CONNECTING THE BUSINESS AND HUMAN RIGHTS AND ANTI-CORRUPTION AGENDAS

UN Working Group on the issue of human rights and transnational corporations and other business enterprises

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About the Authors of the Submission

Hannah Harris is a lecturer at Macquarie Law School, Faculty of Arts, Macquarie University. Her research area is transnational law and corporate regulation. Her current work includes analysis of legislative responses to transnational challenges, including illegal logging and modern slavery, and the impact of foreign bribery enforcement action on corporate compliance policies and practices. A key theme in Hannah's research is the way in which power dynamics and diverse values and interests shape regulatory regimes and impact the effectiveness of these regimes across diverse jurisdictions. Hannah's book: The Global Anti-Corruption Regime – The case of Papua New Guinea (Routledge, 2019) documents the evolution of a global regime to combat corrupt activity, highlighting the challenges faced in implementing and enforcing this regime. The interplay between legal, social, political and economic dynamics is at the heart of Hannah's approach to legal research.

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Justine Nolan is a Professor in the Faculty of Law at UNSW Sydney. She is a Visiting Professorial Scholar at NYU's Stern Center for Business and Human Rights. Justine's research focuses on the intersection of business and human rights. Justine works closely with business and civil society and has been a key driver of the Australian business and human rights movement. Prior to joining UNSW in 2004, she worked as the Director of the Business and Human Rights program at the Lawyers Committee for Human Rights (now Human Rights First) in the USA. She has held various expert advisory roles including as a member of the Australian Government's Multi-Stakeholder Advisory Group on Business and Human Rights (2017) and an adviser to the Australian Department of Foreign Affairs and Trade & AusAId's Human Rights Grants Scheme Expert Panel (2009-2013). Her 2019 co-authored book *Addressing Modern Slavery* examines how consumers, business and government are both part of the problem and the solution in curbing modern slavery in global supply chains.

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Executive summary & Recommendations

Dr Hannah Harris and Professor Justine Nolan welcome the opportunity to make a submission to the consultation on connecting the business and human rights and anti-corruption agendas. In our submission, we focus on questions seven and eight, drawing on insights from efforts to regulate foreign bribery and modern slavery in international business transactions.

Question 7: Are there areas where there should be greater policy alignment, in terms of seeking reforms, that will benefit both the business and human rights and anti-corruption agendas?

- The business and human rights and anti-corruption agendas should learn from each other and align regulatory efforts to incorporate mechanisms including: 1) ***penalty defaults for non-compliance***; and 2) ***multi-stakeholder engagement*** to aggregate information and improve regulation and enforcement. We suggest increased use of penalty defaults for non-compliance with due diligence obligations.

Question 8: How can/should states, private sector and civil society work to better coordinate anticorruption and business and human rights agendas to prevent harms along both dimensions?

- Often, single stakeholder groups such as a State or business will not be able to tackle the challenges of corruption and human rights risks alone. Corruption may facilitate human rights abuses, but conversely, efforts to regulate human rights risks may produce corrupt incentives. Therefore, ***multi-stakeholder engagement and collaboration is key to success***. Increased engagement with and utilisation of the experiences and influence of multiple stakeholders, is key to enhancing effective enforcement and improve regulatory quality. Collaboration may involve ***monitoring and evaluation of due-diligence efforts and reporting***; ***restrictions and requirements for multi-lateral lending***; and the ***use of third party certification schemes***.

The corruption and business and human rights nexus

Corruption is the grease that enables many forms of crime, including human rights violations such as forced labour and human trafficking.[1] Corrupt conduct can contribute to and fuel human rights violations.[2] The challenge of successfully reducing both corruption and human rights abuses facilitated by business is in part derived from difficulties of detection, measurement and effective enforcement in a complex environment of transnational interactions and powerful actors. For example, bribery often occurs across jurisdictions, between corporations domiciled in one country and government officials or corporations in a foreign jurisdiction, as such it can be difficult to track the flow of illicit funds to prove that a bribe occurred. This transnational dynamic poses a significant legal challenge for enforcement efforts: requiring collaboration between enforcement actors who are not always operating under equivalent legal rules. Across jurisdictions, there may also be different levels of political and corporate motivation and judicial independence necessary to address these crimes.

The bi-directional relationship between anti-corruption efforts and human rights risks should be acknowledged. Most States have in place anti-corruption laws including those that criminalise foreign bribery. As parallel laws are developed to target human rights abuses (including modern slavery in global supply chains) the incentive to bribe government officials and law enforcement officers to ignore such practices may increase, establishing a significant enforcement challenge for both anti-corruption and human rights efforts. The links between corruption and human rights justify exploration of the enforcement challenges that arise from efforts to address both activities. This submission focuses specifically on enforcement challenges and suggests some possibilities for improvement. We suggest focusing on the cross-over and lessons learned in the parallel (but related) frameworks that have emerged for addressing the risks of bribery and modern slavery.

[1] United Nations Global Initiative to Fight Human Trafficking, 'Corruption and Human Trafficking: The Grease that Facilitates the Crime' (Vienna Forum to fight Human Trafficking, 13-15 February 2008) <https://www.unodc.org/documents/human-trafficking/2008/BP020CorruptionandHumanTrafficking.pdf>; L Musing *et al.*, 'Corruption and Wildlife Crime: A focus on caviar trade' (Traffic Report, 2019) < https://www.traffic.org/site/assets/files/11818/corruption-and-caviar-final.pdf>.

[2] MK Andersen, 'Why Corruption Matters in Human Rights' (2018) 10 JHRP 182; M Chene, 'Corruption at borders' (U4 Expert Answer, 2018) <https://www.u4.no/publications/corruption-at-borders>; United Nations High Commissioner for Refugees, 'Human Rights and Human Trafficking' (Fact Sheet No 36, 2014) <https://www.ohchr.org/Documents/Publications/FS36_en.pdf>; L Renshaw, 'Migrating for work and study: The role of the migration broker in facilitating workplace exploitation, human trafficking and slavery' (Trends and Issues In Criminal Justice, 2016) <https://aic.gov.au/publications/tandi/tandi527>.

Q7: Are there areas where there should be greater policy alignment, in terms of seeking reforms, that will benefit both the business and human rights and anti-corruption agendas?

Penalty defaults

In responding to this question, we focus on improving policy in respect of the enforcement challenge facing efforts to reduce bribery and modern slavery. We recommend enhancing cross-over between anti-corruption laws and laws that seek to regulate human rights risks, including those require increased transparency and human rights due-diligence by businesses. The business and human rights regulatory agenda (including newly developed modern slavery laws)[3] has been based, in part, on a framework of disclosure without significant consequence for non-compliance. This stands in contrast to the foreign bribery regulatory model which appears 'hard', focusing on criminality and corporate criminal liability in many jurisdictions.

While disclosure-based laws harden the expectation that business will conduct itself responsibly, they are ultimately founded on a soft approach with the assumption that the transparency gained from disclosure will incentivise corporate action to address human rights risks. The broad premise behind these types of social reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake a substantive human rights focused examination (due diligence) of their supply chain practices. However, questions remain about the efficacy of this 'soft' approach.[4]

We suggest that there are lessons to be learned from both the business and human rights and anti-corruption agendas, to enhance the cross-over between the two and address the enforcement challenges that arise in each. One such lesson is to draw on the use of penalty defaults, which have emerged as an innovative mechanism to support enforcement of anti-bribery laws in many jurisdictions.

A penalty default refers to a regulatory penalty that motivates regulated actors to engage and innovate in their efforts to comply.[5]

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[3] *California Transparency in Supply Chains Act* of 2010, Civil Code Section 1714.43, also known as Senate Bill 657 (Steinberg) (2009-10); *Modern Slavery Act* UK 2015; and *Modern Slavery Act (Cth)* 2018. Also see another disclosure-based framework for addressing human rights risk: *Dodd–Frank Wall Street Reform and Consumer Protection Act* 12 USC § 1502. Recent French and Dutch due diligence laws stand in contrast to this and include measures for accountability: 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. (French Law) and *Child Labour Due Diligence Law 2019* (Netherlands).

[4] There is a range of literature on the utility of transparency-based regimes (not restricted to modern slavery) including: A Bateman and L Bonanni,'What Supply Chain Transparency Really Means' *Harvard Business Review* (online, 20 August 2019); O Ben-Shahar and C Schneider, 'The Failure of Mandated Disclosure' (2011) 159 *U Pa L Rev.* 647-746; O Ben-Shahar and C Schneider, C *More Than You Wanted to Know: The Failure of Mandated Disclosure* (USA, Princeton University Press, 2014); M Narine 'Disclosing disclosure's defects: corporate responsibility for human rights impact' 47 (2015) *ColumHumRtsLR* 84; and Fung, Graha and Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge, 2007).

[5] CF Sabel CF and WH Simon, 'Democratic Experimentalism', in Desautels-Stein J and Tomlins C (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017); BC Karkkainen, 'Information-Forcing Environmental Regulation' (2006) 33(3) *FStULRev* 861); CF Sabel and J Zeitlin, 'Learning from Difference: the new architecture of experimentalist governance in the EU' (2008) 14(3) ELJ 271.

The key feature of a penalty default is that the penalty is not simply a deterrent. While it may be punitive in nature, it is applied to facilitate achievement of the regulatory goal by incentivising innovative compliance by regulated entities.[6] In reality, laws and legal norms are only as impactful as their uptake and enforcement capacity. The adoption of penalty defaults for non-compliance with human rights due-diligence obligations will enhance incentives to comply, while discouraging non-compliant behaviour and motivating businesses to experiment with innovative compliance methods.

Examples of penalty defaults

- **Reform undertakings:** In the United States, Deferred Prosecution Agreements have been used in conjunction with corporate monitorships in an effort to re-shape corporate culture and prevent future violations of foreign bribery law.[7] Termed 'reform undertakings', this approach involves an agreement by the company to engage in a process of organisational change, focused on reforming the policies and procedures that enabled the crime to occur. In return, prosecution of the company will be deferred. As part of this agreement, third party monitors may be situated within the company, to oversee and report on the company's efforts. The aim is to incentivise structural reform in the company, in an effort to avoid the harsh penalties otherwise available to regulators.

- **Strict liability offences accompanied by an adequate procedures defence:** This example comes from the UK Bribery Act, which establishes a strict liability offence for failure to prevent bribery.[8] The 'failure to prevent' offence is accompanied by a defence on the basis that the company took meaningful steps to self-regulate and prevent the act of bribery from occurring. Again, the penalty default is designed to motivate pre-emptive action on the part of businesses, rather than only operating retroactively as a punishment for non-compliance.

- **Black Listing, Grey Listing & Restricting Access to Finance:** The idea of black-listing is most commonly associated with the Financial Action Task Force (FATF) and anti-money laundering efforts. The FATF now uses a combination of a grey and blacklist to motivate compliance with money-laundering policy. This system has been described as an example of a penalty default because it provides countries with an opportunity to meaningful improve their policies before being black listed. Furthermore, the listing criteria are based on State co-operation rather than formal compliance.[9] Interestingly, in the human rights context, Brazil launched a 'dirty list' of companies found to have forced labour in their supply chains.[10] This 'dirty list' results in monitoring for two years and potential fines, as well as a recommendation that these companies not be provided with financial assistance by relevant financial bodies. While this 'dirty list' represents a more traditional deterrent penalty, the monitoring aspect and timeline for removal from the list suggest an emphasis on prevention of future misconduct, rather than deterrence and retribution alone.

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[6] S Gilad, 'It runs in the family: meta-regulation and its siblings' (2010) 4 *RegGov* 487, 489.
[7] D Hess and C Ford, 'Corporate Corruption and Reform Undertakings: A new Approach to an Old Problem' (2008) 41 *CornellIntlLJ* 307.
[8] UK Bribery Act 2010, s7(1); C Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' ICLQ (2012) 61(2) 485.
[9] MT Nance 'Re-thinking FATF: an experimentalist interpretation of the Financial Action Task Force' (2018) 69 CL&SC 131.
[10] L Sakamoto, (2005), 'Slave Labour" in Brazil', in Beate Andrees and Patrick Belser (eds), *Forced Labour: Coercion and Exploitation in the Private Economy* (Boulder, CO: Lynne Rienner), 15-34.

- **Public procurement:** Penalty defaults may also be crafted as a form of positive incentive to act. For example, a requirement that companies must comply with modern slavery reporting requirements in order to be eligible to bid on government procurement contracts could be used to induce change. Both the Australian and UK modern slavery laws link public procurement with modern slavery reporting requirements but do not (yet) explicitly require companies to comply with the reporting requirements to determine eligibility for government contracts. If this requirement was formalised, the positive incentive to comply could be constructed as a penalty default because failure to comply would result in ineligibility to compete for valuable government contracts.

Benefits of penalty defaults

- Penalty defaults help to ***overcome resource and capacity limitations*** of regulators by ***encouraging by-in by regulated actors*** and enabling third parties to participate in the regulatory process.
- Penalty defaults allows for ***opportunities to improve on existing practice***, learn from application of policies within businesses and develop novel approaches that may not have been discovered if businesses were only concerned with avoiding liability through static or cosmetic compliance programs.
- Penalty defaults can act as ***a powerful mechanism to motivate regulated actors where moral persuasion or public embarrassment alone are insufficient***.[11]

We recommend the introduction of penalty defaults in response to risks of human rights abuses in global business transactions.

Q 8: How can/should states, private sector and civil society work to better coordinate anticorruption and business and human rights agendas to prevent harms along both dimensions?

Multi-stakeholder engagement and collaboration

In addition to increasing the use of penalty defaults for the regulation of human rights risks in business transactions, it would be equally valuable for anti-corruption and business and human rights efforts to embrace multi-stakeholder engagement and collaboration, to support enforcement and motivate innovation. Often, single stakeholder groups such as a State or business will not be able to tackle the challenges of corruption and human rights risks alone. Therefore, **multi-stakeholder engagement and collaboration is key to success in enhancing the effective enforcement and improvement of regulatory quality**. Existing literature emphasizes the importance of stakeholder engagement in both the human rights and anti-corruption contexts.[12]

Engaging a diverse range of stakeholders in the regulatory process helps regulators to evaluate the quality of compliance efforts, facilitate learning amongst regulators and regulated actors and assess whether a penalty should be triggered. Collaboration may involve monitoring and evaluation

[11] Sabel and Zeitlin (n 5) 305-6.

[12] B Durbach and MT Machado, 'The importance of stakeholder engagement in the corporate responsibility to respect human rights' (2012) 94 *IRRC* 1068; I Carr I and O Outhwaite, 'The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice', (2011) 44 *SuffULRev* 617.

of due-diligence efforts and reporting; restrictions and requirements for multi-lateral lending; and the use of third party certification schemes.

Benefits of Multi-stakeholder Engagement & Collaboration

- Involving diverse stakeholders in regulation and enforcement ***reduces the regulatory burden placed on the State*.**[13]
- ***Facilitates discourse between actors*** impacted by the regulatory framework.
- ***Promotes learning from experience and reshaping of the regulatory framework*** based on practical lessons learned in implementation.
- ***May help to balance power disparities between actors and secure accountability*** where the risk of capture is high, political will to act is low, or State resources and capacity are limited.

Opportunities for Engagement & Collaboration

- **Monitoring and Evaluation:** Laws that enable monitoring by third parties may be a valuable way to encourage collaboration, innovation and meaningful compliance. Another opportunity for multi-stakeholder engagement is in assessment of reports and other information that results from disclosure requirements as part of due-diligence obligations. As due-diligence laws increase in popularity as a legal mechanism to target corruption and human rights risks, requirements to report on business policies and practices will result in a glut of information. It will be important to evaluate the quality of this information, aggregating it and ensuring it is comparable and can be used by consumers, investors and others to guide decision-making.

- **Multilateral Lending:** Multilateral Development Banks (MDBs) play an important role in promoting anti-bribery norms transnationally. These actors are able to disincentivise bribery through policies that mandate compliant behaviour by the organisations they engage with, particularly corporations. The World Bank has in place a system to debar companies found to have acted corruptly in relation to a World Bank contract.[14] Sanctions can also be applied for failure to comply with material terms in the Voluntary Disclosure Program terms and conditions for World Bank contractors.[15] Such frameworks could also be usefully applied to support the business and human rights agenda.

- **Third Party Certification Schemes:** In the regulation of forestry products and illegal logging, third party certification has become a cornerstone of the legal framework in many jurisdictions and an illustration of multi-stakeholder engagement and collaboration. The Forest Stewardship Council (FSC) was able to engage directly with stakeholders and balance their interests to develop a voluntary certification scheme where government efforts had

[13]IHY Chiu and A Donovan, 'A new milestone in corporate regulation: procedural legislation, standards of transnational corporate behaviour and lessons from financial regulation and anti-bribery regulation' (2017) 17(2) *JCLS* 456; C Overdevest and J Zeitlin 'Assembling an experimentalist regime: transnational governance interactions in the forest sector' (2014) 8 *RegGov* 22; G De Burca G, RO Keohane and C Sabel, 'New Modes of Pluralist Global Governance' (2013) 45 *NYUJIntlL*&Pol 723.

[14] World Bank Group, 'WBG Policy: Sanctions for Fraud and Corruption' (2016) < https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBG%20Policy%20-%20Sanctions%20for%20Fraud%20and%20Corruption%20(June%2013,%202016).pdf>.

[15] World Bank Group, 'The World Bank Group's Sanctions Regime: Information Note' (2016) < https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/The_World_Bank_Group_Sanctions_Regime.pdf>.

failed to achieve consensus.[16] This scheme is now used by businesses around the world to help meet due-diligence requirements in the US, the EU and Australia.[17] Expanding the application of these schemes to other areas including anti-corruption and business and human rights agendas may be valuable. However, the efficacy of third party certification schemes will be greatly enhanced with the direct input of workers and key stakeholders on the ground, both in the design and monitoring of such schemes. The relatively recent development of worker-driven social responsibility initiatives highlights the value of foregrounding worker concerns in the development and implementation of such schemes.[18]

The involvement and collaboration of diverse stakeholders will be beneficial in further advancing and refining human rights due-diligence and business responses to reporting requirements. Foreign bribery law will also benefit from similar levels of collaboration and engagement that facilitate new knowledge and understanding around effective regulatory and compliance strategies.

Conclusion & Recommendations

The Working Group must be commended for recognising the relationship between corruption and human rights and for providing this opportunity to engage in developing a coordinated strategy for response. With a focus on collaboration and willingness to learn from experiences (both successful and unsuccessful), all stakeholders will be well placed to contribute to reducing corruption and human rights risks while fostering prosperous societies and economies around the world.

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[16] Overdevest and Zeitland (n 13) 41-2.
[17] RJ Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *MJIL* 188.
[18] For example, see the Bangladesh Accord on Fire and Building Safety https://bangladeshaccord.org/ and the Fair Food Standards Council, http://www.fairfoodstandards.org/ and the 2019 agreement to combat gender-based violence and harassment in Lesotho's garment sector, See: R Abimourched, L Matlho, TNtlama & R Runge. 13 September 2019. 'Lesotho garment workers struck landmark deals to tackle gender-based violence. Here's how it happened.' Business and Human Rights Resource Centre.