



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 224)

# Report on Criminal Liability of Partnerships

report





SCOTTISH LAW COMMISSION

SCOT LAW COM No 224

# Report on Criminal Liability of Partnerships

Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty  
Laid before the Scottish Parliament by the Scottish Ministers

December 2011

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ISBN: 9780101823821

Printed in the UK for The Stationery Office Limited  
on behalf of the Controller of Her Majesty's Stationery Office

12/11

Printed on paper containing 75% recycled fibre content minimum.

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).



# SCOTTISH LAW COMMISSION

*Item No 5 of our Eighth Programme of Law Reform*

## **Report on Criminal Liability of Partnerships**

To: The Rt Hon Michael Moore MP, Secretary of State for Scotland  
Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to present our Report on Criminal Liability of Partnerships

(Signed) JAMES DRUMMOND YOUNG, *Chairman*  
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Malcolm McMillan, *Chief Executive*  
21 November 2011



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# Chapter 1 Introduction

## BACKGROUND TO THE PROJECT

1.1 This project forms part of the Scottish Law Commission's *Eighth Programme of Law Reform*.<sup>1</sup>

1.2 The impetus for the project was the decision of the High Court of Justiciary in *Balmer v HM Advocate*,<sup>2</sup> in which it was held that since the juristic personality of a partnership was extinguished by dissolution, it was not competent to prosecute a partnership which had been dissolved. The result could be that partnerships would escape prosecution for potentially serious offences, such as, in that case, alleged breaches of health and safety requirements with fatal results.

1.3 We published a Discussion Paper in May 2011, with comments sought by 12 August.<sup>3</sup> We received a wide range of comments, and we would like to thank all of those who responded to the paper. The names of those persons and organisations who responded are listed in Appendix B. Their contribution has been of immense assistance to us in preparing this Report.

## SCOPE OF THE REPORT

1.4 The Report is concerned with three issues.

1.5 The first, which we term the "dissolution issue", is the problem identified by the High Court in *Balmer v HM Advocate*:<sup>4</sup> a partnership ceases to exist upon dissolution, and so cannot competently be prosecuted in respect of any crimes which it might have committed.

1.6 The second is the circumstances in which partners may be held criminally liable, as individuals, for offences committed by the partnership. We consider whether the law as it stands strikes an appropriate balance between respecting the status of the partnership as a separate juristic person and allowing guilty individuals to be held to account, and ask whether this balance should be shifted in favour of greater individual liability.

1.7 The third issue is what effect, if any, the dissolution of a partnership may (or should) have upon the prosecution of partners in respect of such individual criminal liability.

## THE STRUCTURE OF THIS REPORT

1.8 Chapter 2 of this Report concerns the dissolution issue. Chapter 3 addresses the individual liability of partners in relation to offences committed by partnerships, both in terms of their civil liability to meet fines levied upon the partnership and in terms of individual

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<sup>1</sup> Scot Law Com No 220 (2010).

<sup>2</sup> [2008] HCJAC 44, 2008 SLT 799.

<sup>3</sup> Discussion Paper on *Criminal Liability of Partnerships*, DP No 150 (2011).

<sup>4</sup> [2008] HCJAC 44, 2008 SLT 799.

criminal liability, and the question of whether the bases of such liability should be broadened. Chapter 4 contains our proposals for ensuring that the dissolution of a partnership will not prevent the prosecution of individual partners where the criteria for such individual liability may be met. Appendix A contains a draft Bill to give effect to our recommendations, while Appendix B contains a list of those individuals and organisations who responded to our Discussion Paper.

## **LEGISLATIVE COMPETENCE**

1.9 As we noted in the Discussion Paper,<sup>5</sup> the dissolution issue is concerned with the circumstances and consequences of the dissolution of a partnership. Since "[t]he creation, operation, regulation and dissolution of types of business association" is a reserved matter in terms of Head C1 of Schedule 5 to the Scotland Act 1998, and a partnership is a "business association" in terms of this reservation, it is clear that any amendment to the law regarding the dissolution of partnerships would be a reserved matter, capable of being implemented only by UK legislation.

1.10 We do not consider that any of the recommendations in this Report raise questions of compatibility with EU Law. In the Discussion Paper we asked whether statute should provide for the personal criminal liability of a partner for an offence committed by the partnership unless the partner was able to discharge an evidential burden of showing that he or she was ignorant of the commission of the offence, or showed due diligence with a view to preventing its commission.<sup>6</sup> We also asked whether it would be appropriate to introduce a scheme whereby partnerships would be required to nominate one or more partners who would bear personal criminal responsibility for offences committed by the partnership.<sup>7</sup> Each of these proposals would have required careful examination of their compatibility with Article 6 ECHR. After considering the responses to the Discussion Paper, we have reached the view that neither of these proposals should feature among our recommendations. The remaining recommendations do not appear to us to raise any issue of compatibility with Convention rights.

## **IMPACT ASSESSMENT**

1.11 As stated in the Discussion Paper, the aim of any proposed amendment to the law regarding the prosecution of dissolved partnerships would be to ensure that the interests of justice could not be frustrated by the dissolution of a partnership, with the result that the alleged perpetrator of serious criminal wrongdoing could not be held to account. That being the case, it would clearly be a mistake to assess any such proposal principally in economic terms. However, as with all law reform proposals, the economic impact of any proposed changes must be taken into account.

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<sup>5</sup> Paras 1.12-1.14.

<sup>6</sup> Question 10, para 6.22.

<sup>7</sup> Question 11, para 6.30.

1.12 We are of the view that our proposed targeted solution will have minimal economic impact upon partnerships, partners and the courts. Whilst economic considerations are important, the interests of justice are paramount.

# Chapter 2 Resolving the dissolution issue

## THE DISSOLUTION ISSUE

2.1 In Chapter 2 of the Discussion Paper, we identified what we have termed the dissolution issue. This arose from a consideration of the case of *Balmer v HM Advocate*,<sup>1</sup> a petition to the *nobile officium* of the High Court of Justiciary relating to the attempted prosecution of the partnership which had been responsible for the management of the Rosepark nursing home at the time of the fire on 21 January 2004 which led to the death of 14 of its residents. The details of the case are briefly outlined in the Discussion Paper,<sup>2</sup> and need not be repeated here.

2.2 For present purposes, what is significant is that the High Court held that the legal personality of a partnership comes to an end immediately upon dissolution and that, accordingly, an indictment directed against a dissolved partnership is incompetent.<sup>3</sup>

2.3 The consequence of this is that once a partnership has been dissolved, and in the absence of evidence showing the guilt of one or more individual partners, there remains no person who can be held criminally accountable for offences committed by the partnership. It is this that we refer to as the dissolution issue.

## POTENTIAL SOLUTIONS

2.4 The Discussion Paper considered two potential solutions to the dissolution issue. The first would be incorporated in the type of comprehensive reform to the law of partnership which was proposed by this Commission and the Law Commission for England and Wales in their Joint Report on *Partnership Law* (the "Joint Report").<sup>4</sup> This would have avoided the dissolution issue by altering the way in which partnerships come to an end, replacing the present rule whereby partnerships undergo "sudden death" on dissolution with a more modern and structured process of winding up. The second approach was more narrowly focused upon criminal prosecution, contemplating a statutory provision which would allow such prosecution notwithstanding the dissolution of the partnership.

### The first approach: comprehensive reform

2.5 Our preferred option, discussed in detail in paragraphs 5.2 to 5.20 of the Discussion Paper, was implementation of the existing recommendations of the Law Commissions' Joint Report on *Partnership Law*.<sup>5</sup> The Joint Report makes a range of recommendations which, if implemented, would clarify and modernise the present law.

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<sup>1</sup> [2008] HCJAC 44, 2008 SLT 799.

<sup>2</sup> Paras 2.4-2.8.

<sup>3</sup> [2008] HCJAC 44, 2008 SLT 799 at para 83 (Opinion of the Court, per Lord Eassie).

<sup>4</sup> Law Com No 283; Scot Law Com No 192 (2003).

<sup>5</sup> *Ibid.*

2.6 For the purposes of the dissolution issue, the most significant of these recommendations concerns the creation of a new process for the winding up of partnerships. Rather than having the legal personality of a partnership come to an end immediately upon dissolution, as at present, the Joint Report suggests a two-stage process. The first stage, termed "break up", would bring an end to the partnership's ability to carry on business for any purpose other than the winding up of the partnership. During the winding up period, the partnership would continue as a legal entity, with power to act only for the purposes of winding up. Only once all of the partnership property was distributed and all actual or potential liabilities discharged would the partnership reach the second stage, termed "dissolution", and cease to exist as a legal person. The recommendation was summed up at paragraph 7.32 of the Joint Report:

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

2.7 In the Discussion Paper, we suggested that in most cases the effect of such a regime would be to delay the dissolution of a partnership for a sufficient period to allow criminal proceedings to be brought against it. We noted, however, that both paragraph 7.32 and the draft implementing legislation (clause 45 of the draft Partnership Bill annexed to the Joint Report) appeared to be contemplating *civil* liabilities of the partnership rather than liability to criminal proceedings. We suggested that it would be appropriate, in any Act resulting from the draft Partnership Bill, for the section equivalent to clause 45 to make specific provision in relation to the criminal liability of Scottish partnerships.

#### *The first approach: consultation responses*

2.8 Consultees strongly supported the implementation of the Joint Report as a means of resolving the dissolution issue and agreed that it would be appropriate, in any section equivalent to clause 45 of the draft Partnership Bill, to make explicit provision in relation to criminal liability. In their very helpful response, Robert F McLachlan, Brian Patton and Isabel G Caskie – the family of Isabella MacLachlan, who was one of those who perished in the Rosepark Fire – noted that without such explicit provision, there was a risk that a loophole would remain. The Senators of the College of Justice supported this proposal, noting that the approach of preserving the legal personality of a partnership until its winding up was completed would not be out of step with other regimes.<sup>6</sup>

2.9 The only opposition to the first approach came from the Glasgow Bar Association. They commented:

"It is essential that the law provides certainty and clarity particularly on the issue of any criminal liability. We consider it would not be appropriate for any Act resulting

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<sup>6</sup> The Senators drew our attention to the case of *United States of America v Mobile Materials, Inc. & Mobile Materials Company* 776 F. 2d 1476 (1985) (US Court of Appeals, 10<sup>th</sup> circuit) in which it was held that the defendant corporation and partnership could be prosecuted after dissolution for crimes allegedly committed prior to dissolution.

from the draft Partnership Bill, in the section equivalent to Clause 45 of the Bill, to make a specific provision relating to criminal liability on Scottish partnerships."

2.10 We agree that it is essential that the law provide certainty and clarity in relation to criminal liability. But we do not agree that our proposed approach would produce uncertainty. We do not take the Glasgow Bar Association to be opposed to a systematic reform of the law of partnership in Scotland. Such general reform of the law attracted near universal support from Scottish consultees prior to the production of the Joint Report, support which was reiterated by a number of consultees to our Discussion Paper, including the Law Society of Scotland. If such a reform were to be taken forward along the lines set out in the draft Partnership Bill, there would be room for doubt about the effect of any section equivalent to clause 45 unless some kind of express provision were made in relation to criminal liability. This doubt could be resolved in one of two ways: by providing, in terms, that "liabilities" either did or did not include liability to criminal prosecutions. We think that it would clearly be preferable, given this choice, to include criminal liability. This approach would increase certainty as to criminal liability, as compared with the enactment of clause 45 as it stands.

2.11 Having considered the consultation responses, we are fortified in our view that the best long-term solution to the dissolution issue is to modernise the law regarding the dissolution of partnerships in the manner recommended in the Joint Report. In so doing, specific provision should be made in relation to the criminal liability of Scottish partnerships. We recommend:

- 1. The dissolution issue should be resolved by the implementation, for Scotland, of the Joint Report on *Partnership Law*.**
- 2. In any Act resulting from the draft Partnership Bill annexed to the Joint Report, the section equivalent to clause 45 of the draft Bill should make specific provision in relation to the criminal liability of Scottish partnerships.**

### **The second approach: a targeted solution**

2.12 As we have noted above, the most appropriate long-term solution to the dissolution issue is comprehensive reform of the law of partnership in Scotland, along the lines set out in the Joint Report. But we must recognise that such far-reaching changes cannot be made overnight. Even if a comprehensive Partnership Bill were to be enacted tomorrow, there would need to be a substantial transitional period – the Joint Report suggested two years – before the new law of partnership could come into force. In practice it would be necessary to find space in the Westminster legislative programme for the Partnership Bill, and even if our recommendations were accepted, there would likely be some delay before the necessary legislative time could be found. We understand that, while Ministers at Westminster are open-minded as to the desirability of general reform, no legislative opportunity will be available in the near future.

2.13 For so long as dissolution of a partnership can prevent its prosecution, there is a real risk that cases will arise in which serious criminal charges cannot be prosecuted. This is an unacceptable state of affairs which should be remedied as soon as possible. So, in addition to the recommended comprehensive reform, it is appropriate to consider more targeted solutions to the dissolution issue which may be implemented more quickly.

2.14 We considered such a targeted solution in paragraphs 5.21 to 5.25 of the Discussion Paper, suggesting that it could be provided in statute that a partnership shall be treated, for the purposes of the criminal law only, as having continuing legal personality notwithstanding dissolution. We suggested that this should be an interim provision, pending the enactment and entry into force of a new Partnership Act. We sought the views of consultees on this proposal, asking also whether the legal personality of the partnership should be taken to persist indefinitely or for a limited period, and, if the latter, for how long.

*The second approach: consultation responses*

2.15 An overwhelming majority of consultees supported the proposal for a more targeted solution. We think it worth recording that all of those who supported this proposal regarded it as necessary only because they viewed the need for a solution to the dissolution issue as urgent and the likelihood of early legislation in relation to partnerships more generally to be low. The Law Society of Scotland stated that the Society would prefer comprehensive reform, but that a limited solution might be acceptable if this were the only means of achieving reform in this area within a reasonable timescale. The Faculty of Advocates agreed that a limited solution in the meantime was desirable, given the likely timescale for more comprehensive reform. The Senators of the College of Justice also expressed their preference for comprehensive reform, but agreed that it would be appropriate to provide that the legal personality of the partnership persists after dissolution for the limited purpose of establishing criminal liability as an interim provision pending the coming into force of an Act based upon the draft Partnership Bill.

2.16 Two consultees expressed doubts. Findlay Stark questioned whether the Discussion Paper had adequately justified the need to ensure that someone could be prosecuted for an offence committed by a partnership. The Glasgow Bar Association opposed our proposal on the basis that it "would most certainly conflict with the principled approach dealt with in regards to the nature of legal personality adopted by the High Court in *Balmer v HM Advocate*," reiterating their view that "[c]ertainty of liability under the Law, criminal or otherwise, is vital."

2.17 We note that none of the other consultees shared Mr Stark's concern regarding the problematic nature of the dissolution issue. We think it self-evident that there may be circumstances in which the interests of justice would demand that it be possible to prosecute *someone* in respect of an allegation of serious offending, even if the only person who could be prosecuted were a now-dissolved partnership. So far as the Glasgow Bar Association's objection is concerned, we would reiterate our agreement with the proposition that the criminal law demands certainty, so far as achievable. Where we differ with the Glasgow Bar Association is in our assessment of whether our proposal would introduce uncertainty. We do not think that it would. The present rule, as expressed in *Balmer*, is that dissolution prevents the prosecution of a partnership. Our proposed new rule would be that it does not. Each rule is equally clear: the only uncertainty which the new rule would introduce is the uncertainty which is inherent in any criminal trial, namely uncertainty as to whether the Crown can prove the case against the accused to the requisite standard of proof.

2.18 We recommend:

3. **Pending a general reform to the law of partnership, limited provision should be made to address the dissolution issue by means of a Bill in the UK Parliament.**
4. **It should be competent to prosecute a partnership in relation to an offence allegedly committed prior to dissolution, notwithstanding the dissolution of that partnership.**

(Draft Bill, clause 1)

*Should any targeted solution be an interim measure?*

2.19 Those consultees who agreed that a targeted solution to the dissolution issue was desirable also agreed with our suggestion that it should be an interim measure, pending the enactment and coming into force of an Act based upon the draft Partnership Bill. Opinion was divided as to whether it would be appropriate or practicable to include some form of "sunset" clause; that is, a clause providing for the legislation to cease to have effect after a stated period. One consultee suggested that the inclusion of a sunset clause might encourage the UK Government to proceed with comprehensive reform within a reasonable time; another doubted whether the Government would wish to bring forward such a clause unless they already planned to legislate on partnership law more generally. Others considered that the targeted solution to the dissolution issue should not be expressed in terms as an interim measure, but should simply be superseded by any future comprehensive reform of partnership law. We consider this latter approach to be preferable, while reiterating our recommendation that comprehensive reform of the law of partnership be enacted sooner rather than later.

2.20 We recommend:

5. **The targeted measure to address the dissolution issue should have effect pending the introduction of more comprehensive reform of the law of partnership.**

*A further doubt about legal personality*

2.21 The case of *Balmer v HM Advocate*,<sup>7</sup> and our Discussion Paper, were concerned with the extinction of the legal personality of a partnership upon dissolution. We did not give explicit consideration to other circumstances in which the legal personality of a partnership might come to an end, and in particular whether legal personality ends upon a change in the membership of a partnership. But as the Commissions noted in the Joint Report:

"In Scots law, in which a partnership has separate legal personality, there is uncertainty as to whether a change in membership terminates the personality of the 'old' partnership and brings into being a 'new' partnership entity."<sup>8</sup>

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<sup>7</sup> [2008] HCJAC 44, 2008 SLT 799.

<sup>8</sup> Joint Report, para 8.7.

2.22 Common sense might suggest that where a partnership continues, so too does its legal personality. It might be thought strange if every change in the composition of a partnership, involving the resignation of a partner or the assumption of a new person into the partnership, were to involve a change in that partnership's legal personality.<sup>9</sup> Such a view might sit uneasily with the status of the partnership as a juristic person separate from the individuals of whom it is composed. But it may well be the law.<sup>10</sup> If so, then, applying the logic of *Balmer*, it may be that a court would be compelled to hold that the assumption or resignation of a partner prevented the prosecution of the partnership in relation to an offence allegedly committed by the partnership as constituted prior to the change in membership.

2.23 If it is undesirable that criminal proceedings should be frustrated by the dissolution of a partnership, it is surely even more undesirable that they should be frustrated by a mere change in membership. The present uncertainty surrounding the continuing personality of a partnership on a change of membership should be addressed, for all purposes, by comprehensive reform of the law of partnership along the lines suggested in the Joint Report. For the present, the limited provision to address the dissolution issue should also apply, for the avoidance of doubt, to changes in membership.

2.24 Under this proposal the partnership would, for the purposes of the criminal law, be treated as retaining the same legal personality before and after a change of membership. It would accordingly be competent to prosecute the partnership as presently constituted in respect of offences allegedly committed prior to a change in membership. Any fine imposed upon the partnership would generally be enforced against the assets of the firm, although it would be competent for diligence to be carried out against the assets of the partners at the time of the conviction.<sup>11</sup> Just as with contingent civil liabilities which arise following a change of membership, the extent to which the current partners have rights of indemnity and relief as regards each other and former partners may be governed by the partnership agreement and the agreements entered into at the time of the change in membership. We recommend:

6. **It should be provided that it remains competent to prosecute a partnership in respect of an offence allegedly committed prior to a change in membership of the partnership, notwithstanding that change in membership.**

(Draft Bill, clause 4)

*For how long should legal personality be taken to persist?*

2.25 If the legal personality of a partnership is to be taken to persist following dissolution or a change of membership, for the limited purpose of allowing criminal prosecution, a further question arises: should there be a time limit? In the Discussion Paper, we asked

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<sup>9</sup> Paras 2.34-2.35 of the Joint Consultation Paper on *Partnership Law* (LC CP No 159 / SLC DP No 111 (2000)) noted that there was doubt as to whether it was competent for the partners in a Scottish partnership to agree that the firm should continue as a legal person on a change of composition, noting that there was authority on both sides of the question.

<sup>10</sup> See, for example, *Jardine-Paterson v Fraser* 1974 SLT 93 and the recent case of *Sim v Howat* [2011] CSOH 115.

<sup>11</sup> Discussion Paper, paras 3.7-3.16. Leaving to one side the lack of limited liability, the position of the partners is analogous to those of the shareholders in a limited company: neither partner nor shareholder bears criminal liability for the offences of the organisation, but the financial impact of any fine imposed on the organisation falls, at least in the first instance, upon its members at the time that the fine is imposed.

whether legal personality should persist for a limited period or indefinitely, and, if for a limited period, for how long.<sup>12</sup>

2.26 Consultees differed widely in their approaches to this question, although the majority favoured some sort of time limit. The Crown Office and Procurator Fiscal Service observed that proceedings in relation to serious offences often take time to investigate, prepare and prosecute, even when the offence itself is readily discoverable, noting that in the Rosepark case it had taken two and a half years from the fire to the service of the first indictment. In light of this, they suggested that it would be difficult to place a time limit on the period for which a partnership should persist for the purposes of criminal proceedings. Robert F MacLachlan, Brian Patton and Isabel G Caskie, the family of Isabella MacLachlan, one of the victims of the Rosepark Fire, noted that liability for prosecution for serious criminal offences is not extinguished by passage of time, and suggested that this should apply equally to juristic and natural persons. In their view, prosecution should continue to be competent for an indefinite period or – failing agreement on this point – for a period of 10 years. Findlay Stark suggested that the appropriate period might depend upon the reason why it was thought appropriate to allow the prosecution of dissolved partnerships. If the reason was to respond to cases in which public confidence in the criminal law might be damaged if no prosecution were possible, then this might argue in favour of an indefinite period. On the other hand, if the purpose of the provision were merely to address the possibility that partners might cynically decide to dissolve the partnership to escape liability, then a shorter period of perhaps 3 years might suffice.

2.27 A considerable range of time limits were suggested. The Law Society of Scotland suggested a period of 20 years; the Faculty of Advocates, 2 years. The Senators of the College of Justice observed that the majority of offences committed by partnerships would be statutory in origin, and many such offences came with their own time limits. They further noted that after the dissolution of a partnership, any remaining assets would generally be distributed and perhaps passed on to successors and others who would have acquired vested interests. They suggested that a period of 5 years would represent an appropriate balance between allowing prosecution and prejudicing the interests of such successors. Sheriff Frank Crowe and Michael GA Christie also stressed the need to avoid undue prejudice to creditors. Sheriff Crowe suggested a period of 3 to 5 years; Mr Christie, 5 years. A 5 year period would align with the period of negative prescription applying to most of the civil liabilities to which a former partner might be exposed.<sup>13</sup>

2.28 We recognise that any time limit will be arbitrary. If a time limit is set, there will always be the risk that a case may arise in which prosecution would seem highly desirable, but would be barred by the passage of time. Nevertheless, we are persuaded that some time limit is appropriate. This must balance the reasonable needs of the Crown, in being afforded sufficient time to learn of the offence and to prepare the prosecution, against the need to avoid creating too much uncertainty for the former partners and their creditors and successors. Bearing in mind that the service of the first indictment in the Rosepark case took two and a half years, we think that a time limit of 2 or 3 years would be too short. A period of 5 years, which was the most common period suggested by consultees, would

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<sup>12</sup> Discussion Paper, para 5.25, question 7.

<sup>13</sup> Most, but not all: as the Commissions observed at para 12.17 of the Joint Report, liabilities may arise many years after a partnership has ceased to do business, in circumstances where the partnership has acted negligently but the loss only arises at a later date: *White v Jones* [1995] 2 AC 207.

appear to strike an appropriate balance. In particular, it would allow the Crown sufficient time to prepare and serve an indictment (or, in summary proceedings, to execute a warrant to cite) in even a very complex case, while imposing no additional uncertainty upon claimants upon the estate of a former partner. We recommend:

7. **There should be a time limit of 5 years following the dissolution of a partnership (or, as the case may be, a change of membership) during which prosecution will remain competent notwithstanding the dissolution (or, as the case may be, the change of membership).**

(Draft Bill, clauses 1(3), 4(3))

#### *Enforcement of fines*

2.29 The prosecution of a dissolved partnership might be thought pointless if any fine which might be imposed upon it could not be enforced. As we noted in Chapter 3 of the Discussion Paper, the general rule is that fines imposed upon a partnership may, like any other partnership debt, be enforced against the assets of the individual partners as well as those of the partnership.<sup>14</sup> If a fine imposed upon a dissolved partnership is to be enforced at all, it will have to be enforced against the assets of the former partners. As a consequence of our recommendation that it should be competent to prosecute a former partnership notwithstanding dissolution, it is necessary to provide that the provisions of the Partnership Act 1890 and the Criminal Procedure (Scotland) Act 1995 governing the payment of fines by a partnership should apply also in relation to fines imposed upon a dissolved partnership. This requirement is given effect, in the draft Bill, by clause 1(5) and (6).

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<sup>14</sup> Discussion Paper, paras 3.7-3.16.

# Chapter 3 Individual liability of partners

## CIVIL LIABILITY FOR FINES LEVIED ON THE PARTNERSHIP

3.1 As we noted in Chapter 3 of the Discussion Paper, the general rule – as established by sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995, read together with sections 4 and 9 of the Partnership Act 1890 – is that a fine imposed upon a partnership will be recoverable not only from the partnership assets, but from the assets of the individual partners, each of whom will have a right of relief against the firm and their fellow partners. The effect of this general rule is that where a fine is imposed on a partnership, any fine may be enforced either against the partnership assets or, where the partnership assets are inadequate (or indeed entirely absent), against the assets of the individual partners.<sup>1</sup>

3.2 We also observed that there were some offence-creating statutes which expressly provided that any fine imposed on a partnership on its conviction for an offence is to be paid out of the partnership assets. It seemed that the effect of these provisions would be to prevent the enforcement of fines imposed upon a partnership against the personal assets of the partners. We surmised that the purpose of these provisions, which appear not to be found in Scotland-only statutes, was to ensure that the fines could be enforced against the assets of a partnership which lacked legal personality (as in England and Wales) and that the *limitation* of enforcement to these assets was merely a side effect.

3.3 As there was no doubt that the assets of a Scottish partnership would be the principal target of any diligence aimed at enforcing a fine imposed upon that partnership, we suggested that such provisions were not required in Scotland. We went on to ask whether it should be provided in statute that provisions limiting the payment of any fine levied upon a partnership to the partnership assets do not apply to partnerships prosecuted in Scotland.

### Limitation of fines to partnership assets: consultation responses

3.4 Consultees were divided on this question. The Crown Office and Procurator Fiscal Service supported the view that statutory provisions limiting the payment of any fine levied on a partnership to the partnership assets should not apply in Scotland. They considered that the present differences in partnership law between Scotland and England and Wales would justify a different approach being taken to the payment of fines in Scotland. The Law Society of Scotland and the Faculty of Advocates also expressed support for disapplying these limits in relation to Scottish partnerships. Peter Ferguson QC, Fiona Grant and Robert F MacLachlan, Brian Patton and Isabel G Caskie also supported this approach.

3.5 Michael GA Christie considered that such provision would be unnecessary, as there was a real possibility that a Scottish court would not follow the approach of the English Court of Appeal, holding instead that the assets of a Scottish partnership included the unlimited liability of partners for their firms debts. The Senators of the College of Justice considered

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<sup>1</sup> Discussion Paper, paras 3.7-3.16.

that the case for disapplying these statutory limitations in relation to Scottish partnerships had not been made out. In their view, it was appropriate to presume that Parliament was well aware of the separate personality of partnerships in Scotland and whatever the reasoning behind the provisions limiting the payment of fines to partnership assets, Parliament must have intended them to take effect.

## **Discussion**

3.6 None of our consultees has suggested a justification for limiting the enforcement of fines against a partnership to the partnership assets. Such a limitation is arguably contrary to principle, since the unlimited liability of partners to meet debts owed by the partnership may itself be regarded as an asset of the partnership. It cannot be assumed that the Scottish courts would necessarily place the same construction upon these provisions as has been favoured by the Court of Appeal. We are mindful of the comments of the Senators of the College of Justice to the effect that whatever the underlying policy, Parliament must be assumed to have known what it was doing. We must certainly recognise the possibility that the imposition of such limitations represented a conscious choice on the part of those responsible for preparing the legislation in which they appear.

3.7 As we noted at paragraph 4.10 of the Discussion Paper, any provision limiting the payment of fines to partnership assets is unlikely to be significant in relation to existing partnerships, since the partnership assets will generally be capable of satisfying any fine which might be imposed. But such provisions, applied to dissolved partnerships, would frustrate any attempt to enforce a fine, since when a partnership is dissolved there will no longer be partnership assets. In order for the recommendations in Chapter 2 of this Report to be fully effective, it is necessary to disapply any such limiting provision in relation to fines imposed upon dissolved partnerships. We recommend:

- 8. Any provision requiring a fine levied upon a partnership to be paid from the partnership assets should not apply to fines levied upon a partnership which has been dissolved.**

(Draft Bill, clause 3)

## **INDIVIDUAL CRIMINAL LIABILITY OF PARTNERS**

### **The existing law**

3.8 As we noted in Chapter 3 of the Discussion Paper, there are a number of circumstances in which the existing law permits individual partners to be held criminally liable in respect of offences committed by a partnership.

*Special statutory provision – eg section 36 of the Health and Safety at Work etc Act 1974*

3.9 The Health and Safety at Work etc Act 1974 places obligations upon employers. Where the employer breaches these obligations, the employer may commit an offence. At first sight, these offences can be committed only by employers. But section 36 of the 1974 Act imposes liability on an individual where it can be shown that an offence under that Act was committed "owing to" the act or omission of that person. It explicitly provides that it is not necessary, in order for that person to be prosecuted, for proceedings to have been taken against the employer. As we noted in the Discussion Paper, section 36 applies a test of

causation – the individual's act or omission must have been a cause (if not necessarily the sole or principal cause) of the offence. This may often be difficult to prove.

#### *Art and part, or statutory aiding and abetting*

3.10 An individual may be held art and part guilty of an offence, whether at common law or under statute,<sup>2</sup> or guilty of the offence of aiding, abetting, counselling or procuring the commission of a statutory offence.<sup>3</sup>

#### *Liability on the basis of consent, connivance or neglect*

3.11 A number of statutes provide for the liability of partners on the basis that the partnership committed an offence with their consent or connivance, or as a result of their neglect.<sup>4</sup> Section 53 of the Criminal Justice and Licensing (Scotland) Act 2010 increased the number of such provisions applying to partnerships by applying to "organisations" offences which were previously limited to bodies corporate.

3.12 As with art and part, it is likely that proof of an offence based on consent and connivance will require the prosecution to show that the individual concerned had subjective knowledge of the offence. One cannot consent or connive in something of which one is ignorant. An offence based upon neglect might be proved by reference merely to what the individual ought to have known, or ought to have done; that is, by showing that the partner concerned had a relevant duty which he or she failed, through neglect, to discharge.<sup>5</sup>

### **Potential reforms**

3.13 In Chapter 6 of the Discussion Paper, we considered whether the existing bases of individual criminal liability went far enough.

3.14 We noted that the existing bases of liability presented prosecutors with profound difficulties of proof, since it would often be almost impossible to establish which of the individuals within a partnership had the necessary degree of subjective knowledge or practical involvement in the commission of the offence. We noted that while the institution of separate legal personality afforded many benefits, it was also the case that an increasing amount of activity was undertaken by such legal persons. It was important, we suggested, that where such a legal person committed a serious offence, perhaps involving serious injury or death, it should be possible to attribute personal responsibility to the natural persons involved in running the business. We identified two related deficiencies in the present position: first, that there may be no-one who can be held criminally responsible when something goes wrong; and second, that unless an individual carries clear responsibility for securing compliance with statutory duties, there was a risk that such duties would be neglected. We asked whether it should be possible to hold partners criminally liable for offences committed by partnerships on a broader basis than at present, and suggested two possible ways in which such liability might be extended.

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<sup>2</sup> Criminal Procedure (Scotland) Act 1995, s 293(1), Discussion Paper, paras 3.40-3.43.

<sup>3</sup> Criminal Procedure (Scotland) Act 1995, s 293(2), Discussion Paper, para 3.44.

<sup>4</sup> Discussion Paper, paras 3.50-3.54.

<sup>5</sup> *Ibid*, paras 6.5-6.7.

3.15 The first possible approach which we identified would relieve the prosecution of the onus of proving that an individual partner had subjective knowledge of the commission of the offence. This could be done by generalising the provision presently found in section 285(4) of the Copyright, Designs and Patents Act 1988:

"(4) Where a partnership is guilty of an offence under this Part, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly."

3.16 We observed that the effect of such a provision, generalised to other statutory offences, would be to alter the onus of proof in establishing liability on the existing basis of consent and connivance. Rather than requiring the Crown to prove knowledge, it would be for the individual partner to show his or her ignorance or (we suggested, in a broadening of the defences available under section 285(4)) due diligence. We suggested that the imposition of such a reverse burden would be likely to be proportionate, and compatible with the presumption of innocence required by Article 6(2) of the European Convention on Human Rights.<sup>6</sup>

3.17 The second possible approach was to suggest that there might be a requirement that partnerships nominate one or more partners to bear individual criminal responsibility for offences committed by the partnership. We suggested that this would have the virtue of ensuring that there was always a natural person who could be prosecuted in respect of a partnership offence, and of ensuring that there was a natural person who had a clear and direct incentive to ensure that the partnership complied with its statutory obligations.<sup>7</sup> But we recognised that such a scheme could be criticised on a number of grounds, both of principle (such as the proportionality and fairness of prosecuting an individual who might, in fact, have had no direct role in the commission of the offence) and of practicality (such as the administrative overhead in requiring nominations to be made, updated, and perhaps registered).

## **Response to Consultation**

*The general question: should the basis of individual criminal liability be broadened?*

3.18 The first question which we asked was a general one: should it be possible to hold partners criminally liable for offences committed by partnerships on a broader basis than at present?<sup>8</sup> Opinion on this general question was mixed. Robert F MacLachlan, Brian Patton and Isabel G Caskie, the family of Isabella MacLachlan who died in the Rosepark fire, were in favour of broadening individual liability. They commented that "[g]iven the gravity of the matter at stake, it would not be unreasonable to expect that a morally significant extension of individual liability would be justifiable and that it should indeed be possible to hold partners criminally liable for offences committed by partnerships on a broader basis than at present." Support for broadening individual liability also came from Sheriff Frank Crowe, the Law Society of Scotland and (perhaps unsurprisingly) the Crown Office and Procurator Fiscal Service. Findlay Stark pointed out that the question raised issues regarding corporate liability more generally, and in particular whether the various statutory and common law tests

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<sup>6</sup> Discussion Paper, paras 6.19-6.22.

<sup>7</sup> Ibid, paras 6.23-6.24.

<sup>8</sup> Ibid, para 6.14, question 9.

for individual liability were fit for purpose. He suggested that these wider issues should be considered, either in the present project or perhaps in a future project on corporate liability more generally.

3.19 The Senators of the College of Justice considered that in light of the various ways in which partners may be found individually liable under the current law, there was no merit in a general alteration to the law aimed at making it easier to prosecute individuals. Michael GA Christie considered the present law in this area to be adequate. The Faculty of Advocates suggested that an extension of the individual criminal liability of partners was neither necessary nor desirable.

*The first possible change: a reversal of onus*

3.20 Moving on to consider the options for broadening individual criminal liability, we asked: "Should statute provide for the personal criminal liability of a partner for an offence committed by the partnership unless the partner is able to discharge an evidential burden of showing that he or she was ignorant of the commission of the offence, or showed due diligence with a view to preventing its commission?"<sup>9</sup>

3.21 A number of consultees were in favour of this option, including the Crown Office and Procurator Fiscal Service, the Law Society of Scotland, Peter Ferguson QC, Sheriff Frank Crowe and Robert F MacLachlan, Brian Patton and Isabel G Caskie. The Faculty of Advocates were opposed, as were the Senators of the College of Justice, Michael GA Christie, Findlay Stark and the Glasgow Bar Association.

*The second possible change: nomination of partners to bear criminal liability*

3.22 The second possible approach to broadening individual liability – that of requiring or enabling partnerships to nominate one or more partners to bear individual criminal responsibility for the offences of the partnership – attracted significantly less support. The Crown Office and Procurator Fiscal service considered that the registration of a nominated partner would ensure that criminal liability could be enforced, but that its success would depend upon partnerships carrying out the nomination procedure, something which would itself require enforcement.

3.23 The Glasgow Bar Association suggested that if the basis of individual criminal liability were to be broadened, then this should be done by something like the mooted registration scheme:

"If it is deemed appropriate to legislate in order to have partners held criminally liable for offences committed by partnerships on a broader basis than presently occurs there should also be, within said legislation, the ability for partnerships, and indeed for the partners themselves, to formally agree areas of responsibility between partners. For so long as such agreements between partners are in written form (and possibly registered) then any criminal liability for particular areas or breaches of criminal law need not lead to any requirement to hold all partners in a partnership criminally liable but to deal with the partner having specific liability.

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<sup>9</sup> Ibid, para 6.22, question 10.

Even with that agreement there would require to be a defence available to the identifiable partner if all appropriate checks and balances can be shown to have been reasonably complied with and/or if the criminal act is particularly the liability of an unauthorised partner which in turn could trigger a separate liability on such eventuality being confessed/proved."

3.24 Otherwise, consultees were united in their opposition to this suggestion. Of particular concern to a number of consultees, including the Senators of the College of Justice, was that the power imbalances inherent in partnerships might result in junior partners being nominated as scapegoats.

## **Discussion**

3.25 Our consultation showed that there was some support for broadening the individual criminal liability of partners, and that were this to be done the preferred approach might be to alter the burden of proof in establishing individual guilt, along the lines presently adopted in section 285(4) of the Copyright, Designs and Patents Act 1988. It also showed that any such expansion of individual criminal liability would be far from uncontroversial, and suggested that if such a step were to be considered, it should be considered in the context of a broader review of corporate criminal liability. We consider that such a broader review of corporate criminal liability would be warranted; but such a review cannot be conducted within the scope of the present project. For the present, we make no recommendation.

## Chapter 4            The effect of dissolution on individual criminal liability

4.1     The final issue to be considered in this project is what effect, if any, dissolution of a partnership might have on the competency of criminal proceedings brought against individual partners. The issue was considered in paragraphs 3.57-3.65 of the Discussion Paper, where we noted that there was an absence of relevant Scottish authority. We suggested, however, that there was no reason in principle why the dissolution of a partnership should prevent the proof of individual guilt, and noted that this conclusion found some support in the English authority of *R v Wakefield*.<sup>1</sup> We went on to ask whether it would be appropriate to provide that individual partners might be prosecuted, in circumstances in which they might be individually liable for offences committed by the partnership, regardless of whether proceedings are brought against the partnership, and regardless of whether the partnership continues in existence.<sup>2</sup>

4.2     Those consultees who responded on this point all supported the introduction of such a provision for the avoidance of doubt, although one<sup>3</sup> suggested that it would be inappropriate to provide for the prosecution of the individual partner alone in circumstances where the partnership is still in existence and is implicated in the offence. We made a very similar point at paragraph 4.17 of the Discussion Paper, where we observed that if the partnership is still in existence at the time of the prosecution (whether generally or for the limited purpose of criminal proceedings) then it would generally be appropriate, in proving the guilt of the partnership for the purpose of establishing the guilt of a partner, to prosecute the partnership as well as the partner.

4.3     We reiterate our view that the present law, in all likelihood, allows the prosecution of an individual partner, where the criteria for individual liability are made out, notwithstanding the dissolution of the partnership in whose (alleged) offending he or she is allegedly involved. Nevertheless, we think that it is appropriate to make limited statutory provision for the avoidance of any possible doubt. We recommend:

- 9.     It should be provided in statute, for the avoidance of doubt, that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by the dissolution of that partnership or a change in its membership.**

(Draft Bill, clauses 2 and 5)

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<sup>1</sup> [2004] EWCA Crim 2278; (2004) 168 JP 505; (2004) 168 JPN 780.

<sup>2</sup> Discussion Paper, para 4.18, question 2.

<sup>3</sup> Findlay Stark.

# Appendix A

DRAFT

## **Criminal Liability of Partnerships (Scotland) Bill**

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- 5 Offence committed before change in membership: proceedings against former partner
- 6 Interpretation
- 7 Consequential amendments etc.
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- 9 Short title, extent and commencement

# Criminal Liability of Partnerships (Scotland) Bill

Draft

of a

**BILL**

to

Make provision for Scotland about the criminal liability of partnerships, of dissolved partnerships and of the former partners of partnerships and dissolved partnerships; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--

## **1 Offence committed before dissolution: general**

- (1) This section applies where—
  - (a) a Scottish partnership ("Z") is dissolved, and
  - (b) an offence is alleged to have been committed by Z before dissolution.
- (2) Z may, by virtue of this subsection, be prosecuted for the offence.
- (3) But it is not competent to commence proceedings against Z by virtue of subsection (2) if a period of more than 5 years has elapsed since the dissolution.
- (4) For the purposes of subsection (3), proceedings are commenced on the date on which, as respects an offence mentioned in subsection (1)(b)—
  - (a) an indictment is served on Z, or
  - (b) a warrant to cite Z is executed.
- (5) The provisions mentioned in subsection (6) apply in relation to the liability of a former partner of Z (being liability incurred by virtue of subsection (2)) as they apply in relation to the liability of a partner of a partnership which has not been dissolved (being liability incurred by virtue of such a partnership having been convicted of an offence).
- (6) The provisions are—
  - (a) sections 4(2) (charging of individual partner on decree or diligence directed against firm) and 9 (liability of partners for debts and obligations of firm) of the Partnership Act 1890 (c.39), and

- (b) sections 70(6) (recovery where organisation sentenced to a fine: solemn proceedings) and 143(2) (corresponding provision: summary proceedings) of the Criminal Procedure (Scotland) Act 1995 (c.46).
- (7) Subsection (3) is without prejudice to section 136 (time limit for certain offences) of the Criminal Procedure (Scotland) Act 1995 (c.46)).

#### NOTE

**Clause 1** addresses the "dissolution issue" (Report, para 1.5 and Chapter 2) by providing that it is competent to prosecute a dissolved partnership in relation to an offence allegedly committed prior to dissolution, notwithstanding the dissolution of that partnership (Recommendation 4, para 2.18). Proceedings must be commenced, by the service of an indictment or the execution of a warrant to cite, within 5 years of the date of dissolution (subsections (3) and (4) (Recommendation 7, para 2.28). This time limit is without prejudice to the six-month time limit for the prosecution of summary-only offences imposed by section 136 of the Criminal Procedure (Scotland) Act 1995 (subsection 7).

Sections 4(2) and 9 of the Partnership Act 1890 and sections 70(6) and 143(2) of the Criminal Procedure (Scotland) Act 1995 operate to render a fine imposed upon the partnership enforceable against the assets of the individual partners as well as against those of a partnership. (Discussion Paper, paras 3.7-3.11 and 3.38). Subsections (5) and (6) of clause 1 apply these provisions in relation to dissolved partnerships, so that any fine imposed following a prosecution by virtue of subsection (2) may be enforced against the former partners, jointly and severally, with each partner having a right of relief against his or her fellow former partners.

## **2 Offence committed before dissolution: proceedings against former partner**

- (1) This section applies where—
  - (a) a Scottish partnership ("Z") is dissolved, and
  - (b) an offence is alleged to have been committed by Z before dissolution.
- (2) Notwithstanding the dissolution and irrespective of whether Z is prosecuted for the offence—
  - (a) a former partner ("P") may, in accordance with a relevant enactment, be prosecuted for the offence, and
  - (b) in proceedings against P by virtue of paragraph (a), evidence led may include evidence as to the commission of the offence by Z.

#### NOTE

**Clause 2** provides that that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by the dissolution of that partnership. At para 4.3 of the Report we express the view that such a prosecution would be competent under the present law; clause 2 puts this beyond doubt. Although it would be competent, in terms of clause 1, to prosecute the dissolved partnership, the dissolved partnership need not be prosecuted before a prosecution of an individual partner can take place (subsection (2)). Prosecution of an individual partner will only be competent where a "relevant enactment" provides for the individual liability of partners for offences committed by a partnership (subsection (2)(a)). "Relevant enactment" is defined in clause 6(1) as an enactment to the effect that a partner may be prosecuted for an offence committed by a partnership. The effect of clause 2 is to make it clear that any liability to prosecution which may arise under a relevant enactment will not be affected by the dissolution of the partnership.

### **3 Payment of fine where partnership dissolved**

An enactment, in so far as it restricts to payment out of a Scottish partnership's assets the payment of a fine imposed on the partnership on its conviction of an offence, does not apply in the case of a partnership which has been dissolved.

#### NOTE

**Clause 3** disapplies any provision requiring a fine levied upon a partnership to be paid from the partnership assets where a fine is levied upon a partnership which has been dissolved (Recommendation 8, para 3.7). This provision is required to give full effect to the recommendations in Chapter 2 of the Report – without it any attempt to enforce a fine against a dissolved partnership would be frustrated since when a partnership is dissolved there will be no partnership assets.

### **4 Offence committed before change in membership: general**

- (1) This section applies where—
  - (a) there is a change in the membership of a Scottish partnership, and
  - (b) an offence is alleged to have been committed by the partnership before the change.
- (2) The partnership may, by virtue of this subsection, be prosecuted for the offence.
- (3) But it is not competent to commence proceedings against the partnership by virtue of subsection (2) if a period of more than 5 years has elapsed since the change.
- (4) For the purposes of subsection (3), proceedings are commenced on the date on which, as respects an offence mentioned in subsection (1)(b)—
  - (a) an indictment is served on the partnership, or
  - (b) a warrant to cite the partnership is executed.
- (5) Despite the change in membership, the provisions mentioned in section 1(6) apply in relation to the liability of a partner of the partnership (being liability incurred by virtue of subsection (2)) as they apply in relation to the liability of a partner of a partnership which has not changed in membership (being liability incurred by virtue of such a partnership having been convicted of an offence).
- (6) Subsection (3) is without prejudice to section 136 (time limit for certain offences) of the Criminal Procedure (Scotland) Act 1995 (c.46)).

#### NOTE

**Clause 4** provides that it is competent to prosecute a partnership in respect of an offence allegedly committed prior to a change in membership of the partnership, notwithstanding that change in membership (Recommendation 6, para 2.24). This addresses the uncertainty in the present law as to whether the legal personality of a partnership necessarily comes to an end upon a change in membership (paras 2.21-2.14).

### **5 Offence committed before change in membership: proceedings against former partner**

- (1) This section applies where—
  - (a) there is a change in the membership of a Scottish partnership, and
  - (b) an offence is alleged to have been committed by the partnership before the change.

- (2) Notwithstanding the change and irrespective of whether the partnership is prosecuted for the offence—
  - (a) a former partner ("P") may, in accordance with a relevant enactment, be prosecuted for the offence, and
  - (b) in proceedings against P by virtue of paragraph (a), evidence led may include evidence as to the commission of the offence by the partnership.

#### NOTE

**Clause 5** provides that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by a change in the membership of that partnership. This parallels the provision made in clause 2 for the prosecution of individual partners following the dissolution of the partnership, and the comments made in the Note to that clause apply equally to clause 5. Subsection (2) permits a partner to be prosecuted in accordance with a relevant enactment regardless of whether the partnership is also prosecuted (cf section 36 of the Health and Safety at Work etc Act 1974). We believe that this may be appropriate in exceptional cases, although as we observe at para 4.7 it will generally be appropriate, where the partnership continues in existence at the time of the prosecution, for the partnership as well as the partner to be made the subject of proceedings.

## 6 Interpretation

- (1) For the purposes of sections 2(2)(a) and 5(2)(a), a "relevant enactment" is an enactment (including an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament) to the effect that a partner may be prosecuted for an offence committed by a partnership.
- (2) For the purposes of sections 4 and 5, there is a change in the membership of a partnership where—
  - (a) a partner dies or, if not an individual, ceases to exist,
  - (b) a partner resigns, retires or is expelled from the partnership, or
  - (c) a person is admitted as a partner into the partnership.

#### NOTE

**Clause 6** provides definitions of a "relevant enactment" for the purposes of clauses 2(2)(a) and 5(2)(a) and of a change in the membership of a partnership for the purposes of clauses 4 and 5.

A "relevant enactment" is one which has the effect of rendering an individual partner criminally liable for an offence committed by the partnership. The bases upon which such personal liability might arise are (a) that the offence is attributable to any act, neglect or default on the partner's part (whether alone or among others); (b) that the offence was committed with the partner's consent or connivance; or (c) that the partner was art and part in the offence (see Discussion Paper, paras 3.36-3.57). The definition includes enactments contained in Acts of the Scottish Parliament and Scottish Statutory Instruments.

## 7 Consequential amendments etc.

- (1) The Secretary of State, after consulting the Scottish Ministers, may by order make such modifications of any other Act, or any Act of the Scottish Parliament, as the Secretary of State thinks necessary or expedient in consequence of, or in connection with, any provision of this Act.
- (2) An order under subsection (1) may make different provision for different purposes.

## **8 Orders**

- (1) Any power conferred by this Act to make an order is exercisable by statutory instrument.
- (2) No order may be made under section 7(1) unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament.

## **9 Short title, extent and commencement**

- (1) This Act may be cited as the Criminal Liability of Partnerships (Scotland) Act 2011.
- (2) This Act extends only to Scotland.
- (3) This section comes into force on the day on which this Act is passed.
- (4) The other provisions of this Act come into force at the end of the period of 6 months beginning with that day.

### **NOTE**

**Clause 9** provides that the Bill extends to Scotland only, and that it shall come into force at the end of the period of 6 months beginning with that day. We have chosen to specify a coming into force date, rather than give the Secretary of State a power to bring the Act into force by order, on the basis that this will allow the reader more easily to ascertain whether the Act has or has not come into force. The six month delay in coming into force is to allow partnerships to consider whether any amendment to their partnership agreements might be required by clause 4, should they have been drafted on the assumption that legal personality terminates on a change of membership.

## **Appendix B      List of Respondents to Discussion Paper**

Crown Office and Procurator Fiscal Service

Glasgow Bar Association

Mr Findlay Stark, University of Edinburgh (PhD Candidate)

The Law Society of Scotland

The Faculty of Advocates

The Senators of the College of Justice

Mr Peter Ferguson QC

Ms Fiona Grant, University of Abertay, Dundee

Sheriff Frank R. Crowe

Mr Michael G. A. Christie

Robert F MacLachlan, Brian Patton and Isabel G Caskie, family of Isabella MacLachlan, killed in the fire at Rosepark











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