

Business and Human Rights National Plan Implementation Group Meeting

Minutes

10.00 a.m. – 12 .00 p.m., Tuesday, 13 October 2020 (by VC)

In attendance:	
Ms. Breege O'Donoghue, Chairperson	Dr. Mairéad Moriarty
Mr. Niall Brady (DFA)	Mr. Paul Morrissey
Ms. Orlagh Collison (D/Finance)	Ms. Sarah Murphy (DFA)
Ms. Meadhbh Costello (IBEC)	Ms. Ann Marie O'Brien (IEA)
Ms. Fiona Crowley (Amnesty International)	Ms. Mary O'Callaghan (D/Justice)
Mr. Gerry Cunningham (DFA)	Dr. Martha O'Hagan Luff (TCD)
Ms. Siobhán Curran (Trócaire)	Ms. Jean O'Mahony (IHREC)
Ms. Deborah Dignam (D/ETE)	Mr. Conor O'Neill (Christian Aid)
Mr. Brian Gray (ESB Group)	Mr. Ciaran Potter (DFA)
Mr. David Joyce (ICTU)	Ms. Michaela Reilly (Chambers Ireland)
Ms. Emma Jane Joyce (NTMA)	Ms. Lydia Rogers (Enterprise Ireland)
Ms. Sarah Kavanagh (DFA)	Ms. Rosie Valentine (Primark)
Ms. Mairéad Keigher (Shift International)	Mr. Tomás Sercovich (Business in the Community)
Ms. Emma Kerins (Chambers Ireland)	Mr. Matthew Sewell (D/Justice)
Mr. Simon McKeever (IEA)	
Guest speaker: Ms. Rachel Widdis, TCD	

1. Welcome by Chair and Minutes & Matters Arising

The Chairperson welcomed all attendees to the meeting. She noted that the minutes for the previous meeting on 18 June had been circulated to members twice with requests for feedback. She asked if there were any objections to their adoption by the Implementation Group; as there were none, the minutes were adopted.

The Chairperson asked if anyone had anything to add under AOB. **Mr. David Joyce** flagged that he would raise on EU mandatory due diligence proposals.

The Chairperson noted that the meeting fell on Budget Day, a busy day for many and said she would endeavour to get through the business of the meeting efficiently and effectively. In particular, she hoped the meeting would achieve tangible progress on the key agenda items.

The Chairperson extended a particular welcome to new members – Siobhán Curran who has replaced Niamh Garvey as the Tróciare representative and Meadhbh Costello has replaced Rhona Murphy as the IBEC representative. She noted that Sarah Mongey no longer represented the Department of Justice on the Implementation Group and welcomed Mary O’Callaghan and Matthew Sewell who attended on behalf of the Department of Justice. She further noted that Conor O’Neill was representing Christian Aid at this meeting.

The Chairperson also noted significant personnel changes in the Human Rights Unit of the Department of Foreign Affairs.

She acknowledged the contributions made by Niamh Garvey, Rhona Murphy, Sarah Mongey, Martina Feeney, Padraig MacCoscair and Ellen Swan, during their time on or supporting the Implementation Group.

2. Welcome by HRU Director

Mr. Gerry Cunningham, the new Director of the Human Rights Unit of the Department of Foreign Affairs, welcomed attendees to the meeting and introduced himself and the new members of the HRU team – Sarah Kavanagh, new Deputy Director and Sarah Murphy, new Human Rights Officer. He highlighted the importance of Ciarán Potter’s role in providing continuity. Mr. Cunningham noted that it had been a busy start for the new team as the UN Human Rights Council had been in session in Geneva and the Third Committee of the UN is currently in session in New York. However, he emphasised the priority being given to Business and Human Rights and the strong desire of the team to make progress in implementing the National Plan.

3. Report on Joint Meeting of Subgroups 1 and 2

The Chairperson noted that subgroups 1 and 2 had held a joint meeting to consider how best to advance the proposed toolkit and that the draft minutes of this subgroup meeting have been circulated along with a synopsis of its outcome.

She asked Mr. McKeever, as Chairperson of subgroup 2, to briefly sum up the proposals coming from this joint meeting of subgroups 1 and 2.

Mr. McKeever explained the context of the meeting, noting that, as the tool kit is an issue of great relevance for both subgroups, they held a joint meeting last week (5th October). That meeting had agreed that, rather than reinventing wheel, it should point businesses towards existing resources which would tell companies what they need to do and allow for a gap analysis by businesses. The material should help businesses to identify what steps to take.

He noted the successful initiatives in raising awareness in advance of GDPR coming into force and around Brexit and highlighted the importance of raising awareness, particularly in the context of EU proposals around mandatory due diligence which are proposed for next year.

The subgroups had agreed that Mr. McKeever would seek to have Business and Human Rights as an agenda item at the next meeting of the Export Trade Council.

The Chairperson proposed taking the next item before opening up the floor, due to the relationship between agenda items 3 and 4.

4. Update on TCD Research project on implementation of BHR GPs by larger Irish companies

Dr. Martha O'Hagan Luff was invited to provide a briefing on the work being undertaken by the Centre for Social Innovation at the Trinity Business School in respect of benchmarking Irish businesses' compliance with the UN Guiding Principles on Business and Human Rights in Ireland and in their global supply chains.

She stated that following pilot research in 2018, the 2020 phase of the research, builds on the expertise developed through this research. The 2020 analysis includes the ten largest commercial public sector bodies by turnover, alongside 50 of the largest public companies operating in Ireland as ranked by *The Irish Times* Top 1000 index. During the research for the project, they informed companies that they were being included in the study and then contacted them a second time with their scorecard. Twenty-seven of the companies involved have offered to meet to discuss the outcome of the project.

Dr. O'Hagan Luff indicated that while the study was not yet complete the initial findings are that there has been greater engagement with the 2020 research, compared to the pilot. Initial findings suggest a lack of awareness about the UN Guiding Principles. She referred to the poor scores of Semi-State companies; the fact that the benchmark process examines the text and terminology of publicly-available documents and suggested that the [2016](#) Governance Code of Practice for Semi-State companies requires updating. There is a need for greater information and outreach from Government. She noted that the UK Human Rights Commission has published a step by step guide for managers on what actions were required and a similar approach might be useful in Ireland.

Dr. O'Hagan Luff said that in her view benchmarking should take place on a regular basis, ideally annually to track progress.

The Chairperson thanked Dr. O'Hagan Luff for her presentation. She said that reflecting on the presentation made by Mairéad Keigher to the joint meeting of subgroups 1 and 2 and the work underway in TCD, there is now an opportunity to bring people together to look at the potential content for a toolkit. She noted that the TCD research focussed on larger companies but suggested that it might be possible to distil key points for SMEs. She proposed that Mairéad Keigher, Martha O'Hagan Luff, Simon McKeever, Tomás Sercovich and Sarah Kavanagh meet to identify potential toolkit content.

Mr. McKeever, Dr. O'Hagan Luff and Ms. Keigher all emphasised the primary goal of the toolkit will be raising awareness of existing resources and not creating a new one. **Ms. Keigher** also highlighted that practical steps for awareness raising needed to be identified.

Ms. Sarah Kavanagh noted that Ms. Keigher, in her presentation to the joint meeting of subgroups 1 and 2, had underlined the importance of business representative bodies as nodes of contact between

government and business that could facilitate communication. She suggested that the HRU could liaise with the IEA, IBEC, Chambers Ireland and other business networks. She said that the HRU would look into a communications campaign but that the scale would not be comparable to the campaign around Brexit, which was not analogous to the BHR National Plan.

Mr. Cunningham said that the DFA would be happy to host the toolkit on its website in the first instance but would seek better avenues to disseminate information.

Ms. Maeve Costello emphasised the ongoing challenges that businesses are facing with COVID 19 and Brexit – she noted that an awareness campaign would have to cut through that. She said that the toolkit would need to be sensitive to the changes faced by business and the different capacities of large companies and SMEs who will be coming from different starting points.

Mr. McKeever agreed and said the process would need to be warmed up slowly over time. He agreed that different sized companies would have different capacities to absorb new requirements.

5. Updates from the HRU

Mr Cunningham noted that the Trade function had transferred back to the Department of Enterprise. Responsibility for policy files was currently being settled across government, following structural changes and the new Programme for Government.

The European Union is in the process of agreeing a 5-year Action Plan on Democracy and Human Rights. This plan outlines how the EU will engage with third party countries on a broad range of issues, including business and human rights. Ireland has supported the inclusion of commitments on Business and Human Rights. At the same time, the EU Justice Commissioner, Didier Reynders, has also proposed new EU changes to company law and corporate governance in the area of environmental and human rights due diligence. The HRU's understanding is that Commissioner Reynders will shortly commence a public consultation process. The HRU will update the Group when a timeframe is known. The UN Forum on Business and Human Rights will be held in November and **Mr. Cunningham** encouraged everyone to participate virtually noting that some information was now available on www.ohchr.org.

The Open Ended Inter-Governmental Working Group in transnational corporations will be held at the end of October. The EU is considering its approach to the session. As yet there is no common EU position on the legally binding instrument (LBI); several Member States, including Ireland, have asked the EU to engage more on this.

Ms. Fiona Crowley asked if it was proposed to revise the National Plan to include due diligence measures. She asked for clarity as to what was proposed in terms of a review and the options to extend the current plan or propose a new plan. She emphasised the need for the review to include a review of the mechanism for implementation and the transparency of the process. **Mr. Cunningham** committed to address these questions under the agenda item on the review.

Ms. Siobhán Curran said it was very welcome that Ireland had positioned itself within the EU to push greater engagement in the Treaty process. She noted that there were dual competency issues that meant that Ireland couldn't intervene in many areas but asked if Ireland could intervene on some specific areas that were not dual competencies e.g. could Ireland make a statement on human rights defenders or gender or show support for the treaty. **Mr. Cunningham** responded by noting that the EU Commission has indicated that it will make an overall statement on behalf of member states. The DFA is attempting to find a constructive way forward and is in the process of developing a position on the new draft. He noted that some member states wanted a process that was more aligned to the UNGPs and that many concerns had been raised about the deviation from the UNGPs in the LBI process. Any legally binding instrument should be aligned with the UNGP and inclusive of modern challenges. The EU had its first proper discussion last week so further analysis of the document is needed. He noted the complexity of the issue and said that Ireland would work closely with EU Member States in developing its approach further. The HRU had had preliminary discussions with the mission in Geneva last week. States are trying to find a constructive way forward.

6. Presentation by Ms. Rachel Widdis on draft Access to Remedy Review

The Chairperson introduced Ms. Widdis and highlighted the importance of members providing feedback on Ms. Widdis' draft report either at this meeting, in writing afterwards, or both.

Ms. Widdis echoed these sentiments and began her presentation by encouraging feedback from the implementation group and noting that this feedback would be incorporated into the next draft of the Report (copy of presentation slides at Appendix 1).

Ms. Widdis noted that there is no international legal regime for access to remedies and no human rights based causes of action. Claims tend to revert to civil or private law. Soft law mechanisms like the UNGP are not moving fast enough. They are supposed to be supported by legislation but this has, for the most part, not occurred. She highlighted that remedies should be accessible, affordable, adequate and timely.

Ms. Widdis proceeded to demonstrate the barriers to effective remedies that exist in general, and in Ireland, when it comes to businesses involvement with human rights abuses.

- Legal: No direct obligations placed on companies, separate legal entities/complicated corporate structure, inadequate law on corporate criminal liability,
- Procedural: Barriers to accessing information on corporate grouping, no provision for collective redress, language, geography, distance, intersectional discrimination, legal expertise
- Financial: High rate of legal costs, the loser pays rule, legal aid not being available for such claims or for multi-party litigation, lack of litigation insurance and the prohibition of third party funding for litigation (maintenance and champerty).

Ms. Widdis indicated that foreign direct litigation (FDL) or cross border litigation is legally, but not practically, possible in Ireland and that we could look to the UK for guidance as FDL has been successful there in recent years. She added that the Irish Law Reform Commission has recommended in 2005 and 2018 that the law around corporate criminal liability is in need of reform and the introduction of “failure to prevent” offences is advisable. Such offences already exist for corruption and bribery and contain a defence of adequate procedures. She also noted that EU mandatory due diligence legislation is coming in 2021.

She stated that the Irish Government had opposed a bill which would address cross-border access to remedy issues and instead referred the matter to Mr. Justice Peter Kelly who is tasked with a review of the administration of civil justice in Ireland. Ms. Widdis noted the persuasive precedence of the British courts and said her guess was that Irish judges would be similarly active in facilitating cases of this nature.

Ms. Widdis noted that remedies of these kinds of human rights abuses would primarily take the form of judicial remedies, but that non-judicial remedies are important too. In terms of non-judicial

remedies, **Ms. Widdis** advised that the National Plan on Business and Human Rights be revised to move towards a rights and obligations approach, rather than a focus on Corporate Social Responsibility. In her view, more mandatory language and a precise timeline is required. She also noted that the involvement of the Irish Human Rights and Equality Commission would be crucial to raising awareness about these kinds of claims and influencing related legislation or policy. She also encouraged more engagement from the OECD National Contact Point in order to maximise its impact (more on this in the Report).

Ms. Widdis compared Ireland and the UK and demonstrated the prominence of barriers to justice in Ireland. The UK, for example, allows collective actions and third party funding, has mandatory due diligence legislation and facilitates FDL style litigation. Ms. Widdis did note, however, that the UK Modern Slavery Act should not be taken as a model of good practice as it has been widely criticised.

Ms. Widdis concluded her presentation by offering some recommendations going forward, including fundamentally revising the National Plan on Business and Human Rights, making preparations for the proposed EU mandatory due diligence regulations, enhancing resourcing for the NCP and addressing barriers to justice in criminal and civil law.

Follow **Ms. Widdis'** presentation, the **Chair** opened the floor to questions.

Mr. Tomas Sercovich asked **Ms. Widdis** to elaborate on the critique of the UK's Modern Slavery Act – what were the major shortcomings. **Ms. Widdis** replied that the Act only applies to companies with turnover of over £36 million and companies are required to issue annual statements but not obliged to do so and are allowed to not issue a statement. There is no particular sanction or enforcement. It's not impactful and doesn't deliver what it was supposed to.

Ms. Jean O'Mahony of IHREC asked if **Ms. Widdis** could elaborate on the role of National Human Rights Institutions in other jurisdictions. She noted that the mandate of IHREC is to protect human rights within the Irish State and not outside it. **Ms. Widdis** responded that she hadn't particularly looked at the matter in her review but the focus of this study was the Irish NHRI because it has wide powers under statute and so, she did not look at the practice of NHRIs in other jurisdictions. She said that everything in her study concerned the protection of human rights within the State and was consistent with the strategic priorities of IHREC which she had obtained and reviewed. She said in her view there wouldn't be a problem with the fact that IHREC's remit related only to Ireland because

there would be “a cascade effect”. She noted that the IHREC could act as an amicus in cases and had the ability to produce shadow reports.

Ms. Mary O’Callaghan of the Civil Justice Unit of the Department of Justice said the Department would provide written feedback based on Mr. Justice Peter Kelly’s forthcoming review of the Administration of Civil Justice in the State which was due to be completed in the near future.

Ms. Maeve Costello noted that multiparty litigation was in fact possible in Ireland through test cases and that third parties with legitimate interests were permitted to sponsor cases. She asked how these existing measures could relate to human rights. **Ms. Widdis** stated that collective actions and test cases are not applicable because they don’t work and are heavily criticised. She asserted that there is a funding bar for these cases in Tort law. She stated that Ireland’s third party funding excludes the opportunities for investors to fund cases. She noted that companies such as Harbour Litigation Funding Ltd. in the UK use hard-edged commercial investment criteria; it is not a charity model. In regard to the FDL model we do not have the procedural mechanisms here. Representative actions are not applicable here as they have been widely criticised as not being appropriate for these kinds of human rights abuses, and because there is no legal aid available for them.

Ms. Deborah Dignam welcomed the paper and said that colleagues would respond in writing in relation to the NCP aspects.

The **Chairperson** thanked **Ms. Widdis** for her presentation and consulted with her on timeframes. Ms. Widdis indicated that if feedback from stakeholders was received within the next 10 days (i.e. by Friday, 23 October 2020), she would need three further weeks to incorporate it into her draft document. The Chairperson encouraged stakeholders to communicate with Ms. Widdis, copying the HRU, and suggested that subgroup 3 might convene again to consider the report. It was noted that subgroup 3 is scheduled to meet on 1 December.

7. Looking Towards Review

Mr. Cunningham said he wished to speak on the review and in so doing to respond to the questions raised by Ms. Crowley under item 5.

He noted that the Programme for Government contains a commitment to review the National Plan by the end of the year. He noted that there had been progress made on access to remedy and the toolkit but much of the rest of the work is ongoing. He said the HRU had an open-mind about the form the review would take – it could be taken forward by the HRU in consultation with the Implementation Group or it could be done by an external consultant. The HRU would be guided by the voices around the table at the Implementation Group.

He said that the HRU was currently engaging with Departments and noted it had previously been proposed to incorporate a BHR dimension into the Civil Society Forum in January.

Ms. Siobhan Curran said that a new plan is needed with clear lines of responsibility and timelines. She also noted that it was important to look forward and not focus too much on the review. She pointed out that there was a lot of work done that could be incorporated into a new Plan including the baseline report, the review by Ms. Widdis, the proposals coming from the EU on due diligence, and the work done in countries such as France.

She said that the positive aspects of the work of the Implementation Group should be retained and that work should continue on implementation.

Mr. Simon McKeever noted that there is an opportunity for Ireland to establish a competitive advantage as our current FDI model is coming under increased pressure. High performance in sustainability could be a way to set ourselves apart in the future. He said it was important that the Department now works with the Implementation Group as an engine room, noting that communication had been particularly good of late.

Mr. Tomas Sercovich reiterated that raising awareness is critical and that it was important to engage with the political system to gauge the level of ambition. He said more business voices were needed to provide concrete experiences of how issues were identified and overcome. There needed to be an opportunity for businesses to help one another. **Ms. Mairead Keigher** added that a new plan needed practical detail for how awareness raising will happen.

Ms. Fiona Crowley agreed that a new plan is needed and that the current plan is already limited. She noted that there needed to be a critical look at the efficacy of the group and it would be difficult for the Implementation Group to do that. She said that the Access to Remedy report had a much wider

scope that she had expected. It would be a wasted opportunity not to work on a new plan that would be time-bound. She said that all the expertise required was not at the table and that there was a contrast in the dynamism of different subgroups. Subgroup 1 had been particularly inactive.

Ms. Lydia Rogers of Enterprise Ireland added that awareness is key and regard needs to be had for the different levels of capacity of large companies and SMEs.

Mr. Cunningham added that this Group's feedback is helpful and agreed that the review should aim to learn lessons for next plan, including focus on awareness raising. He said that existing commitments would not be jettisoned. He noted the changing context for business and the need for balance. He said it was important that a Review was owned by the Implementation Group who would sign off at the end of the document.

Mr. Conor O'Neill of Christian Aid added that it would be helpful for an update on the institutional home for business and human rights within government. **Mr. Cunningham** responded that this is a work in progress at the moment and the HRU would be happy to give updates to the Group by email.

8. AOB

Mr. Joyce's question on institutional home of the EU due diligence regulation was answered under item 5.

9. Concluding Remarks

The Chair concluded by reviewing the progress made in the Meeting:

- With regard to the toolkit, a group is now in place to move that forward.
- On the Access to Remedies report, the Chair urged group members to provide their feedback to Ms. Widdis no later than Friday, 23 October.
- The Chair also proposed convening a meeting in December. It was agreed that the next meeting will take place at 10 am on Tuesday, 8 December. The Chair asked the HRU to issue notification to the group as soon as possible.

The Chair thanked everyone for their presence and drew the meeting to a close.

Ends.



Rights compatible remedies

ACCESSIBLE
AFFORDABLE
ADEQUATE
TIMELY

ADDITIONAL BARRIERS

VICTIMS OVERSEAS
WOMEN
CHILDREN
MARGINALISED GROUPS

Structural Barriers to Remedy ++ for women ++ cross border

Systemic Legal

Corporate Law

No Direct Obligations

Risk of Denial of Justice

Provision in criminal law

Barriers in civil law

- Corporate structures
- Jurisdiction
- Applicable law

Procedural / Other

National civil procedure

Collective redress

Governance gaps

Language, distance

Rule of law, conflict

Legal expertise

Information

Technical expertise

Cross Border litigation

Financial

High Costs

Loser pays

Legal Aid

CFA

Third party funding

Protective Order / ATE insurance

Supports for cross border litigation

Barriers to Remedy in Ireland



Civil Law

Fundamentals for cross border litigation absent

No collective redress / MPA / other

No legal aid

No third party funding

Constitutional right to access courts?

ILRC 2003, 2005...MPA Bill 2017...

Submissions 2015 IHREC.. FLAC...

Irish Supreme Court

Criminal Law

'Reform of [corporate liability] is long awaited'

Design of offences

ILRC 2005.. 2018...

Fundamental changes

Legal expertise

Enforcement

+ Burden on victims

Right to Remedy

Denial of Access to Justice

Obligations v Action

Disconnect with Narrative

EU Legislative initiative 2021

Evident support for intervention

Time to move

Non Judicial Remedies



Enable suite of supports

NAP

Step change required BHR →

Directional and Unifying Force

Focus on remedy

Firm Messaging

Concrete time defined actions

Include recommendations in NAP

IHREC

Impact of Business on Rights

Role

Capability to influence
legislation, policy, practice

Positive force in engagement

NCP

Structure & Resource amplifying

Visibility

Promoting Best Practice

Facilitating remedy

Judicial Remedies



Civil Remedy

- FDL litigation increasing
- 20+ years settled law in UK
- Game changing *Vedanta*
- Persuasive precedent
- Proposals to change Brussels I & Rome II to facilitate remedy
- Render remedy feasible Ireland

Criminal Law

- LRC Proposals 2018 +
- Failure to Prevent + defence**
- Success models Ireland + UK
- Arguably more effective
- Economic crimes only?
- Extend to Rights Abuses**
- favour public prosecution

Mandatory Due Diligence

- Voluntary means insufficient
- Manifest support for intervention
- EU initiative 2021
- Successful French model 2017..**
- Proposals in a dozen EU countries
- Link to civil and criminal remedies
- Extraterritorial reach

Remedy - Comparative Scorecard

UK



- | | |
|----------------------------------|------------|
| ▶ Collective Actions | Yes (GLDs) |
| ▶ Third party funding | Yes (1967) |
| ▶ Modern Slavery* | Yes 2015 |
| ▶ Failure to Prevent | Yes (2010) |
| ▶ FDL style litigation | Yes (1998) |
| ▶ FDL litigation feasible | Yes |
| ▶ Judicial support | Yes |
| ▶ EJ Recommendations | Yes |
| ▶ Constitution | No |

* extensively critiqued

Ireland



- | | |
|-----------------------------------|------------|
| ▶ Collective Actions | No |
| ▶ Third party funding | No |
| ▶ Modern Slavery | No |
| ▶ Failure to Prevent | Yes (2018) |
| ▶ FDL style litigation | No |
| ▶ FDL litigation feasible* | No |
| ▶ Judicial Support | ? |
| ▶ EJ Recommendations | No |
| ▶ Constitution | Yes |

* substantively Yes, practically No

REMEDY

Adopt and Adapt
Successful Models



- FUNDAMENTALLY REVISE NAP
- FUND AND RESOURCE NCP
- AMPLIFY ROLE OF NHRI
- SWITCH JUDICIAL REMEDY ON
 1. Reduce barriers in civil law
 2. Introduce criminal sanction
 3. Address barriers cross border
 4. Address barriers for women
- SUCCESSFUL MANDATORY HRDD MODELS

Comments

Thank you

RACHEL WIDDIS