

Mandatory Human Rights Due Diligence in the Australian Legal Landscape

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Australian Government

Australian Law Reform Commission

Who we are

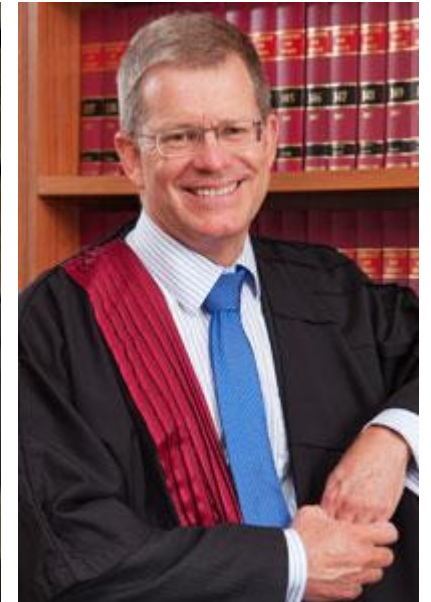


President

The Hon Justice
S C Derrington

Part-time Commissioners

The Hon Justice Middleton
The Hon Justice Bromwich



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Who we are

- Government agency that conducts research and provides recommendations for law reform, on topics selected by the Attorney-General
- >85% of ALRC reports substantially or partially implemented
- The ALRC makes recommendations that:
 - bring the law into line with current conditions and needs
 - remove defects in the law
 - simplify the law
 - adopt new or more effective methods for administering the law and dispensing justice, and
 - provide improved access to justice.
- The ALRC recommendations must not trespass unduly on personal rights and liberties of citizens, or make those rights and liberties unduly dependent on administrative, rather than judicial, decisions and, as far as practicable, are **consistent with Australia's international obligations**.
- The ALRC must also have regard to any effect that its recommendations may have on the costs of access to, and dispensing of, justice.



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The Inquiry Process

10 April 2019 — Terms of Reference

100+ consultations

15 November 2019 — Discussion Paper

49 written
submissions

31 August 2020 — [Final Report](#) tabled in
Parliament

4 public seminars



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Inquiry into Corporate Criminal Responsibility

Terms of Reference:

- REFER to the ALRC for inquiry and report a consideration of whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime. ...
- This review would encompass consideration of: ... potential application of Part 2.5 of the Code to extraterritorial offences by corporations;



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Why review Corporate Criminal Responsibility

- 25+ years since the adoption of the *Criminal Code*
- Public concern about corporate regulation, esp. following the Banking Royal Commission
- Concern also sparked by events like the Christchurch mosque attack, and the regulation of foreign-owned internet companies disseminating offensive material within Aus.



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Role of Australian criminal law overseas

- Most Australian criminal law is only applicable in Australia
- Some offences such as foreign bribery travel with Australians, including Australian companies, so they apply even when Australians are overseas
- However, prosecution of these extraterritorial offences against companies is rare
- During ALRC Inquiry, the Government introduced legislation that would make it an offence for an Australian company to 'fail to prevent' foreign bribery
- Failure to prevent offences proven successful in UK



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Key Findings

- Success of F2P foreign bribery offence in UK → should not be limited to bribery offences
- However, capacity of criminal law to address transnational crime and business & human rights issues is limited
- Need for a Smart Mix of regulatory options
- Consensus that the MSA was a good start, but only the first step
- mHRDD is a logical progression from MSA



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A SMART REGULATORY MIX



See Chapter 10 of the Corporate Criminal
Responsibility Final Report (ALRC report 136).



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BUSINESS AND HUMAN RIGHTS ROADMAP



mHRDD options for Australia

- Support from academia, civil society, business and government
- Bring Aus. into line with community expectations and international developments (esp. EU & US)
- Example from the *Illegal Logging Prohibition Act*
- Set clearer expectations for business on *how* to prevent human rights violations in supply chains
- Broad application (inc. SMEs) but obligation adapted to the nature and size of operations
- Possible civil penalty for failure to conduct HRDD, and criminal penalties where offences are proven (as is currently the case)



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