

CHAPTER 15

CAPACITY TO COMMIT OFFENCES: CHILDREN AND CORPORATIONS

Children

15.1 Under the Penal Code s 17, there are two significant ages that define criminal responsibility — an age below which there is a total exemption from criminal responsibility, and a higher age under which there is an exemption unless the child is proved to have been able to distinguish between right and wrong and did so with respect to the offence charged.

- The total exemption applies to children aged under 10 years.
- The other exemption, dependent upon the actual capacity of the child, applies to children aged under 14. The burden of proof for moral capacity is on the prosecution.

15.2 The more difficult cases will concern the partial exemption. The provision reflects a common law presumption against the capacity to be criminally responsible for conduct. In line with the common law, capacity to distinguish between right and wrong is likely to be interpreted to mean capacity for knowledge that the conduct was morally wrong rather than legally wrong. In *RP v The Queen* (2016) 340 ALR 212 [2016] HCA 53 at [9], the High Court of Australia explained how the presumption works:

The presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong".

15.3 A child who has capacity for the purpose of the law of criminal responsibility is subject to the same substantive criminal law as an adult. In some other jurisdictions, there are juvenile justice statutes establishing a special regime for the trial process and the applicable penalties. There is no such legislation in Vanuatu, although appropriate flexibility in the handling of juvenile offenders can be expected. In addition, the Penal Code s 54 prohibits a sentence of imprisonment for a child under 16 'unless no other method of punishment is appropriate' and the court gives reasons.

Corporations

15.4 Corporations as well as natural persons can commit criminal offences if certain conditions are met. The Penal Code s 19 provides:

A corporation may be criminally liable to the same extent as a natural person, provided that the acts and intentions of its principals or responsible servants may be attributed to the corporation.

The Code does not, however detail the conditions for attributing the acts and intentions of its principals and responsible servants. The matter is left to the common law: see below **15.7-15.14**.

15.5 In modern times there has been a proliferation of regulatory offences such as those relating to occupational health and safety, fair trading and licensing, all matters that may involve corporations. However, there are no formal limits on the offences that a corporation can commit. Although there are some offences which are practically inconceivable for a corporation to commit, corporate liability is not confined to commercial offences. For example, a corporation can, in principle, commit an offence against the person such as manslaughter, especially if the corporation is shown to have caused death through gross negligence.

15.6 A corporation as an abstract entity cannot be imprisoned. It can, however, be fined or required to perform community work. The Code s 58B provides that, where imprisonment alone is prescribed as the penalty for an offence, a court may substitute a fine or a sentence of community work.

Common law principles of corporate liability

15.7 A corporation can only act through its personnel. In determining which actions can be attributed to a corporation, the common law requires corporate personnel to be acting within the scope of their authority or employment. This does not mean that there must be some instruction or authorisation to engage in the conduct. It means no more than that the conduct must fall within an assigned area of operation and perhaps must be linked to a benefit for the corporation: *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662. The conduct may be disguised from other corporate personnel and may even be in breach of corporate policy.

15.8 Common law principles for attributing criminal liability to corporations have been highly restrictive. Vicarious liability, attributing to an employer

what all employees do in the course of their employment, has been rejected in criminal law even though it is recognised as part of the civil law of torts. This is reaffirmed in the Code s 19, which provides:

In all cases in which it is necessary to prove criminal intention, a person shall not be liable for the criminal act of another person, whether that person is his child, servant, employee, agent or merely a stranger.

15.9 Under common law principles, only 'identification liability' has been recognised in criminal law. With 'identification liability', liability can flow to a corporation only from the personal liability of those higher management personnel who are identifiable with it, constituting its 'directing mind and will'. One or more of these personnel must commit an offence before the corporation commits an offence.

15.10 An influential statement of the common law principles has been that of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1971] 2 All ER 127:

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instruction from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.

This restrictive test evidently excludes many persons who direct the day-to-day operations of corporations, even when they are given some measure of discretion respecting how these operations are to be conducted. Subordinates can only make the corporation liable when they are given full discretion to act independently, so that the functions of management have been effectively delegated to them.

15.11 It has, however, been said that the test is to be applied in a flexible way. For example, in *MKP Management Pty Ltd v Shire of Kalamunda* [2020] WASCA 130, it was said:

[80] However, the question whether, in a particular case, a natural person was acting as the directing mind or will or the embodiment of

a body corporate in relation to the matter in question is not to be answered simply by ascertaining whether the natural person held an office of the kind specified by Lord Reid in that passage. See, generally, *Director of Public Prosecutions Reference No 1 of 1996* [[1998] 3 VR 352] (355).

[81] Rather, that question is to be answered, in each particular case, having regard to the nature of the alleged offence and the facts of the particular case, including:

(a) the seniority of the natural person and his or her management functions within the body corporate's organisation;

(b) the character and quality of the natural person's act or omission;

(c) the nature and extent of the natural person's discretion in relation to his or her management functions, including in relation to the relevant act or omission; and

(d) whether the natural person did the relevant act or made the relevant omission within the scope of his or her authority or employment.

15.12 The traditional conception of limited corporate liability is complicated by the relative ease with which corporate liability is accepted for offences where the proscribed conduct is described by words such as 'permitting' or 'selling'. In offences using the word 'permitting', the offence descriptions target a failure to prevent something from happening. Such offences are easily applied to the directing officers of corporations who can, in turn, make the corporations themselves liable. In those offences using the word 'selling', the courts appear to have recognised two senses in which a sale can be said to be made:

1. by the person who physically makes the transfer; and
2. by the owner who authorises the transfer: see D Ormerod, *Smith and Hogan: Criminal Law*, 11th ed, Oxford University Press, Oxford, 2005, pp 230–1, 234.

A corporation, acting through its directing officers, can 'sell' in the second sense, even though the physical act is performed by a subordinate employee.

15.13 The line of traditional authority on corporate liability was reviewed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; [1995] 3 All ER 918. The Privy Council took the view that 'directing mind and will' is not a universal test, but is rather one of a range of options between which the courts can choose. The choice is to be made

as a matter of statutory construction, considering language, context and policy, with the aim of determining whose conduct is to be identified as that of the corporation for the purposes of the relevant statute. In some instances, it might be confined to the 'directing mind and will'; in other instances, subordinates could make the corporation liable. In *Meridian Global Funds* itself, it was decided that a corporation could be convicted of offences relating to failure to disclose dealings in publicly quoted securities, even though employees who individually committed these offences may not have constituted its 'directing mind and will'.

15.14 The authority of *Meridian Global Funds* could be used to expand the scope of corporate liability in Vanuatu. It is doubtful, though, that its approach would be applied outside the realm of commercial statutes to offences in general statutes such as the Penal Code. For traditional criminal offences, courts might be expected to decide that only the conduct of the 'directing mind and will' is intended to be identifiable with the corporation. This was the conclusion in *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796; [2000] 3 All ER 182. The English Court of Appeal held that a corporation could only be liable for manslaughter through attribution from the liability of its 'directing mind and will'. A similar conclusion has been reached in Victoria: *DPP Reference No 1 of 1996* (1998) 3 VR 352.

Reform of corporate liability

15.15 There has been widespread concern that the common law principles for attributing corporate liability are too narrow. Increasingly, it has been argued that corporations should be vicariously liable for the acts and omissions of all employees acting within their scope of employment unless the corporation proves that it exercised due diligence to prevent the conduct. It has also sometimes been proposed that due diligence should require action to create and maintain a 'corporate culture' of compliance with regulatory statutes.

15.16 Concern has also been expressed about the relationship between corporate and individual liability. Identification liability and vicarious liability are both forms of derivative liability. They both require an offence to have been committed by an individual, with corporate liability then being derived from the individual liability. This can cause difficulties in cases where the standard of criminal negligence is in issue. No matter how pervasive negligence may have been throughout a corporation, the corporation cannot be liable if no single individual's negligence amounted to criminal negligence.

15.17 An innovative approach to corporate liability for negligence can be found in the Australian Model Criminal Code (2009). For offences of criminal negligence, the corporation can be liable even when no individual has reached a criminal degree of negligence. The negligence of the corporation can be assessed by viewing its conduct 'as a whole' — that is, by aggregating the conduct of any number of its employees, agents or officers. Pervasive negligence in the corporation may make it criminally negligent even though simple negligence is all that can be established against any single individual. This approach has been adopted not only in the Australian Criminal Code (Cth) s 12.4 but also in the Fiji Crimes Act s 54. It would be an attractive development for other parts of the Pacific.