

THE LAW REFORM COMMISSION OF IRELAND

**CORPORATE KILLING
(LRC CP 26 – 2003)**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL01/04)**

JANUARY 2004

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,100 members in the UK and abroad, with 64 members based in the Republic of Ireland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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CORPORATE KILLING

Introduction

1. APIL welcomes the opportunity to comment on the Law Reform Commission's consultation on corporate killing. In summary, APIL believes that the law as it stands, in both the UK and Ireland jurisdictions, is totally unsatisfactory and allows many medium-to-large sized companies to get away with acts of negligence which result in death. APIL cautiously welcomes the introduction of a new statutory offence of corporate killing which will be applicable to all incorporated and unincorporated entities alike. APIL's acceptance of this new corporate killing offence, however, is made with the provision that the use of the identification doctrine¹, and the criteria of 'high managerial agent', is given its widest possible interpretation. This will allow non-directors to be identified and prosecuted.
2. In terms of sanctions, APIL considers that fines currently imposed on companies are often not high enough to act as a deterrent against negligent practices. APIL is encouraged, therefore, to see that the Commission is recommending that corporate killing should carry with it an unlimited fine, and that this fine should be based on the means of the corporation involved.
3. APIL supports the offence of corporate killing being applicable to individual members of a corporation. On conviction of this secondary offence, the 'high managerial agent' should be liable for one, or all, of the following sanctions: imprisonment for up to five years; an unlimited fine; and disqualification from holding a high management position. It is imperative that company directors take responsibility for their

company's health and safety practices if deaths and injuries at work are to be prevented.

4. APIL proposes that director's duties regarding health and safety should be clearly identifiable at a board level, with a health and safety director appointed. It is envisaged that this will result in the higher prioritisation of health and safety policies within the corporate agenda. To this end, APIL feels that the Companies Act should be reformed to enshrine directors' health and safety responsibilities in law. This would make it is easier to identify those who have breached health and safety law and effectively level the playing field, as directors of large firms are often able to hide in anonymity in a way which directors of small firms are not.

5. APIL broadly welcomes the recommendations proposed in the consultation documents as they will go a long to remedying many of the faults within the current system. Due to the fact that the recommendations are mostly positive, APIL intends to only highlight the recommendations that it feels need to be commented on. *(A full list of recommendations is attached – Appendix A).*

¹ This doctrine views the crimes of a corporation's controlling officers as constituting the acts of the corporation itself by identifying them as being one with the corporation.

Provisional Recommendations

Recommendation 9.07

The Commission recommends that corporations should be subject to criminal liability for corporate killing. [Paragraph 7.11]

6. APIL fully endorses the proposal to introduce a new offence of corporate killing. APIL shares the justification identified at paragraph 7.05 of the consultation paper, namely that to expose corporations to criminal liability for a corporate killing offence would *“allow society to express a greater level of condemnation than is currently possible by means of a civil right of action in tort ... or the offences created by health and safety legislation”*.

7. The necessity for corporate killing legislation is further enforced by the fact that, in Ireland, corporations have rarely been prosecuted for grossly negligent conduct causing loss of life. If carried out by an individual, similar grossly negligent conduct would lead to a prosecution for gross negligence manslaughter. The lack of prosecutions and convictions is due to the narrow interpretation which the courts have applied to the identification doctrine and the stipulation that there must be a “controlling mind”. This makes it necessary to identify an individual board member or director which represents the “mind” of the company and who is culpable of gross negligence before a conviction can be brought.

Recommendation 9.09

The Commission recommends the establishment of a statutory corporate killing offence which would be prosecuted on indictment. In essence, the offence would be defined in terms equivalent to gross negligence manslaughter. Thus the negligence required to constitute the new offence

would have to be of a very high degree and would have to involve a serious risk of substantial personal injury to others. The statutory offence would be adapted to take account of the difficulties in applying such an offence to corporations. [Paragraph 7.17]

8. APIL agrees with the view stated in the consultation paper that *“corporate killing should be treated as on a par with gross negligence manslaughter in terms of gravity”*. In order to properly achieve this, we are encouraged to note that the new offence of corporate killing carries the same burden of proof as its common law equivalent. In addition, by establishing a statutory basis for the offence, the uncertainty about whether a corporation can be convicted of common law manslaughter will be dispensed with.
9. The new corporate killing offence also addresses some of the limitations of current health and safety law². For example, the health and safety law does not *“provide a satisfactory or comprehensive alternative to a prosecution for murder or manslaughter”*. They are also limited to breaches of specific regulations and are only applicable in the workplace.
10. Finally, the offence carries with it a more prominent mark of disapproval from the wider community, and so will act as a more effective deterrent.

Recommendation 9.10

The Commission particularly invites comments on whether extension of the common law offence of gross negligence manslaughter to corporations by statute would be preferable to the establishment of a statutory offence

² Safety, Health and Welfare at Work Act 1989

of corporate killing which has been provisionally recommended in this Consultation Paper. [Paragraph 7.19]

11. APIL supports the adoption of a statutory offence of corporate killing rather than an extension of the current common law offence of gross negligence manslaughter. One of the primary conflicts involved in corporate killing legislation is whether a corporation can effectively be convicted of a crime. Irish law, however, has come to recognise that corporations can be prosecuted for criminal offences. The majority of these offences are based on statutory regimes (for example to protect health and safety, the environment or the integrity of financial markets). Outside of these examples the Irish courts have not espoused the view that corporations can be prosecuted for other crimes. So in order to avoid possible future conflicts, a statutory offence would be more in line with current Irish legal tradition.

12. In addition, APIL believes it is essential that any corporate killing offence must be closely connected with health and safety legislation. Indeed several of the sanctions proposed to be available on conviction of corporate killing originate from health and safety legislation (i.e. remedial orders). Due to the fact that health and safety sanctions are enshrined in legislation, it is only appropriate that the offence of corporate killing should be likewise enshrined in legislation.

Recommendation 9.11

The Commission is of the view that legislation establishing the offence of corporate killing should apply to unincorporated and incorporated entities alike, but would welcomes views on this point. We are not in favour of excluding charitable bodies, public sector bodies and not-for-profit entities from the scope of the offence. Accordingly, a statutory corporate killing offence should be expressed to apply to all ‘undertakings’ rather than

limiting the scope of the offence to corporations. ‘Undertaking’ could be defined as “a person being a body corporate or an unincorporated body of persona engaged in the production, supply or distribution of good or the provision of a service in the State”. [Paragraph 7.31]

13. APIL can see no reason in principle why unincorporated associations should be beyond the scope of the proposals contained within the paper. On the contrary, APIL endorses the view that the offence of corporate killing should extend to unincorporated bodies, and would cite as an example to illustrate the point, the case of asbestos in Irish government buildings. In this case (which is still ongoing), even though there were international concerns about the dangers of asbestos, white asbestos was not banned in the Irish Republic until just over three years ago. In particular Government buildings were known to contain asbestos. Yet in the 1980s letters to contractors inviting tenders for asbestos removal included warnings that protective clothing and masks should be used, but employees of the state were not told at the time of the need for such precautions. APIL believes that the Irish Government should be held accountable in circumstances such as these, and as such would recommend their inclusion within the recommendations.

14. Furthermore, including unincorporated companies within the scope of the offence could avoid many of the inconsistencies which would occur if the offence were applied to only corporations but not to other similar bodies. APIL feels that to restrict the scope of the offence to corporations would create artificial barriers, since there is often very little difference in practice between an incorporated body and an unincorporated association.

Recommendation 9.13

The Commission recommends the establishment of a statutory corporate killing offence to be prosecuted on indictment whereby the acts or omissions of a 'high managerial agent' of an undertaking would be treated as those of the undertaking. On the death of a person, an undertaking could be found guilty of the offence of corporate killing where it is proved that the acts or omissions of a high managerial agent of the undertaking, fell far below what could reasonably be expected in the circumstances and those acts or omissions involved a high degree of risk of serious personal injury to any person and were a cause of death. [Paragraph 7.50]

15. Under the present system, the crimes of a corporation's controlling officers (acting as the "*directing mind and will*" of the corporation) are regarded as the acts of the corporation itself. This is known as the doctrine of identification³. The identification principle has proven particularly problematic in recent years, due to the growth in size and complexity of organisational structures and the narrowness of the test used. The test focuses on the acts or omissions of members of the board of directors only, and does not take account of corporations which do not operate the traditional 'top-down' model of management. The use of this form of the identification principle has led to corporations escaping liability for all crimes except those committed through its board of directors. The test fails to recognise that particular activities or policies may be delegated to persons who are not at the highest strata of management.

16. APIL supports the widening of the identification principle proposed by the Commission so that the relevant corporation can be represented by a 'high managerial agent'. This will allow the expansion, beyond the boardroom, of the class of person whose act and omissions can be

³ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153

considered that of the corporation (and therefore beyond the 'directing mind and will' formulation of the identification doctrine). This will help accommodate the broad spectrum of management structures which exist today, particularly in large undertakings.

Recommendation 9.14

The Commission recommends that 'high managerial agent' be defined as "an officer, agent or employee of the undertaking having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the undertaking". [Paragraph 7.53]

17. APIL primary concern is that the responsibility of both directors and board members is not passed to a lower ranking agent of the corporation. Thus we cautiously agree with the proposed definition of high managerial agent as detailed above.

18. This definition will encompass employees with delegated authority to make decisions in particular areas (i.e. health and safety), but will not cover people who may have day to day operational responsibilities but no actual power to formulate policy. In respect of these people who have day to day responsibilities, it should be noted that while they will not be liable under the proposed corporate killing law, they will still be potentially liable for manslaughter under common law.

Recommendation 9.15

The Commission recommends that in order to establish 'reckless toleration' by a high managerial agent, it must be proved that, in the circumstances, the high managerial agent of the undertaking was aware, or ought reasonably to have been aware, of a high degree of risk of serious personal injury to any persons arising from the acts or omissions of

another person and nonetheless have unreasonably disregarded that risk. [Paragraph 7.56]

19.APIL supports the above recommendation as it explicitly targets the high managerial agent who ‘turns a blind eye’ to dangerous practices. In particular, we are pleased to note that the test of reckless toleration is not whether the person was *actually* aware of the dangerous acts, but that he *ought to have been* aware of the risks. This will prevent a high managerial agent pleading ignorance of the dangerous practices which were occurring unbeknownst to him, because the new offence will mean he ought to have known.

Recommendation 9.16

The Commission recommends that in order to find an undertaking guilty of the proposed offence of corporate killing, the relevant acts or omissions which are attributed to the undertaking must fall far below what could reasonably be expected in the circumstances and have involved a high degree of risk of causing serious personal injury to any person. [Paragraph 7.59]

20.APIL agrees that to reflect the gravity of the proposed offence, the standard of culpability for corporate killing should not be materially different from that required for gross negligence manslaughter for individuals (i.e. criminal negligence). This would mean that an undertaking would be guilty of corporate killing if a reasonable person would have realised that his actions were risky and that serious injury could be caused. The use of the ‘reasonable man’ test of gross negligence puts the offence of corporate killing in line with gross negligence manslaughter in Ireland.

21. A further benefit of the suggested culpability test is that it does not limit the responsibilities of the corporation to complying with the letter of health and safety legislation. So a corporation will be guilty even if it has not broken any health and safety laws.

Recommendation 9.19

The Commission recommends that it should be provided that, the relevant acts or omissions of a high managerial agent need only be a cause of death rather than the immediate or only cause of death. [Paragraph 7.68]

22. APIL agrees with the above recommendation as it allows the high managerial agent to be liable for any actions or omissions which are a cause of a negligent death, rather than the sole cause of such a death. This stipulation will prevent difficulties in relation to the possible interruption of the causation chain⁴.

23. The causation chain is the connection between the act of the person (i.e. hitting someone) and the eventual consequence (i.e. the person dies). If the action of the person is shown not to relate to the consequence (i.e. a person hits someone who subsequently gets run over by a bus), then the chain of causation is broken. In some instances it is a viable defence that the act or omission by the offender may have contributed to a person's death, but was not the sole cause of it. If this is found to be true then the act of the offender didn't actually cause the death of the person, so they are not guilty of the person's death.

⁴ The concept of *novus actus interveniens* – See McAuley and McCutcheon *Criminal Liability* (Dublin 2002) at 258 – 268.

Recommendation 9.20

On balance, the Commission is of the view that in order to reflect the gravity of the offence of corporate killing, legislation should provide for an unlimited fine in respect of an undertaking found guilty of the offence and, in imposing a fine the court may take into account the means of the undertaking and the effect which a fine would have on the viability of the undertaking [paragraph 8.08]

24. APIL believes that fines currently imposed on companies are often not high enough to act as a deterrent against negligent practices and the new law should ensure a fine represents a substantial portion of a company's turnover. It is our contention that a fine only works as a sanction if it relates to the depth of the defendant's pockets. The difficulty is that due to the variety of entities which are included in the Commission's definition of 'undertakings', some organisations may be asset rich rather than cash rich. As such a turnover fine would not adequately punish the company. APIL agrees it may be more appropriate that fines should be unlimited and based on the means of the company, rather than turnover fines.

Recommendation 9.23

The Commission recommends that a remedial order should be available as a sanction for the offence of corporate killing. Statutory guidance should be provided relating to the circumstances in which such a remedial order may be appropriate, the circumstances in which a remedial order may be imposed *in lieu* of a fine and the type of conditions that might be imposed by such orders on a corporation. [Paragraphs 8.21, 8.25 and 8.30]

25. The use of remedial orders is currently available to the courts in Ireland for offences under health and safety legislation. The statute states that "*in addition to or instead of inflicting a fine, [the court may] order [the*

defendant] *to take steps within a specified time for remedying the matters in respect of which the contravention occurred*⁵. In respect of corporate killing, the use of a remedial order would allow the court to require the offending corporation to conduct an internal investigation into the circumstances of the incident, followed by appropriate internal disciplinary proceedings, and the filing of a satisfactory compliance report with the court. APIL is fully supportive of the use of such a sanction as it will allow for the proper scrutiny of a corporation's health and safety practices, and illustrate any potential future problems.

26. It is also hoped that consideration by the court of any compliance report would allow public scrutiny of both the judicial action taken and recommendations suggested. Important lessons have not been learnt because of a failure to implement recommendations made following an accident. While the corporation is duty bound to implement recommendations as ordered by the court, it will often be reluctant to do so for political or financial reasons. There needs to be public scrutiny of these decisions. Using the example of a public enquiry, the Hidden report, published after the Clapham train crash in the UK, recommended the installation of the automatic train protection system (ATP). This was not done. Potentially with public scrutiny and judicial pressure such a system may have been introduced. It has been argued that ATP would have prevented the Southall and Paddington train crashes. If the compliance report is to be effective, it needs to be reviewed at regular intervals by both the public and the court.

Recommendation 9.24

The Commission considers that the community service order provides a valuable sanction. We recommend that in sentencing an undertaking

⁵ Section 48 (16) of the Safety, Health and Welfare Act 1989

convicted of corporate killing, a court should have the power, at its discretion, to impose a community service order. [Paragraph 8.39]

27. The community service order is a valuable sanction in relation to the proposed corporate killing offence. It will compel the offending corporation to provide a community service of some description, ideally closely linked with the original offence. APIL would like to see such a sanction used to provide a constructive benefit to the community at large.

28. Of particular interest to APIL, as mentioned in the consultation paper, is the use of a community service order to compel an offending corporation to conduct research into causes of accidents within its field. We would be greatly encouraged by the use of such a sanction as one of our primary remits is the prevention of workplace accidents and deaths, and the type of research which has been suggested would be invaluable in informing new preventative regimes.

Recommendation 9.25

The Commission considers that an adverse publicity order is a useful and effective sanction in sentencing undertakings. Accordingly we recommend that in sentencing an undertaking convicted of the offence of corporate killing, a court should have the power, at its discretion, to impose an adverse publicity order. [Paragraph 8.44]

29. APIL considers the use of an adverse publicity order an excellent way of 'shaming' a company into better safety practices. The order would impose on the guilty corporation the duty to pay for and promote the corporate killing conviction. It has been suggested that reputation plays an important part in a company, and that anything which damages this reputation intrinsically damages the company. If this is accepted, then

the use of an adverse publicity order would indeed act as an effective sanction. Yet while APIL supports the use of any sanction which directly affects a guilty corporation, we feel that it should be one of the sanctions imposed rather than the only sanction imposed.

Recommendation 9.27

The Commission recommends the adoption of a secondary offence which would be prosecuted on indictment. A high managerial agent would be guilty of this offence in circumstances where an undertaking has been convicted of corporate killing and the acts or omissions which were attributed to the undertaking as constituting its liability for the offence of corporate killing were those of the high managerial agent or such acts or omissions were authorised, requested or recklessly tolerated by that person. In this context, we recommend that ‘recklessly tolerated’ would carry the same meaning in the secondary offence as in the primary offence.

[Paragraph 8.52]

30. The liability of high managerial agents for the secondary offence of corporate killing is essential if the newly proposed law is going to act as an effective deterrent. It would be inherently unfair to penalise an undertaking for corporate killing without punishing its high managerial agents in related proceedings. Indeed if this was not to happen it may create the public perception that the policy-makers, the high managerial agents, are hiding behind the corporation. APIL agrees that action should be taken against individual officers, since this will force those officers to take health and safety issue seriously.

31. To reiterate, APIL proposes that director’s duties regarding health and safety should be clearly identifiable at a board level, with a health and safety director appointed. It is envisaged that this will necessitate the

higher prioritisation of health and safety policies within the corporate agenda.

Recommendation 9.28

In order to reflect the range of circumstances in which the secondary offence might occur the Commission recommends that the penalty for it should be an unlimited fine or up to five years' imprisonment, or both. [Paragraph 8.53]

32. APIL believes that the sanctions which apply to the secondary offence of corporate killing should relate to the seriousness of the offence. The proposed crime of corporate killing is such that it involves the negligent death of a person. While there is nothing which can fully compensate for the loss of a person's life, the parties responsible for the death should be appropriately punished. Any sanctions for the secondary offence should reflect the penalty imposed in the criminal law for gross negligence manslaughter. We are pleased to see that the sanctions for the newly proposed offence do indeed reflect that of the criminal law.

Recommendation 9.29

The Commission recommends that a court would also have the power to make a disqualification order prohibiting a high managerial agent from holding high management positions in undertakings for a defined period where they have been convicted of the secondary offence. [Paragraph 8.55]

33. APIL believes it is essential that the court should have the discretion to disqualify an individual from acting in a management role in any Irish corporation. Whilst this sanction should not be used in isolation of a fine and/or imprisonment, it does reflect the fact that the offence was committed by the individual with corporate responsibilities. It is only appropriate therefore that the privileges which accompany such a

position be restricted, as the person has failed to exercise the accompanying corporate responsibilities.

Recommendation 9.30

The Commission recommends that the prosecution of an undertaking for corporate killing would not prevent an individual being prosecuted for manslaughter or another offence arising out of the same circumstances. [Paragraph 8.57]

34. APIL agrees with the above recommendation.

Recommendation 9.31

The Commission recommends that the offence of corporate killing should be limited in territorial scope to the death of a person within the State, whether the person was a citizen of Ireland or not and irrespective of the country of the undertaking's formation. [Paragraph 8.61]

35. APIL agrees with the Commission's assessment that there would be considerable practical difficulties in attempting to extend jurisdiction over the actions abroad of companies registered in Ireland.

APPENDIX A

"Summary of Provisional Recommendations"

Pages 207 – 211

The Law Reform Commission of Ireland
Consultation Paper on Corporate Killing
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