



Corporate Crime Podcast Series – Episode 2 – The Data

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Nadine Davidson-Wall: Hello and welcome to the second episode in the Australian Law Reform Commission Podcast Series on Corporate Criminal responsibility. My name is Nadine-Davidson Wall and in this podcast we're delving further into the findings and recommendations made in the ALRC's recent report on Corporate Criminal Responsibility. This report, which was recently tabled in Parliament, makes 20 recommendations for the improvement of Australia's corporate criminal responsibility regime. The first of those recommendations pertains to the availability of criminal justice data, and in particular, data relating to corporate crime and corporate criminal responsibility.

I am joined today by Sophie Ryan, a Legal Officer at the ALRC who worked extensively on this recommendation and the data more broadly informing the ALRC's Report. In this podcast, we're going to deep-dive into the role of data in the ALRC's law reform process, the particular data presented in this report and access to criminal justice data more broadly.

So, to get started, can you tell us a little bit more about the role of 'data' in the ALRC's law reform process and in particular, the role it played in this Report?

Sophie Ryan: Absolutely. Basically, the role of the data comes down to understanding exactly what the problem or issue is at the core of the ALRC's Inquiry, and what are causes rather than symptoms of that problem. This step is really important because often, people can have different understandings of what the problem actually is and where we should be looking for solutions. It's a bit like the story of the man who is looking under a streetlight for a key he lost on the other side of the street, just because that's where the light is. We have to make sure, when we set out on an inquiry, that we're looking for the key in the right place and not just where the streetlight is.

This is where data, and evidence more broadly, comes in. It helps us work out where to look for the key in the first place.

So, our first port of call in every Inquiry is working out what kind of information might help us understand the issue at the core of the Inquiry. For this Inquiry, that meant identifying an evidence base that could tell us what the criminal law applicable to corporations looks like, and also how it is actually applied in practice.

What we found, though, was that there wasn't really much data out there that ticked that box. There were only a few streetlights, so to say, and they didn't really light up the right places. So, what you see in the Final Report is a considerable amount of original data that the ALRC collected about the state of the law in this area, and also data we collated about the enforcement of the law. Through the data we've tried to shine a little bit more light on the

problems at the heart of corporate criminal responsibility regime and in the process of doing that, mapped out where more streetlights are needed.

NDW: So, and one of those 'streetlights' comes in the form of a recommendation for better criminal justice data practices and policy. What exactly did the ALRC find lacking in the available criminal justice statistics relating to corporate crime and corporate criminal responsibility?

SR: Commentators in this area talk about corporate crime as a 'blind spot' of the quantitative research agenda. The ALRC's experiences in collecting data for this Inquiry were consistent with that observation.

In Australia, we don't have any specific national statistics on corporate crime rates, corporate crime victimisation, or enforcement action taken against corporations. The data that we do have is piecemeal and incomplete such that the data we do have largely overlooks, or at least obscures, the extent and nature of problems in this area. That reality makes evidence-based regulation of corporate conduct difficult.

NDW: Can you provide an example of one of the problems you identified with existing data relating to corporate crime and corporate criminal responsibility?

SR: We found that the statistics that are available are generally not configured to be sensitive to the unique characteristics of corporate crime as a phenomenon, and that because of that, there is some really important information about corporate crime and corporate criminal proceedings that simply isn't recorded – or if it is, isn't shared more broadly. For example, the main classification system used to categorise criminal justice data is primarily configured for analysis of crime perpetrated by individuals, not corporations. That system, the Australian and New Zealand Standard Offence Classification, is a hierarchical scheme which groups offences by divisions and sub-divisions. Unfortunately, most of the offences relevant to corporations fall within the 'miscellaneous' division of the scheme. Aggregating all of these offences in this sub-division means that we don't get to see the information specific to corporate crime and corporate defendants to the same degree that we do for individuals.

NDW: So considering this current lack of data, what would we find out if this data was more visible?

SR: To start with, failing to disaggregate data specific to corporation defendants means that we can't identify statistics specific to corporate defendants. The flow on effect is that we can't identify *trends* relating to crime committed by corporations, or the application of criminal law to defendants. It's pretty difficult to shape policy – and law – that responds to an actual problem, and not just a perceived one, without data painting a clear picture of what that problem looks like.

Relatedly, low visibility can lead to the assumption that certain types of crime do not occur or are not in need of regulation. We know that corporations do, however, commit crime. The Banking Royal Commission established clearly that significant corporate misconduct has been happening in Australia for years. Better criminal justice data and statistics would help us understand the problem and assess the existing responses to it. The ALRC's recommendation, if implemented, would help establish a pathway for collecting, maintaining and sharing that data.

NDW: The ALRC also publishes a substantial amount of data in this Report about the state of the Commonwealth criminal law applicable to corporations. What was the rationale behind collecting this data?

SR: In many ways, the first question that arises in any law reform process is a simple one: “what actually is the law, and how does it operate?” In the context of corporate criminal responsibility, that required the ALRC identifying *how* and *when* the law currently attributes criminal liability to corporations.

To help paint a picture of the law in relation to each of those questions, the ALRC undertook a review of 25 Commonwealth statutes considered particularly relevant to corporate conduct in Australia. The aim was to identify in each statute the sources of criminal liability—that is, the scope and scale of criminal offences applicable to corporations—and the available methods for attributing such liability to corporations.

The review proved a considerable undertaking and a source of significant insight into the problems in the current law. The key findings are summarised in Chapter 3 of the Final Report and contained in full in Appendix A of the Data Appendices.

NDW: When considering the data and Recommendation 1 of the Report, can you walk us through one of the findings?

SR: Sure. As the Terms of Reference specifically directed the ALRC to consider the corporate criminal responsibility regime in Part 2.5 of the Commonwealth Criminal Code, that was our starting point for the review. What we found proved foundational to the ALRC’s recommendations about corporate attribution. I know that there’ll be another podcast in the series unpacking it in a lot more detail, but basically what we’re talking about when we refer to attribution is the legal vehicle by which we apply the criminal law to corporations. It allows us to determine how we ascribe conduct and states of mind to a corporation. ‘Part 2.5’ is supposed to be the default mechanism of doing that. According to the Criminal Code, it applies to every Commonwealth law unless it is expressly excluded. So it would be easy to think that if we are having problems in holding corporations accountable that there must be something wrong with that default attribution mechanism in Part 2.5.

Our review revealed a little bit of a streetlight effect in that argument, however. We found that even though Part 2.5 is by law the ‘default’ method, it doesn’t actually apply under a lot of the criminal law applicable to corporations. In fact, its application is excluded by the majority of the legislation we reviewed. Instead, the statutes we reviewed generally contained alternative legislative attribution methods. For some statutes, there were *multiple* potentially applicable attribution methods.

This finding was important to that first stage of the Inquiry that I spoke about earlier – essentially it helped us to see more of the problem and separate causes from symptoms. For example, it meant that instead of a starting point of “why doesn’t Part 2.5 work”, we could instead ask questions like:

- “what do these alternative methods of attribution have that Part 2.5 doesn’t?”
- “what is the effect of having multiple methods of attribution in practice?”
- “which methods of attribution are used more often and why?”

The ALRC’s recommendations about attribution take into account these questions and many more. I think that’s what the data does for this Report – it allows more questions to be asked, it lights up more of the street so that we can work out where that key – or keys – might be.

NDW: Thanks, Sophie. Our next podcast is dedicated to attribution, so that is actually a great place to wrap up our conversation today. We’ve only had time to delve just beneath the surface in this podcast. For a more thorough understanding of the ALRC’s findings from its review of the Commonwealth criminal law, or the data collected about the enforcement of that law, see

Chapter 3 of the ALRC's final report on Corporate Criminal Responsibility. You can download the report from our website.

Download the Corporate Criminal Responsibility Final Report:
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