

GUIDANCE ON THE IMPACT OF THE PARTNERSHIPS (PROSECUTION) (SCOTLAND) ACT 2013

PART I – INTRODUCTION

This part of the Guidance sets out the background to the Act and why it was needed.

1. The Partnerships (Prosecution) (Scotland) Act 2013 (“the Act”) came into force on 26 April 2013.
2. The Act amends Scots law on partnerships so that a partnership is not able to avoid prosecution for a crime allegedly committed by it by subsequently dissolving, or changing its membership.

Background

3. The Act gives effect to recommendations contained in the Scottish Law Commissions’ Report on Criminal Liability of Partnerships¹ issued in December 2011.
4. The Act overturns the decision of the High Court in the case of *Balmer v. HM Advocate*² in which it was held that since the separate legal personality of a partnership was extinguished by its dissolution, it was not competent to prosecute a partnership which had been dissolved.
5. The decision of the High Court followed upon the Lord Advocate’s attempts to prosecute the partnership which had run Rosepark Nursing Home in Uddingston, Lanarkshire, in which 14 people lost their lives in a fire in 2004. The partnership was dissolved by its partners subsequent to the fire. As the alleged offences were committable by the employer and it had been established that the partnership was

¹ Scots Law Com No 224, CM 8238 (2011).

² [2008] HCJAC 44, 2008 SLT 799.

the employer, the prosecution attempts could not proceed to test the relevant facts, given that the employer had ceased to exist as a legal entity.

6. Following *Balmer v. HM Advocate* it was accepted as settled law that the legal personality of a partnership ends immediately upon its dissolution; so dissolution bars prosecution of a partnership which is treated in law as a separate legal person. Partnerships can be dissolved quickly and easily. A partnership is capable of being formed without any written contract and may be dissolved without formality.

7. Additionally, it was not clear under existing law whether the legal personality of a Scottish partnership survives changes to its membership³. It might be that the resignation of a partner, or assumption of a new partner, brings the old partnership to an end and a new partnership into existence. If so, the prosecution of offences committed by the partnership prior to the change in membership might also be rendered incompetent. The Act resolves this problem for the purposes of criminal prosecutions.

8. The Act is a targeted reform of the law more generally as it applies to partnerships. It operates within the law of partnerships and should be seen in that context.

9. The purpose of this Guidance is to inform prospective partners, partners, partnerships and those advising them about what the Act does, and how it might impact on them. The guidance is organised into 3 parts – (1) The background (pages 1-2); (2) The effect of the Act (pages 3-8); and (3) What the Act means for prospective partners, partners and partnerships (pages 9-10). Annex A sets out what the Act does on a section by section basis, and Annex B lists relevant material that may be of further assistance to readers of this Guidance.

³ Joint Report of the Law Commission of England and Wales and the Scottish Law Commission on Partnership, Law Com No 283; Scots Law Com no 192 (2003).

PART II – EFFECT OF THE ACT

This part of the Guidance sets out how partners and partnerships are currently prosecuted; when the Act applies; and the partnerships and offences to which it applies.

Which partnerships does the Act apply to?

10. The Act applies to any partnership⁴ which is capable of being prosecuted as a matter of Scots law, subject to the qualifications mentioned below. This includes:

- (a) Partnerships within the meaning of the Partnership Act 1890 (“the 1890 Act”);
- (b) Limited Partnerships within the meaning of the Limited Partnership Act 1907; and
- (c) Partnerships constituted under the law of countries other than Scotland (if they are considered not to fall within (a) or (b) above).

11. As the majority of partnerships active in Scotland are Scottish partnerships, the principal impact of the Act will be on them. Scottish partnerships in this Guidance means partnerships which have a separate legal personality by virtue of falling within section 4(2) of the 1890 Act. That provision states “*In Scotland a firm is a legal person distinct from the partners of whom it is composed ...*”.

12. However, certain partnerships to which section 4(2) of the 1890 Act does not apply, might in addition be treated in Scots law as being a separate legal person for other reasons⁵. Separately, certain offences may be framed so that they can be brought against a partnership as an entity rather than its individual partners.

13. As the prosecution of partnerships for offences mentioned in paragraph 12 may be frustrated by the dissolution or change in membership of the partnership, the Act applies to them also.

⁴ Section 1(1) of the Partnership Act 1890 defines a “partnership” as “*the relation which subsists between persons carrying on a business in common with a view to profit*” and section 1(2) excludes from that definition companies or associations registered under the Companies Act 2006 or formed or incorporated under Acts of Parliament, letters patent or Royal Charter.

⁵ For example, as a result of the law of the country under which they are constituted.

14. The Act only applies to partnerships and will not apply to other legal entities such as:

- (a) Individuals practicing on their own (sometimes referred to as sole practitioners);
- (b) Limited Liability Partnerships (“LLPs”) as constituted under the Limited Liability Partnership Act 2000; and
- (c) Companies as constituted under the Companies Act 2006.

Where must the criminal offence be capable of being prosecuted?

15. The Act in the main extends to Scotland⁶ and so it only changes the law as it relates to offences which are capable of being prosecuted as a matter of Scots law.

16. Certain offences may be committed outwith Scotland but prosecuted as a matter of Scots law⁷. However, most of the exceptions to the general position - that only offences committed in Scotland may be tried in Scotland - are unlikely to be relevant to partnerships.

17. In general, when considering whether the Act relates to a particular situation, the essential question to ask is not where a partnership was constituted, but whether activities carried out by the partnership are capable of being prosecuted in the Scottish Courts.

Which criminal offences does the Act make provision for?

18. The Act does not create any new criminal offence, or criminalise activity which is not criminal under the law as it existed prior to commencement of the Act. The Act only changes the law insofar as it relates to offences that are capable of being

⁶ See section 8(5) and (6). The amendment to section 38 of the 1890 Act takes the same extent as the 1890 Act and amendments made in exercise of the power in section 6(6) of the Act take the same extent as the provision being amended.

⁷ For example an offence under section 14 of the Bribery Act 2010 may be committed abroad, but tried in any part of the United Kingdom if the accused person has a “close connection” with the United Kingdom.

committed by a partnership itself separately from the partners of which it is composed⁸.

19. Subject to an exception, the Act does not change the law in relation to the criminal liability of individual partners. Such liability continues to be determined by reference to the terms of the particular offence in question. The Act clarifies that the competency of criminal proceedings against individual partners within a partnership are not affected by the dissolution of a partnership, or a change in its membership. However, under the Act, an individual partner may not be prosecuted if the partnership itself has been prosecuted and acquitted.

How are partnerships and partners prosecuted under the pre-existing law?

Partnerships

20. In Scotland, a partnership is a legal entity in its own right as distinct from the partners of whom it is composed. A Scottish partnership can therefore commit criminal offences and be prosecuted as a partnership either on indictment or summary complaint. Individual partners may also be prosecutable for the reasons mentioned in paragraphs 21 and 22.

Partners

21. The partners in a partnership can be held individually criminally liable in respect of offences committed by a partnership either on the basis that they are art and part perpetrators of an offence committed by the partnership⁹ or as a result of specific statutory provision¹⁰.

⁸ See section 7(a) of the Act for the meaning of references to an offence.

⁹ Under section 293 of the Criminal Procedure (Scotland) Act 1995.

¹⁰ See, for example, section 37 of the Health and Safety at Work etc. Act 1974.

22. Section 53 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) provides that where a partnership is found guilty of a “corporate offence”¹¹ and it is proved that the corporate offence committed by the partnership was committed with the consent or connivance of a partner or was attributable to the negligence of a partner, then that partner is also guilty of the corporate offence. That provision was intended to make across the board provision so that individual partners who were culpable would generally also be criminally liable for partnership offences. Section 53 of the 2010 Act does not however enable a dissolved partnership of itself to be prosecuted.

How are fines imposed on partnerships and partners under pre-existing law?

23. When a fine is imposed on a partnership as a consequence of a criminal prosecution, it is enforceable in the same way as any other debt of the partnership under section 70 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) in relation to proceedings on indictment, and section 143 of that Act in relation to summary proceedings.

24. Partnerships are unlimited liability business associations. Individual partners of Scottish partnerships are liable to pay partnership debts from their personal assets by virtue of section 4(2) of the 1890 Act¹². In Scottish partnerships, partners are joint and severally liable under section 9 of the 1890 Act, with other partners in the partnership. In respect of other partnerships within the meaning of the 1890 Act, partners have joint liability for such debts. A creditor will normally seek to enforce any decree obtained against a partnership from partnership assets in the first instance. If the partnership assets are insufficient to meet the debt, the creditor may seek to enforce the debt against individual partners.

¹¹ “Corporate offence” is defined in subsection (2) as an offence in relation to which an enactment has the effect that where a body corporate is guilty of the offence, and it is proved that the offence was committed with the consent or connivance of a director or was attributable to the neglect of a director, the director (as well as the body corporate) is guilty of the offence.

¹² Section 4(2) of the 1890 Act relevantly provides “...an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief pro rata from the firm and its other members.”

25. Taken together, sections 70/143 of the 1995 Act and sections 4(2) and 9 of the 1890 Act mean that a partner of a Scottish partnership has civil liability to meet in full any fine imposed upon the partnership, with a right of relief against the partnership and the other partners within it.

26. The enforcement of a fine imposed on a partnership against an individual partner is treated as the enforcement of a debt - so a partner's personal liability is civil and not criminal in nature.

27. Although the general rule is that a fine imposed against a partnership can be enforced against the assets of individual partners, certain United Kingdom statutes provide that any fine against a partnership should be enforced against the partnership assets only, and not the personal assets of the partners.¹³ When a partnership dissolves, it clearly cannot be the owner of assets. Therefore, in order that such provisions do not frustrate the enforcement of a fine where a partnership dissolves, the Act displaces any such requirements.

28. The mechanisms by which fines can be enforced against those partnerships mentioned in paragraphs 10 (b) and (c) above will continue to apply and operate as they did prior to commencement of the Act.¹⁴

When does the Act apply?

29. The Act applies only to dissolutions of partnerships and changes in membership which take place on or after 26 April 2013. In relation to dissolutions, a partnership is only capable of being prosecuted by virtue of the Act, where the prosecution is commenced within the period of five years from the date of the dissolution. Where a shorter time-limit for prosecution of a particular offence applies (such as for summary-only offences) the shorter time limit will apply to prosecution of a dissolved partnership that has allegedly committed the crime.

¹³ For example section 285(3) of the Copyright, Designs and Patents Act 1988 provides that a fine imposed on a partnership on its conviction shall be paid out of partnership assets.

¹⁴ Section 1(2) of the Act provides "*The partnership may be prosecuted, or continue to be prosecuted, for the offence as if it had not been dissolved.*"

30. The Act also applies to offences committed prior to 26 April 2013 but only where the dissolution or change in membership takes place on or after that date. The date on which the offence was committed does not start the 5 year time period running.

PART III – WHAT THE ACT MEANS FOR PROSPECTIVE PARTNERS, PARTNERS AND PARTNERSHIPS

This part of the Guidance sets out the implications of the Act for prospective partners, partners and partnerships.

What does the Act mean for partners?

31. The Act has implications for persons who are partners of a partnership at the time an alleged offence is committed, for those who become partners after the alleged offence and persons contemplating joining a partnership.

32. The Act does not impose individual criminal liability on any partner - regardless of the time at which they joined the partnership. In particular, persons who become partners after the alleged offence - newly assumed partners - are not exposed to prosecution as individuals by virtue of the Act.

33. Persons who are or become partners prior to conviction and fine are or may have a civil liability to pay a fine arising from a prosecution. Their liability in this respect is to be determined under general partnership law (including for example statutory rights of relief and rights arising from the good faith nature of partnerships and contractual arrangements entered into by partners on leaving or joining).

How might the Act impact on you as a partner?

34. Partnership is an unlimited liability business association which can be entered into without a written contract. Where a third party creditor seeks payment of a debt owed by a partnership, individual partners in a Scottish partnership will be joint and severally liable for payment of the debt.

35. Individual partners can contract amongst themselves in relation to who will ultimately bear liability for any debt. Whilst such a contract may not have any effect on how a third party creditor enforces a debt against the partnership, it can modify an individual partner's right of relief or indemnity against fellow partners.

36. It is therefore important for individuals entering into a partnership to understand what the financial and legal consequences of doing so are. Prospective partners are encouraged to take the necessary steps to inform and protect themselves against consequences, such as acquiring liability for contingent liabilities of the partnership which may already exist. Potential exposure to a fine is just one of the liabilities which prospective partners should assess before joining a partnership.

37. The Act changes the law under which dissolution of a partnership is a technical obstacle to prosecution. Any partnerships which have relied on the continuation of that element of the pre-existing law should now consider what the Act means for them. Additionally, any pre-existing contractual arrangement reached by partners within a partnership may be affected by the provisions of the Act, and partners should also consider what the Act means for them in this context.

38. This narrow reform of partnership law provides an opportunity for organisations who represent the interests of partnerships, or who give advice to prospective or current partners, to remind their members and clients of the need to consider not only what the Act means for them, but what the law on partnership in Scotland means for them more generally.

39. Any partners or prospective partners reading this Guidance should seek legal advice in order to determine how the Act affects your position, and whether in light of the Act, you require to make any alterations to current contractual agreements.

Scotland Office

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ANNEX A

What does the Act do?

Section 1

- Permits a dissolved partnership to be prosecuted, or where proceedings have already been commenced to continue to be prosecuted, for an offence allegedly committed by the partnership prior to dissolution.
- Applies only to prosecution of an offence which a partnership is capable of committing separately from its partners by virtue of an enactment or rule of law.
- Requires prosecutions to be brought within 5 years of the date of dissolution. Where a shorter time-limit for prosecution of a particular offence applies (such as for summary-only offences) the shorter time limit will continue to apply to prosecution of the dissolved partnership.
- Makes provision for the enforcement of any fine which might be imposed upon a partnership following its conviction by applying the same rules to the liability of partners of a dissolved partnership convicted under section 1 of the Act as would have applied had the partnership not been dissolved.

Section 2

- Provides for the prosecution, or where proceedings have already commenced the continuing prosecution, of a person who could have been prosecuted for the offence allegedly committed by a now-dissolved partnership by virtue of an enactment or rule of law.
- Applies only where the law presently provides for an individual to be prosecuted for an offence committed by the partnership.

- Makes it clear that the dissolution of a partnership will not prevent the prosecution of a culpable individual where individual criminal liability arises under the pre-existing law.
- It does not extend individual criminal liability to any person who would not have been subject to prosecution under the pre-existing law.
- Provides that a prosecution may be brought against an individual whether or not the partnership has been, or is being, tried for the offence, but may not be brought against an individual where the partnership has been tried and acquitted (whether before or after dissolution).

Section 3

- Disapplies any provision requiring a fine levied upon a partnership to be paid only from the partnership assets in cases where a fine is levied against a partnership which has been dissolved.
- Is required to give full effect to section 1 of the Act, since without it there would be cases in which a prosecution was competent by virtue of that section, but where no fine could be imposed owing to the absence of partnership assets.
- Applies only to cases in which the offence was committed, and proceedings commenced, after its coming into force.

Section 4

- Provides that a partnership may be prosecuted for an offence allegedly committed by the partnership prior to a change in membership.
- Applies only in relation to offences that a partnership is capable of committing separately from its partners by virtue of an enactment or rule of law.

- Applies where there is a change in membership of the partnership, the partnership continues to carry on business after the change, and an offence is alleged to have been committed by the partnership before the change.
- Provides that the continuing partnership may be prosecuted notwithstanding a change in membership, and that any rule whereby a change in membership constitutes a new partnership shall not apply for the purposes of this section.
- Defines what is meant by a change in the membership of a partnership for the purposes of this section.

Section 5

- Applies where the alleged commission of an offence has been followed by a change in the membership of a partnership.
- Is of equivalent effect to section 2 of the Act.

Section 6

- Gives the Secretary of State the power to make further amendments or repeals of any enactment as appear to him to be necessary in consequence of the Bill.
- Makes consequential amendments to the 1890 and 1995 Acts.

Section 7

- Provides that references in the Act to an offence committed by a partnership are to an offence that a partnership is capable of committing separately from its partners, whether because the partnership enjoys a separate legal personality generally or because the offence-creating enactment requires

criminal proceedings to be brought in the name of the partnership only and not in that of any of the partners.

Section 8

- Provides for the Act to come into force on the day after the day upon which it is passed.
- Provides for the Act to apply where the partnership is dissolved or there is a change in membership of the partnership on or after the day on which it comes into force. It will not apply in relation to dissolution, or a change in membership, which takes place prior to the day on which the Act comes into force.
- Provides that the Act (other than section 3) will apply irrespective of when the offence is alleged to have been committed. This means that it can apply to offences committed before the Act becomes law as well as to offences committed after the Act becomes law.
- Provides that the Act (other than section 3) will apply to proceedings which are ongoing on the day the Act comes into force, apart from section 3 which will apply only in relation to offences committed after the Act has come into force.
- Provides that the Act extends to Scotland only, subject to the exception outlined at footnote 6 in this Guidance.

ANNEX B

Background materials relevant to the Act

- Click [here](#) for a link to the decision of the High Court in *Balmer v. HM Advocate*.
- Click [here](#) for a link to the findings of the Fatal Accident Inquiry into the Rosepark fire.
- Click [here](#) for a link to the Scottish Law Commission Discussion Paper on the Criminal Liability of Partnerships.
- Click [here](#) for a link to the Scottish Law Commission Report on the Criminal Liability of Partnerships.
- Click [here](#) for a link to the Scotland Office Consultation Paper and responses.
- Click [here](#) for a link to the UK Parliament website showing the Bill as introduced; amendments tabled; transcripts of debates; and explanatory notes etc.
- Click [here](#) for a link to the Act.
- Click [here](#) for a link to the Scotland Office press release relating to the Act.
- Click [here](#) for a link to the Scotland Office website containing a notice relating to the Act.