



Corporate Crime Podcast Series – Episode 4 – The Model

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Nadine Davidson-Wall: Thanks for joining us to talk about the ALRC’s recent Inquiry into corporate criminal responsibility in Australia. I’m Nadine Davidson-Wall, Communications Coordinator at the Australian Law Reform Commission. And I’m here with Samuel Walpole, a Legal Officer who has been working on the ALRC’s Corporate Criminal Responsibility Inquiry. The ALRC’s Final Report on this topic was recently tabled in Parliament. One aspect of that Report that Sam worked on was the theoretical foundations of corporate criminal responsibility, and how we might achieve a principled use of criminalisation in corporate regulation.

Sam, to start, could you tell us a little bit about the role of the criminal law in corporate regulation?

Samuel Walpole: Of course. Traditionally, the criminal law had been used to address serious, egregious wrongdoing in our society. For example, things like murder, fraud, and theft. As society developed more complexity, there became a greater need to *regulate* behaviour. Criminal law was one of the regulatory tools used. This led to a growth in the volume of criminal offences. Criminal law is not the only regulatory tool available, however, and it has unique aspects. Civil penalty provisions are also an extremely common part of Australia’s regulatory mix, as are administrative penalties. In this Inquiry, the ALRC was interested in whether, in a corporate context, criminalisation was occurring in an effective way.

NDW: With this in mind, what did the Inquiry find about the current use of the criminal law in the regulation of corporate behaviour in Australia?

SW: The ALRC found two main issues. First, there is a lack of *principled* criminalisation in the design of regulatory laws – the law does not adopt a principled distinction between criminal offences and civil penalty provisions. Indeed, many criminal offences relevant to corporations are focused on conduct that does not involve true criminality. Instead, many address low-level regulatory breaches. For example, failing to include an ACN on certain company documents. Without some principled approach to what conduct is criminalised and what is a civil penalty provision, it is difficult to distinguish both types of regulation where provisions apply to corporations, as the sanctions are similar. A corporation is a juristic entity that cannot be imprisoned. The consequences of this have been recognised for centuries. As Baron Thurlow said in the 1700s in relation to the East India Company, a corporation “has no soul to be damned, no body to be kicked”. The lack of principled distinction blunts the effectiveness of the criminal law in tackling corporate crime and prevents us from utilising criminal law’s most unique attribute – its expressive force.

Secondly – and we see this also in the findings of the Financial Services Royal Commission – there is a degree of complexity, duplication and particularisation in the current law that makes it difficult to see the forest for the trees. This imposes a significant regulatory burden but also obscures the intent of the law.

NDW: Can you explain what ALRC has recommended to address these shortcomings in legislative design?

SW: The ALRC has recommended a new “model” for the legislative design of corporate regulatory provisions that will achieve a *principled* approach to criminalisation in this context. We recommended that civil regulation should be recognised as the primary form of corporate regulation. This reflects the reality of enforcement practice but not the content of our legislation. We then recommended that a criminal offence applicable to a corporation should be created only where there was an additional need for the *expressive force* of the criminal law in relation to the misconduct proscribed by the particular provision. We have set out evaluative guidance principles for legislators, based upon fundamental features of the criminal law, to assist in determining whether criminalisation is appropriate. These principles provide that a criminal offence applicable to a corporation should only be enacted where:

- denunciation and condemnation of the conduct constituting the offence would be appropriate;
- imposition of the stigma that should attach to criminal offending would be appropriate;
- deterrent characteristics of a civil penalty would be insufficient;
- the level of potential harm that may occur as a consequence of the conduct justifies criminalisation; or
- it is otherwise in the public interest to prosecute the corporation *itself* for the conduct.

NDW: At the moment, in many circumstances, the same conduct may be captured by both a criminal offence and a civil penalty provision, under what is sometimes called “dual-track” regulation. Does the ALRC’s model recommend changing this?

SW: Under the ALRC’s model, we envisage a reduction in the number of criminal offences applicable to corporations, with the criminal offences that remain recognising the expressive power of the criminal law to denounce particularly egregious misconduct. The model does not seek to eliminate dual-track regulation. However, we suggest that where there is a dual-track, the criminal offence should generally require proof of an additional fault element that the civil penalty provision does not. At the same time, we recognise that there may be circumstances where a particular risk of harm justifies a strict or absolute liability criminal offence, with or without dual track. Our concern is to change the default, not to remove flexibility where a gradation in response is legitimately needed.

NDW: What about infringement notices? The power to issue these has become increasingly common for both criminal offences and civil penalty provisions.

SW: If the model is implemented, infringement notice powers would not be available for the criminal offences that remain applicable to corporations. We do not consider them to be an appropriate response to those remaining offences. Infringement notices can be an appropriate response to civil penalty contraventions.

NDW: The existing regulatory framework has developed bit-by-bit over decades. If the ALRC’s “model” is implemented, how do we ensure that these principles continue to be employed into the future?

SW: So, I think it is important to emphasise that the recommendations are not at all about imposing some sort of rigid uniformity over corporate regulation. Regulation has to be dynamic, and respond to the issues in particular regulated environments. Some require more bespoke approaches. The model accommodates that. That is why the principles are *broad* and *evaluative*. At the same time, it is crucial to effective corporate criminal law that the law has regard to criminal law's unique normative role.

Accordingly, we have recommended updates to the *Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* to reflect the model, and other recommendations in the Final Report. We have also recommended a requirement for government to provide detailed justification in Explanatory Memoranda for any proposed offence applicable to corporations that does not comply with the Amended Guide. This could then be considered by the Senate Scrutiny of Bills Committee.

The model is about ensuring that the criminal law applies in a distinctive and principled way, in conjunction with other tools for regulating corporate misconduct.

NDW: Thank you, Sam, for talking us through the recommended model from the ALRC's Final Report on Corporate Criminal Responsibility.

SW: It was a pleasure, Nadine. You can read more about the model in Chapter 5 of the Final Report.

NDW: I encourage listeners to head over to the ALRC website to download the Final Report. The full list of recommendations can also be found in the Summary Report if you would just like a quick overview.

Join us for the next episode in this series covering corporate criminal responsibility to hear Matt Corrigan and Samuel Walpole discuss offences that are specific to corporations.

Download the Corporate Criminal Responsibility Final Report:
<https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>