Human Rights Law Centre

AUSTRALIAN CENTRE FOR INTERNATIONAL JUSTICE

Reform required to end corporate impunity

Submission to the Australian Law Reform Commission's Review into Australia's corporate criminal responsibility regime

31 January 2020

www.hrlc.org.au

Freedom. Respect. Equality. Dignity. Action.

Contact

Keren Adams

Director of Legal Advocacy
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4433
F: + 61 3 8636 4455
E: keren.adams@hrlc.org.au
W: www.hrlc.org.au

Tess McGuire

Secondee Lawyer
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 9021 0154
F: + 61 3 8636 4455
E: tess.mcguire@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas.

It is an independent and not-for-profit organisation and donations are tax-deductible.

Follow us at http://twitter.com/rightsagenda
Join us at www.facebook.com/HumanRightsLawCentreHRLC/

Australian Centre for International Justice

Rawan Arraf

Director
Australian Centre for International Justice Ltd
E: rawan.arraf@acij.org.au
W: www.acij.org.au

Contents

1. Executive Summary

In recent years, some of Australia's most prominent companies from ANZ to BHP have been implicated in serious international human rights violations. Australian mining companies have been linked to hundreds of workplace fatalities across Africa,[1] public health scandals in Colombia[2] and Thailand,[3] and environmental devastation in Brazil.[4] Australian banks have been accused of funding land grabs in Cambodia and Indonesia[5] and enabling child sexual exploitation in the Philippines.[6] Australian private security contractors have been responsible for a suite of violations in Australia's offshore detention centres on Manus Island and Nauru resulting in deaths and serious injuries.[7]

Yet criminal prosecutions against corporations in Australia remain rare and as the Australian Law Reform Commission (**ALRC**) has noted, are frequently not pursued due to practical barriers and perceived low prospects of success.

The Human Rights Law Centre (**HRLC**) and Australian Centre for International Justice (**ACIJ**) therefore welcome the opportunity to provide a submission to the ALRC's Review into Australia's corporate criminal responsibility regime. We see the Inquiry as a critical opportunity for the Australian Government to consider holistic legislative reform to strengthen Australia's corporate criminal regime and ensure that serious crimes committed by companies can be successfully prosecuted.

The HRLC is a not-for-profit legal centre which uses a combination of legal action, advocacy and research to protect and promote human rights in Australia and in Australian activities overseas. Our business and human rights work seeks to ensure that Australian businesses respect human rights and that the Australian Government protects against corporate human rights abuses in accordance with its obligations under international and domestic law.

The ACIJ is a not-for-profit specialist legal centre working to develop Australia's domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code and employing strategies to combat the impunity of the perpetrators of these crimes to seek justice, redress and accountability for the survivors.

---

[1] Will Fitzgibbon, *Fatal Extraction: Australian Mining's Damaging Push into Africa*, International Consortium of Investigative Journalists (2014) <https://www.icij.org/investigations/fatal-extraction/>.

[2] Julia Symms Cobb and Luis Jaime Acosta, 'Colombia's Cerro Matoso mine must pay damages to local communities, court rules', *Reuters* (online) 17 March 2018, <https://www.reuters.com/article/colombia-mining-cerromatoso/colombias-cerro-matoso-mine-must-pay-damages-to-local-communities-court-rules-idUSL1N1QY1ZF>.

[3] Lindsay Murdoch, 'Thailand shuts down Australian gold mine over health fears' *Sydney Morning Herald* (online), 14 January 2015, <https://www.smh.com.au/business/companies/thailand-shuts-downaustralian-gold-mine-over-health-fears20150114-12nrfd.html>.

[4] Dom Phillips, 'Brazil Dam Disaster: firm knew of potential impact months in advance' *The Guardian* (online) 1 March 2018, <https://www.theguardian.com/world/2018/feb/28/brazil-dam-collapse-samarco-fundao-mining>.

[5] Oxfam Australia, *Banking on Shaky Ground: Australia's Big Four Banks and Land Grabs* (2014) <https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%27s%20big%204%20banks%20and%20land%20grabs_fa_web.pdf>; Oxfam Australia, *Still Banking on Land Grabs* (2016) <https://www.oxfam.org.au/wp-content/uploads/2016/02/2016-22-Banks-and-Land-report_V4a_web_spread.pdf>.

[6] Mark Schliebs, 'Micro payments for alleged child exploitation in The Philippines' *The Australian* (online) 22 November 2019, <https://www.theaustralian.com.au/inquirer/westpac-a-trail-of-child-exploitation/news-story/455ef5564743c5894b0f585e532cfc2f>.

[7] See eg., Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre and any like allegations in relation to the Manus Regional Processing Centre, (21 April 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report>.

The work of both the HRLC and ACIJ focuses principally on the actions and operations of Australian companies overseas. This submission thus focuses primarily on the proposals made by the ALRC to strengthen accountability for extraterritorial offences by Australian companies, although the HRLC also supports many of the proposals made by the ALRC to strengthen accountability for domestic offences.

Recommendations

The HRLC supports the following proposals set out in the ALRC's draft issues paper:

1. That there be a single method for attributing criminal and civil liability to a corporation for the contravention of Commonwealth laws pursuant to which the conduct and state of mind of persons acting on behalf of the corporation is attributable to the corporation (subject to a due diligence defence) (Proposal 8). We recommend, however, that a 'failure to prevent' offence for gross human rights violations is also added to the *Criminal Code 1995* (Cth).

2. That company officers (in particular senior officers) who were in a position to influence the conduct of the corporation in relation to the commission of an offence should be subject to a new civil penalty under the *Corporations Act 2001* (Cth) unless they can demonstrate that they took reasonable measures to prevent it, and that where the conduct was engaged in intentionally, knowingly or recklessly, it will constitute a criminal offence (Proposals 9 and 10).

The HRLC and ACIJ make the following additional recommendations to strengthen accountability for offences committed by Australian corporations extraterritorially:

3. The development of legislation imposing mandatory human rights due diligence obligations on large Australian companies and those operating in high-risk sectors or jurisdictions;

4. The establishment of a specialist investigations unit focused on international crimes; and

5. A further inquiry into criminal investigative processes, including in relation to extraterritorial offences.

2. Why corporate criminal accountability matters

> *If….the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously*.[8] – United State Supreme Court, 1909.

Corporations wield enormous power in our society. Decisions made by corporations can impact the lives of millions of people – from working conditions, to our collective environment. Corporations can also be the legal entity through which egregious human rights abuses are committed.

Over the past two decades, Australian companies have been implicated in various ways in serious international human rights violations.[9] To cite but a few examples:

- In 2005, Anvil Mining was exposed for actively assisting the Congolese armed forces in a military operation that involved a massacre of over 70 civilians in the Democratic Republic of Congo.
- In 2014, G4S Australia guards were involved in violent assaults at the Manus Island Detention Centre that caused the death of one person and injuries to over seventy others.
- In 2015, BHP's Samarco dam collapsed, causing the deaths of 19 people and untold environmental devastation. A number of BHP executives were subsequently charged in Brazil with homicide and environmental damage.
- Between 2016 and 2019, companies including Rip Curl,[10] Woolworths,[11] and Ansell[12] were exposed for supplying from factories in Asia relying on forced labour. The importation of Ansell gloves has recently been banned by the US Customs and Border Department as a result. [13]
- In 2019, Westpac was accused of more than 23 million breaches of money-laundering laws in relation to transactions worth more than $11 billion, the worst of which involved the alleged funding of live streaming of child sexual exploitation in the Philippines.[14]

Despite the public outrage provoked by these sorts of exposures, human rights violations by Australian companies overseas are rarely investigated and prosecution rates in Australia for corporate crime in general, remain extremely low. Indeed, since the addition of a number of serious offences with

---

[8] *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909) 493.

[9] For further details of these cases and others, see the Human Rights Law Centre's report, *Nowhere to Turn: addressing Australian corporate abuses overseas* (2018) <https://www.hrlc.org.au/reports/nowhere-to-turn>.

[10] Nick McKenzie & Richard Baker, 'Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea', *The Sydney Morning Herald* (online), 21 February 2016 <http://www.smh.com.au/business/surfclothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375.html>.

[11] Melissa Davey, 'Prawns sold in Australia linked to alleged slavery in Thai fishing industry', *The Guardian* (online), 12 June 2014 <https://www.theguardian.com/global-development/2014/jun/12/prawns-sold-in-australia-linked-toalleged-slavery-in-thai-fishing-industry>.

[12] Nassim Khadem, 'Top Glove, Malaysian rubber gloves supplier to Ansell, accused of abusing workers' rights', *ABC* (online), 8 December 2018 <https://www.abc.net.au/news/2018-12-08/rubber-gloves-supplier-to-ansell-accused-abusing-worker-rights/10595996>.

[13] Nassim Khadem, 'Australia urged to follow US, ban shipments of rubber gloves over forced labour concerns', *ABC* (online), 14 October 2019 <https://www.abc.net.au/news/2019-10-14/australia-urged-to-ban-import-of-gloves-from-ansell-supplier-wrp/11594690>.

[14] Ben Butler, 'What is Westpac accused of, and how is this related to child exploitation? – explainer', *The Guardian* (online), 21 November 2019 <https://www.theguardian.com/australia-news/2019/nov/21/what-is-westpac-accused-of-and-how-is-this-related-to-child-exploitation-explainer>.

extraterritorial application to Australia's Commonwealth Criminal Code in 2002, these provisions have never been used.[15]

The failure to advance prosecutions for extraterritorial corporate human rights violations not only leaves the victims of such violations without justice or redress, it sends a strong message that Australian corporations are somehow above the law. This in turn encourages continued wrongdoing, particularly in jurisdictions where local law enforcement efforts may be compromised by corruption, conflict or lack of resources.

Australia has an obligation under the United Nations Guiding Principles on Business and Human Rights to protect against corporate human rights violations within its territory or jurisdiction.[16]

In addition, Australia has obligations to investigate and prosecute allegations of egregious violations of human rights in particular where these violations amount to grave or international crimes. These obligations are set out under principles of customary international law[17] and international treaties.[18]

The ALRC Report echoes the point that although 'it may be difficult to distinguish a civil penalty from a criminal fine imposed on a corporation solely from a deterrence perspective, this analysis fails to appreciate that criminal law has additional aims of retribution and moral condemnation'.[19]

The levers through which corporations can be held accountable must reflect the range of potential impacts that corporations can have – including criminal acts. It is critical that these are enabled so that individuals who act through corporations are not able to avoid responsibility and accountability under the law.

---

[15] Allens Linklaters 'Stocktake on Business and Human Rights in Australia' (Report, April 2017) <https://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf>, p 9; also, response received to an Freedom of Information request, from the Commonwealth Director of Public Prosecutions (CDPP) in May 2018, relevant only to instances of prosecutions for the offences in Divisions 268 and 274 of the Criminal Code.

[16] United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011); see also, Australian Department of Foreign Affairs and Trade (DFAT), 'Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights' (Report, August 2017) <https://dfat.gov.au/international-relations/themes/human-rights/business/Documents/final-msag-priorities-paper.pdf>.

[17] For example, see International Committee of the Red Cross, *Customary International Humanitarian Law: Volume 1: Rules*, 2005, rule 158. See also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 60th sess, UN Doc A/RES/60/147 (16 December 2005).

[18] For example, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 7; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

[19] Lawrence Friedman, 'In Defence of Corporate Criminal Liability' (2000) *23 Harvard Journal of Law and Public Policy* 833, 834.

3. Reforming the test for corporate criminal responsibility

Proposal 8: *There should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which:*

a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and

b) a due diligence defence is available to the corporation.

The HRLC broadly supports the ALRC's proposed new test for attributing corporate criminal responsibility as set out in Proposal 8, with one caveat.

As the ALRC notes, under section 12.3 of Part 2.5 of the *Criminal Code 1995* (Cth), there are currently four ways a jury may be asked to find that a corporation possessed the requisite fault elements (other than negligence):

a) proving that the body corporate's **board of directors** intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

b) proving that a **high managerial agent** of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

c) proving that a **corporate culture** existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

d) proving that the **body corporate failed** to create and maintain a **corporate culture** that required compliance with the relevant provision.[20]

There has been very little judicial consideration of these sections in Part 2.5 of the *Criminal Code*.[21] The term 'corporate culture' is defined in section 12.3(6) as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.[22] However, the application of the 'corporate culture' standard remains vague, uncertain and largely untested.

In response to this challenge, the ALRC suggests amending Part 2.5 in a way that 'provides the simplicity which is characteristic of the TPA Model, while retaining the focus on corporate blameworthiness which is fundamental to Part 2.5'.[23] If implemented, this would mean that instead of looking to the four methods for imputing fault elements detailed above, it is sufficient to show that:

a) one or more **associates** of the body corporate who **engaged in the conduct** had **that state of mind**; or

[20] *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), s12.3.

[21] Australian Law Reform Commission, *Corporate Criminal Responsibility: Discussion Paper* (DP 87, 2019) ('ALRC Discussion Paper') 112 [5.38].

[22] *Criminal Code 1995* (Cth) s12.3(6).

[23] ALRC Discussion Paper (n 21) 131 [6.16].

b) the body corporate **authorised or permitted** the conduct.[24]

Simplifying this section removes one of the key hurdles that has deterred past prosecutions. This approach strips away the vague concept of 'corporate culture' and substitutes this with a focus on whether a body corporate 'authorised or permitted the conduct'. We agree with the ALRC's assessment that this is likely to prove a more effective test, particularly in the context of transnational corporate groups, where the failure to adequately regulate the transmission of criminal responsibility between entities within the group has traditionally made it very difficult for Australian holding or parent companies to be held criminally responsible for offences committed by overseas subsidiaries.[25]

We also see the value in a single method for attributing corporate criminal responsibility, rather than multiple tests which impose different standards. The test developed by the ALRC appears to overcome some of the chief limitations of the current 'corporate culture' test and should make it more difficult for corporations to deliberately structure their operations so as to shield themselves from liability.

We also support the ALRC's proposed expansion of the list of individuals whose conduct may be attributed to the corporation from 'officers, employees, and agents' to 'associates' acting on behalf of the corporation.[26] This functional focus on the individual's relationship with the corporation rather than their title will, as the ALRC notes, capture a broader range of actors, including subsidiaries of the body corporate, a controlled body of the body corporate, as well as officers, employees, agents or contractors.[27]

The HRLC has previously argued for a stand-alone 'Failure to Prevent' offence for human rights violations akin to that recently proposed for foreign bribery.[28] In the context of bribery, a 'failure to prevent' offence makes a company strictly liable for bribery of foreign officials conducted by its associates for the profit or gain of the company. The company has a defence if it can prove that it had adequate procedures in place designed to prevent the conduct.

The ALRC considers the 'failure to prevent' model in the Discussion Paper, but rejects it on the basis that a) the ALRC's Proposal 8 already incorporates key aspects of the way a 'failure to prevent' model would work, making an offence of this kind superfluous, and b) that the revised test set out in Proposal 8 imposes a higher standard of culpability, because attribution means that "the corporation itself is criminally responsible for the offence, not just for failing to prevent someone else committing it".[29]

While we agree with the latter argument, and therefore endorse the ALRC's revised test under Proposal 8 for attributing criminal responsibility, we are not necessarily convinced that the ALRC's new test makes a 'failure to prevent' offence superfluous. There may well be situations in which a corporation should not be held to be criminally responsible for the actions of an associate, but is guilty of failing to put in place systems to prevent the conduct.

---

[24] Ibid 129 [6.7].

[25] Radha Ivory and Anna John, 'Holding companies responsible? The criminal liability of Australian corporations for extraterritorial human rights violations' (2017) 40(3) *University of New South Wales Law Journal* 1175, 1177. See http://www5.austlii.edu.au/au/journals/UNSWLawJl/2017/43.html.

[26] ALRC Discussion Paper (n 21) 131 [6.16].

[27] Ibid.

[28] In 2017, a new corporate offence of failing to prevent foreign bribery was proposed in Australia in the Combatting Corporate Crime Bill 2017 (Cth), see [6.60] of ALRC Discussion Paper.

[29] ALRC Discussion Paper (n 21) 142 [6.74].

We believe that there would therefore be value in adding a 'failure to prevent' offence for human rights violations already criminalised under the Criminal Code *in addition to* the new attribution test proposed by the ALRC.

In the context of offences committed by Australian companies or their subsidiaries overseas, however, we do have concerns that changing the attribution test, even the addition of a 'failure to prevent' offence, will not be sufficient to encourage more effective prosecutions in the absence of other measures to strengthen oversight and investigation of extraterritorial crimes. Our recommendations in this regard are discussed further in section 5 below.

4. Individual Liability for Corporate Conduct

Proposal 9: *The Corporations Act 2001 (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.*

Proposal 10: *The Corporations Act 2001 (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.*

Question A: *Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?*

The HRLC also supports the ALRC's proposed reforms to ensure that where corporate officers have clear responsibilities to prevent corporate misconduct, and fail to take reasonable measures to do so, they should be held personally liable.

As the ALRC rightly observes, within large multi-national corporations, decisions taken by senior executives have the potential to impact the lives of employees, consumers and communities in which they operate – not to mention the environment, politics and the economy - in ways that can be "immense and irremediable". [30]

Too often, however, corporate groups are structured so as to both shield directors and senior executives from individual liability for those decisions and to simultaneously deflect liability from the corporation (or parts of the corporation). Strengthening personal liability for company directors and executives as well as for the corporation itself is, in our view, an essential ingredient in ensuring corporate compliance with the law.

The proposed model recommended by the ALRC, in our opinion, strikes the right balance. It takes a functional approach to liability focusing on capacity of the officer to influence the conduct of the company, but also includes a defence where the individual can prove they took 'reasonable measures' to prevent the commission of the offence by the corporation.

[30] ALRC Discussion Paper (n 21) 164, 165 [7.94].

This test, if adopted, should encourage more company directors and senior executives to establish internal systems aimed at preventing corporate misconduct, rather than establishing structures that deliberately shield senior company officers from knowledge of it. It means that those with a senior role in company decision-making will also have clear responsibility to ensure compliance throughout the parts of the company over which they have influence, as opposed to merely ensuring that their personal conduct is compliant.[31] We concur with the ALRC's view that these provisions should be limited to senior officers within companies, to ensure that individual liability cannot be pushed too far down to middle-management.

The threshold for what constitutes 'reasonable measures' will obviously be crucial to the effectiveness of the model. The ALRC cites, by way of example, section 496 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBCA**) which lists the factors that a court is to have regard to when determining whether an executive officer has failed to take 'reasonable steps' to prevent a contravention. These include consideration of whether the individual took steps to ensure regular compliance monitoring, to implement the recommendations of such assessments, to ensure adequate training and understanding of obligations for employees and took any action after becoming aware of the contravention.[32]

While we do not have a concluded view on whether the standard ultimately adopted should be enshrined in statute or left to regulation, either way it would be useful for the ALRC to give further consideration in its final report to the range of factors that should be considered, including how effective the EPBCA test has proved in practice. It is essential that the standard ultimately adopted avoids focusing too heavily on corporate processes, which can lead to a superficial 'tick-box' approach to compliance, at the expense of substantive action. The size of the company and resources it has at its disposal may also be relevant factors to consider when 'reasonable steps' are being evaluated.

5. Transnational Business and Overseas Offences

Question L: *Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?*

If the purpose of this Inquiry is to implement reforms that enable greater corporate accountability, ensuring that those reforms will apply to the extraterritorial activities of Australian corporations is imperative. The ALRC Discussion Paper makes no firm proposal in this regard, but canvases several potential options, including strengthening the existing reporting regime introduced by the *Modern Slavery Act 2018* (Cth) (**MSA**), the creation of a new 'failure to prevent' offence for certain offshore crimes or the creation of new positive due diligence obligations on companies to identify and prevent involvement in offshore crimes, with a corresponding offence for corporations that fail to fulfil these obligations.[33]

We believe that these proposals for reform should not be viewed as mutually exclusive. It will take a multi-dimensional approach to ensure Australia has the legislative framework to enable corporate accountability.

[31] ALRC Discussion Paper (n 21) 163 [7.82].

[32] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s496(1)(a).

[33] ALRC Discussion Paper (n 21) 264 [12.91].

As canvassed above, the HRLC recommends that a 'failure to prevent' offence for gross human rights violations is added to the *Criminal Code*, with extraterritorial application.

The *Modern Slavery Act* should also be strengthened, however, seeking to implement this reform alone would be far from an adequate solution to addressing transnational corporate crime. The MSA covers specific criminal conduct – slavery and forced labour. Strengthening this regime would therefore not address the range of other equally serious human rights violations for which companies may be responsible and which are already criminalised under the *Criminal Code*, including torture, people trafficking, war crimes and crimes against humanity.[34]

We also agree with the ALRC's comment that even if the MSA is strengthened (such as through the addition of penalties for companies that fail to report or provide misleading information), a "'name and shame' approach to enforcement of Commonwealth criminal law is both limited in potential efficacy and difficult to justify, given the seriousness of the offences involved".[35]

1) The need for mandatory human rights due diligence obligations for companies

The HRLC and ACIJ also strongly urge the development of new positive human rights due diligence obligations (**MHRDD**), particularly for large Australian companies and those operating in high-risk sectors or locations.

The development of positive mandatory human rights due diligence obligations would require companies to do far more than simply report publicly on their existing practices. Rather, it would require companies to "know and show" what they are doing to prevent and mitigate potential human rights violations: to put in place processes for 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[36]

Human rights due diligence obligations would ensure that companies are required to form a much more complete and accurate understanding of their impacts on human rights and risk management practices. Such a regime also effectively utilises the leverage of parent companies at the top end of supply chains to improve human rights and environmental standards by suppliers further down the chain, where governance regimes may be weaker.

As noted by the ALRC, the requirement that companies then publicly report on the due diligence they have undertaken also potentially overcomes some of the 'significant information asymmetry' between multinational businesses and investigators in the context of offences committed in other jurisdictions.[37]

Mandatory human rights due diligence legislation has already been enacted in France. The corporate Duty of Vigilance law[38] creates a legal obligation for very large French companies (which employ at least 5,000 people in France or 10,000 employees worldwide) to establish, effectively implement and publish Vigilance Plans outlining "reasonable vigilance measures adequate to identify risks and to prevent

---

[34] *Criminal Code Act 1995* (Cth) ss 274.2, 271.2 – 271.7, 268.24 – 268.101, 268.8 – 268.23.

[35] ALRC Discussion Paper (n 21) 265.

[36] Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31 (2011), 3 (UNGP 1), <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> 18-19 (UNCG 17). The UNGPs clarify that the extent of due diligence required will vary in complexity with the size of the company, the risk of severe human rights impacts and the nature and context of its operations.

[37] ALRC Discussion Paper, (n 21) 248 [12.12].

[38] *LAW No 2017-399 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies*, JORF No 0074 of 28 March 2017, text No 1.

severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment".[39]

The scope of the obligation extends to subsidiaries, subcontractors and suppliers with whom an established business relationship is maintained.[40] Vigilance measures include 'risk mapping, value chain assessment processes, alert mechanisms and monitoring systems on the effective and efficient implementation of measures'.[41] An alliance of 14 French local authorities and several NGOs have recently initiated court action against the French oil company Total under the law on the basis that the company's duty of vigilance plan fails to provide enough substantial detail on its actions to curb carbon emissions.[42]

Similar legislative proposals are now under active consideration in Switzerland, Finland, Germany, with substantial NGO coalitions also calling for the UK Government and European Commission to develop similar legislation.[43]

As the ALRC rightly notes, Australia has also already adopted a due diligence approach to try to stamp out the importation of illegally logged timber under the *Illegal Logging Prohibition Act 2012* (Cth). The adoption of a similar approach in relation to serious human rights violations that are already criminalised under the *Criminal Code* is the logical next evolution.

The imposition of positive human rights due diligence obligations on companies also makes inherent sense in a context where, if the ALRC's proposed new test for attributing corporate criminal liability is adopted, undertaking appropriate due diligence becomes a defence for companies.

2) The need to address barriers to the effective investigation of extraterritorial offences

The ALRC Discussion Paper notes that 'investigative processes are outside the scope of the current Inquiry which focuses primarily on a review of the substantive criminal law'.[44] However, it goes on to state that over the course of the Inquiry, stakeholders raised concerns not just about the processes for prosecuting corporate crime but also about the process of investigation before charges can be laid, and in light of these concerns, 'an inquiry into criminal investigative processes would be appropriate'.[45]

The HRLC and the ACIJ support this view. It is clear from cases we have previously identified and the statistics revealed in the Discussion Paper that most extraterritorial crimes are not investigated, much less prosecuted. Unless there is also an inquiry into how investigations and prosecutions can be more effectively resourced and encouraged, we are concerned that changing the test for the attribution of

---

[39] *French Commercial Code*, art. L. 225-102-4, resulting from *LAW No. 2017-399 of 27 March 2017 on the Duty of Vigilance,* art. 1.

[40] Sherpa, 'Vigilance Plans Reference Guide' (12 February 2019) 9 <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf>.

[41] Ibid.

[42] Angelique Chrisafis, 'French NGOs and local authorities take court action against Total', *The Guardian* (online), 27 January 2020 < https://www.theguardian.com/world/2020/jan/27/french-ngos-and-local-authorities-take-court-action-against-total>.

[43] European Coalition for Corporate Justice (ECCJ), 'Over 100 civil society organisations demand human rights and environmental due diligence legislation' (2 December 2019), < https://corporatejustice.org/news/16800-over-100-civil-society-organisations-demand-human-rights-and-environmental-due-diligence-legislation>; CORE Coalition, 'Mandatory human rights due diligence: an issue whose time has come' (28 October 2019), <https://corporatejustice.org/news/16793-mandatory-human-rights-due-diligence-an-issue-whose-time-has-come>

[44] ALRC Discussion Paper (n 21) 31 [1.40].

[45] Ibid.

corporate criminal liability, or even the imposition of mandatory due diligence obligations, will not substantially change poor prosecution rates for extraterritorial offences.

We are cognizant that extraterritorial corporate crimes pose serious challenges for investigators, requiring them to overcome jurisdictional constraints, language, cultural and technological barriers, difficulties accessing crime scenes and relevant evidence and substantial imbalances in the resources and information available to them in comparison with the company under investigation.[46]

One answer to at least some of these challenges would be the establishment of a specialised investigations unit to pursue extraterritorial crimes under the *Criminal Code*.

Australia lags behind the global community through not having a specialised investigations unit of this nature. This was not always the case. In 1987, Australia established a Special Investigations Unit (**SIU**), following a review by the federal government into the presence of alleged World War II Nazi war criminals living in Australia.[47]

The SIU was disbanded in 1992 (and its successor, the War Crimes Prosecution Support Unit, in 1994).[48] This has meant the responsibility and mandate to investigate crimes of an international nature now lies with the AFP. In 2016, the AFP published their Case Categorisation and Prioritisation Model (**CCPM**), noting that 'while the AFP has primary responsibility for investigating criminal offences against the Commonwealth, it does not have the resources to investigate all reports', and as a result, in order to use the limited resources effectively, the AFP evaluates all matters in accordance with its CCPM.[49]

The 'resources required by the AFP to undertake the matter' is one of the four key considerations that the AFP must take into account when deciding whether to pursue an investigation.[50] This is as well as the 'incident/crime type'; 'the impact of the matter on Australian society'; and 'the importance of the matter to both the client and the AFP in terms of the roles assigned to them by Government and Ministerial Direction'.[51] Beyond the high priorities of terrorism, 'real threat to life and the harming of Australians overseas', child sex offences, and human trafficking, the CCPM does not provide indication that it prioritises investigations of egregious violations of human rights which amount to serious crimes such as those indictable offences found in Chapter 8 of the *Criminal Code* or corporate criminal activity that leads to human rights violations.[52]

This leaves Australia far behind our international counterparts.

Canada also established a special inquiry after similar allegations were made regarding Nazi war criminals residing there.[53] This led to the current cross-government approach through a Crimes Against

---

[46] Ibid 248 [12.12].

[47] Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy,' (2016) 40 (46) *Melbourne University Law Review* 51.

[48] Boas and Chifflet 'Suspected War Criminals in Australia' (n 48) 56.

[49] Australian Federal Police, *The Case Categorisation and Prioritisation Model: Guidance for AFP Clients*, 1 July 2016. <https://www.afp.gov.au/what-we-do/operational-priorities> ('AFP CCPM').

[50] AFP CCPM 2.

[51] Ibid.

[52] AFP CCPM 5.

[53] See, Department of Justice Canada, *13th Report Canada's Program on Crimes Against Humanity and War Crimes 2011–2015*, (2016) 5 <https://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015.pdf> ('Canada Department of Justice').

Humanity and War Crimes Section located within its Department of Justice, which receives an estimated annual budget of $15.6million.[54]

The purpose of Canada's War Crimes Program is to:

- deny safe haven to suspected perpetrators of war crimes, crimes against humanity or genocide;
- contribute to the domestic and international fight against impunity; and
- reflect the government's commitment to international justice, respect for human rights, and strengthened border security.[55]

The United States set up the Office of Special Investigations in 1979, which was also prompted by Nazis fleeing to America,[56] and has expanded to a multi-agency approach towards investigating and prosecuting human rights abuses. This includes through the Department of Justice's Human Rights and Special Prosecutions Section (HRSP), the Department of Homeland Security's Human Rights Violators and War Crimes Unit, the FBI's International Human Rights Unit (IHRU), and US Immigration and Customs Enforcement's (ICE) Human Rights Violators & War Crimes Unit, as well as the broader U.S. Intelligence Community (USIC).

Notably, this inter-agency collaboration has led to the prosecutions of perpetrators of human rights violations in Guatemala, Rwanda, the former Yugoslavia and Liberia.[57]

The UK also has a specialised unit, the Metropolitan Police Counter Terrorism Command (SO15) which is responsible for the investigation of all allegations of war crimes, crimes against humanity, genocide and torture. It works with the Counter Terrorism Division (CTD) of the Crown Prosecution Service who are responsible for the prosecution of any such crimes. They recently updated their referral guidelines.[58]

European countries have been proactive in the investigation and prosecution of egregious human rights violations committed extraterritorially. The value and necessity of specialist and dedicated investigative units can be observed in the following recent examples being pursued against corporate actors in Europe:

- In November 2018, the Swedish Prosecution Authority concluded an investigation that it commenced in 2010, into Swedish oil company Lundin Petroleum SA for allegations of aiding and abetting war crimes and crimes against humanity between 1998 and 2003 in Sudan (now South Sudan). A trial against two of the company's officers, CEO and Chairman has

[54] Canada Department of Justice 4 <https://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015.pdf>.

[55] Department of Justice (Canada) 'War Crimes Program, <https://www.justice.gc.ca/eng/cj-jp/wc-cdg/prog.html>.

[56] Eric Lichtblau, 'Nazis Were Given 'Safe Haven' in U.S., Report Says' The New York Times (online), November 13 2013, <https://www.nytimes.com/2010/11/14/us/14nazis.html>.

[57] David Crane, Stephen Rapp, Clint William Son and Beth Van Schaack, 'FBI's human rights investigators critical to prosecuting 'atrocity crimes'' *The Hill* (online) 22 February 2019 <https://thehill.com/opinion/criminal-justice/430482-fbis-human-rights-investigators-critical-to-prosecuting-atrocity>; Jeremy Roebuck and Kelly Brennan, 'Delco Man Convicted of Hiding Past as Liberian War Criminal' *The Inquirer* (online) 3 July 2018 <https://www.inquirer.com/philly/news/pennsylvania/philadelphia/tom-thomas-woewiyu-delco-convicted-liberia-civil-war-immigration-fraud-20180703.html>.

[58] Crown Prosecution Service, 'War Crimes/Crimes Against Humanity Referral Guidelines' (7 August 2015) (Updated 30 September 2019) <https://www.cps.gov.uk/publication/war-crimescrimes-against-humanity-referral-guidelines>.

commenced.[59] The company itself received a notification from the Swedish authority that the company may be liable to a corporate fine and forfeiture of economic benefits.[60]

- In December 2019, the Office of the Attorney General of Switzerland announced commencement of a formal criminal investigation into a Swiss businessman accused of the war crime of pillage in the Democratic Republic of the Congo.[61] The Swiss authorities began their preliminary investigation in 2018 following referrals from civil society organisations in 2016. The businessman is accused of illegal trade of minerals in the armed conflict between 1998 and 2003.

It is of no surprise that both Sweden and Switzerland, which have active and specialist investigations units tasked primarily with the investigation of crimes committed extraterritorially, were able to pursue investigations and prosecutions into allegations of corporate crime.

Eight member states of the European Union - France, Germany, Belgium, Netherlands, Denmark, Sweden, Poland, and Croatia - have dedicated investigative units to investigate crimes committed extraterritorially. These units are commonly referred to as 'war crimes units' however it is acknowledged that these units have mandates to investigate any crimes with an extraterritorial element and not just those offences that are classified as war crimes. This is because it is acknowledged that investigating and prosecuting crimes committed abroad come with extra challenges and barriers that do not arise in investigating domestic crimes and therefore requires creative strategies, international cooperation and sharing of expertise for successful prosecutions.[62]

The European Union recognises the value and need for specialised units and encourages member states and partners around the world to establish specialised units within their respective prosecution and police services and develop national strategies and plans for cooperation in fighting impunity.[63]

Eurojust is the European Union's Criminal Justice Cooperation Agency and it includes the national authorities of all the 27 EU member states. In 2002, Eurojust established a separate 'Genocide Network'[64] in parallel to the establishment of the International Criminal Court, to fulfil the obligations of the Rome Statute which provides that it is the State's primary responsibility to investigate and prosecute core international crimes. The Genocide Network also includes non-governmental organisations and observer states such as the USA, the UK, Canada, Norway, Switzerland and Bosnia-Herzegovina.

Australia has cooperative relationships with Eurojust and with national services from various countries around the world to coordinate investigations and engage in mutual legal assistance for a range of

---

[59] For more see, Miriam Ingeson and Alexandra Lily Kather, 'The Road Less Travelled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad' *EJIL:Talk!* (Blog Post, 13 November 2018) < https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/#more-16602>.

[60] Lundin Petroleum, *'Lundin Petroleum Receives Information Regarding a Potential Corporate Fine and Forfeiture Of Economic Benefits in Relation to Past Operations in Sudan'* (Press Release, 11 November 2018) <https://www.lundin-petroleum.com/media-centre/?cp_30=5>.

[61] Trial International, 'Pillage: Swiss Businessman Under Criminal Investigation for War Crimes in the DRC' 12 December 2019 <https://trialinternational.org/latest-post/pillage-swiss-businessman-under-criminal-investigation-for-war-crimes-in-the-drc>.

[62] International Association of Prosecutors, 'Forum for International Criminal Justice Members Profile: Matevz Pezdric' < https://www.iap-association.org/FICJ/In-Profile/Matevz-Pezdirc>.

[63] Eurojust, 'Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crimes Against Humanity and War Crimes within the European Union and its Member States' (2014) <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Strategy%20of%20the%20EU%20Genocide%20Network%20(November%202014)/Strategy-Genocide-Network-2014-11-EN.pdf>.

[64] See, Eurojust, The Genocide Network < http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/GN-sitemap.aspx>.

transnational crimes, particularly relevant to terrorism, drug trafficking, money laundering and organised crime. Australia's involvement in the Joint Investigative Taskforce related to the downing of flight MH17 is also another encouraging example of Australia's contribution and commitment to tackling the difficulties of investigating crimes extraterritorially. However, Australia's lack of particular institutional structure relevant to investigating other extraterritorial offences in the *Criminal Code* particularly where they involve serious violations of human rights has contributed to the poor investigative and prosecution rate of these offences which further entrenches the impunity of the perpetrators of these crimes.

In addition to establishing a specialist investigations unit, we believe Australia should seek Observer State status of Eurojust's Genocide Network, and tap into the existing resources, and methods, to pursue a collaborative approach to investigating and prosecuting serious human rights violations.

Human Rights Watch's report, 'The Long Arm of Justice' further discusses the value of dedicated units, and the lessons that can be learned from those already established in France, Germany and the Netherlands. Human Rights Watch states that experiences show that without specialised units, authorities often find the challenges involved in investigating and prosecuting crimes committed extraterritorially daunting, and consequently choose not to prioritise these cases. [65] They state that a key benefit of specialised units is that they deliver depth of experience and over time show that the quality of investigations improves and the time it takes to carry out investigations decreases.[66]

Recommendations

The HRLC and ACIJ recommend:

- The development of legislation imposing mandatory human rights due diligence obligations on large Australian companies and those operating in high-risk sectors or jurisdictions;
- The establishment of a specialist investigations unit focused on international crimes; and
- A further inquiry into criminal investigative processes, including in relation to extraterritorial offences.

[65] Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, (2014) 5 <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and> ('HRW, Long Arm of Justice').

[66] HRW, Long Arm of Justice 3.