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**Traidcraft input into update of UK National Action Plan on Business and Human Rights**

Traidcraft’s recommendations relate to the third pillar of the UN’s protect, respect, remedy framework and specifically to access to judicial remedy[[1]](#footnote-1). For a wider set of recommendations, please refer to the submission made by the CORE Coalition.

**Why access to judicial remedy is important**

The UK is the fifth largest overseas investor in the world. Our businesses have far-reaching impacts as investors, exporters and buyers of goods and services. In particular, investment in emerging markets and Africa has grown in recent years. This presents a real opportunity to help bring about growth and create jobs and business opportunities in less developed regions of the world, but it also brings very powerful enterprises into direct contact with vulnerable workers and communities.

The UK is home to some pioneers of responsible business and Government has played a key role in encouraging and supporting them. But as we approach five years since the UN Guidelines on Business and Human Rights were unanimously adopted, research by the Business and Human Rights Resource centre shows that UK companies continue to be involved in human rights abuses around the world[[2]](#footnote-2).

Government has an important role to play in holding companies to account when they fail to properly assess the likely impact of their actions or fail to take adequate steps to prevent harm. Unless Government acts in these cases, the behaviour of a minority will undermine the ability of the rest to operate, and the reputation of British business risks being damaged.

The existence of clear and accessible legal routes to hold companies to account in the UK, is an essential – and currently largely absent - element in driving improved performance from ***all*** companies, which can complement existing voluntary and non-judicial channels and deliver justice to vulnerable communities harmed.

**Current situation regarding access to judicial remedy in the UK**

The UK does have provision for civil cases to be brought against companies for harm that happens overseas, but this is getting more difficult. Landmark cases such as Cape plc or the recent Bodo case which have enhanced the UK’s global reputation for justice would be unlikely to proceed given today’s restrictions.

The UK’s provision for criminal prosecution for corporate misconduct is considerably weaker than other jurisdictions and needs to be improved.

The Government is clearly committed to ensuring the highest standards of practice by British companies overseas, to tackling corporate excess and taking a firm line on corruption and bribery. These practices are often intimately connected to many of the harms we see, which are essentially committed - often through inadequate oversight - for economic gain.

**Access to judicial remedy needs to be at the heart of the next NAP**

There were no clear commitments on judicial remedy in the UK’s first National Action Plan on Business and Human Rights, so it is critical that the updated version reverses this, gives access to judicial remedy a central role and includes specific, time-bound commitments.

There are many ways access to judicial remedy can be improved, including improvements in the judicial system of the country where the harm took place. There is clearly a role for Government in supporting this through various FCO, MOJ and DFID programmes. However this must not be a substitute for action in our own jurisdiction, not is it realistic to seek to achieve significant improvements in all the countries where British companies operate. Improving the rule of law in partner countries is a complex undertaking and depends on the leverage the UK can bring to bear, the willingness of Governments to make improvements and the level of state complicity in harms.

The updated National Action Plan should focus on the area where there is clear accountability gap and where Government is in a position to make autonomous progress. This requires:

* Removing the mounting barriers to bringing civil cases in the UK
* Developing (or amending existing) legislation that would allow criminal prosecution of companies for the most serious harms.

We need to be sure that we are applying the same high standards we expect of British companies operating in the UK, when they are operating overseas.

**Summary of Policy Recommendations**

Traidcraft has sought extensive legal advice relating to both criminal and civil law.

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| --- | --- | --- |
| Recommendation | Responsibility and action | Cost |
| Criminal law |  |  |
| 1a) Develop an offence of ‘failure to prevent serious human rights abuse’ or ‘failure to prevent serious crime’ modelled on section 7 of the Bribery Act and including an adequate procedures defence. | The Department of Business, Innovation and Skills and the Foreign Office to sponsor legislation or suggest additions to proposals under consideration on economic crimes.  Definitions to be developed or taken from existing legislation/UN. | Businesses would need to extend their anti-bribery policies to include this wider set of crimes. This is would be required anyway under the proposals relating to economic crimes.  Limited cost to the Treasury. Additional resource may be required for the relevant prosecuting authority. |
| 1b) Clarify that ‘improper conduct’ under the Bribery Act (or its successor) includes profiting from the commission of a human rights abuse. | Serious Fraud Office to issue guidance.  Definitions to be developed or taken from existing legislation/UN. | None |
| 2. Amend existing statutes on international crime to allow an alternative to imprisonment and enable corporate prosecutions. | Statutory Instrument | Limited cost to the Treasury. Additional resource may be required for the relevant prosecuting authority. |
| Civil law |  |  |
| 3. Provide guidance regarding proportionality | Ministry of Justice | None |
| 4. Limit financial risk taken by victims |  |  |
| a) Extend qualified one-way cost shifting to cases beyond personal injury | Civil procedure rules | None to Treasury. Cost borne by defendant. |
| b) Extend use of Protective Cost Orders beyond judicial review | Civil procedure rules | As above |
| 5. Improve ability to bring collective actions | Civil Procedure Rules | None |
| 6. Improve pre-action disclosure and break link with costs | Civil Procedure Rules | None |
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**Policy recommendations relating to criminal law**

There is currently no specific piece of legislation that allows criminal prosecution of corporations for human rights abuses overseas. Traidcraft commissioned a detailed analysis of this area, which highlighted some of the challenges and recommended practical policy options that overcome these[[3]](#footnote-3). Following a roundtable with criminal law experts and with an understanding of the present political and economic climate, we have two recommendations.

***Recommendation 1a: Develop a new offence modelled on Section 7 of the Bribery Act (semi-strict liability, with an adequate procedures defence)***

* The Bribery Act 2010 created the offences of bribery of another person, being bribed, and bribing a foreign official. Each of these offences can apply to a corporation just as they can apply to a natural person.
* Section 7 of the Act creates a semi strict liability offence of ‘failing to prevent bribery’, which is specifically aimed at companies and can be committed by any ‘relevant commercial organisation,’ irrespective of where the act occurred. An organisation is guilty of the offence if an ‘associated person’ bribes another intending to obtain or retain business or a business advantage for it. It is a defence for the corporation to prove that it had in place adequate procedures to prevent bribery.
* The ‘architecture’ of the Bribery Act therefore overcomes a number of the challenges relating to corporate criminal liability including extra-territoriality and issues of evidence collection.
* Although, as yet, there have been no prosecutions, the Bribery Act is already having a significant impact on company practice. The possibility of extending the Act or replacing it with legislation tackling a wider set of ‘economic crimes’ is being considered by Government at present.[[4]](#footnote-4)

**We recommend establishing a new section 7-type offence of either:**

1. **‘failure to prevent a serious human rights abuse’ by associated persons**. The term human rights abuses would clearly need to be defined precisely.
2. **‘failure to prevent a serious crime’ by associated persons.** Traidcraft are working with legal experts at the moment to draft more precise wording for this offence, as well as a possible schedule to attach to it and a draft indictment.

**This could be achieved either through new legislation or incorporated into the ongoing proposals to extend the Bribery Act. In either case a defence would be to demonstrate that the company had in place adequate procedures to prevent the commission of the offence.**

***Recommendation 1b: Clarification of guidance regarding ‘improper conduct’***

* A secondary recommendation is that the existing Bribery Act or its possible wider focus on ‘economic crimes’ could also support prosecution of human rights abuses, with some clarifications.
* The ‘improper performance’ requirement (under sections 1 and 4 of the Act) would be considered as being satisfied when, for example, UK Company ‘A’ pays its overseas subsidiary ‘B’ for products or services procured through the commission of gross or serious human rights abuses, where ‘A’ knew (or reasonably believed) that the products or services had been procured through the commission of such abuses.
* The logic is that in many cases there is a profit motive behind a company’s acceptance of goods or services procured through human rights abuses. The delivery of such goods or services procured in this way must inevitably be considered as ‘improper performance’ under the terms of the Act.
* **This option would require the Serious Fraud Office (who would ordinarily be the relevant prosecuting authority under the Act for large scale or international cases) to issue guidance on interpreting ‘improper performance’ under the Bribery Act or its successor in this way. It was also require resources to enable investigations and prosecutions.**

**Provision for victims under criminal law recommendations**

* Whichever of recommendation is adopted, a further component for victims would need to be included. A provision similar to the requirement for a Court to prioritise compensation to the victim over a fine where the convicted company has insufficient means to pay both, as is currently the case under section 8(6) of the Modern Slavery Act 2015, could be inserted into any legislation.

***Recommendation 2: Amending existing statues on international crimes***

* The UK asserts extraterritorial jurisdiction for certain specific (international) criminal offences to which universal jurisdiction applies.
* *The International Criminal Court Act 2001 (ICCA)* criminalises genocide, crimes against humanity, war crimes and other ‘ancillary conduct’. The Act applies extraterritorially to UK nationals, UK residents or to persons subject to UK service jurisdiction.
* This statute could apply to UK-based companies that aid and abet, or procure, genocide, a crime against humanity or a war crime committed by another, such as their subsidiary or supplier.
* *The Geneva Conventions Act 1957 (GCA)* criminalises the commission, or aiding, abetting or procuring of a grave breach of the Geneva Conventions, specific violations of the Conventions during war time.
* This statute could apply to UK-based companies that aid and abet, or procure, a grave breach committed by another, such as their subsidiary or supplier.
* **In either statute an amendment would be required to insert an alternative to imprisonment for corporate defendants. This would allow companies to be prosecuted under these statutes.**

**Policy Options relating to civil law**

Access to civil law remedies are particularly important for victims in that they can receive compensation for the harm suffered and the high cost of defending such actions and paying any fines can be a strong incentive for companies to improve their conduct. The barriers to victims pursuing civil cases in relation to an alleged human rights abuse by a company are largely administrative and financial, rather than substantive. It is possible to bring cases under tort law, for example for negligence by a parent company and a handful of cases have reached out of court settlement in this way.

However these are few and far between and a number of factors are conspiring to make them harder to bring.

* There are very few law firms whose structure allows them to pursue these types of cases. The nature, scale and complexity of these cases means they are expensive to investigate and litigate while the claimant are likely to have severely limited resources and may have no other way of accessing legal remedy.
* The stricter LASPO proportionality test and lack of clarity regarding its interpretation has made firms more reluctant to take on cases which may have a strong public interest aspect to them, but which they fear may fail the proportionality test. This means that important cases that could set a precedent, have an important impact on corporate accountability or might provide redress to victims with no other options, may not be brought.
* Changes to the cost system have made funding these complex cases more difficult. Damages must now be assessed in accordance with the law and procedure of the country where the harm occurred, plus success fees have to be deducted from the claimants’ damages and cannot be more than 25% of the total. The Jackson reforms (2013) have meant that the financial risk borne by the claimants, for which they can take out ‘After the event insurance’, is no longer recoverable from the losing party, except in personal injury cases.
* Lawyers acting on a no win no fee/contingency basis therefore face huge financial risks and may now be forced not to take on cases that have merit, because they are concerned about proportionality, cannot cover their costs, or may prefer to favour cases that are likely to deliver higher overall damages. Some firms are now relying on public donations to bring cases.

***Recommendation 3: Provide guidance regarding proportionality***

Provide guidance on the application of the LASPO proportionality test in complex cases involving serious harm overseas in which the costs incurred are likely to exceed the value of the claim, but where there are wider public interest issues at stake.

***Recommendation 4: Limit financial risk taken by victims***

Although it may not be possible to argue for full public finding for such cases it could be possible to limit the financial risk taken by the victims thereby making a wider range of cases more viable. There are a number of ways this could be achieved:

* **Extend QOWCS. A system called ‘Qualified one-way cost shifting’ applies to personal injury claims, meaning that victims do not have to bear the defendant’s legal costs if they lose and they no longer have to obtain adverse costs insurance. QOWCS could be extended from personal injury cases to all relevant cases from overseas victims or to a wider range of civil cases relating to human rights, public interest or environmental cases.**
* **In Judicial Review cases claimants can apply for Protective Cost Orders (PCOs) which limits the claimants’ liability to pay the defendants legal fees should they lose the case. PCOs are given in recognition that JRs are often public interest matters. The use of PCOs could be extended to a wider range of civil cases relating to human rights, public interest or environmental cases. These would need to be clearly defined.**

***Recommendation 5: Improve the ability to bring collective actions***

* Existing rules governing collective actions have been deemed ineffective, leading to insufficient access to justice for a range of groups in the UK including consumers, SMEs and employees[[5]](#footnote-5). Meritorious cases that could be more efficiently brought collectively are not proceeding.
* In a recent development the Consumer Rights Act passed in March 2015 introduces a new ‘opt-out’ collective action in the Competition Appeal Tribunal, so that claims can be brought on behalf of a defined group of consumers without the need to identify all the individual claimants.
* Such opt-out class actions reduce costs by enabling the aggregation of cases. These are available in Canada, Australia, South Africa and the United States for a much wider range of cases.
* At present the UK’s civil procedure rules allow for test cases, for the consolidation of cases and for Group Litigation Orders. These have a range of limitations, including extremely strict interpretations of ‘commonality’ and the difficulty in making test cases more widely applicable to a group.
* **A simpler and more cost effective system would be enable collective actions in all civil claims – including both opt-in and opt-out mechanisms. This could be achieved via a change to the civil procedure rules.**

***Recommendation 6: Improve pre-action disclosure and break link with costs***

* At present it is very difficult for law firms to judge whether to proceed with a case because they can only access the most relevant documents after proceedings have started and substantial costs have been incurred.
* This is particularly problematic in cases involving a parent and subsidiary as it is necessary to investigate the internal workings of the parent company in order to establish which part of the group was responsible for the functions that were connected with the harm.
* Claimants’ lawyers have to rely on scarce information in the public domain or they can make an Application for Specific Disclosure or Pre-Action Disclosure, but if they do so the requester is then usually responsible for the defendant’s costs. This can be prohibitive.

**We recommend two steps to improve this:**

* **Break the link between requesting pre-action disclosure and liability for the defendant’s costs.**
* **In cases involving parent and subsidiary companies, require the parent company to prove that it *was not* in control of the relevant subsidiary functions that caused the harm. This reversal of the burden of proof in these specific types of cases would encourage companies to disclose the relevant documents sooner.**

***ENDS/.***

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***For further information contact:***

***Liz May***

***Head of Policy & Advocacy***

***Traidcraft***

***2.12 The Foundry***

***17 Oval Way***

***London***

***020 3752 5719***

***Liz.may@traidcraft.org***

1. Traidcraft is a UK fair trade company, sourcing products from around 70 producer groups in nearly 30 countries. We use our direct trading experience to inform our campaigns for corporate accountability and trade justice. On 2nd July 2015 a delegation of Traidcraft supporters visited the Foreign Office, the Department of Business, Innovation and Skills and the Ministry of Justice asking that access to justice be put at the heart of the revised National Action Plan. [↑](#footnote-ref-1)
2. Business and Human Rights Resource Centre Briefing, “Is the UK living up to its business and human rights commitments?”, April 2015 [↑](#footnote-ref-2)
3. Rachel Chambers & Alex Batesmith “Options for criminal prosecution of UK companies for human rights abuses committed outside England and Wales” May 2015. Available from Traidcraft. Challenges identified include the type of corporate liability and level of intent required for a prosecution, the extra-territorial dimension, definitions of human rights crimes and the link to compensation for the victim. [↑](#footnote-ref-3)
4. See the UK Anti Corruption Plan, December 2014, Action 36, *‘*The Ministry of Justice will examine the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more widely (by June 2015)*’*. [↑](#footnote-ref-4)
5. For a full explanation of the current system see “Improving Access to Justice Through Collective Actions”, Civil Justice Council, 2008. <http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf> “Access to justice is, despite the present procedural mechanisms, still disproportionately weighted against claimants whether they are groups of consumers, small businesses, employees, or victims of mass torts. This has resulted in few claims being brought, and significantly, demonstrates that a number of meritorious claims simply have not seen the light of day.” [↑](#footnote-ref-5)