MEMORANDUM TO THE JOINT COMMITTEE ON HUMAN RIGHTS
INQUIRY ON BUSINESS AND HUMAN RIGHTS

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30 April 2009

Summary of Submissions

This paper addresses the following issues of which we have direct experience, and which arise from the list of questions in the call for evidence:-

1. Application of the Human Rights Act to businesses to which public functions have been contracted out by public authorities.

2. Effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas.

3. Funding issues relating to 1 and 2 above

4. Effectiveness of non-judicial mechanisms for holding UK business to account for human rights violations committed overseas.

5. Possible legislative, judicial and non-judicial changes that could be introduced in relation to 1 and 2 above.

1. Application of the Human Rights Act ("HRA") to businesses to which public functions have been contracted out by public authorities

Section 6 of the HRA provides that the HRA applies only to "public authorities". No definition is provided in the HRA, save for stating that courts and tribunals are public authorities for the purposes of the act. The lack of provision of guiding principles and/or non-exhaustive list of bodies considered to be public authorities has led to litigation producing anomalies and the question of whether a person or body is a public authority for the purposes of the HRA can be very difficult to determine. In 2003, the House of Lords confirmed that there was no single test of universal application to distinguish what is or is not a public authority.[1]

The anomalies produced are illustrated by the case of *Johnson & others v LB Havering; YL v Birmingham City Council*[2] in which the House of Lords held that an individual placed in a privately-owned care home by a local authority was not a public authority. This result means that Mr A, who through no choice of his own, is placed in a privately-run care home by his local authority loses the protection of the HRA; yet Mr B who is placed in a local authority run care home retains the protection. This anomaly required addressing through

[1] See *Aston Cantlow & others v Wallbank [2003] 3 All ER 1213*
[2] 3 WLR 112

primary legislation (see Health & Social Care Act 2008, brought into force on 1 April 2009).

A key area in which the protection of the HRA fails (and in which Leigh Day & Co are often instructed) is in relation to private companies running immigration detention centres and providing escort services for removals and deportations. There is a plethora of complaints and litigation surrounding the maltreatment of immigration detainees by these private companies, including multiple allegations of assault, inhuman and degrading treatment, and deprivation of liberty. We refer you to the Medical Justice report "Outsourcing Abuse"[3]. The Home Office argue that it is not responsible for the actions of the private companies and hence rigorously defend HRA claims, and the companies themselves state that they are not subject to the HRA. This issue has yet to be determined by the Court, and highlights the unnerving ability of public authorities to potentially contract out of their human rights obligations.

2. Effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas

Criminal Accountability

Thor Chemicals (see further below), a UK multinational involved in the manufacture of mercury-based chemicals, shifted its operations, lock stock and barrel to Natal. This was after serious concerns had been expressed by the HSE. 40 South African workers were poisoned, including 1 fatality. Thor was charged and fined the equivalent of approximately £3,000 by the Pietermaritzburg Magistrates. At the time, other companies commented that the paltry fine made it difficult to justify health and safety expenditure to shareholders.

In the event of no action being taken in the local courts, it is possible, under the International Criminal Court Act 2001, for a prosecution to be brought against individual UK citizens responsible for specified offences overseas, including "aiding and abetting" the commission of "crimes against humanity" and "torture". Officers and employees of UK businesses that have engaged in conduct ancillary to such offences could therefore be prosecuted under the Act. To date, we are unaware of any such investigations having been undertaken.

Civil Action in the UK courts

Case Study: BP, a UK multinational, was involved in the exploration and exploitation of oilfields in the Department of Casanare, Colombia, in the early 1990s. A pipeline was built by a locally registered company (OCENSA) to transport the oil from the oilfields to a port on the Caribbean coast. Civil claims were initiated in Colombia against OCENSA by peasant farmers whose livelihoods had been destroyed as a result of environmental damage to their

[3] Available at http://www.medicaljustice.org.uk/images/stories/reports/outsourcing%20abuse.pdf

land, which they claimed was caused by the construction of the pipeline. The claims were stifled as a consequence of the inadequate Colombian justice system and the perilous position of human rights lawyers in Colombia[4]. The lawyer acting for the farmers ultimately sought asylum in the UK following increased threats from paramilitary groups due to her involvement in the case. The farmers subsequently instructed Leigh Day & Co and a successful settlement was eventually reached with BP by way of a mediation in June 2006.

A ruling of the ECJ[5] confirmed that the UK courts do not have jurisdiction to stay proceedings commenced against a UK-domiciled corporation, on the grounds of *forum non conveniens*. This is a welcome development given the substantial resources and court time wasted on this issue in the litigation against Cape PLC, Thor Chemicals[6] and Rio Tinto.

Claims directly alleging human rights violations cannot be brought in the UK against non-state entities. This contrasts for example with the position in the US, where a federal statute, the Alien Tort Claims Act, specifically provides for such claims.[7] However, in light of *Owusu* and the recent coming into force of the Rome II Regulation, claims arising overseas will invariably be governed by local (foreign) law[8]. Consequently, should the local law provide for human rights causes of action, it should be possible to pursue these in the UK courts.

Overseas operations of UK businesses are usually conducted through local subsidiaries. In general, in order for the UK courts to have jurisdiction, the UK parent company will need to be sued. However, in view of the "corporate veil", the parent is not generally liable for the wrongdoing of its subsidiaries.[9] In light of this well-established precedent, the focus in such cases has been on the direct negligence of the parent company itself in causing the harm in question. This type of approach is infinitely more complex, factually, than one entailed in a claim against a local operating company. The position is graphically illustrated by the RTZ tree (appendix 1) researched and produced for the *Connelly* case (in which the parent, at the top of the tree, was sued in respect of damage arising at Rossing Uranium Ltd, the entity at the bottom of the tree).

This increased level of complexity has important consequences. First, significantly more resources are required to investigate the relationship between different entities within the corporate group. Secondly, this makes the prospects of success more uncertain. Such cases are also necessarily subject to the funding considerations described below.

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[4] See, for example, the Law Society's report on its August 2008 International Human Rights Mission to Colombia, due to be launched on 6th May 2009

[5] *Owusu v Jackson and Others* Case C-281/02

[6] Sithole & Others –v- Thor Chemicals Holdings Ltd and Another (Times Law Report dated 15 February 1999)

[7] Doe v Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997). An action by Burmese villagers alleging complicity by Unocal in human rights violations perpetrated by the military around a pipeline

[8] Rome II applies where (a) proceedings are commenced from 11 Jan 2009 and (b) events giving rise to damage occurred after 19 Aug 2007

[9] Adams v Cape Industries Plc [1990] 2 WLR 657; the "veil" can be "lifted" in the event of fraud on the part of the parent or an agency relationship [between parent and subsidiary]

Case management procedures for group actions enable cases to be run on a more cost-effective manner than a multiplicity of individual cases. However, the need to commence claims within the requisite limitation periods – whichever limitation law applies – and the extent to which individual particulars are required procedurally, tends to make cases prohibitively expensive. Class action legislation of the type that exists for example under Australian federal law (or the law of Victoria) would enable an issue to be resolved through a single representative claim, whilst at the same time suspending limitation.[10]

3. Funding Issues

Access to justice against businesses is subject to the ability of individuals or communities to fund legal proceedings against large corporations and the fundamental inequality of arms that this engenders. The vast majority of individuals simply cannot afford to risk litigating because of the costs risks involved.

Due to the erosion of the availability of Legal Aid over recent years by stringent means testing and by its removal from certain fields of law such as personal injury, often the only available mechanism for funding legal cases is a Conditional Fee Agreement (CFA). CFAs do not protect an individual from adverse costs risks, and the practical reality is that it is only feasible to act for clients under a CFA when the prospects of success and the overall value of the claim are sufficiently high to persuade a third party litigation funder to support the case.

In order to act under a CFA, legal representatives have to possess the necessary resources (which are invariably huge in the case of a large group action) to fund the case pending its conclusion, a risk that represents a significant disincentive for all but a few firms to carry out this type of work. In spite of these hazards, CFAs have been subject to criticism by politicians who seem to have been successfully lobbied by business, creating a climate which risks further distancing the individual from effective access to justice.

One further potential mechanism to assist access to remedies is the Protective Costs Order (PCO). PCOs limit or extinguish the risk of having to pay adverse costs. PCOs are available in limited circumstances where public law proceedings brought are considered to have a wider public interest. Although still relatively rare, the Courts have gradually indicated a growing acceptance of PCOs to facilitate public interest litigation (particularly in the environmental context). For example the proceedings against the SFO in the BAE case where brought with the benefit of a PCO (and a CFA to cover our legal costs). Leigh Day & Co has subsequently applied for PCOs in over 15

[10] The value of class action legislation in increasing access to justice can be illustrated, for example, by the fact that, apart from in the US, legal action against Merck Inc, for compensation for heart attack and strokes suffered following the use of anti-arthritic drug Vioxx, has only been launched in Victoria (Australia) and Canada.

public law cases, of which approximately 95% of applications have been successful.

That said, PCOs offer no certainty and although such orders are in principle available in private law proceedings against non-public authorities, there is to our knowledge only one occasion on which a PCO has been made (namely in proceedings directly linked to the later BAE public law case) .

4. Effectiveness of non-judicial mechanisms for holding UK business to account for human rights violations committed overseas.

In light of the difficulties associated with judicial remedies outlined above, individuals and organisations have often had to look to "soft law" mechanisms as an alternative source of corporate accountability. Among these the OECD Guidelines are the most prominent. The Guidelines were adopted by all thirty OECD Countries and eight non-members in 1976 and were updated in 2000. Observance of the Guidelines is voluntary and not legally enforceable".[11] Significantly, among the principles companies are asked to take into account is to:

> *"Respect the human rights of those affected by their activities consistent the host government's international obligations and commitments*."

Governments adhering to the Guidelines have been obliged to set up "National Contact Points" ("NCPs") to promote the Guidelines and 'contribute to the solution of problems which may arise'.

Since 2007, the British Government has demonstrated a real commitment to a more robust implementation of the Guidelines. It has found that two British companies breached the Guidelines because of their activities in the DRC. The first company, Afrimex (UK) Ltd, is a mineral trading company which sourced minerals from the DRC occupied by rebel troops until 2003, and according to the NCP, it thereby contributed to the conflict.

The second company, DAS Air, was a UK airline which was found to have broken the Guidelines when it flew into Eastern DRC to transport minerals between 2000 and 2001. The British Government has stated that the OECD Guidelines are their leading CSR tool and that it "expects all UK businesses to be able to prove they meet the OECD Guidelines".[12]

The Guidelines are criticised on three principal grounds:

i) They are voluntary and any decision cannot be legally enforced against the company;
ii) They lack independence from Government and thus are not perceived as impartial;

[11] Para 1of Concepts and Principles of the OECD Guidelines.
[12] Press release. Dept for Business Enterprise & Regulatory Reform. 27 August 2008. Ref 2008/183.

iii) The NCP has no power to award damages or to otherwise sanction companies who are guilty of misconduct.

Leigh Day & Co is of the view that these criticisms are important and should be addressed. The Government has recently shown a willingness to improve the implementation of the Guidelines but much must be done. In particular, the implementation of the Guidelines should be conducted by a body which is independent of Government, sufficiently well resourced, staffed by legally trained personnel and given significant investigative powers. Secondly, the decisions of an NCP should be legally binding upon the companies and consideration should be given to giving the NCP the power to award damages and/or fine companies who are in breach.

Guidance

The JCHR "Call for Evidence" asks whether the UK Government gives adequate guidance to UK business. It is our view that this is a major cause for concern and many responsible businesses are now demanding clearer guidance as to how they conduct business in the developing world and in conflict zones in a way which respects human rights principles. Currently the Government states that it expects compliance with the OECD Guidelines but offers no guidance at all as to how these instruments should be implemented and considered by British business.

Furthermore, there exists a plethora of voluntary initiatives, codes of practice and CSR principles but it often remains entirely unclear how these principles apply in specific situations or industries. In addition, apart from the OECD Guidelines, no international instrument benefits from a complaints mechanism, which is vital in order to encourage the compliance of all business. Leigh, Day & Co supports the CORE Coalition's proposal *for a UK Commission on Business, Human Rights* to offer greater guidance to business and to provide a more robust complaints mechanism for those cases which cannot be dealt with in the civil courts.

5. Recommendations

In light of the issues raised above, Leigh Day & Co suggests the following possible legislative, judicial and non-judicial changes for consideration by the Committee:

i) *Amendment of UK legislation to make business subject to ICC provisions where an offence is authorised or permitted by (a) the board (b) a "high managerial agent" of the business; (c) as a result of a "corporate culture" within the business .*[13]

ii) *An inference, rebuttable with the onus on the defendant, that a parent company does, as a matter of fact, have control over the conduct of its overseas subsidiaries.*

[13] Section 12.3 of the Australian CriminalCode

iii) *Introduction of opt out class actions into UK law.*

iv) *Extension of the HRA to cover all publicly funded functions, including businesses to whom functions have been contracted out by public authorities, such as private companies running immigration detention facilities and providing escort services during immigration removals and deportations; and private businesses with publicly funded safety obligations, such as Railtrack.*

v) *Expansion of the acceptance/use of PCOs to all cases where the interests of justice and need for equality of arms require it, including private law proceedings against private companies.*

vi) *Unification of the various soft law initiatives, codes of practice and principles for corporate accountability into a single independent body or commission which would have the dual roles of i) providing detailed guidance to business as to best practice when conducting business in the developing world and ii) offering a robust complaints mechanism and remedies for victims of those companies who have flouted human rights standards when conducting business. We would support the CORE Coalition proposal for a UK Commission on Business, Human Rights and the Environment, however, we accept that a good deal of thought would have to be given as to how this would work in practice.*

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