**LEIGH DAY SUBMISSIONS TO THE OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP FOR THE ELABORATION OF AN INTERNATIONAL BINDING LEGAL INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS, RESOLUTION A/HRC/26/9 (the “Working Group”)**

**11 October 2016**

**SUBMISSION 3 – RECOMMENDATIONS IN RELATION TO ACCESSIBILITY AND EFFECTIVENESS OF UK JUDICIAL MECHANISMS FOR HOLDING UK BUSINESS TO ACCOUNT FOR HUMAN RIGHTS VIOLATIONS COMMITTED OVERSEAS**

Introduction

## Set out below are Leigh Day’s recommendations dated 31st August 2016 to the UK Parliamentary Inquiry on Business and Human Rights in relation to accessibility and effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas. The mandate of this Inquiry is set out at paragraph 4 of Submission 1.

1. Whilst the recommendations below were made by Leigh Day in the UK context, they are relevant to the mandate of the Working Group as the proposals seek to address the existing limitations of national judicial mechanisms for holding UK business to account in relation to human rights violations committed overseas.

## Recommendations

## Mandatory human rights due diligence (“HRDD”) and reporting

1. It would be counter-intuitive to the UK Government’s commitment to the G7 Leaders’ Declaration (7-8 June 2015) to “encourage enterprises active or headquartered in our countries to implement due diligence procedures” for UK-domiciled entities with opaque corporate structures to be less accountable than those that demonstrate greater transparency. Yet, in the absence of mandatory reporting on HRDD, this is the practical effect.
2. We consider that it would be of great value to victims of corporate human rights abuses for a law to be enacted imposing a mandatory duty of HRDD and reporting on business enterprises, consistent with the UK Government’s commitment to the UN Guiding Principles. To ensure policy coherence and limit the regulatory burden, the legal duty could be imposed consistent with reporting requirements such as those under the Modern Slavery Act 2015,[[1]](#footnote-1) and/or the non-financial reporting requirements of the EU.[[2]](#footnote-2) We would propose a legal duty be imposed upon “commercial organisations”[[3]](#footnote-3) with a “turnover”[[4]](#footnote-4) of over £36m, to conduct and report on HRDD in respect of themselves and their subsidiaries (wherever located).
3. The introduction of such a requirement would have significant potential to prevent human rights abuses occurring in the first instance. In all of the cases brought by Leigh Day against UK multinationals on the basis of de facto control, it is equally alleged that the abuses could have been prevented if the relevant UK-domiciled entity had identified the risk of human rights abuses occurring and taken reasonable steps to avoid the realisation of that risk.
4. A reporting obligation would also ensure that even the human rights “laggards” who are the least transparent of corporations would be required to make accessible information regarding their assessments of potential human rights impacts and what steps they had taken to mitigate any adverse impacts.
5. It is noteworthy that in 2015 the French National Assembly took steps towards improving the accountability of French multinational corporations and passed a Bill “relating to the duty and vigilance of parent and subcontracting companies”.[[5]](#footnote-5)  In essence, this statute imposes a legal obligation upon parent companies with at least 5,000 employees to conduct human rights due diligence with regard to the activities of their subsidiaries, subcontractors and suppliers abroad, failure of which would result in civil liability and would be an offence under the criminal law.  If passed, this new legislation will represent a significant step in reducing barriers to “remedy” in France.

## The burden of proof should be reversed so that a common law duty of care will be presumed to be owed by a parent company in the absence of evidence to the contrary

1. It is proposed that this reversal would apply only in circumstances involving multinational corporate enterprises in which the parent company holds a majority shareholding (directly or indirectly) in the subsidiary whose operations directly caused the harm.
2. In circumstances where documents shedding light on internal corporate relationships are not accessible, for example because they have not been preserved or are in the possession of subsidiaries and the parent company claims it does not have control over the documents, this proposal will place the onus on the MPC to positively adduce documentary or witness evidence to rebut the presumption of a duty of care.

## Documents in the possession of group subsidiaries should be deemed to be under the control of the parent company

1. As indicated above, to avoid victims being deprived of documents which an MPC contends are outside its control as they are held by subsidiaries, we propose that documents held by subsidiaries over which a parent has a majority shareholding (directly or indirectly) should be deemed to be under the control of the parent unless it can prove otherwise.

## Reforming Rome II Regulation (EC) No 864/207

1. Rome II stipulates that, in relation to tort claims, the applicable law shall be that of the country where the damage occurs unless the tort is manifestly more closely connected with another country (Article 4). Article 22 also stipulates that these applicable law provisions apply to the burden of proof. Consequently, any reforms to substantive (as opposed to procedural) UK law would be to no avail unless these provisions of Rome II were rendered inapplicable. In regards to the recommendations above, therefore, reform of Rome II would be required to ensure the non-applicability of Article 22 to the reversal of the burden of proof in circumstances involving multinational corporate enterprises in which the parent company holds a majority shareholding (directly or indirectly) in the subsidiary whose operations directly caused the harm.
2. Under Article 14.3 (c) of Rome II, the same rule applies to the assessment of damages. The effect of this is to reduce the level of compensation for victims as compared to English law equivalents. In so doing, the proportionality requirements under the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (LASPO), discussed in Submission 2, are more easily breached. Further, the relatively low damages levels fail to act as a deterrent against human rights violations on the part of corporations that might consider the relative “cost” of such abuses outweighed by the potential “benefit”. This disparity is wholly at variance with the goal of ensuring corporate accountability for human rights violations and Article 14.3(c) of Rome II should reformed so as to be disapplied in claims arising from human rights abuses, environmental damage or modern slavery.

## The "proportionality" test should be relaxed to avoid it acting as a bar to access to justice in claims arising from human rights abuses, environmental damage or modern slavery.

1. The effect on access to justice of the strict application of this rule is outlined in the section above and is also relevant to the submissions on modern slavery (Submission 4).

*Costs protections for victims of corporate human rights abuse*

1. Costs orders in civil cases in the UK follow the “loser pays” principle. Previously, ATE cover for the adverse costs risk was obtained by claimants and the premiums were recoverable from the defendant as part of overall costs recovery. Recoverability of these premiums was however abolished by s.46 LASPO. At the same time, in cases involving personal injury, “QOCS” was introduced, which rendered the need for adverse costs cover redundant[[6]](#footnote-6). QOCS does not however apply to pure environmental claims or to human rights abuse claims that do not result in a personal injury. It may not, for example, apply to claims arising from trafficking or forced labour.
2. Due to the risks involved and the magnitude of defendant’s costs ATE premiums in cases of this type are huge, typically 80-90% of the amount of the cover. Payment of ATE premiums by claimants would generally wipe out their damages, substantially or totally. Consequently, obtaining ATE is not an option, which means that environmental claimants and victims of modern slavery are vulnerable to adverse costs. This is a deterrent against the bringing of such claims.

## Recommendation:

## QOCs should apply in environmental claims against multinational companies and claims arising from modern slavery.

1. The slavery and human trafficking statement under s54(4)(a) of the Modern Slavery Act. [↑](#footnote-ref-1)
2. Under which large public-interest entities with more than 500 employees are required to disclose in their management report relevant and useful information on their policies, main risks and outcomes relating inter alia to environmental matters, social and employee aspects and respect for human rights: see <http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news> [↑](#footnote-ref-2)
3. Akin to the definition in s54(12) of the Modern Slavery Act 2015. [↑](#footnote-ref-3)
4. Akin to the definition in s3 of the Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015. [↑](#footnote-ref-4)
5. Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, no 501, 30 mars 2015. [↑](#footnote-ref-5)
6. Civil Procedure Rules 44.13- 44.16. [↑](#footnote-ref-6)