⁰⁹ The offences are stated in the OECD Phase 2 reported to be bribery, money laundering, two terrorism related offences and 'participation in a collective undertaking'. See *Switzerland Report*, above n 101, n 92.

¹¹⁰ *Ibid*, 37.

¹¹¹ *Ibid*.

The Examiners also considered what was meant by 'all reasonable and necessary organisational measures'. They noted that the legislation itself does not provide any indications of what is required, but Swiss officials explained that reference would be had to external standards relevant to the field of offending, which might include international standards in certain cases.¹¹² The Examiners also stated:

According to the Swiss authorities, as far as organisational measures are concerned, consideration must be given to a general due diligence obligation which extends to the overall activity of the enterprise. According to them, this obligation is well-known in relation to offences committed through negligence by individuals. Here, case law has established what is understood by the term "duties of diligence" in certain professions (doctors, skiing instructors, mountain guides), even though the law is silent on that point. In other words, the situation is comparable and case law needs to develop what is to be understood by "reasonable and necessary organisational measures". The Swiss authorities consider that the courts will have to consider what another, comparable enterprise would reasonably have done, what instructions were given, what controls were in place, what internal information was provided and what the overall organisation was.¹¹³

As such, it would appear that art 102(2) might raise questions akin to a corporate culture provision, as it focuses attention on the corporation's internal attempts to comply with the requirements of the relevant law.

Critics of the legislation have pointed out that art 102(2) thus allows corporations to be held criminally liable on the basis of something akin to negligence, in relation to certain limited offences, whereas there could be no criminal liability for commission of the same offences by a human without the *mens rea* of intention.¹¹⁴ On the other hand, some commentators have drawn the distinction between liability for the negligent commission of offences, to which objection is taken, and the negligent fostering of conditions in which an offence can occur, which is slightly different.¹¹⁵

7.3 Articles 102(1) and (2): Overlap and Differentiation

It is not entirely clear whether the organisational deficiencies upon which arts 102(1) and (2) turn are of a different nature. To the extent that the relevant wording differs, this is probably referable to the fact that the two provisions were conceived by different bodies, at different stages of the legislative process.¹¹⁶

Commentators have suggested that the lack of organisation to which art 102(1) refers involves unclear management structures, a lack of supervision, the absence of records, or falsification of records,¹¹⁷ whereas the enquiry under art 102(2) is likely to encompass such

¹¹² Roth, above n 103, 22.

¹¹³ *Switzerland Report*, above n 101, 38.

¹¹⁴ Jeanneret, above n 108, 7.

¹¹⁵ Roth, above n 103, 22.

¹¹⁶ Müller, above n 97, 15.

¹¹⁷ *Ibid*, 13.

matters as training, instructions to staff, the control of activities of collaborating organisations, the choice of staff and recruitment practices.¹¹⁸

As art 102(1) applies to all offences, it has been pointed out that, even where a corporation has in place adequate organisational measures to prevent an offence mentioned in art 102(2), where an individual nevertheless commits that offence, the corporation may be prosecuted under art 102(1) if it is not organised in such a way that the individual offender can be identified.¹¹⁹ Where both arts 102(1) and (2) potentially apply, i.e. in situations where the individual offender cannot be identified, and the corporation has not taken reasonable steps to prevent the commission of a relevant offence, art 102(2) applies to the exclusion of art 102(1), presumably as a result of the *lex specialis* principle.

¹¹⁸ Roth, above n 103, 22.

¹¹⁹ Jeanneret, above n 108, 7.

8. Finland

8.1 Brief History of Corporate Liability in Finland

Finland's Penal Code was created in 1889 and, like many civil law countries, operated on the basis that only natural persons could be guilty of offences. The first proposal for corporate criminal liability was made by the Environmental Offences Committee in 1973, suggesting a chapter be added to Code dealing with environmental offences including provisions for corporate criminal liability. Under the proposal, corporations would be liable on a strict liability basis.

In 1976, the Criminal Law Committee produced a report on the reform of the entire Finnish Penal Code which recommended the introduction of a chapter dealing exclusively with corporate criminal liability. This report set the tone of the work done by the Penal Code Task Force, which made a similar proposal in 1987. This proposal was commented on by the Commission for the Examination of Legislation in 1990 and formed the basis of Bill 95/1993.¹²⁰ That bill did not pass, but an Act in seemingly identical terms was passed as 743/1995. Aspects of Chapter 9 were amended by Act 61/2003.

8.2 Corporate Criminal Liability in Finland: Provisions of the Penal Code

(a) The Structure of Chapter 9

Before discussing the mechanics of attribution under Chapter 9 of the Penal Code (extracted in Appendix 6), it is worth examining the structure of the relevant provisions which, for our purposes, are sections 1, 2, 3 and 4.

Section 1 is the operative provision. It declares that a corporation may be subject to a fine for an offence committed 'in its operations'.

Sections 2 and 3 are interrelated, if not overlapping. Section 2 appears to examine the relationship between the offence and the corporation. It essentially requires the corporation to have played a facultative role in the commission of the offence, either through the conduct of management or through a negligent failure to prevent the offence. Section 2 also provides for 'anonymous guilt' where no specific offender can be identified.

Section 3 seems to look at the connection between the offender and the corporation. It raises questions of authority, intention and status on the part of the offender.

One possible way of looking at the distinction between section 2 and 3 is to see section 2 as forming a sort of corporate *actus reus*, as it requires some act or omission on the part of the corporation at risk. Section 3, on the other hand, could be viewed as kind a of question of corporate *mens rea* by asking whether the offender is the kind of person whose behaviour may be attributed to the corporation. It should be stressed that this explanation is a common law gloss to assist comprehension and that, ultimately, Chapter 9 must be approached on its own terms.

¹²⁰ See M Riihjärvi, 'Corporate Criminal Liability – Finland' in de Doelder and Tiedemann (eds), *La Criminalisation du Comportement Collectif* (1996) 203, 211 (Riihjärvi).

Section 4, which we will not examine at length, provides a residual discretion to the court to decline to punish the corporation. It sets out a list of factors which the court may take into account in deciding whether to punish.

(b) Primary Criteria for Liability

Section 2 of Chapter 9 provides:

Section 2 - Prerequisites for liability (61/2003)

(1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.

(2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

It may be seen that section 2 provides two bases for corporate liability. The first is on the basis of accessory conduct by the management of the corporation. Such conduct may be active or passive ('allowed the commission of the offence'). Riijihärvi, commenting on an earlier draft of the legislation, states that management encompasses the

board of directors, partners, chief executive officers, the participants of the shareholders' meeting, auditors, the members of the municipal council and other high echelon managers. The commentary [produced by the Commission for the Examination of Legislation] specifically notes that the provision does not encompass middle management.¹²¹

The provision, at least since it was amended to include 'persons exercising actual decision making authority', would seem to include agents as well. The second basis on which a corporation may be found liable is on the basis of negligence. Riijihärvi explains

It is a general principle of law that a corporation ... has the duty to obey laws and regulations. To fulfil this duty, a corporation must ensure due enforcement of law and regulations by supervising their application and enforcement internally. Fulfilling this duty requires, for example, that the personnel is [sic] selected, supervised and trained in appropriate manner, and that all corporate activities and operations are organised in accordance with law and regulations. ...

The commentary points out that the duty to prevent offences is limited to what is reasonable under the prevailing circumstances. In other words, a corporation is responsible only when its procedures and practices unreasonably fail to prevent corporate criminal violations. Hence, when determining whether a corporation is liable, two questions must be asked; firstly, whether the corporation has performed its duties in a careful and responsible manner, and secondly, whether the corporation had, under the circumstances, the capacity and opportunity to do so. ...

¹²¹ Ibid, 216 – 217.

When an offence has been committed by someone exceeding her authority, the corporation can be made liable if the corporation has neglected to define the limits of authority in a clear and specific manner, or if the offender's supervision and training have been neglected.¹²²

Riijihärvi's description of the questions to be asked in determining whether a corporation has breached its duty to obey the law appear not dissimilar to those that might be expected to be asked in examining the culture of a corporation. He discusses the standard of proof to be applied:

The minimum requirement is that the breach of duty has at least considerably increased the prospects of the crime being committed. Thus, in order to convict a corporation, the prosecutor must prove that the fact that that corporation, for example, neglected to supervise its personnel, organise education or draw procedure guidelines, caused or at least significantly increased the risk of the violation.¹²³

Paragraph (2) of Section 2 allows for the punishment of a corporation even if no specific offender is identified. Riijihärvi gives the rationale behind the decision to include this rule:

In some cases, finding the guilty individual is difficult or even impossible due to complex structure and delegation of powers in the corporation. Hiding an individual behind the corporate veil can also be done intentionally. Therefore, if the prerequisite of finding and convicting an individual offender was followed to the word, corporations who have neglected to arrange the power relations in a clear and exact manner would avoid liability while their more conscientious competitors were convicted.¹²⁴

Nonetheless, Riijihärvi states that it is always preferable to identify a specific individual, and that section 2(2) is reserved for exceptional cases.¹²⁵

(c) Secondary Criteria for Corporate Liability

Turning to the second set of criteria for attaching corporate liability, section 3 provides (so far as is relevant):

Section 3 - Connection between offender and corporation (743/1995)

(1) The offence is deemed to have been committed in the operations of a corporation if the offender has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.

The critical phrase in the clause is 'acted on behalf of or for the benefit of'. Riijihärvi explains the requirements as follows:

"Acting on behalf of the corporation" includes those individuals who have a statutory or delegated power over the particular area to which the allegedly criminal conduct relates. The essential element is authority. Such authority is not dependant on the person's status within the company, but it can be gained through a contract, even a tacit contract, if the individual is led to understand that committing an offence shall be accepted or even required.

¹²² Ibid, 217.

¹²³ Ibid, 218.

¹²⁴ Ibid.

¹²⁵ Ibid, 219.

When someone acts for the benefit of the corporation, he does not have formal authority for his actions. In fact, the act may not even be accepted. Essential elements are the opportunity to act, and that the corporation benefits from the activity. Hence, if the acts were done for the benefit of the company, the corporation may be held liable even though the acts were done in defiance of express corporation policy.¹²⁶

Riihjärvi goes on to state the text seems to indicate that the corporation must benefit in fact from the actions of the natural person. A mere attempt to benefit the company would be insufficient.¹²⁷ It is not clear, and Riihjärvi does not state, whether the conduct of an offender who accidentally benefits the corporation would result in liability.

The requirement of the second clause is simply that the offender be affiliated with the corporation. Notably, it is not restricted to senior management or agents, but encompasses a person 'in a service or employment relationship' with the corporation. It therefore appears that the actions of any employee of a corporation could result in a corporation being sanctioned.

There is an apparent tension between the concept of 'anonymous guilt' as created by section 2(2) of Chapter 9 and the requirements of section 3. It is not clear how, in the absence of an identified offender, one would satisfy the requirements of section 3. It is unclear whether section 2(2) should be taken to override section 3 to the extent of any inconsistency or whether it must still be proven that the corporation benefited in fact from the offence.

(d) Avoidance of Sanctions

The final sections to consider are sections 4 and 7 of the law. Section 7 grants prosecutors a discretion to decline to charge a corporation and section 4 grants a court a power to decline to punish a corporation. Both of these sections list considerations to be borne in mind when exercising the power under them. Significantly, corporations may be able to avoid prosecution or punishment by changing their internal procedures (much as under American non-prosecute agreements). Section 4 provides (in relevant part):

(2) The court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration:

...

(2) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the neglect or offence; or

Section 7 provides:

Section 7 –Waiving of the bringing of charges (61/2003)

(1) The public prosecutor may waive the bringing of charges against a corporation, if:

(1) the corporate neglect or participation of the management or of the person exercising actual decision-making power in the corporation, as referred to in section 2(1), has been of minor significance in the offence, or

¹²⁶ Ibid.

¹²⁷ Ibid.

(2) only minor damage or danger has been caused by the offence committed in the operations of the corporation and the corporation has voluntarily taken the necessary measures to prevent new offences.

8.3 Corporate Criminal Liability in Finland: Application in Practice

As with many of the corporate criminal liability provisions, it is difficult to say how effective the provisions are in practice. A 2001 report by the European Institute for Crime Prevention and Control observes that there were ‘only a few cases’ brought under the law.¹²⁸ The OECD *Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions on Finland*, produced in 2002, states:

Since the liability of legal persons was created under the Penal Code in 1995, legal persons have been subject to criminal liability five times.¹²⁹

It is not clear whether ‘subject to’ means prosecuted or convicted, but the number is not particularly high on any account. As such, it is difficult to say how the provisions have been applied in practice.

9. Japan

9.1 Corporate Criminal Liability in Japan: Ryobatsu-Kitei

General criminal liability of corporations does not exist under Japanese law. This situation arose from the historical origins of the modern Japanese legal system, which was originally based on the French and German Civil law systems and the notion that only natural persons can commit crimes. As a result, the Japanese Penal Code of 1907 contained no provisions for corporate criminal liability.

In 1932, however, the *Act Preventing Escape of Capital to Foreign Countries* was passed. The Act introduced the ‘Ryobatsu-Kitei’ into Japanese law. Ryobatsu-Kitei have subsequently appear in various Japanese laws. Ryobatsu-Kitei is frequently translated as ‘double punishment’, although Kyoto indicates that ‘[t]wo-sided or bilateral punishment’ is a better translation.¹³⁰ Essentially, Ryobatsu-Kitei are clauses declaring that in the event of a natural person committing an offence, an associated legal person may also be punished. An example of a Ryobatsu-Kitei can be found in the *Securities and Exchange Act* (as at 1 April 2002), article 207:

In case where any representative of a juridical person (including a non-incorporated association which has internal rules providing for a representative or administrator; the same

¹²⁸ Matti Joutsen, Raimo Laiti and Pasi Polonen, ‘Criminal Justice Systems in Europe and North America – Finland’ (National Criminal Justice Profiles series, HEUNI, 2001) 8.

¹²⁹ OECD, *Finland: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2002) 18, available at <<http://www.oecd.org>> at 14 October 2007.

¹³⁰ N Kyoto, ‘Corporate Criminal Liability – Japan’ in de Doelder and Tiedemann (eds), *La Criminalisation du Comportement Collectif* (1996) 275, 275.

shall apply hereinafter in this paragraph and the next paragraph), or agent, employee, or other worker of a juridical or natural person, conducted an act, in regard to business or property of such juridical or natural person in violation of the provisions set forth in each item below, the person who conducted such an act shall be imposed a penalty; in addition, the juridical person shall be imposed the penalty of fine set forth in each such item; and the natural person shall also be imposed such fine as prescribed in each applicable article ... [article sets out fine amounts]¹³¹

A second example is in article 164(1) of the *Corporation Tax Act*, which provides:

In a case where a representative of a legal person, or an agent, an employee, or a worker of other types, of a legal or a natural person, violated regulations as provided in Art. 159, Para. 1 (crime of tax evasion), Art. 160 (crime of non submitting final declaration), or Art. 162 (crime of submitting deceptive intermediate declaration) in the process of carrying out business pertaining to the said legal or natural person, the primary actor shall be punished. In addition, the said legal or natural person shall be fined pursuant to the aforesaid articles.¹³²

A final example is article 22(1) of the *Unfair Competition Prevention Act* (as at 1 November 2005)

When a representative of a juridical person, or an agent, employee or any other [sic] of a juridical person or an individual has committed a violation prescribed in any of the provisions of the following items with regard to the business of said juridical person or said individual, not only the offender but also said juridical person shall be punished by the fine specified by the respective items, or said individual shall be punished by the fine prescribed in the relevant article: [article lists fines]¹³³

Although the precise wording differs, a common underlying form is discernible.¹³⁴ On proof that a relevant natural person committed the physical elements of the offence, the legal person may be liable to a fine. In the case of agents, it appears that no further attribution is required. In the case of employees, it must be shown that there was negligence on the part of the legal person in appointing or supervising the employee. Such negligence is, however, presumed, unless rebutted.¹³⁵ Commentators have suggested that corporate criminal liability in Japan thus amounts to a form of strict liability.¹³⁶

¹³¹ Article 207, *Securities and Exchange Law*, available at <<http://www1.oecd.org>> at 14 October 2007. The translation is that produced by the OECD and is in somewhat broken English. We have retained it, however, so as not to place our own gloss on it.

¹³² Quoted in Fafo AIS, 'Survey Responses, Laws of Japan (Human Rights Now), "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions"' (2006) 7, available at <<http://www.fafo.no>> at 14 October 2007.

¹³³ Article 22(1), *Unfair Competition Prevention Act*, available at <<http://www.cas.go.jp>> at 14 October 2007.

¹³⁴ In addition to the Ryobatsu-Kitei, there are also Sanbatsu-Kitei that personally punish senior management of the legal person in question in addition to the legal person and the offender. These are, however, rare. By way of example, see 95-3(1) of the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade, available at <<http://www.cas.go.jp>> at 14 October 2007.

¹³⁵ Fafo AIS, above n 132, 9. See also Kyoto, above n 130, 282.

¹³⁶ Ibid. See also Kyoto, *ibid*, 284 and Kuniji Shibahara, 'Le droit japonais de la responsabilite penale, en particulier la responsabilite penale de la personne morale' in Eser, Heine and Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999), 39.

9.2 Corporate Criminal Liability in Japan: Theoretical Underpinnings

Japan appears to lack a widely accepted theoretical foundation for the enforcement of Ryobatsu-Kitei. This is in spite of the fact that Japan is the only non-common law OECD country in which the prosecution of corporations is well-entrenched.¹³⁷ Paraphrasing Kyoto, it is not clear why legal persons are liable under Ryobatsu-Kitei. The clauses themselves do not adopt any specific theory.¹³⁸

As noted above, courts have adopted a presumption of negligence in the hiring or supervision of employees to justify fines imposed under Ryobatsu-Kitei. In relation to representatives, an agency principle is used as justification for the imposition. As such, it appears that, as a practical matter, Japan applies a mixed agency / negligence approach to the attribution of liability. On the other hand, it seems open to suggest that this may be an *ex post facto* legal positivist justification for the punishment required by the relevant statute.

Kyoto does, however, refer to a number of theories that have been advanced. Hiroshi Itakura has argued for the corporate organisation theory (*Kigyo-Soshiketai-Sekinron*) which would permit findings of guilt on the part of a corporation without identifying any natural offender and which appears to closely resemble corporate cultural approaches. Kyoto remarks that this is a minority opinion.¹³⁹ It would also appear difficult to square with the language of the Ryobatsu-Kitei given above, which appear to predicate corporate liability on the underlying liability of the natural person.

Kyoto himself appears to favour a pure negligence approach where the failure of the corporation to prevent the crime is itself a crime of omission. This view is apparently the prevalent view, although with internal divisions, and one form is that used by the Supreme Court.¹⁴⁰

The two last theories mentioned by Kyoto are one advocating a penal administrative approach, where the imposition of fines is justified on the grounds of the administrative

¹³⁷ OECD, *Mid-term Study of Phase 2 Reports Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2006) 33, [111], available at <<http://www.oecd.org>> at 14 October 2007.

¹³⁸ Kyoto, above n 130, 282.

¹³⁹ *Ibid*, 277.

¹⁴⁰ *Ibid*, 278.

benefits it produces,¹⁴¹ and another which argues that criminal law is merely a form of social control and does not involve any normative or ethical judgments and, on that basis, there is no reason why a legal person cannot be punished.¹⁴²

¹⁴¹ Ibid.

¹⁴² Ibid, 280.

Part 2B: Additional Country Information

10. Introduction

10.1 The Purpose of this Part

The purpose of this part is to provide a broad overview of what systems are in place in different countries. Countries are included in this section if we have been unable to gather enough material, in English or French, to allow us to engage in meaningful analysis of the countries' corporate criminal liability system.

11. Austria

11.1 Corporate Criminal Liability in Austria

Like many continental European nations, Austria has only recently introduced corporate criminal liability. The *Law on the Responsibility of Associations* (Verbandsverantwortlichkeitsgesetz, VbVG) was passed in 2005 and entered into force on 1 January 2006.

The VbVG establishes corporate liability on the basis of a mixed agency / negligence model similar to that of Finland. Unlike the Finnish model, however, different standards are applicable to different classes of personnel.

(a) Actors Whose Conduct May Be Attributed

By section 2 of the VbVG, an association may be held responsible for the acts of both 'decision makers' and 'employees'. 'Decision makers' as defined in s2(1) are

- individuals authorized to represent the association under its by-laws (such as managing directors, executive board members or registered agents);
- other individuals authorized to represent the association under its by-laws or a contractual relationship;
- supervisory board members, members of the administrative board or individuals in positions of authority.¹⁴³

The OECD Examiners note that this definition appears to exclude outside agents and independent contractors.¹⁴⁴ 'Employees' are defined in s2(2) as those carrying out work for the association, including trainees and apprentices.

(b) Criteria for Attribution

¹⁴³ Gudrun Stangl, 'Austria: Corporate Criminal Liability' (November 2005) *International Financial Law Review* available at <<http://www.iflr.com>> at 14 October 2007

¹⁴⁴ OECD, *Austria: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2006) 39, available at <<http://www.oecd.org>> at 14 October 2007.

The VbVG posits a two stage test for making a association liable for an offence. Section 3(1) requires that the criminal act itself be of a kind that may be attributed to the corporation. Section 3(2) and (3) then set out the basis on which the association may be held liable for the act of a Decision Maker or Employee respectively.

Section 3(4) provides that both a natural person and the legal person may be held responsible for the same offence.

(i) Primary Criteria for Attribution

Section 3(1) states that a association is liable when the act in question is committed either (a) for the benefit of the association or (b) when the act is committed in breach of the association's duties.

(ii) Secondary Criteria for Attribution

Section 3(2) sets out the test for whether an association may be held responsible for the act of a Decision Maker when the Decision Maker, 'illegally and culpably' commits an offence in their course of their role as Decision Maker.

It is unclear what the phrase 'illegally and culpably' (alt: 'illegally and negligently') means in this context. It could be taken as referring to the requirements of *actus reus* and *mens rea*. Alternatively, it could be taken as speaking to the nature of the intent required and saying that intention is required where the offence requires intention or negligence where the offence requires negligence.

Section 3(3) is more interesting from a comparative legal point of view. It provides that, if an employee commits an offence as defined in the Austrian Criminal Code, an association will be liable when

the commission of the deed was made possible or substantially easier because Decision Makers disregarded the due and reasonable care appropriate in the circumstances, especially by way of refraining from essential technical, organizational or personnel measures that would have prevented such deeds.

Section 3(3) would appear to be a negligence provision, but it seems to place a particular emphasis on 'cultural' factors in determining whether such negligence has occurred.

12. Belgium

12.1 Corporate Criminal Liability in Belgium

The Act of 4 May 1999 reintroduced corporate criminal liability into Belgian law.¹⁴⁵ The provisions have recently been the subject of legislative review, following the preparation of a bill in February 2007 intended to overcome some of the difficulties arising in the application of the current law.

Article 5 of the Belgian Penal Code provides:

¹⁴⁵ Corporate criminal liability had apparently been removed in 1934: see Fafo AIS, 'Survey Responses, Laws of Belgium (Bruno Demeyere), "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions"' (2006) 6 (*Demeyere*) available at <<http://www.fafo.no/>> at 14 October 2007.

Any legal person is criminally liable for offences which are intrinsically linked to the achievement of its purpose or to the defence of its interests or for offences on whose behalf the facts show they were committed.

When a legal person is liable solely because of the intervention of an identified natural person, only the person who committed the more serious fault may be convicted. If the identified natural person committed the fault knowingly and voluntarily, he/she can be convicted at the same time as the legal person that is liable.

Demeyere states that the first paragraph contains two limbs. First, a corporation may be liable for an offence ‘intrinsically linked to achievement of its purpose or to the defence or its interests’ or, alternatively, for offence committed on its behalf. The Belgian *Cour de Cassation* has stated to be ‘intrinsically linked to the achievement’ of a corporation’s purpose, it is sufficient to be directed to the achievement of those goals.¹⁴⁶

It is not immediately apparent whether the liability of corporations under art 5 is derivative or organisational. Belgian authorities have stated that it is organisational¹⁴⁷ (though a recent legislative review has noted that art 5 fails to provide a free-standing liability for corporations). On this basis, it was said that is unnecessary to specify whether a natural offender must be identified or, if so, what position they must hold in relation to the corporation.¹⁴⁸ It was considered to be a matter best left to the judge.¹⁴⁹

Nonetheless, liability under art 5 is not objective. There must be some imputation of intention or negligence. The Belgium Phase 1 Report states:

It must be established that the offence was the result of an intentional decision taken within the legal person, or, through a specific relationship of cause and effect, of negligence by the legal person.¹⁵⁰

Interestingly, the source given for this assertion, a Belgian Parliamentary statement, gives the following example of what might constitute such a link:

defective internal organisation of the legal person, inadequate safety measures or unreasonable budget restrictions created conditions that made it possible to commit the offence.¹⁵¹

As with many provisions that allow for the possibility of negligence, these factors would seem to raise questions going to corporate culture. Of particular interest is the reference to ‘unreasonable budget restrictions’ which might raise interesting questions of causation, as well as whether it was a case of negligence or intent.

¹⁴⁶ It is unclear whether this refers to a ‘goal’ in the legal sense, i.e. contained in the objects clause of a corporation’s articles of association, or in a general sense, i.e. the securing of a contract may be a goal of a corporation. See Demeyere, *ibid*, 12.

¹⁴⁷ OECD, *Belgium Review of Implementation of the Convention on the 1997 Recommendation* [sic] (1999) 8 (**Belgium Phase 1 Report**).

¹⁴⁸ *Ibid*.

¹⁴⁹ *Rapport de la Commission de la Justice du Sénat, Doc. parl.*, Senate, 1998-99, no. 1217/6, p. 9 referred to in OECD, *Belgium: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2005), n 47 (**Belgium Phase 2 Report**).

¹⁵⁰ Belgium Phase 1 Report, above n 147, 8.

¹⁵¹ *Proposition de loi instaurant la responsabilité pénale des personnes morales*, Vandenberghe, *Doc. Parl.*, 1-1217/1, 23 December 1998, p. 2., referred to in Belgium Phase 1 Report, *ibid*, n 16.

Demeyere states that standard of proof required to convict a corporation will depend on the underlying offence. Belgian law generally requires intent to commit an offence. Negligence may only be used as the basis for a conviction where the relevant provision implicitly or explicitly permits.¹⁵²

The second paragraph of art 5 raises some of interesting questions. First, it refers to circumstances in which the company is liable 'solely' because of the intervention of an identified natural person. It is unclear what this means. Many cases of corporate offending would seem to result from the act of single people and could, on that basis, be said to be 'solely' because of their behaviour. Equally, though, the person whose acts are directly responsible may themselves have been placed in that position by corporate policies. In the absence of guidance, the interpretation of the term 'solely' would seem likely to have significant impact on the availability of corporate criminal liability.

The second point raised by the second paragraph is the question of 'greater fault'. The paragraph appears to prohibit punishing both the natural person and the legal person unless the natural person acted wilfully. Otherwise, the question is who committed the greater fault. It is not obvious how this is determined. Is the question legal (i.e. intent is worse than negligence) or normative? Faure comments that this restriction¹⁵³

would seriously limit the reach of the criminal law where crimes have been committed in the corporation. Presumably, this was the price to be paid for the endorsement of the Belgian business world. It support for the proposal to obtain the criminal liability of entities was conditioned on creating a guarantee of immunity for managers, with the exception of illegal acts personally and wilfully committed.

A bill of February 2007 proposed to amend the Penal Code by omitting the second paragraph of art 5 altogether (as well as by altering provisions for nomination of a representative of a corporation to stand in for the corporation during proceedings, and by systematising some penalties applicable to corporations).

The explanatory statement noted a number of deficiencies in the present law, and admitted that it had not adequately reflected the underlying principle that had motivated the introduction of the Act of 4 May 1999, namely that a corporation could bear criminal responsibility in its own right, rather than on a derivative basis.¹⁵⁴

A number of observations were also made concerning difficulties in the application of the law:

- It requires a judge first to be satisfied that the liability of a corporation has been engaged 'exclusively' by the intervention of a natural person, and then, paradoxically, to assess whether the fault of the corporation or the natural person was greater.

¹⁵² Demeyere, above n 145, 13 – 14.

¹⁵³ Michael Faure, 'Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium' in Eser, Heine and Huber (eds), *Criminal Liability of Legal and Collective Entities* (1999) 105, 110.

¹⁵⁴ Chambre des représentants de Belgique, 'Projet de loi modifiant la loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales' (19 February 2007) 7.

- It provides no guidelines for assessing the magnitude of fault committed by the corporation on the one hand, and the natural person on the other.
- It creates the possibility of unequal treatment of natural persons who offend: where one commits an offence on their own account, they are automatically exposed to criminal punishment, whereas another natural person committing the same offence may escape punishment if the offence was intrinsically linked to the achievement of their employer's purpose, and the employer itself engaged in wrongdoing judged to have involved the greater fault.
- Practice has shown that, as it was unclear how the determination of which party had committed the greater fault would be reached, both the physical person and the moral person were investigated and charged, generating an increased workload for the courts.¹⁵⁵

The legislative review stated that it should be possible to pursue both a physical person and a moral person for commission of an offence, each within their own sphere of responsibility, and approved the deletion of the second paragraph of art 5. It is unclear whether or when this amendment will take effect.

13. China

13.1 Corporate Criminal Liability in China

Corporate criminal liability exists in China as a subset of what are called 'Unit Crimes'. Units include corporations, but also various entities. In 1997, revisions to the General Part of the Chinese Criminal Code allowed for unit crimes. As translated by Jianfu Chen, article 30 of the Criminal Code provides:

Companies, enterprises, institutions, state organs and social organisations when committing acts endangering the society shall assume criminal liability when prescribed by law.¹⁵⁶

Chen observes that approximately 81 offences in the Criminal Code allow for corporate criminal liability.¹⁵⁷ Liu Jiachen, writing later, states that there are 129.¹⁵⁸

Liu states:

A unit crime is committed as a result of a decision made by the unit collectively or by a person in a position of responsibility, and reflects the will of a unit.

"The decision made by a unit collectively" refers to the decision made by an agency which has the authority to act on behalf of a unit in accordance with the law or the constitution of that unit, e.g., decision [sic] made by staff and workers' representative assembly, shareholder's assembly, board of directors, and special leader's agency. "The decision made by a person in a position of responsibility" refers to the decision made by an individual

¹⁵⁵ Ibid,8-15.

¹⁵⁶ Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (1999) 181.

¹⁵⁷ Ibid.

¹⁵⁸ Liu Jiachen, 'The Legislation and Judicial Practice on Punishment of Unit Crimes in China' in Eser, Heine and Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 71, 75.

who has the authority to act on behalf of a unit in accordance with the law or the constitution of the unit, e.g., decision made by a factory director, chairman of the board of a corporation, general manager, or the persons who are responsible in organs and institutions.¹⁵⁹

He goes on to say that an ordinary employee's crimes will not amount to a unit crime. The majority of unit crimes can only be committed intentionally, although some can be committed by negligence.¹⁶⁰ The second part of this test, the 'person in a position of responsibility' limb, is essentially the 'identification' approach seen in many jurisdictions. The collective decision of the unit limb is different. It seems to represent either a form of genuine collective responsibility unrecognised by common law systems or alternatively perhaps an aggregatory form of identification in which bodies composed of individuals can be found to have a collective *mens rea* imputable to the corporation.

Chinese law also appears to impose a benefit test: Liu observes that a unit crime requires the unit to obtain an illicit benefit for the unit. The requirement of benefit for the unit exclude private crimes committed by personnel for their own private benefit. More confusing is the requirement of 'illicit benefit'. Liu explains:

Here "illicit benefit" refers to the benefit prohibited by national laws, administrative laws and regulations, local laws and regulations, as well as other related stipulations. If a unit obtains a legitimate benefit by an act which violates the law, it will not have committed a unit crime.¹⁶¹

It is unclear what exactly this means, but it appears to suggest that a unit will be only be liable when the end sought by the crime is itself illegal, not merely where the means is illegal. It also unclear whether the unit must have actually benefited from the offending, although Liu seems to indicate that it must.¹⁶²

Article 31 of the Chinese Criminal Code provides:

When a unit commits a crime, it shall be fined. At the same time, the person in charge of the unit and other directly responsible persons shall be able to be punished by the criminal law unless otherwise provided...¹⁶³

Liu describes this as a 'dual punishment' system and it is clearly similar to the Japanese Ryobatsu-Kitei. Liu makes the following observation:

If a unit, as an independent subject of a crime and of its own will, commits a crime which seriously endangers society, the unit ought to receive criminal punishment. At the same time, the intention of committing the crime and the act of endangering society shall be deemed to be conscious actions by the person who is responsible within the unit. *If no person is responsible, there is no crime committed by a unit.* (emphasis added)¹⁶⁴

¹⁵⁹ Ibid, 74 – 75.

¹⁶⁰ Ibid, 76.

¹⁶¹ Ibid, 74.

¹⁶² Ibid.

¹⁶³ Ibid, 76.

¹⁶⁴ Ibid, 77.

It is unclear how far this principle goes. As China uses an identification system, it will, in practice at least, be necessary to identify an offender before the unit can be held liable. It is not clear, however, whether the offender needs to be convicted as a prerequisite to a finding against the unit.

14. Denmark

14.1 Corporate Criminal Liability in Denmark

Corporate criminal liability in Denmark is governed by Chapter 5 of the Danish Criminal Code, introduced by Act 474 of 12 June 1996. The sanctions under Chapter 5 are only available where the relevant offence provides that a corporation may be punished.

Section 27 (1) provides

Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

Liability under 27(1) is not restricted to management, senior personnel or even those formally employed by the company and encompasses agents. In terms of intent, it must be shown that the person in issue had the relevant mental state, whether negligence or intent.

The phrase 'within the establishment' appears to mean in the course of business, so as to exclude purely private acts of persons associated with company. Acts contrary to corporate policy may still be attributed to the company, but not where such acts are 'totally abnormal'. Nielsen gives an example of such a case: an employee of a company used the fork on a fork lift truck to lift himself, even though there was a basket specifically for the purpose. The High Court acquitted, but the Supreme Court convicted, noting the act was not aberrant enough to warrant dismissal.¹⁶⁵ It is not necessary to identify the natural person responsible for the offence.

Nielsen observes:

The question of guilt is typically satisfied by an employee having negligently broken the rules. This is enough. Whether or not any blame attaches to management is irrelevant under Danish law. The company will also be found guilty in cases where management has been very active in ensuring observance of the law. The fact that it is irrelevant whether management has been active or passive is probably the question attracting most debate. But, if in order to obtain judgment against the company, the prosecutor has to prove the manager is personally liable, he may as well bring the charges against him personally. If managerial negligence must be proved, company liability will lose much of its meaning.¹⁶⁶

¹⁶⁵ Gorm Nielsen, 'Criminal Liability of Collective Entities – the Danish Model' in Eser, Heine and Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 189, n 6.

¹⁶⁶ *Ibid*, 192 – 193.

15. Iceland

15.1 Corporate Criminal Liability in Iceland

Article 19 of the General Penal Code of Iceland provides for corporate criminal liability. Under 19(b), liability can attach to any person who is (a) a non-natural person and (b) capable of bearing rights and duties.

Section 19(c) provides:

Subject to other provisions in law, a legal person can only be made criminally liable if its officer, employee or other natural person acting on its behalf committed a criminal and unlawful act in the course of its business. Penalties may be imposed even if the identity of that person has not been established. Administrative authorities can only be made criminally liable if an unlawful and criminal act has been committed in the course of an operation deemed comparable to the operations of private entities.

16. Ireland

16.1 Corporate Criminal Liability in Ireland

Ireland follows the Anglo-Australia approach and relies on the identification doctrine. Interestingly, however, the case-by-case nature of the identification process itself has been criticised in Ireland and it has been suggested that it may be so unpredictable as to be contrary to principle of legality and, as such, unconstitutional under the Irish Constitution.¹⁶⁷

17. India

17.1 Corporate Criminal Liability in India

Section 2 of the Indian Penal Code 1860 provides that every person shall be liable to punishment under the Code. Section 11, as is common in common law countries, defines a person as including 'any Company or Association or body of persons, whether incorporated or not'. Indian courts have inherited the identification approached from England.

Until recently, however, Indian courts would refuse to punish a legal person for an offence where the punishment required imprisonment.¹⁶⁸ In 2005, the Supreme Court of India reversed this position, holding that where a statute mandated imprisonment and a fine, a court could impose a fine alone instead.¹⁶⁹ The Supreme Court did not deal with the situation where the only punishment prescribed is imprisonment, but, given the discussion in *Directorate of Enforcement*, it seems likely that the Court would hold companies could not be subject to prosecution for such offences.

¹⁶⁷ Irish Law Reform Commission, *Report on Corporate Killing*, Report No. 77 (2005), [1.07], available at <http://www.lawreform.ie> at 14 October 2007.

¹⁶⁸ See the discussion in *The Assistant Commissioner, Assessment-II, Bangalore & Ors v M/s Velliappa Textiles Ltd & Anor* [2003] INSC 454.

¹⁶⁹ See *ANZ Grindlays Bank Ltd & Ors v Directorate of Enforcement* [2005] INSC 315.

18. Indonesia

18.1 Corporate Criminal Liability in Indonesia

It is unclear whether Indonesia has a system for the attribution of criminal liability to corporate entities. The Indonesian Penal Code, stipulated by the Dutch in the early years of the 20th century, does not treat corporations as the subject of criminal law. A number of other laws have subsequently introduced corporate criminal liability for specific offences. It is now suggested that the future revision of the Penal Code should include provision for corporate criminal liability.¹⁷⁰

The Fafo report on Indonesia suggests that there is no uniform approach to attribution of liability and that it depends on the views of the individual judge. Nor is there agreement in professional or academic circles as to the criteria to be used in attributing liability.¹⁷¹

19. South Africa

19.1 Corporate Criminal Liability in South Africa

South Africa has adopted a statutory model of corporate criminal liability based on vicarious liability. Section 332 of the *Criminal Procedure Act 1977* provides:

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by the corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

It should be noted that the meaning of 'for any offence' is contested. On the one hand, it has been read as meaning exactly what it says. On the other, it has been treated as meaning only those offences for which a corporation can *prima facie* be liable.¹⁷²

The principles applicable to s332 seem to be similar to those used in relation to vicarious liability in the US. For example, in both jurisdictions, there is no apparent restriction on the

¹⁷⁰ Fafo AIS, 'Survey Responses, Laws of Indonesia (Harkristuti Harkrisnowo and David K Linnan), "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions"' (2006) 4 – 5, available at <<http://www.fafo.no>> at 14 October 2007.

¹⁷¹ *Ibid.*, 5.

¹⁷² E.g. not bigamy or rape, although *quaere* whether either offence could ever meet the requirements of attribution under s332 other than theoretically. See Ferdinand van Oosten, 'Theoretical Bases for the Liability of Legal Persona in South Africa' in de Doelder and Tiedemann (eds), *The Liability of Legal and Collective Entities* (1999) 195, 196, 198.

level of the employee whose conduct can be attributed to the corporation. Equally, in both jurisdiction, an intention to benefit the corporation will be sufficient to bring an *ultra vires* act within the scope of the doctrine. It appears, however, that s332 may be wider than the US test for vicarious liability as the US test appears to require a party to be acting in the course of their duties and for the benefit of the corporation, whereas s332 phrases these considerations in the alternative.

It has been suggested that s332 violates South Africa's Constitution. Van Oosten states:

Legal commentators, on the other hand, unanimously repudiate the doctrine of vicarious responsibility as representing a departure from the fault requisite for criminal liability, and it will in all likelihood be declared unconstitutional by the constitutional court for the same reason, if and when the matter comes up for decision.¹⁷³

In addition, South Africa recently signed the OECD Bribery Convention and it will be interesting to see whether a pure vicarious liability system is sufficient to meet the requirements of the Convention.

20. South Korea

20.1 Corporate Criminal Liability in South Korea

Corporate criminal liability in South Korea appears to be very similar to the position in Japan, although we have only been able to find information on the foreign bribery offence Korea was obligated to create under the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. Article 4 of *The Act Preventing Bribery of Foreign Public Officials in International Business Transactions* provides:

In the event that a representative, agent, employee or other individual working for legal person has committed the offence as set out in Article 3(1) in relation to its business, the legal person shall also be subject to a fine up to 1,000,000,000 won in addition to the imposition of sanctions on the actual performer. In case that the profit obtained through the offence exceeds a total of 500,000,000 won, it shall be subject to a fine up to twice the amount of the profit. If the legal person has paid due attention or exercised proper supervision to prevent the offence against this Act, it shall not be subject to the above sanctions.

It may be observed that the structure is much like the Japanese Ryobatsu-Kitei. According to Korean authorities, liability under art 4 is strict and may be triggered by an employee of the corporation provided it is committed 'in relation to [the] business'. In determining whether the offence was committed in relation to the business, the Supreme Court of Korea has said that a number of factors needed to be considered:

- Objectively, the offence must appear to have been done in relation to the business.
 - Subjectively, the employee must have intended to act for the legal person.
- Relevant considerations mentioned by the Court were

¹⁷³ Ibid, 199.

- the legal scope of the business of the corporation;
- the rank and position of the employee;
- the relation between the crime and the scope of the business;
- knowledge of the corporation of the offence and its involvement in the offence;
- origin of funds used in the offending; and
- who receives the benefits of the offending.¹⁷⁴

It will be noted that art 4 include a defence of due diligence. The scope of this defence is somewhat unclear. In the OECD Phase 1 Report on South Korea, authorities suggested it was also a strict liability test (akin to Japan) where the corporation must show that it has taken 'concrete and specific' steps to avoid the offending.¹⁷⁵ On the other hand, in the Phase 2 Report, the Examiners comment adversely on an Explanatory Manual published the Ministry of Justice which suggests that a statement on a website or a general policy may be sufficient to establish a defence of due diligence.¹⁷⁶

21. The Netherlands

21.1 Corporate Criminal Liability in the Netherlands

A provision concerning general corporate criminal liability was introduced into the Dutch Criminal Code 1976. Previously, it had existed under the *Act on Economic Crimes*, but was of narrower application. Article 51.2 of the Dutch Criminal Code provides

Where a criminal offence is committed by a juristic person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable may be imposed:

- (1) against the juristic person; or
- (2) against those who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour; or
- (3) against the persons mentioned under (1) and (2) jointly.

There appear to be different tests for attribution to the corporation based on its size. Attribution in relation to smaller corporations appears to be on the basis of the 'power and acceptance' test, which asks whether the corporation had the power to control the act in question and, if so, whether the act was in line with the business of the corporation (that is, was of the kind 'accepted' by the company). This second limb is somewhat vague, but was used to convict a hospital of manslaughter for:

¹⁷⁴ Quoted in OECD, *Korea Review of Implementation of the Convention on the 1997 Recommendation* (1999) 8 available at <<http://www.oecd.org>> at 14 October 2007.

¹⁷⁵ Ibid.

¹⁷⁶ OECD, *Korea: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2004) 36 – 37, available at <<http://www.oecd.org>> at 14 October 2007.

failing to ensure that old or redundant anaesthetic equipment was removed or made un-useable. The equipment in question was not listed as being in service, and routine maintenance of it had ceased. No safety system for checking the work of maintenance technicians was in place. As a result, the wrong tubes were connected to obsolete equipment which was then used in an operation with fatal consequences. The management of the hospital trust claimed they could not prevent the unsafe practices because they did not know of them, but the District Court responded that their lack of knowledge actually made the case against them, since they ought to have been aware of routine practices within the hospital.¹⁷⁷

Severely aberrant or purely self-serving behaviour would presumably be excluded on the basis of the acceptance principle. In the case of larger corporations, the test seems to be different. Jägers states that in such cases the question focuses more on 'normal company policy'.¹⁷⁸ Unfortunately, there is no elaboration on what this means other than a reference to a 1993 judgment of the Supreme Court.¹⁷⁹

The terminology of 'power and acceptance' seems largely to refer to the necessary connection between the offender and the corporation in that the corporation must have power over the offender (an employment relationship would seem the most likely candidate) and the action must be one that it accepts, the test for which looks at the business activities of the corporation. As such, in practical terms, it may well be that the 'power and acceptance' test is essentially one of negligence. In the hospital case referred to above, it is clear that it was the failure of the hospital to properly supervise its operations that led to the finding against it.

22. New Zealand

22.1 Corporate Criminal Liability in New Zealand

Corporate criminal liability in New Zealand is broadly based on the identification doctrine. There appear, however, to be two interesting differences.

In the OECD Phase 1 Report, the Examiners note

The accepted test currently applied in New Zealand is whether the individual responsible for the alleged conduct has actual authority within the company in relation to the area of the alleged conduct. Therefore it is no longer necessary to determine whether he/she can be regarded as the "brains or mind" (and possessed the necessary state of corporate mind for the offence) or is simply the "hands" of the company.¹⁸⁰

¹⁷⁷ Irish Law Reform Commission, *Corporate Killing*, Consultation Paper 26 (2003) [4.22], available at <<http://www.lawreform.ie>> at 14 October 2007.

¹⁷⁸ Fafo AIS, 'Survey Responses, Laws of the Netherlands (Nicola Jägers), "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions"' (2006) 10 – 11, available at <<http://www.faf.no>> at 14 October 2007.

¹⁷⁹ HR 23-02-1993, NJ 1993, 605.

¹⁸⁰ OECD, *New Zealand Review of the Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2002) 12, available at <<http://www.oecd.org>> at 14 October 2007.

Thus it would appear that *Tesco* has been used more broadly in New Zealand. The second point of interest is that the *Human Rights Act* 1993 (NZ) does appear to contain a form of corporate culture provision. Section 68 of the *Human Rights Act* provides:

- (1) Subject to subsection (3) of this section, anything done or omitted by a person as the employee of another person shall, for the purposes of this Part of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.
- (2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.
- (3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

As the OECD Examiners observe

This appears to be a form of vicarious liability with a possible defence based on "corporate culture" and would have the salutary effect of providing corporations with an incentive to engage in meaningful preventive efforts.¹⁸¹

At present, however, it only applies to breaches of the Human Rights Act.

23. Norway

23.1 Corporate Criminal Liability in Norway

The Norwegian corporate criminal liability regime is similar to other Scandinavian regimes. Introduced in 1991, Chapter 3 a. of the Criminal Code sets the conditions under which an enterprise will be liable. Section 48a provides

When a penalty provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person is prosecuted for the contravention.

By enterprise is here meant a company, society or other association, one-man enterprise, foundation, estate or public activity.

The penalty shall be a fine. The enterprise may also be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, cf. section 29.¹⁸²

Hillblom¹⁸³ states that an offence will be committed 'on behalf of' an enterprise when three conditions are satisfied:

¹⁸¹ OECD, *New Zealand: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (2006) 57, available at <<http://www.oecd.org>> at 14 October 2007.

¹⁸² Section 29 of the Code allows for a comparable prohibition on a person pursuing certain activities if they have shown themselves unfit, e.g. a lawyer might be prohibited from practicing if they defrauded clients.

- A crime has been committed;
- A connection between the offender and the corporation is shown; and
- The offence formed part of the offender's work for the corporation.

The first condition appears to be straight forward. As to the second, the offender will usually be a statutory organ of the corporation, an agent or an employee but may come from outside these groups. It is a question of the interpretation of the legislation. The liability of agents is subject to further tests.

Where the cumulative effect of a number of legal acts is an illegal act, the corporation may be liable (provided that the actors had the relevant connection to the corporation).

The third condition requires the offence to have been committed in the scope of employment. Acts of extreme disloyalty by an employee will not be attributed to the company. A mere failure to obey instructions will not, however, amount to such disloyalty.

If the above conditions are satisfied, the corporation may be punished. In punishing the corporation, a court must consider 'whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence' (art 48b (c)). As such, it appears that corporate culture concepts may have some application in Norway at the sentencing stage.

¹⁸³ Fafo AIS, 'Survey Responses, Laws of Norway (Ingrid Hillblom), "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions"' (2006) 3 – 4, available at <http://www.fafo.no> at 14 October 2007.

Part 3: Analysis of Impact of Corporate Culture Provisions

24. General Overview of the Impact of Corporate Culture Provisions

24.1 Impact on civil and criminal liability

At least in the common law system, corporate culture provisions are going to be of most relevance to criminal liability, rather than civil liability. This is because the threshold for tortious liability in common law systems – a breach of a duty of care to address foreseeable risks – is already likely to turn on many of the same factors that are relevant to a 'corporate culture' analysis.

However, corporate culture provisions are likely to have a significant impact on the scope of criminal liability, by instituting a conceptual shift in the basis of this liability and making it easier, as a practical matter, to find corporations criminally liable, at least as compared to the identification approach currently found in the UK. In the course of drafting the Australian corporate culture provisions, the MCCOC observed that 'the concept of "corporate culture" casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.' Taking corporate culture into account at the liability stage increases the breadth of application of corporate criminal liability substantially. In doing so, it increases the incentives to improve internal controls as a failure to do so increases the risk of prosecution.

24.2 Impact at the liability rather than sentencing stage of proceedings

The ways in which corporate culture provisions operate are complex and varied. In Australia, for example, they are relevant at the liability stage, in determining whether or not the corporation has liability at all, and do not yet have a corresponding, formally codified role in the fixing of sentences. In other countries whose regimes for corporate liability take into account corporate culture factors, corporate culture is also generally taken into account at the liability stage, though some aspects of corporate culture may be relevant to sentencing.

In the US, corporate culture effectively has an impact both at a liability and a sentencing stage (for example, corporate culture considerations are relevant to the exercise of prosecutorial discretion as to whether to pursue criminal proceedings, as well as being important factors in the fixing of an appropriate penalty where it is found that a corporation is guilty of an offence).

The question of at what stage corporate culture provisions are likely to have the greatest impact depends on both the theoretical rationales for the criminal justice system and, assuming that at least one motivation for introducing the provisions is to deter and prevent wrongdoing, whether corporations and their officers are likely to be more influenced by the risk of being found criminally responsible for wrongdoing, or by the magnitude of potential fines.

Using corporate culture factors at the sentencing stage may pave the way for the imposition of quite sophisticated remedial measures upon a corporation (such as the adoption of compliance policies and staff education, which may be ordered in the US). Such remedial measures may be effective in both addressing existing breaches within corporations, and setting an example for other corporations.

Moreover, taking corporate culture into account at the sentencing stage may offer more flexibility in terms of responding to the varying degrees of moral blameworthiness of corporate actors. Models of organisational liability tend to require only that the corporation has failed to take reasonable precautions to prevent the commission of an offence, which can capture a broad spectrum of behaviours from mere oversight and incompetence to a wilful disregard for human life. While sentencing practices would, in any case, tend to differentiate between these different levels of culpability, integrating corporate culture into sentencing considerations would allow close attention to the organisational deficiencies that actually permitted the relevant conduct to occur.

There is no reason why corporate culture considerations should not be relevant, albeit in different ways, at both the liability and sentencing stages.

25. Design Issues in Corporate Criminal Liability Regimes

25.1 Introduction

The survey in Pts 2A and 2B of this Discussion Paper of various States' approaches to corporate criminal liability suggests that, in designing corporate liability provisions, States must consider a range of issues including the following:

- On whose fault is the corporate liability based?
- What standard of liability is adopted?
- Who must prove liability?
- Is liability general or specific?
- What relationship must exist between the physical actor and the corporation sought to be held liable?
- What relationship must exist between the prosecution of the corporation and the prosecution of the individual offender?
- What link needs to exist between the corporation and the subject-matter of the offending?

Other issues may also need to be addressed in the course of designing a corporate liability regime, for example, the kinds of corporate entity covered, jurisdiction, sanctions and enforcement.

Set out below is a discussion of each of these issues, and the way in which corporate culture provisions intersect with them, based on the countries surveyed. The primary focus is on the countries in Pt 2A, but reference will be had to countries in Pt 2B where appropriate.

25.2 Accountability and Predictability

So far as possible, these issues are discussed in terms of the criteria of accountability and predictability. A brief discussion of what is meant by these terms is in order.

Predictability is the simpler of the terms. A design choice favours, or produces, predictability where it makes clear (or tends to make clear) the outcome of an action. Predictability is desirable. A corporation ought to be able to be reasonably certain before embarking on a course of conduct whether that course of conduct will render them criminally liable. As a business matter, uncertainty, whether legal or factual, is generally undesirable. It makes it hard to accurately judge the likelihood of outcomes. At the extreme end of the spectrum, a legal doctrine that operates unpredictably may violate the principle of legality, an aspect of the rule of law that requires laws to be clear, ascertainable and non-retrospective. A degree of uncertainty is, however, likely to accompany the introduction of any new legal regime, whether in the field of corporate criminal liability or elsewhere. Such temporary uncertainty, however, is unlikely to justify a decision not to implement a new regime when other factors favour its implementation.

The criterion of accountability is somewhat more complex. Obviously, accountability can be said to be increased when the scope of a person's criminal liability is broadened. On one level, a person is more accountable for their actions if they can be held liable for them. At the same time, too aggressive an approach, leading to persons being held liable for conduct that, as a normative matter, they are not responsible for may be contrary to the principle of accountability. As such, the principle of accountability requires a balancing act between the pragmatic consideration of an effective and dissuasive criminal law and the principled concern that a person should not be held liable for offences they are not, morally speaking, guilty of.

It is submitted that there is typically a tension between the two criteria, but this is not invariably the case. A design choice that expands the liability of corporations may promote both accountability and predictability if the operation and application of the new rules is sufficiently clearly delineated.

25.3 On Whose Fault is the Corporate Liability Based?

The question here is fairly clear: Is corporate liability based on the fault of human beings, whether identified or not, within the corporation (**derivative**) or is the liability based on some identifiable failure on the part of the corporation as a whole (**organisational**)?

It may be observed that the two models of fault are not necessarily exclusive. In Australia, sub-s. 12.3(2)(a) and (b) plainly allow for attribution of individual guilty conduct to a corporation in addition to punishing the corporation where the corporation itself has erred. Insofar as Finland allows for corporate punishment on the basis of organisational negligence, Ch. 9, section (2)(1) also permits (and, arguably, favours) punishment based on the acts of a person, whether identified or not. In Austria, the VbVG allows for both derivative managerial fault and corporate negligence in the case of crimes committed by lower ranking employees.

As Pieth has noted, the majority of countries have adopted a derivative model of fault, typically based on some version of the identification doctrine (e.g. the UK, Canada), but also sometimes based on vicarious liability models (e.g. the US, South Africa).

(a) Identification

The identification approach, used in the UK and other British Commonwealth countries, has been heavily criticised in academic literature.¹⁸⁴ It is notorious for failing to secure convictions in relation to large corporations, even in high profile and allegedly incontrovertible cases.¹⁸⁵

Pieth observes:

With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently refusing a concept of 'aggregate knowledge', would in our view fail to meet the [OECD Bribery Convention] requirements of 'effective, proportionate and dissuasive sanctions'.¹⁸⁶

Pieth implies this criticism extends to the broader identification approaches adopted by Canada and New Zealand.¹⁸⁷

In terms of the tension between ensuring the accountability of corporate actors for conduct occurring in the course of their operations, and providing a predictable and certain legal environment, the identification approach favours predictability at the expense of accountability. The identification approach requires that a member of senior management in the corporation to perform both the physical element of the offence and have the fault element of the offence. In other words, it requires a member of senior management to actually commit the offence with which the corporation is charged. As such, the exposure of the corporation to corporate criminal liability is very small. The scope of liability of the corporation is, however, very predictable: provided no senior officer actively commits an offence, the corporation will not be liable.

The practical problems raised by the identification approach are well expressed by Jürgen Meyer. Whilst these comments are directed to the German administrative liability regime, they are entirely applicable to jurisdictions applying the identification approach.¹⁸⁸

¹⁸⁴ See, for example, John Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey' in Eser, Heine and Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 9, 16 - 17; Ferguson, 'The Basis for Criminal Responsibility of Collective Entities in Canada' in the same, 153, 176 - 178 and Celia Wells, 'Developments in Corporate Liability in England and Wales' in the same, 217, 217 - 224.

¹⁸⁵ Department of Transport, *Report of Formal Investigation; The Herald of Free Enterprise* (1987), [14.1]; (1991) 93 Ct App R 72; and see, generally, Matthias Beck and Charles Woolfson, 'An Economic Analysis of the Proposed Reform of the Law of Involuntary Manslaughter' (2001) 5 (2) *Journal of the Institution of Occupational Safety and Health* 63, 63 - 64.

¹⁸⁶ Pieth, above n 5, 28.

¹⁸⁷ *Ibid*, 19 - 20.

¹⁸⁸ The German administrative liability regime takes a similarly narrow approach to the class of individuals whose actions may trigger the liability of the corporation and so is a close fit to the identification approach, other than its insistence that the liability is non-criminal.

This individualistic approach to attributing responsibility, taken by classical criminal law, whereby an individual offender and an individual victim, i.e. natural persons, confront each other, means that crime committed by legal and collective entities cannot be combated effectively. Even in cases where the prosecuting authorities have established without a doubt that a criminal offence has been committed by and in the interest of a company, illegal dumping of waste or water pollution for example, complex organisational structures and company hierarchies mean that it is often not possible to ascertain with sufficient certainty who the individual offender is and to call them to account. To an increasing degree, we are seeing an "organised" or structural lack of individual responsibility.

The consequences of this development become clear in the field of offences committed against the environment for example. The number of cases solved is continuously sinking. According to a study, carried out a few years ago by a criminological research group at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, the dismissal of criminal proceedings by the public prosecutor's office in the field of environmental criminal law has established itself as the standard method of dealing with offences.

In the relatively rare cases where charges are brought the risk of conviction in the case of corporate offences or offenders is very small. The majority of these criminal proceedings are dismissed by the courts. Real risk of conviction mainly arises in the case of simple matters concerning private or smaller commercial operations, i.e. in cases concerning (large) industrial operations a positive risk of punishment becomes less and less likely.

The current need for the greatest possible economic efficiency and the huge number of individual tasks mean that a flexible system of decentralisation is necessary particularly in large companies. This, in turn, means that many decisions, having effects outside the company, are made, not by the top management, but at lower levels. In addition, companies are increasingly shifting their production areas (so-called out-sourcing). If this makes it more difficult to attribute responsibility, the problems multiply when operations are transferred abroad.¹⁸⁹

Coffee has also suggested that the identification doctrine creates incentives to be ignorant of developments within other parts of the corporation, lest those developments create the mental state required to give rise to liability.¹⁹⁰

(b) Expanded Identification

Having observed that the identification approach is by itself inadequate, Pieth goes on to suggest that countries adopting the expanded identification approach seen in the *Criminal Law Convention on Corruption* 1999¹⁹¹ and the *Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests*¹⁹² would meet the requirements of the OECD Bribery Convention.¹⁹³ As such, it appears that international approaches to dealing with criminal conduct may increasingly require States to implement corporate liability regimes that go beyond the basic identification doctrine.

¹⁸⁹ Jürgen Meyer, 'Criminal Responsibilities of Legal and Collective Entities: Comments on Developments in Germany' in Eser, Heine and Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1999) 130 – 131.

¹⁹⁰ Coffee, above n 184, 12.

¹⁹¹ Opened for signature 27 January 1999, ETS 173 (entered into force 24 January 2003).

¹⁹² Adopted 19 July 1997.

¹⁹³ Pieth, above n 5, 20.

The expanded identification approach remains relatively untested and it is hard to comment on its effectiveness in terms of accountability and predictability. Certainly, the expansion of liability to capture acts of negligence on the part of senior management makes it more likely that corporations will be prosecuted. At the same time, the continued focus on the acts of senior management leaves the expanded identification approach vulnerable to the charge that it is still not capable of responding to the challenge posed by modern corporate structures, as it only punishes those actions for which senior management are directly responsible.

By making failure of supervision a ground of liability, it seems that the expanded identification approach remedies the difficulties faced by the identification doctrine in respect of cross-border conduct as the fault can be located where the failure to supervise took place, i.e. if a member of senior management at head office fails to adequately supervise a person in another jurisdiction, then the physical element may be said to take place at the head office.

Expanded identification would not, however, seem to address the issue of 'insulation by delegation'. If senior management delegates its responsibilities to middle management and then diligently supervises them, but accidents still occur because of the failure of middle management to supervise the personnel under them, then the corporation would appear not to be liable as senior management has fulfilled its duty to supervise. Given that Meyer notes the increasing responsibility of lower level personnel, this may significantly blunt the impact of the expansion of liability.

In terms of accountability and predictability, the expanded identification approach certainly appears to broaden accountability as it means that senior management can be held liable for the consequences of their acts even when those consequences occur in another location. In terms of predictability, it does not clearly define the supervisory duties owed by senior management which means case law is likely to be required in each jurisdiction to give content to duties.

(c) Vicarious Liability

The vicarious liability approach is an alternative liability approach that can be applied on an organisational or derivative basis, depending on one's theoretical approach. In the US, it is applied as a derivative approach, where the fault of the agent or employee is attributed to the firm. In Japan, the fault element is said to be the failure of the corporation to properly supervise its employee. At a mechanical level, the two approaches are very similar.

Whichever theoretical approach is taken, vicarious liability is very effective in securing prosecutions, in part because it contains an implicit or explicit reversal of the burden of proof: the State is required only to prove that an offence was committed by some employee at which point the onus shifts, as a practical matter, to the defendant to establish the act should not be imputed to them.

This strict approach has its advantages. Arlen and Kraakman, examining the economic efficiency of different corporate liability models observe that 'strict [vicarious] liability is generally the superior rule for inducing efficient preventative measures and private

sanctioning.¹⁹⁴ They go on to observe, however, that vicarious liability creates incentives to conceal wrongdoing that occurred undetected because the exposure of the wrongdoing enhances the risk of the corporation itself being held liable.¹⁹⁵

Pieth notes that a vicarious liability regime also has practical advantages. He states that it is the most 'dissuasive power' of any corporate liability system. He also notes 'this approach has the advantage of being simple to manage. So simple that even laymen, including members of a jury, can apply the concept. He goes on to admit, however, that '[vicarious liability] holds the corporation liable even where it has done all it could to prevent the crime.'¹⁹⁶

A similar criticism is levelled by Wells, who comments:

To render a corporation vicariously liable, the employee's conduct must be within the scope of the individual's employment or authority. Vicarious liability has been criticised for including too little (in demanding that liability flow through an individual, however great the fault of the corporation), and for including too much (in blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault).¹⁹⁷

Vicarious liability models form an interesting counterpoint to identification models in terms of accountability and predictability. It is clear that vicarious liability models render corporations broadly liable for offending. They may do so, however, at the expense of any moral guilt on the part of the corporation.¹⁹⁸ The case of *US v Sun-Diamond Growers of California*¹⁹⁹ illustrates how tenuous the link between offender conduct and the prosecuted corporation can be. As the DC Circuit observed:

Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.²⁰⁰

In this way, vicarious liability arguably holds corporations 'over-accountable' for the acts of employees. Vicarious liability does not, however, call for liability in the absence of an identified offender, meaning that the corporation is still not liable when the offender cannot be identified, which may create an incentive for corporations to conceal the offender. As far as predictability goes, the operation of the doctrine of vicarious liability is fairly

¹⁹⁴ Jennifer Arlen and Reinier Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' 72 (4) *New York University Law Review* 687, 717.

¹⁹⁵ *Ibid.* A counterargument would be that this risk is reduced by the fact that wilful concealment of offending will lead to further sanctions and that early reporting should reduce liability. See Coffee, above n 184, 29 - 30.

¹⁹⁶ Pieth, above n 5, 19.

¹⁹⁷ Celia Wells, 'Criminal Responsibility of Legal Persons in Common Law Jurisdictions' (paper prepared for OECD Anti-Corruption Unit, Working Group on Bribery in International Business Transactions, 4 October 2000) [6.4].

¹⁹⁸ The identification approach is vulnerable to similar criticism as it does not require any fault on the part of the corporation, but rather imputes the fault of an individual offender. At the same time, the narrowness of the class of persons whose fault can imputed lessen the force of this criticism.

¹⁹⁹ 138 F.3d 961 (DC Cir, 1998).

²⁰⁰ *Ibid.*, 970.

predictable, especially as the fact that the employee or agent disobeyed explicit corporate policy will not prevent the corporation from being found responsible.²⁰¹

The sentencing guidelines appear to be an important part of the US vicarious liability regime, as they serve to mitigate the harshness that would otherwise exist. The *US Sentencing Guidelines* add to the predictability by setting out how to minimise corporate liability once it does attach.

(d) Organisational Approaches

Organisational approaches have emerged as a direct response to the perceived shortcomings of derivative liability models. As such, they are typically said to have two benefits:

- Unlike derivative liability approaches, organisational liability approaches focus on fault on the part of the corporation. This is in line with criminal law theory which favours punishing persons for their faults, rather than the faults of another; and
- Organisational approaches more accurately reflect the reality of modern corporate structures and are more in tune with ordinary perceptions of corporate responsibility.

In respect of the first rationale, the point is well made by Gobert and Punch who observe:

In the final analysis the linkage of corporate fault to human fault is unsatisfying because corporate fault is not the same as human fault ... The goals of a company cannot automatically be equated with the goals of any one person or combination of persons, nor can one derive the goals of the company by adding together potentially conflicting individual goals. A company has its own distinctive goals, its own distinctive culture, and its own distinctive personality. It is an independent organic entity, and, as such, should be responsible in its own right, directly and not derivatively, for the criminal consequences that arise out of the way that its business is conducted ... What is needed is a theory of criminal liability that captures the distinctive nature of corporate fault ... Typically, the company's fault will lie in its failure to have put into place protective mechanisms that would have prevented harm from occurring. It is for this failure that the company bears responsibility for the harm. Recognising that corporate crimes are more often crimes of omission than commission reinforces the poverty of derivative theories of corporate liability that attribute the offences of individuals to a company. While it may be feasible to link wrongful acts to particular actors, it is often impossible to determine who should have done something that was not done. The obligation to put into place systems that would avert crime is *collective* and the failure to do so is a reflection of the way that the company has chosen to conduct its business.²⁰²

They continue:

The main shortcoming of theories of vicarious, derivative or imputed liability ... is that they fail to identify what exactly it is that a company has done wrong to warrant the offence of a natural person being attributed to it.²⁰³

²⁰¹ As to Japan, see *Fafo AIS*, above n 132, 9. As to the US, see *US v Potter* 463 F.3d 9 (1st Cir, 2006) 25 - 26.

²⁰² Gobert and Punch, above n 76, 38-9.

²⁰³ *Ibid*, 44.

As to the second rationale, the MCCOC observed that ‘the concept of ‘corporate culture’ casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.’ A related point was made by Alan Rose, then President of the Australian Law Reform Commission who observed:

[The corporate culture approach] quite clearly seeks to address the significant criticisms of the 1972 *Tesco* decision, which restricted corporate criminal liability to the conduct or fault of high-level managers or a delegate with full discretion to act independently of in-house instructions, an approach ironically appropriate to the small and medium-sized business, with which large national and multi-national corporation [sic] have almost nothing in common.²⁰⁴

It is not clear whether the Australian *Criminal Code* approach goes so far as to dispense with the requirement that some person be identified as responsible for the physical element of an offence. It is clear that Finland at least does allow for anonymous guilt. Riijiharvi suggests the provision allowing this is only to be exercised in exceptional circumstances,²⁰⁵ with the OECD observing:

It is not necessary that the offender be identified or otherwise be punished. Chapter 9, section 2 refers to the situations of “anonymous guilt”. The reason for this provision is that it may be very apparent that an entity has not fulfilled its duty to take care even if the real offender remains unidentified. In these situations there may be reasonable cause for imposing a corporate fine.²⁰⁶

Such anonymous guilt provisions may reasonably be regarded as akin to a strict liability regime where the mere occurrence of the prohibited event is sufficient to trigger liability on the part of the corporation.

In their examination of the economic efficiency of corporate liability regimes, Arlen and Kraakman concluded that a mixed model, adopting elements of strict liability and ‘duty based’ liability, was likely to be the most economically efficient and effective approach as it created incentives both to prevent and punish offending, but also to actively search out offending that might have gone undetected.²⁰⁷ Pieth makes a related point. He states:

This approach has the advantage of placing due diligence and compliance ‘centre stage’. Gobert rightly points out that offering a ‘due diligence defence’, rather than creating strict liability, is more subtle and more motivating to companies: it uses the ‘carrot’ rather than the ‘stick’.²⁰⁸

There is presently little in the way of criticism of organisational liability regimes.²⁰⁹ This is probably because such scheme are generally in their infancy and have not been widely

²⁰⁴ Alan Rose, ‘1995 Australian Criminal Code Act: Corporate Criminal Provisions’ [1995] 6 *Criminal Law Forum* 129.

²⁰⁵ See above, section 8.2(c).

²⁰⁶ OECD, *Finland Review of Implementation of the Convention and the 1997 Recommendation* [sic] (1999) 6.

²⁰⁷ Arlen and Kraakman, above n 194, 752 – 753.

²⁰⁸ Pieth, above n5, 20.

²⁰⁹ Pieth, *ibid*, suggests that one difficulty is that organisational models are more complicated than others. Given, however, that juries are called upon to decide complex criminal fraud cases, it does not seem that this is necessarily an insuperable problem.

applied. The corollary of this is, however, a high degree of uncertainty in their application. Heine comments that

a cautious shift can be observed from an approach imputing individual behaviour to the corporation to an original liability of the enterprise as such, which attaches through faulty organisational structures or deficiencies laid down in the business matters of the legal person. Indeed the imputation model presumes an enterprise which is managed by a small number of identifiable executives. This approach is limited when dealing with large decentralised enterprises, the decisions of which are spread over time and therefore offences can hardly be traced to individual decisions. For these reasons this shift adequately integrates the actual needs and seems to improve efficiency, last but not least, by separating responsibility of individuals from more extensive liability of large scale enterprises. However corporate sanctions must not only be effective but as well calculable. Yet, for the time being, clear and agreed criteria are still as rare as fuel in the filling-stations in September.²¹⁰

The difficulty of defining what exactly an organisation must do in order to avoid liability under an organisational model was raised by the OECD Examiners in Switzerland who stated:

The notion of "all reasonable and necessary organisational measures to prevent such an offence" also raised questions, particularly when applied to transnational bribery. There is nothing in the text of the law or in the legislative history to shed light on the concept. The legal writing seen by the Examiners considers it only in very general terms. A representative of the Federal Office of Justice said that the provision had been discussed in a parliamentary committee and that experts had been consulted in drawing up the text but the discussions have not been published. For the money laundering offence, there are several sources outside the criminal law to establish standards of organisation for financial intermediaries, but that is far from the case where bribery is concerned. One academic article notes that the main sources for such organisational standards in bribery cases would be international, primarily the OECD Convention, the Revised Recommendation and the OECD Guidelines for Multinational Enterprises. However, the article considers that it would be difficult for these standards to constitute extra-criminal rules of conduct governing criminal liability because they are little-known and do not derive from an explicit delegation of authority like the one that gave rise to the development by SROs of standards in money laundering. Moreover, it is far from certain that such standards would be sufficiently explicit to enable prosecutors to prove defective organisation.²¹¹

Another issue is what precisely is meant by 'corporate culture'. It is not clear whether the corrupt culture of one branch office in one country of a multinational corporation could be used to prosecute the head office in another country. The definition of corporate culture in the Australian *Criminal Code* appears to suggest that corporate culture extends beyond the immediately affected part of the body corporate:

corporate culture means 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.

²¹⁰ Günter Heine, 'Criminal Responsibility of Legal Persons in Civil Law Jurisdictions' (paper prepared for OECD Anti-Corruption Unit, Working Group on Bribery in International Business Transactions, 4 October 2000), 5 – 6.

²¹¹ Switzerland Report, above n 101, 38.

The reference to culture 'generally or in the part of the body corporate' would certainly seem to encompass culture within different divisions of the same company, but it is not clear whether it would cross the veil between different companies within the same group. Either option potentially has problematic consequences from an accountability perspective. If corporate culture does not permeate the corporate veil, then a corporate group could be structured to avoid or minimise criminal liability just like any other liability. On the other hand, if corporate culture can permeate, then there is the risk that one 'bad apple' will spoil the entire corporate group.

In terms of accountability and predictability, the organisational approaches surveyed here plainly increase the scope of liability of corporations beyond the identification approach. It is not clear that the Australian approach goes as far as incorporating elements of vicarious liability, although the Finnish approach seems to do so. That said, the Finnish approach recognises vicarious liability as the exception rather than the rule. As such, the organisational approaches surveyed here seem to tread a middle path in terms of accountability.

As the questions about standards of liability and corporate culture above indicate, predictability is currently the most significant issue in respect of organisational model of liability. Under the Australian regime, it is unclear what is required to avoid liability simply because the regime has not been tested in court. Likewise, the Finnish provisions have seen only limited application. This kind of unpredictability can impose extra costs on business operating in the relevant jurisdictions. As noted, however, it is a consequence of any new legal regime. Greater legislative forethought can address the problem, but is unlikely to solve it completely.

25.4 Standard of Liability

Civil, common and hybrid legal systems recognise various levels of intent, ranging from direct intent to negligence. Generally, the more serious the crime, the more direct the intention required to be found guilty of the offence.

One criticism that has been levelled at Australia's organisational liability model is that it has the effect of reducing the level of intention required for all crimes to a single fault element of 'authorising or permitting' the offence to occur (essentially, negligence). Critics have suggested that this is anomalous in the field of criminal law and that it is unfair to hold a corporation liable where a natural person with the same fault element would not be held liable.²¹²

This 'reductionist' approach to corporate intent appears to be a constant of organisational liability systems, however. Finland and Switzerland both require only negligence in relation to organisational offending. It is significant that the UK *Corporate Manslaughter Act 2007* adopts a negligence standard, albeit somewhat modified to require the heightened fault of gross negligence. This is still, however, a lower standard than intention. In view of the difficulty of establishing a specific mental state on the part of a corporate actor, it may be

²¹² See above, section 3.2, n 26.

that this approach is a necessary corollary of looking at organisational, rather than derivative, fault.

This indicates one theoretical advantage of a derivative liability system in that, in principle, it allows for a more finely tuned system of criminal responsibility because it allows for a recognition of differing degrees of intent.

It is notable that Chapter 9, section 4 of Finland's penal code allows a court to waive punishment of a corporation entirely where various conditions are satisfied. In general, these are where the corporation was either only involved in the offending in a minor way or where the corporation has taken steps to prevent further offending.

From a design perspective, such a provision seems to represent a trade off between the lowered standard of liability inherent in an organisational model and the recognition that the strict imposition of this standard of liability would be likely to have adverse consequences for businesses.

25.5 What is the Relationship between the Physical Actor and the Corporation?

It is often said that a corporation cannot act other than through a natural person. The question then is, what relationship must exist between the natural person who acts and the corporation who is held responsible?

In organisational liability models, the required relationship varies. A corporation may only act through a natural person, but it can omit by itself. As such, where the act required is a failure to do something, e.g. to take reasonable care, then the corporation can be the actor for the relevant purposes. In these cases, there is no need for further investigation of the relationship between actor and offender. An example of this is art. 102(2) of the Swiss penal code, where the failure of the corporation to take all reasonable and necessary steps to prevent the offending supplies the physical element of the offence.

Alternatively, and in the ordinary case, organisational models will usually require a physical offender who must in some way be related to the corporation in order for the corporation to be liable in its own right. In Australia, the required relationship is specified in s12.2 of the *Criminal Code* which applies to any 'employee, agent or officer' of the corporation. Finland, Austria and Japan take similarly broad approaches.

Finland and Switzerland go a step further than most organisational liability models by allowing for the possibility of anonymous guilt. Under art. 102(1) of the Swiss Penal Code, an inability to identify the offender itself is sufficient to trigger corporate liability. Chapter 9, section 2(2) of the Finnish Penal Code allows for the corporation to be found liable where the offender cannot be identified. The operation of Ch. 9, 2(2) is somewhat unclear, however, but appears to represent a form of criminal *res ipsa loquitur*.

In derivative liability models, the identification approach and the vicarious liability approach diverge. Like organisational models, the US vicarious liability approach takes a broad approach, encompassing the act of any employee or agent.²¹³

²¹³ It is submitted the absence of 'officer' is irrelevant, since any officer will either be an employee or an agent or both.

In the identification model, the actor must be a senior manager of the company. The Supreme Court of Canada, in *Canadian Dredge and Dock Co. v. The Queen*,²¹⁴ observed:

In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the "ego", the "center" of the corporate personality, the "vital organ" of the body corporate, the "*alter ego*" of the corporation or its "directing mind".²¹⁵

In *A-G's Reference (No. 2 of 1999)*,²¹⁶ the Court of Appeal of England and Wales stated:

Identification is necessary in relation to the physical element, i.e. whose acts or omissions are to be attributed to the company and *R v Adomako*'s objective test in relation to gross negligence in no way affects this. Furthermore, the civil negligence rule of liability for the acts of servants or agents has no place in the criminal law—which is why the identification principle was developed. That principle is still the rule of attribution in criminal law whether or not *mens rea* needs to be proved.²¹⁷

The expanded identification doctrine seems to expand the class of individuals whose actions may be attributed to the corporation to include those persons exercising *de facto* control of operations. In this regard, it appears to resemble the approach adopted by the Canadian Criminal Code which allows for the prosecution of 'senior officers', defined as 'a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities'.

25.6 Must Prosecution of the Individual Offender Occur as well as Prosecution of the Legal Offender?

One issue that emerges in a number of jurisdictions, primarily falling outside those surveyed above, is whether the conviction of the individual offender is required before the corporation can be convicted.

Obviously for the category of offences where the corporation itself is the offender, this question does not arise, although, seemingly out of an abundance of caution, the liability of a corporation under art 102(2) of the Swiss penal code is explicitly stated to be without regard to the liability of the individual offender for the underlying offence.

Equally, art 102(1) of the Swiss Penal Code and the provisions of the Finnish Penal Code which allow for anonymous guilt mean that an individual offender need not be prosecuted before the corporation can be found guilty. In fact, a conviction under art 102(1) could not be secured if the offender could be identified.

Generally speaking, regardless of whether the liability model is organisational or derivative, it does not appear that prosecution of an individual offender will be a prerequisite to bringing charges against a corporation. As quoted above, the Supreme Court of Canada in *Canadian Dredge and Dock* referred to 'the actions of the employee (who must generally

²¹⁴ [1985] 1 SCR 662.

²¹⁵ *Ibid*, 682.

²¹⁶ [2000] 3 All ER 182.

²¹⁷ *Ibid*, 190.

be liable himself),²¹⁸ which would seem to indicate that the requirement of personal liability is not invariable. Moreover, an individual offender may have status defences (e.g. voluntariness, insanity) that do not apply to the corporation. It is even possible that an employee might be able to raise a defence of duress on the basis of illegitimate pressure by superiors within the corporation.

It should be noted that, as a general matter, since the identification doctrine requires proof of fault element and physical element by a member of senior management, the prosecution and conviction of the individual offender would seem to be a relatively simple matter.

In Belgium, paragraph 2 of art 5 of the Criminal Code meant there were situations in which the liability of an individual offender actually precluded the liability of a corporation, although, as indicated, this may be amended in the future.²¹⁹

In several non-survey countries, for example Poland and Mexico, the individual offender must be found guilty of an offence before the corporation can be charged.

It is worth noting in passing that some international instruments require that the prosecution of a corporate offender be without prejudice to the prosecution of any natural offender.²²⁰

It is submitted that, as a matter of principle, it is preferable if any individual offender is punished alongside the relevant corporation. Fisse and Braithwaite observe that one of the problems of corporate liability is that it has the potential to undermine personal responsibility.²²¹ They state:

Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch all device.²²²

As a matter of public policy, it is obviously desirable that those most responsible for criminal offending be punished for the offending. Given that, in many cases, this will be a natural person, it would appear unjust to only prosecute the corporation concerned.

25.7 Is Liability General or Specific?

One question that must be considered in designing a corporate liability system is whether or not corporate liability should be specific or general, that is, should it be restricted to identified offences or available in respect of all of them?

In general, common law countries, such as the UK, Canada, New Zealand and India, have adopted a general approach by defining the subjects of criminal law as 'persons' and then defining person to include both natural and corporations.²²³

²¹⁸ See above n 215.

²¹⁹ See above section 12.

²²⁰ See art. 10(3) of the *UN Convention against Transnational Organized Crime* and art. 18(3) of the *Criminal Law Convention on Corruption*.

²²¹ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993) 1.

²²² *Ibid.* See also pp. 2 – 8.

By contrast, civil law countries have historically tended to prefer specific liability. In Finland, s1(1) of Chapter 9 restricts corporate liability to offences which specifically state they may be punished by corporate fine. In Denmark, s25 of the Criminal Code states that a corporation may be punished if that punishment is authorised by a law. Similarly, in the civil law-influenced jurisdictions of Japan and China, liability of corporations is specific. As with the common law nations, this position is not universal, however: Belgium and the Netherlands have general liability systems.

The more interesting point about general and specific liability, however, is its application in terms of federal systems. Both the US and Australia apply different tests of corporate criminal liability at the State and Federal levels. The test applied at the Federal level is by definition specific, since it applies only to those offences which the Federal government has power to punish.

25.8 Burden of Proof

One practical question to be considered in designing a corporate liability regime is the question of who carries the burden of proving the corporation is guilty of the offence alleged to have been committed. It is generally considered axiomatic that, in the criminal law, the State is required to prove the guilt of the accused.

In all of the countries surveyed, this is the official position. In two countries, Australia and Switzerland, a reverse burden of proof was considered. In Japan and the US, the burden remains technically on the prosecution, but, as a practical matter, it appears reversed. It is worth examining these countries briefly.

In Australia, the MCCOC considered a general reversal of the burden of proof, but declined to implement it, noting:

Two submissions favoured this approach but the Committee decided that such a general reversal of the onus of proof just because a company was charged, especially for the most serious offences (eg manslaughter), could not be justified.²²⁴

In Switzerland, the OECD Examiners considering the country's provisions suggested that a reversal of proof was reasonable in the context of proving institutional negligence. They observed:

The Swiss authorities consider that the courts will have to consider what another, comparable enterprise would reasonably have done, what instructions were given, what controls were in place, what internal information was provided and what the overall organisation was.

Under these circumstances, in the Examiners' opinion it seems inappropriate to place the burden of proof on the prosecutor (or magistrate). The enterprise is much more familiar than the judiciary with the nature of its own internal organisation, its qualities and its defects. The

²²³ Subject to the principle *lex non cogit ad impossibilia* (frequently loosely translated as 'the law requires nothing impossible') which means that corporations cannot be convicted of offences for which imprisonment is the only punishment. This is the traditional justification in English law for the inability of corporations to be convicted of murder: *R v ICR Haulage Ltd* [1944] 1 All ER 691, 693; *Murray Wright Ltd* [1970] NZLR 476, 480. This principle is easily overturned, however: see, for example, s16 *Crimes (Sentencing Procedures) Act 1999* (NSW) and s4B of the *Crimes Act 1914* (Cth).

²²⁴ Final Report, 107.

justice system will probably find it difficult to prove defective organisation, especially when an enterprise is part of a complex group, and this could deter prosecutions.²²⁵

The Swiss authorities suggested that such a reversal of the onus of proof is not compatible with art 6 of the *European Convention on Human Rights*. It is not clear that this is correct. There is a body of English case law dealing with the question of whether a reverse onus of proof in relation to statutory offences is compatible with art 6. In the recent case of *Sheldrake v. DPP; A-G's Reference (No. 4 of 2002)*,²²⁶ the House of Lords suggested that it was a question of proportionality.²²⁷ As such, it is arguable that considerations such as those articulated by the OECD Examiners could justify a reverse burden of proof under art 6.

In Japan, the Supreme Court, in its judgment of 26 March 1965 has stated that there is a rebuttable presumption that, where an employee commits an offence, the corporation has been negligent. Shibahara states:

According to this opinion, even in the case of punishing a legal person, the existence of some fault on its part was a necessary element. As regards this opinion, there are three different views.

The fault of the employer is a preliminary assumption for punishing the legal person. However, where the "double sanction rule" applies, we continue to recognise the existence of fault on the employer's part as a legal fiction. There is no need to prove its existence. Consequently, in practice, this view returns to punishing a legal person despite the absence of any fault on its part.

1. Fault on the employer's part is a preliminary assumption. Consequently, the Prosecution must prove its existence. In this instance the fault of the employer is viewed as carelessness in the designation and oversight of the employer who committed the offence.
2. It is evident that this position is compatible with the principle of criminal responsibility. However in practice it is often difficult for the Prosecution to prove the existence of negligence on the part of the employer. Therefore, in order to harmonise the principle of criminal responsibility with administrative efficiency, the third conception is favoured.
3. The fault (negligence) of the employer is the prerequisite element, but the burden of proof lies with the accused. Consequently it is the accused who must prove that there was no negligence involved in the appointment and the monitoring of the said employee. This is the view shared by the majority of current doctrine. The Supreme Court of Japan also maintains this view.²²⁸

It is not clear whether the three views are meant to be expressed as exclusive or whether there is some capacity for cross-over. At any rate, it seems clear that one justification that has been advanced for Japan's rebuttable presumption is essentially the same as that noted by the OECD Examiners in relation to Switzerland.

²²⁵ Switzerland Report, above n 101, 38 – 39.

²²⁶ [2005] 1 AC 264.

²²⁷ *Ibid*, [21].

²²⁸ Shibahara, above n 136, 45.

It should be noted that, as a matter of practice, the US also adopts a reverse onus of proof. Under the vicarious liability approach, the onus is on the defendant corporation to show that the acts of the individual offender should not be imputed to it.

The reversal of the burden of proof supplies self-evident benefits to regulators and victims who are relieved of having to prove various aspects of their case. Equally obviously, it entails consequent and significant unfairness to the corporate defendant who is stripped of part of the traditional protection of the criminal law. The UK House of Lords has found such removal of protection can be justified at least as regards certain aspects of certain offences. It is unclear whether a more widespread principle that the onus of proof is reversed in respect of a specific class of defendants, regardless of the offence charged, would be compatible with the right to a fair trial.

25.9 The Link between the Defendant and the Subject Matter of the Offending

A number of nations require a link between the defendant and the subject matter of the offending. The strength of that link varies between jurisdictions. In some cases, all that is required is that the offending in question be 'in connection with' the business of the corporation. Other countries go further and require an intention to actually benefit the corporation. A third approach is to explicitly exclude crimes where pure self-interest is the motivation for offending.

A unique approach is apparently adopted by Sweden which is to lessen the supervisory duty on the corporation in proportion to the strength of the link between the corporation and the subject-matter of the offending.²²⁹

An example of the 'weak subject matter connection' is the Japanese approach. Of the various Ryobatsu-Kitei set out in Pt 2A, two require the offending conduct to be carried out 'in regard to' the business of the corporation, whilst the third requires the conduct to occur 'in the carrying out of' the business of the corporation.

The major example of the 'intent to benefit' approach is the US, which requires an intention to benefit the corporation to be part of the offender's intention in order to impute liability. As is obvious from the case of *US v Sun-Diamond Growers of California*,²³⁰ however, this test is not particularly stringent. There, the DC Circuit Court of Appeals admitted that the argument that Sun-Diamond had been defrauded had 'considerable intuitive appeal', but stated:

By responding to the Secretary's request to help his brother, [the offender] may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit. See, e.g., *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-07 (4th Cir.

²²⁹ This is an interesting approach and may be worth further investigation, but unfortunately we have not been able to locate an adequate explanation of how it operates in practice. The OECD Phase 1 Report on Sweden states 'According to the commentary to the Penal Code, the obligation on the entrepreneur to monitor the business is far reaching, except where there is a weak link between the business and the crime.' It directs the reader to pp. 504 – 506 of the *Commentary of the Penal Code* (4th edition).

²³⁰ 138 F.3d 961 (DC Cir, 1998).

1985) (agent's conduct which is actually or potentially detrimental to corporation may nonetheless be imputed to corporation in criminal case if motivated at least in part by intent to benefit it); cf. *Local 1814, International Longshoremen's Association, AFL-CIO v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984) ("[T]he acts of an agent motivated partly by self-interest-even where self-interest is the predominant motive-lie within the scope of employment so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.' ") (quoting *Restatement (Second) of Agency* § 236 & comment b (1957)). Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.²³¹

It should be noted that the US approach does not require a corporation to benefit in fact from the offending.²³²

It appears the requirement of an intention to benefit the corporation was adopted by the Canadian legislature in amending their Criminal Code. Section 22.2 of the Canadian Criminal Code requires a senior officer to have an 'intent at least in part to benefit the organization' in order to find that an organisation is a party to an offence.

Finland requires that an offender 'act for the benefit' of the corporation, but it is not clear whether this means that they act with an intent to benefit the corporation or simply that the corporation benefits from the offending and that the offender's state of mind is irrelevant.

Examples of the exclusionary approach can be seen in Canada and Denmark. In both cases, the requirement seems quite high. The Supreme Court of Canada in *Canadian Dredge and Dock*²³³ stated that a corporation would not be liable for acts of the directing minds committed 'totally' in fraud of the corporation or for their own gain:

Where the directing mind conceived and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.²³⁴

In that case, the directing minds intended to increase the corporation's profits and, as such, their acts were not excluded. In Denmark, a corporation may not be held liable for the acts of employees acting in their own name or that of a third party. It appears, however, that the

²³¹ Ibid, 970.

²³² See, for example, *Standard Oil v US*, 307 F.2d 120 (5th Cir. 1962), 128 – 129, where the Court of Appeals observed: 'If [the act of the agent] is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the results turn out to be adverse.'

²³³ [1985] 1 SCR 662.

²³⁴ Ibid, 713.

fact that the employee is engaging in activity contrary to corporation policy will not be sufficient to break the subject matter link unless the misbehaviour in question would warrant dismissal.²³⁵

26. Analysis of Impact of Corporate Culture Provisions in Specific Areas

26.1 Piercing the corporate veil

One issue that arises in connection with the prosecution of corporations is the 'corporate veil', or the fact that the legal structure of corporate entities may effectively shield corporate decision-makers from liability.

At present, no corporate culture provisions appear to directly provide for the corporate veil to be pierced. For example, under the Australian provisions, the physical element of an offence and the fault element must apparently both be attributable to the same legal person.

However, on a conceptual basis, corporate culture provisions may pave the way for challenges to the corporate veil, in that they focus attention on the actual process of decision-making and line of authority, rather than to the legal structure of corporate groups. It would be conceivable that the corporate culture context could give rise to new understandings of the physical element of offences, and provide for physical elements to be attributed to corporations that effectively ordered or required them to be committed. Alternatively, a failure to adequately supervise corporate subsidiaries could become an offence in its own right.

26.2 Liability for wrongdoing by contractors

Another issue that typically arises in connection with the prosecution of corporations is the extent to which corporations may be held liable for the acts of contractors and their staff, rather than the corporation's own employees.

The major question in such cases is whether the physical acts of contractors can be attributed to the corporation. In the identification and expanded identification approaches, the individual offender must be so closely identified with the corporation that this is unlikely. The vicarious liability model can attribute liability to the corporation for the acts of an agent, which potentially extends to contractors. On the organisational liability model as it exists in Australia, a physical act must still be committed by 'an employee, agent or officer'. It is not clear whether this extends to independent contractors. However, there is no conceptual reason why an organisational liability model could not extend to physical acts committed by contractors as agents of corporations.

Moreover, depending upon the body of criminal law in question, it may be possible for corporations to be complicit in, or have some other form of accessorial liability for, the acts of their contractors. In such circumstances, the assistance or complicity may be constituted by acts of employees of the corporation that can be attributed relatively easily to the corporation itself

²³⁵ Nielsen, above n 165, 193.

Leaving aside difficulties with the attribution of physical acts, a question also arises as to the determination of the corporation's mental state. The identification and expanded identification approaches require that a member of the corporation's senior management have the direct intention to commit the relevant offence (or to be complicit in, or aid and abet the offence, if an accessorial liability argument is mounted). The vicarious liability model is, in a way, indifferent to the state of mind of the corporation: once it can be established that an individual committed the offence, it will be imputed to the corporation in most cases if it can be shown that it was intended at least in part to benefit the corporation. An organisational liability approach, by contrast, would focus on the aggregate corporate failings that permitted the contractor to commit the offence.

Appendix 1: Extracts from the Australian Federal *Criminal Code*

Part 2.5—Corporate criminal responsibility

Division 12

12.1 General principles

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence 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, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non compliance with the relevant provision; or

- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means 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.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
 - (a) negligence is a fault element in relation to a physical element of an offence; and
 - (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
 - (b) such a high risk that the physical element exists or will exist;
- that the conduct merits criminal punishment for the offence.

Appendix 2: Extracts from *Corporate Manslaughter and Corporate Homicide Act 2007* (UK)

1 The offence

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
 - (a) causes a person’s death, and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (2) The organisations to which this section applies are—
 - (a) a corporation;
 - (b) a department or other body listed in Schedule 1;
 - (c) a police force;
 - (d) a partnership, or a trade union or employers’ association, that is an employer.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
- (4) For the purposes of this Act—
 - (a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;
 - (b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;
 - (c) “senior management”, in relation to an organisation, means the persons who play significant roles in—
 - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
 - (ii) the actual managing or organising of the whole or a substantial part of those activities.
- (5) The offence under this section is called—
 - (a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
 - (b) corporate homicide, in so far as it is an offence under the law of Scotland.
- (6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.
- (7) The offence of corporate homicide is indictable only in the High Court of Justice.

2 Meaning of “relevant duty of care”

- (1) A “relevant duty of care”, in relation to an organisation, means any of the following duties owed by it under the law of negligence—
- (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
 - (b) a duty owed as occupier of premises;
 - (c) a duty owed in connection with—
 - (i) the supply by the organisation of goods or services (whether for consideration or not),
 - (ii) the carrying on by the organisation of any construction or maintenance operations,
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or
 - (iv) the use or keeping by the organisation of any plant, vehicle or other thing;
 - (d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.
- (2) A person is within this subsection if—
- (a) he is detained at a custodial institution or in a custody area at a court or police station;
 - (b) he is detained at a removal centre or short-term holding facility;
 - (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
 - (d) he is living in secure accommodation in which he has been placed;
 - (e) he is a detained patient.
- (3) Subsection (1) is subject to sections 3 to 7.
- (4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.
- (5) For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law.
- The judge must make any findings of fact necessary to decide that question.
- (6) For the purposes of this Act there is to be disregarded—

- (a) any rule of the common law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;
- (b) any such rule that has the effect of preventing a duty of care from being owed to a person by reason of his acceptance of a risk of harm.

(7) In this section—

“construction or maintenance operations” means operations of any of the following descriptions—

- (a) construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of—
 - (i) any building or structure,
 - (ii) anything else that forms, or is to form, part of the land, or
 - (iii) any plant, vehicle or other thing;
- (b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operations within paragraph (a);

“custodial institution” means a prison, a young offender institution, a secure training centre, a young offenders institution, a young offenders centre, a juvenile justice centre or a remand centre;

“detained patient” means—

- (a) a person who is detained in any premises under—
 - (i) Part 2 or 3 of the Mental Health Act 1983 (c. 20) (“the 1983 Act”), or
 - (ii) Part 2 or 3 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4)) (“the 1986 Order”);
- (b) a person who (otherwise than by reason of being detained as mentioned in paragraph (a)) is deemed to be in legal custody by—
 - (i) section 137 of the 1983 Act,
 - (ii) Article 131 of the 1986 Order, or
 - (iii) article 11 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (S.I. 2005/2078);
- (c) a person who is detained in any premises, or is otherwise in custody, under the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) or Part 6 of the Criminal Procedure (Scotland) Act 1995 (c. 46) or who is detained in a hospital under section 200 of that Act of 1995;

“immigration escort arrangements” means arrangements made under section 156 of the Immigration and Asylum Act 1999 (c. 33);

“the law of negligence” includes—

- (a) in relation to England and Wales, the Occupiers’ Liability Act 1957 (c. 31), the Defective Premises Act 1972 (c. 35) and the Occupiers’ Liability Act 1984 (c. 3);
- (b) in relation to Scotland, the Occupiers’ Liability (Scotland) Act 1960 (c. 30);
- (c) in relation to Northern Ireland, the Occupiers’ Liability Act (Northern Ireland) 1957 (c. 25), the Defective Premises (Northern Ireland) Order 1975 (S.I. 1975/1039 (N.I. 9)), the Occupiers’ Liability (Northern Ireland) Order 1987 (S.I. 1987/ 1280 (N.I. 15)) and the Defective Premises (Landlord’s Liability) Act (Northern Ireland) 2001 (c. 10);

“prison escort arrangements” means arrangements made under section 80 of the Criminal Justice Act 1991 (c. 53) or under section 102 or 118 of the Criminal Justice and Public Order Act 1994 (c. 33);

“removal centre” and “short-term holding facility” have the meaning given by section 147 of the Immigration and Asylum Act 1999;

“secure accommodation” means accommodation, not consisting of or forming part of a custodial institution, provided for the purpose of restricting the liberty of persons under the age of 18.

...

8 Factors for jury

- (1) This section applies where—
 - (a) it is established that an organisation owed a relevant duty of care to a person, and
 - (b) it falls to the jury to decide whether there was a gross breach of that duty.
- (2) The jury must consider whether the evidence shows that the organization failed to comply with any health and safety legislation that relates to the alleged breach, and if so—
 - (a) how serious that failure was;
 - (b) how much of a risk of death it posed.
- (3) The jury may also—
 - (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
 - (b) have regard to any health and safety guidance that relates to the alleged breach.

- (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
- (5) In this section “health and safety guidance” means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

Appendix 3: Extracts from *Criminal Code of Canada*

Parties to Offences

21. (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

...

Offences of negligence — organizations

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
 - (i) one of its representatives²³⁶ is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer²³⁷ who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

2003, c. 21, s. 2.

Other offences — organizations

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

²³⁶ A 'representative' is defined in s2 to include directors, partners, employees, members, agents and contractors.

²³⁷ A 'senior officer' is defined in s2 as 'a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer'.

2003, c. 21, s. 2.

...

732 (3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

Consideration — organizations

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

Appendix 4: Extracts from *Federal Sentencing Guidelines Manual* (2006) §8B2.1

§8B2.1. Effective Compliance and Ethics Program

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
- (1) exercise due diligence to prevent and detect criminal conduct; and
 - (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
- Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.
- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
 - (2)(A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
 - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
 - (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal

activities or other conduct inconsistent with an effective compliance and ethics program.

- (4)(A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
- (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
 - (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
 - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
- (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance and ethics program" means a program designed to prevent and detect criminal conduct.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

"Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling

its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

6. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

Appendix 5: Extracts from Swiss *Code pénal*

In the earlier discussion, we have relied on an in-house translation. In the interests of transparency, we provide both the original French text and our translation below:

Article 102

Punissabilité

1. Un crime ou un délit qui est commis au sein d'une entreprise dans l'exercice d'activités commerciales conformes à ses buts est imputé à l'entreprise s'il ne peut être imputé à aucune personne physique déterminée en raison du manque d'organisation de l'entreprise. Dans ce cas, l'entreprise est punie d'une amende de cinq millions de francs au plus.
 2. En cas d'infraction prévue aux art. 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies} ou 322^{septies}, al. 1, ou encore à l'art. 4a, al. 1, let. a, de la loi fédérale du 19 décembre 1986 contre la concurrence déloyale, l'entreprise est punie indépendamment de la punissabilité des personnes physiques s'il doit lui être reproché de ne pas avoir pris toutes les mesures d'organisation raisonnables et nécessaires pour empêcher une telle infraction.
 3. Le juge fixe l'amende en particulier d'après la gravité de l'infraction, du manque d'organisation et du dommage causé, et d'après la capacité économique de l'entreprise.
-
1. A crime or a misdemeanour that is committed in a corporation²³⁸ in the exercise of commercial activities conforming to its objects is imputed to the corporation if it cannot be imputed to an identified physical person by reason of the lack of organisation of the corporation. In such a case, the corporation shall be punished with a maximum fine of five million francs.
 2. In the case of a breach referred to in articles ... the corporation is punished independently of the culpability of physical persons if the corporation can be said to have not taken all reasonable and necessary organisational measures to prevent such a breach.
 3. The judge shall fix the fine, in particular, according to the gravity of the breach, the lack of the organisation and the damage caused, and in accordance with the economic capacity of the corporation.

²³⁸ Article 104 provides a definition of '*entreprise*' for the purposes of art 102 which includes companies, corporations sole, private legal persons (e.g. associations) and most public corporations.

Appendix 6: Extracts from Chapter 9 of the Penal Code of Finland

NB. This translation is an unofficial translation provided by the Finnish Ministry of Justice, incorporating all amendments up to 650/2003. It was available at <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> at 14 October 2007.

Chapter 9 - Corporate criminal liability (743/1995)

Section 1 - *Scope of application* (61/2003)

- (1) A corporation, foundation or other legal entity in whose operations an offence has been committed may on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code.
- (2) The provisions in this chapter do not apply to offences committed in the exercise of public authority.

Section 2 - *Prerequisites for liability* (61/2003)

- (1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.
- (2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

Section 3 - *Connection between offender and corporation* (743/1995)

- (1) The offence is deemed to have been committed in the operations of a corporation if the offender has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.
- (2) The corporation does not have the right to compensation from the offender for a corporate fine that it has paid, unless such liability is based on separate provisions on corporations and foundations.

Section 4 – *Waiving of punishment* (61/2003)

- (1) A court may waive imposition of a corporate fine on a corporation if:
 - (1) the omission referred to in section 2(1) by the corporation is slight, or the participation in the offence by the management or by the person who exercises actual decision-making authority in the corporation is slight; or
 - (2) the offence committed in the operations of the corporation is slight.

- (2) The court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration:
 - (1) the consequences of the offence to the corporation;
 - (2) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the neglect or offence; or
 - (6) where a member of the management of the corporation is sentenced to a punishment, and the corporation is small, the offender owns a large share of the corporation or his/her personal liability for the liabilities of the corporation are significant.

Appendix 7 – Summary of States' adoption of 'organisational' liability approach

States which have adopted some form of 'organisational' liability		States considering adoption of 'organisational' liability	States which have rejected 'organisational' liability
Form of liability	Stage at which 'organisational' factors most relevant	<p>We are not aware of any states currently actively considering the adoption of corporate culture provisions similar to those in place in Australia.</p> <p>We note, however, that on the basis of our research, there appear to be a number of factors that might encourage states to enact stronger provisions concerning corporate criminal liability. These factors include the proliferation of international agreements on such matters as bribery of foreign officials, money laundering and responses to organised crime, which require states to ensure that corporations can be held criminally liable for offences (although the instruments do not generally require that liability be on the basis of corporate culture).</p>	<p>Canada: In 2002, the Government considered the adoption of a corporate culture approach similar to that in force in Australia, but rejected this course, citing concerns about, inter alia:</p> <ul style="list-style-type: none"> • consistency with the Canadian Charter of Rights and Freedoms, particularly the presumption of innocence until proven guilty in article 11(d) (which, it was said, may apply to corporations as well as natural persons); • the fact that adopting a corporate culture approach would probably not simplify the factual investigation necessary to determine whether there had been an offence; and • the fact that Australia's corporate culture approach was untested and vague. <p>United Kingdom: In approximately 2005, parliamentary committees considered whether corporate culture should form the basis of liability for the offence of corporate manslaughter. A pure corporate culture approach was rejected on the basis that reform of the corporate manslaughter offence had always proceeded on a different basis of</p>
<p>Australia: In relation to a limited range of federal offences, the existence of a corporate culture that 'directed, encouraged, tolerated or led to non-compliance', or the absence of a corporate culture that required compliance, with relevant laws, is a basis for the finding of a fault element in a corporation.</p>	<ul style="list-style-type: none"> • Liability stage 		
<p>United Kingdom: From April 2008, corporate culture may be an element of the offence of corporate manslaughter, where the way in which an organisation's activities are managed and organised causes death, and constitutes a gross breach of a relevant duty of care; <i>and</i> the way in which the organisation's activities are managed or organised by its 'senior management' is a 'substantial element' of the gross breach of the relevant duty of care.</p>	<ul style="list-style-type: none"> • Liability stage 		
<p>United States: In relation to federal offences, corporate culture-type factors may be important considerations in the exercise of prosecutorial discretion to institute proceedings or enter into deferred or non-prosecution agreements, and are taken into account in a systematic way in the determination of appropriate penalties.</p>	<ul style="list-style-type: none"> • Exercise of prosecutorial discretion • Sentencing stage 		
<p>Switzerland: A deficient corporate culture may give rise to corporate criminal liability if the corporation 'can be said to have not taken all reasonable and necessary organisational measures to prevent' the breach of a law (note there is some uncertainty as to how other potentially relevant provisions operate).</p>	<ul style="list-style-type: none"> • Liability stage 		

States which have adopted some form of 'organisational' liability		States considering adoption of 'organisational' liability	States which have rejected 'organisational' liability
<p>Finland: A deficient corporate culture may give rise to corporate criminal liability 'if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation'.</p>	<ul style="list-style-type: none"> Liability stage 		<p>liability and it was too late to change now. Elements of a corporate culture approach were, however, adopted in the final legislation (see at left).</p>

Explanatory notes

This table should be read alongside the table on p 6 of the report entitled '*Corporate Culture as a Basis for the Criminal Liability of Corporations*' previously provided.

The table is not an exhaustive survey of state practices concerning corporate criminal liability. Instead, it identifies and categorises a few key examples discussed in more detail in the report already provided. Many states mentioned, as well as those not mentioned, may have specific regimes for liability contained within particular statutory regimes.

Regarding the scope of the table, please note in particular:

- Those states which are identified as having adopted some form of organisational liability are not said to base their corporate criminal liability exclusively on such factors. In Australia, for example, the corporate culture provisions apply only to a small range of federal offences. Similar provisions have been rejected in some instances in the context of state (as opposed to federal) corporate manslaughter laws, and the identification approach still applies to such offences (and others not covered by the federal law).
- It is difficult to demarcate those systems which have adopted organisational liability provisions from systems which rely on some other basis of liability. This column focuses on states whose laws appear to look squarely to the structures, policies, practices or attitudes of the corporation as a criteria for liability, as opposed to countries such as Japan, in which corporate liability attaches almost automatically in certain cases, and countries such as Austria which rely on the negligence of senior officials, or senior officials' failure to supervise their subordinates, to ground corporate liability (note, however, that even the UK corporate manslaughter provisions retain a reliance on the deficient conduct of senior officers as a basis for liability).