

Submission to DFA consultation for Ireland's Second National Plan on Business and Human Rights (2024- 2027)

Dr. Ciara Hackett * and Dr. Marisa McVey**
School of Law, Queen's University Belfast



**QUEEN'S
UNIVERSITY
BELFAST**

*Ciara Hackett (c.hackett@qub.ac.uk) is a Senior Lecturer in the School of Law, Queen's University Belfast

**Marisa McVey (m.mcvey@qub.ac.uk) is a Lecturer in the School of Law, Queen's University Belfast.

Both Drs Hackett and McVey are members of the Business and Human Rights Research Group at Queen's University Belfast. Special thanks to Dr. Ciaran O'Kelly (also School of Law, QUB) who advised on the Northern Ireland economy/legacy of the Troubles, and on the implications of EU Conflict Minerals Directive.

1. Introduction	3
2. Overall recommendations	4
3. Implementation and monitoring	7
3.1. Participation and membership of the monitoring body	7
3.2. Implementation and monitoring	9
3.3. Meetings of the monitoring body	12
4. Legal environment and legislative developments	13
4.1 Themes	14
4.2 Legal and Legislative Developments	17
5. Selected Issues for consideration	19
5.1 BHR as a cross border issue	19
5.2 Modern Slavery	22
5.3 Remedy	23
5.3.1. Foreign Direct Liability issues	24
5.3.2 The National Contact Point	26
5.3.3 Historical Human Rights Impacts	27
5.3.4 Education	29
6. Conclusion	29

1. Introduction

National Action Plans on business and human rights (NAPs) now form a key part of the 'smart mix' envisioned by the UN Guiding Principles on Business and Human Rights (UNGPs) to ensure corporate responsibility for human rights abuses.¹ The UN Working Group on Business and Human Rights (UNWG) has strongly encouraged all states to develop, enact, and update NAPs.² NAP processes should be iterative and adaptable and, as such, we welcome the DFA's proposal for a second updated Plan.

As an open economy, Ireland is home to extensive commercial activities by both foreign and domestic multinational companies, in addition to micro and SMEs.³ Since the publication of Ireland's first National Plan, the trajectory of business and human rights (BHR) regulation has changed significantly; with an emphasis on mandatory human rights due diligence (mHRDD), and greater recognition of climate-related human rights impacts of corporations, alongside heightened discussions of an international binding treaty on business and human rights. At the same time, Ireland faces challenges regarding biodiversity collapse,⁴ modern slavery,⁵ and Irish companies'

¹UNGPs Commentary to Principle 3.

² UNWG <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>

³ Central Statistics Office, 'Business in Ireland 2020' <<https://www.cso.ie/en/releasesandpublications/ep/p-bii/businessinireland2020/multinationalsanirishperspective/>> (accessed 22 August 2023).

⁴ Biodiversity Working Group, 'Interim Review of the Implementation of the National Biodiversity Action Plan 2017-2021' <https://www.npws.ie/sites/default/files/publications/pdf/Interim%20Review%20of%20the%20Implementation%20of%20the%20National%20Biodiversity%20Action%20Plan%202017%20-%202021%20.pdf> (accessed 22 August 2023).

⁵ Felicity Lawrence and Ella McSweeney, 'UN experts condemn Ireland's migrant fishing workers scheme' (2019) *The Guardian* <https://www.theguardian.com/world/2019/feb/19/un-experts-condemn-irelands-migrant-fishing-workers-scheme> (accessed 22 August 2023).

involvement in human rights abuses in other parts of the world.⁶ The second National Plan must be able to adequately adapt to address these challenges.

In writing this response, we would urge the government to take into consideration the criticisms levied at NAPs generally to this point. There is no doubt that publishing and committing to a NAP is a positive advancement of BHR standards; yet, NAPs to date tend to be vague and non-committal. We encourage the Irish NAP to focus less on past actions, and more on future commitments (with a concrete action plan to realise those commitments within the time frame of the NAP).⁷ With that in mind, this response outlines key areas for enhancement related to the monitoring body, the current legal environment and legislative developments (domestically, regionally and internationally), business and human rights as a cross-border issue, access to remedy and education.

2. Overall recommendations

For ease of access, we have included our recommendations here. These are further unpacked in the particular sections outlined throughout the document.

1. Any future monitoring body of the second NAP should have a transparent and robust selection process to identify suitable candidates, focussing on those most at risk of

⁶ Irish Coalition for Business and Human Rights, 'Make it Your Business: How Ireland can ensure businesses respect human rights and the environment' (2020) https://www.trocaire.org/wp-content/uploads/2021/10/Make_it_your_Business-FINAL.pdf?type=policy (accessed 22 Aug 2023).

⁷ ICAR, ECCJ, Dejusticia, 'Assessment of Existing National Action Plans (NAPs) on Business and Human Rights' (2017) <<https://www.dejusticia.org/wp-content/uploads/2017/08/NAPAssessmentAug2017FINAL.pdf>> (accessed 24 Aug 2023)

marginalisation, and reflecting the all-island nature of the business and human rights impacts.

2. In addition to the organisations involved in the monitoring body, the names and relevant expertise of the members selected should be published and made accessible. Changes or updates to the structure of the monitoring body should also be published accordingly.
3. Any stakeholder consultation convened in the development of the second NAP should require meaningful, useful and sustainable participation, with a focus on those most at risk of vulnerability or marginalisation.
4. The language in the NAP should be clear and unambiguous, and all implementation targets must be relevant, measurable and achievable and include clear responsibilities of the relevant entities, specific timeframes and indicators to evaluate success.
5. The second NAP must include a detailed framework for the monitoring of and reporting on NAP implementation. and empower an independent, adequately resourced body to monitor and oversee this implementation.
6. Any future monitoring body should also be able to amend the NAP so that it is able to best respond to particular policy issues that may arise throughout the life course of the mandate.
7. Meetings of the future monitoring body should be convened, recorded and published in a timely manner.
8. The second NAP must recognise that all businesses have human rights responsibilities and that BHR responsibilities should not necessarily be characterised towards large Anglo or American multinational corporations. Specifically, there should be adequate recognition of micro, small and medium enterprises and their role in the respecting of human rights.

9. The second NAP should ensure that Ireland develops their own positioning on mHRDD within their borders. We strongly encourage the NAP to recognise the importance of the state in fostering a dynamic HRDD environment with a wide range of stakeholder participation.
10. The second NAP must commit to transposing and implementing EU BHR regulations in a timely manner, ensuring that any gaps in regional initiatives are adequately addressed via national legislation.
11. The ongoing peculiarities created by the UK's departure from the EU, combined with Northern Ireland's relationship with the EU and Ireland as a result of the Windsor Agreement requires both recognition and consideration by the second NAP.
12. We recommend recognition of and focus on the potential of a holistic approach to BHR. This might include how it encapsulates ideas of participation, education, remedy and engagement within the BHR framework.
13. The second NAP needs an island wide approach to BHR. This involves advancing all-island issues, consultation on all-island issues and holistic participation on all-island issues.
14. Appropriate space should be made for the three human rights and equality Commissions and that they are utilised and adequately supported as a conduit for BHR issues on an all-island basis.
15. We recommend commitment on the continuation of benchmarking assessments (every 2-3 years) that is inclusive of an all-island perspective.
16. We recommend the development of a national policy (as a minimum) on Modern Slavery.
17. The second NAP should address and action the recommendations set out in the *Review of Remedy* (as developed by the first NAP).

18. Any action on remedy should include a focus on foreign direct liability.
19. Any human rights due diligence process and remedy mechanisms envisioned in the next NAP should have the capacity and expertise to provide the opportunity for redress for historical business and human rights abuse, centring rights holders as part of any remediation process.
20. This NAP should outline governmental investment in universities across Ireland to strengthen existing programmes and build capacity to become knowledge hubs for the advancement of business and human rights education.

3. Implementation and monitoring

The implementation group (IG) was a welcome part of the 2017-2021 National Plan. However, certain issues around meaningful participation, mandate and transparency remain, limiting the full potential of the group as a monitoring body. For BHR NAPs to be fully effective, they require *inter alia* an openness to participation of stakeholders in a non-hierarchical process, continuous feedback, reporting and monitoring, and revision and re-evaluation involving peer review.⁸

3.1. Participation and membership of the monitoring body

Guidance on the effectiveness of NAPs published by the Danish Institute for Human Rights and the ICAR and the UNWG both emphasise the role of stakeholder involvement throughout a NAP process.⁹ Academic research has also highlighted the need for meaningful participation of those

⁸ Claire Methven O'Brien, John Ferguson and Marisa McVey, 'National Action Plans on Business and Human Rights: An Experimentalist Governance Analysis' (2021) 23 *Human Rights Review* 71.

⁹ Danish Institute for Human Rights and ICAR, 'National Action Plans on Business and Human Rights Toolkit: 2017 Edition' (2017) <<https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>> (accessed 22 August 2023); UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (2016) <<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> (accessed 22 August 2023).

affected groups, both in the NAP process and more widely when tackling business and human rights issues.¹⁰ Wherever possible, persons impacted by business-related human rights harm, or actors legitimately representing their views, should be able to participate in the process.¹¹ This requirement has been further developed in the most recent (fourth) revised draft of the legally binding instrument on BHR, where State Parties must, when adopting appropriate BHR measures ‘promote the active and meaningful participation’ of individuals and groups, such as trade unions, civil society, NHRIs, NGOs and community-based organisation in the development and implementation of policies to prevent corporate human rights abuse.¹² The Terms of References of any future monitoring body should reflect this requirement for meaningful participation from affected stakeholders. In practice this could be done via a stakeholder mapping exercise,¹³ where the focus should be on those who are from or representing communities at heightened risk of vulnerability and marginalisation, such as women, children, persons with disabilities, older persons, those from the LGBTQIA+ community, migrants, and refugees.¹⁴ BHR expertise drawn from civil society, NGOs and academia should also be considered. Given that BHR impacts are

¹⁰ Claire Methven O’Brien, John Ferguson and Marisa McVey, ‘National Action Plans on Business and Human Rights: an Experimentalist Governance Analysis’ (2021) 23 *Human Rights Review* 71; Humberto Cantú Rivera, ‘National Action Plans on Business and Human rights: Progress or Mirage?’ (2019) 4(2) *Business and Human Rights Journal* 213. Tara J. Melish, ‘Putting ‘Human Rights’ Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights, in Rodriguez-Garavito, C. (ed), *Business and Human Rights: Beyond the Beginning* (Cambridge University Press, 2017);

¹¹ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (2016) <<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> (accessed 22 Aug 2023).

¹² Article 6.2(d), Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (July 2023) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>> (accessed 4 Sept 2023)

¹³ Danish Institute for Human Rights and ICAR, ‘National Action Plans on Business and Human Rights Toolkit: 2017 Edition’ (2017) <<https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>> (accessed 22 Aug 2023).

¹⁴ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (2016) <<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> (accessed 22 Aug 2023).

not constrained by borders, an all-island approach should be taken in the selection of candidates (see Section 5.1 below). Going forward, **any future monitoring body of the second NAP therefore requires a transparent and robust selection process to identify suitable candidates, with a focus on those who are most at risk of marginalisation, and reflecting the all-island nature of the business and human rights impacts. In addition to the organisations involved in the monitoring body, the names and relevant expertise of the members selected should be published and made accessible. Changes or updates to the structure of the monitoring body should also be published accordingly.**

3.2. Implementation and monitoring

As highlighted by the UNWG, governments must ensure that NAP measures are specific, measurable, and achievable. This means that for every planned activity of NAP implementation, there must be a clarification of the modality of this implementation, including clear responsibilities of the relevant entities, a timeframe and indicators to evaluate success.¹⁵ Echoing the assessments of NAPs in general by ICAR, ECCJ and Dejusticia, and the Human Rights Unit's (HRU) review of the Irish NAP, we note that the future action points set out in the first Irish NAP were vague, using language that often lacked specificity or concrete steps. This makes it extremely difficult for a monitoring body to effectively monitor NAP progress. For example, Section 3 of the 2017-2021 NAP on key commitments for policy coherence states that the government will 'ensure coherence' between the Plan and various other areas of government priorities, without detailing what this coherence might look like.¹⁶ Many of the 'key commitments' were also scheduled concurrently

¹⁵ Ibid, 12.

¹⁶ Department of Foreign Affairs, 'National Plan on Business and Human Rights 2017-2020' (2016), 16-17 <<https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>> accessed 4 September 2023.

with the publication of the NAP. In addition, while the NAP outlines actions and responsible government departments to a certain extent, no indicators are provided to evaluate the success of each action.¹⁷ Other additional and ongoing actions in the NAP have neither a timeframe nor evaluative indicator.¹⁸ **We would urge that language in any future NAP be clear and unambiguous, and that all implementation targets are relevant, measurable and achievable, and include clear responsibilities of the relevant entities, specific timeframes and indicators to evaluate success.**

In addition to clear language and measurable goals, effective NAPs require a monitoring mechanism, with a framework for the monitoring of and reporting on implementation.¹⁹ While the creation of the IG for the first National Plan is welcome, we would stress that any monitoring body for a future NAP should be strengthened to include clear, robust, and timely monitoring mechanisms. We note and would agree with the sentiments expressed in the review of the first National Plan by the HRU, which suggest that the IG ‘operated like a consultative forum rather than an implementation group in the traditional sense.’²⁰ Consultation and engagement is no doubt an important facet of the NAP process, however at its core the monitoring body should be one that can coherently oversee NAP implementation. Current best practice on BHR NAPs suggest the monitoring body could be tasked with the compilation and publication of annual reviews of the

¹⁷ Ibid.

¹⁸ Ibid, 21.

¹⁹ Danish Institute for Human Rights and ICAR, ‘National Action Plans on Business and Human Rights Toolkit: 2017 Edition’ (2017) <<https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>> (accessed 22 August 2023).

²⁰ Human Rights Unit, ‘Review of implementation of National Plan on Business and Human Rights 2017-2020’ (2021) Department of Foreign Affairs, 41 <<https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf>> (accessed 4 September 2023).

NAP, rather than only a final evaluation after the NAP period is ended.²¹ In addition, it is crucial that adequate human and financial resources are allocated to any body monitoring and reviewing the NAPs implementation.²² At the time of writing, no government that has developed a BHR NAP has published a budget allocated for the implementation of the NAP. Providing adequate resources to the monitoring body would therefore demonstrate the Irish Government's commitment to business and human rights and the NAP process. **As such, we recommend that any future iteration of the Irish NAP must include a detailed framework for the monitoring of and reporting on NAP implementation. and empower an independent, adequately resourced body to monitor and oversee this implementation.**

While we agree with the HRU's assessment that time-limited implementation targets are necessary for NAP effectiveness,²³ we would caution against moving away from the idea that the NAP is a 'living document'. Ensuring corporate accountability for human rights is not only a holistic endeavour, but it is one where policy and regulatory developments change rapidly, as evidenced in Section 4 below. Since the last NAP, there has been growing consensus around corporate impact on the environment and role in climate destruction as a human rights issue.²⁴ An enhancement of

²¹ ICAR, ECCJ, Dejusticia, 'Assessment of Existing National Action Plans (NAPs) on Business and Human Rights' (2017) <<https://www.dejusticia.org/wp-content/uploads/2017/08/NAPAssessmentAug2017FINAL.pdf>> accessed 24 Aug 2023.

²² Danish Institute for Human Rights and ICAR, 'National Action Plans on Business and Human Rights Toolkit: 2017 Edition' (2017) <<https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>> accessed 22 Aug 2023.

²³ Human Rights Unit, 'Review of implementation of National Plan on Business and Human Rights 2017-2020' (2021) Department of Foreign Affairs, 36 <<https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf>> accessed 4 September 2023.

²⁴ Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 *Business and Human Rights Journal* 93, 108–9; Annalisa Savaresi, Marisa McVey and Claire Methven O'Brien, 'Corporate accountability for climate-change related human rights abuses: What role for a UN business and human rights treaty?', in Ricardo Periera, Lee McConnell and Annalisa Savaresi (eds) *Business, Human Rights and Natural Resource Governance* (Hart, forthcoming 2024).

the monitoring body's scope will strike the necessary balance between monitoring the implementation of existing NAP commitments and ensuring that the commitments reflect and adequately respond to relevant BHR developments. **We would therefore recommend that any future monitoring body should also be able to amend the NAP so that it is able to best respond to particular policy issues that may arise throughout the course of the mandate.**

3.3. Meetings of the monitoring body

We note that while there were at least three meetings of the IG in 2019 and 2020, only one meeting has been recorded for early 2021 and published online. Given that the HRU review of the first National Plan suggests two more meetings took place during 2021,²⁵ the lack of public evidence for these meetings may just be an administrative error. Nevertheless, we would urge that there are adequate resources in place to ensure that these meetings are able to proceed and are evidenced accordingly, not simply during the NAP review process. Meetings should be minuted and proposed actions published. Given the time elapsed between the previous mandate of the IG and the consultation for the second NAP, plans should be put in place to allow for an extension of the monitoring body mandate in the case of such delays. We also note, for example, the detail in the Terms of Reference for the Women, Peace and Security NAP regarding its Working Methods, and recommend that this approach is taken forward for any monitoring body for the second iteration of the BHR NAP.²⁶ **To ensure transparency of and adequate oversight of the NAP**

²⁵ Human Rights Unit, 'Review of implementation of National Plan on Business and Human Rights 2017-2020' (2021) Department of Foreign Affairs, 41 <<https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf>> (accessed 4 September 2023).

²⁶ Department of Foreign Affairs, 'Oversight Group on Ireland's third National Action Plan on Women, Peace and Security 2019 – 2024 Terms of Reference' (2019) <<https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/Terms-of-Reference.pdf>> (accessed 25 Aug 2023).

implementation, meetings of the future monitoring body should be convened, recorded and published in a timely manner.

4. Legal environment and legislative developments

Business and Human Rights is typically orientated towards large global firms. This should not be the case. True, there are huge global firms that have whole departments committed to BHR issues, ESG and due diligence. It is also true that many global firms have a European base in Ireland (and that some industries, particularly tech and finance, have seen an explosion of large firms based in Ireland since the UK exited EU).²⁷ But, the nature of BHR is that it applies to *all* business operations. As such, those businesses from the micro, small and medium size enterprises are also

²⁷ It is also important to note the complexity of corporate groups. We believe that this is a limitation within the field of BHR generally (and not just within NAPs or indeed the NAP process in Ireland). Corporations are complex technologies in themselves. Corporate groups build intricate organisational webs across parent companies, subsidiaries, sub-contractors and so on both within a particular country (in this case the UK) and beyond. Further, with the body of summary case law that has emerged now since *Vedanta and Okpabi* liabilities for BHR/ESG type issues extend beyond the particular company back to the parent within a corporate grouping (depending on the level of operational engagement and interaction with policies etc.) For *Vedanta* see, *Lungowe v Vedanta Resources plc* [2019] UKSC 20. For more, Samantha Hopkins, 'Vedanta Resources plc and another v Lungowe and others' (2019) 70 (3) Northern Ireland Legal Quarterly. Also, Hogan Lovells 'The implications of the UK Supreme Court's Decision in *Vedanta* for the Management of Human Rights Risk in Overseas Operations and Supply Chains *Oxford Business Law Blog* (May 2019) < <https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/implications-uk-supreme-courts-decision-vedanta-management-human>> (accessed 3 Sept 2023). For *Okpabi*, see *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC; S Hopkins, C O'Kelly, C Hackett & C Patton, *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC *Case Comment* (2021) 72 (1) Northern Ireland Legal Quarterly 148-159. There has been a move to holding parents liable for the actions of subsidiaries within climate change cases also. Albeit not (yet) as far reaching in Ireland as in other jurisdictions (see for example: *Milieudefensie et. al v Royal Dutch Shell* (2021) C/09/571932 HA ZA 19-379 (English judgment) (Netherlands) & *TotalEnergies v 14 NGOs* (2021) N°RG 20/00915 - Portalis N° DB3R-W0B7E-VQFM (France)) some guidance exists. Some forthcoming cases in the UK may also inform. For example, *Client Earth v Financial Conduct Authority* (Ithaca Energy plc Listing on London Stock Exchange) [2023] is awaiting High Court permission for trial to proceed. Beyond case law, guidance from non-judicial state bodies also informs. See for example, the failed Specific Instance to the UK National Contact Point under the OECD Guidelines for Multinational Enterprises filed by Global Witness against UK Export Finance (2020). For an excellent academic overview of climate change litigation, see Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 Business and Human Rights Journal 93, 108-9; Chiara Macchi and Josephine van Zeven, 'Business and Human Rights Implications of Climate Change Litigation: *Milieudefensie et al. v Royal Dutch Shell*' (2021) 30 Review of European, Comparative & International Environmental Law 409.

captured by their responsibilities to and for human rights. Smaller scale enterprises tend to be “subordinate to the global firms and supply chains upon which the focus of business and human rights typically lies. They are subjects, not initiators of BHR policies and are likely to encounter BHR as a form of contractual governance through supplier audit functions etc.”²⁸ **We strongly recommend that the second NAP ensures that all business voices have adequate opportunities for participation and engagement. Further we would strongly encourage the NAP to continuously monitor its own language, policy and recommendations to ensure that they apply to all business enterprises. It is crucial that the second NAP recognises that all businesses have human rights responsibilities and that BHR responsibilities should not necessarily be characterised towards large Anglo or American multinational corporations.**

4.1 Themes

Thematically, and currently, mandatory Human Rights Due Diligence (mHRDD) shapes the legal and regulatory BHR space. Due diligence requires relevant bodies to exercise reasonable care to ensure that their (or their subsidiaries/sub-contractors and so on) activity will not lead to a negative human rights impact. HRDD exists at an institutional,²⁹ national,³⁰ sectoral³¹ and institutionalised

²⁸ O’Kelly, Hackett, Hopkins and Patton (2023 (in press)) ‘Covid 19 as a lens to investigate local approaches to Business and Human Rights: The case of Northern Ireland’ Northern Ireland Legal Quarterly. See also: Doreen McBarnet and Marina Kurkchyan, ‘Corporate Social Responsibility Through Contractual Control? Global Supply Chains and “Other-Regulation”’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007); also Kateřina Mitkidis, Sonja Perkovic and Panagiotis Mitkidis, ‘Tendencies in Contractual Governance to Promote Human and Labour Rights in Transnational Supply Chains’ (2019) 23 *Competition & Change* 397.

²⁹ E.g. UNGPs, OECD Guidelines for Responsible Business Conduct, OECD Due Diligence Guidance for Responsible Business Conduct; (<https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>); Proposed EU Corporate Sustainability Due Diligence Directive

³⁰ Dodd-Frank Act (2010)

³¹ Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas 2017 (OJ L2017/130); Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains

multistakeholder level.³² As far as possible, the ‘regulation’ of the due diligence space involves directing, influencing, or shaping corporate engagement within human rights. mHRDD has been described as an ‘open ended standard’.³³ This means that businesses are reliant on interpretations of mHRDD within a particular industry, field, and, importantly for this consultation, region. This also connects with the point we made in the introduction to this subsection (4). Some organisations will require greater guidance than others on the scope of due diligence. There is also a need to reinforce the value of due diligence as a means of exercising those responsibilities to and respect for human rights. For example, Macchi noted (in the context of climate change litigation) that some large corporations viewed mHRDD as simply a business process. Responses to litigation focus on risk mitigation and integration. This is something that can also be evident within company responses to NCP specific instances also.³⁴ This is not unexpected. The fracturing of business and business processes (particularly within larger corporate structures and complex groups) means that not all impacts can be anticipated and addressed. As well as this, the flexibility around mHRDD within the UNGPs means that mHRDD can be very wide and all encompassing, whilst at the same time lacking in clarity. How businesses identify which impacts and when, helps us to see whether they value the respecting of human rights or if it is simply another policy to be interpreted and a procedure to be applied. More sectoral or localised approaches to HRDD could

³² Child Labour Act (2019) (Netherlands)

³³ Chiara Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of “Climate Due Diligence”’ (2021) 6 Business and Human Rights Journal 93, 117

³⁴ Ciara Hackett and Ciaran O’Kelly ‘Can National Contact Points adequately remedy human rights impacts or do their roots as a CSR initiative transform remedy and human rights into corporate processes?’, *Nova Centre on Business, Human Rights and the Environment Blog*, (12th November 2021). <<https://novabhre.novalaw.unl.pt/can-national-contact-points-adequately-remedy-human-rights-impacts-or-do-their-roots-as-a-csr-initiative-transform-remedy-and-human-rights-into-corporate-processes/>> (accessed 7 Sept 2023). We would argue that in company responses made to National Contact Points under the OECD, similar themes emerge. We have looked at the complaints made to the UK National Contact Point. We remark that the NCP process reinforces a broader shift whereby human rights are assimilated into business governance discourses of procedure, or due diligence and of risk. This can be evidenced for example in *IAC & WDM v GCM Resources plc* (2012)

be more effective than what Marshall and Nolan term ‘cross sectoral approaches.’³⁵ The wider scope of mHRDD that originates within the UNGPs shows a difficulty in drafting meaningful requirements; a greater likelihood of tick the box type activities; difficulty in monitoring and tracking implementation of effectiveness and may also lead to a reliance on social audits.³⁶ We wholeheartedly agree with Nolan and Marshall that this is not ideal - HRDD needs to be more transformative than this.³⁷ Therefore, **the second NAP should ensure that Ireland develops their own positioning on mHRDD within their borders. This will help guide businesses on what impacts are important and when. It ensures that this particular tool in the protection of human rights of the most vulnerable in our society keeps the pressure on some of the most powerful actors in our society. We recommend that the second NAP consider the pivotal importance of stakeholder engagement and participation on HRDD. By this we recommend going beyond consultation to true participation. We strongly encourage the NAP to recognise the importance of the state in fostering a dynamic HRDD environment with a wide range of stakeholder participation.**³⁸

4.2 Legal and Legislative Developments

There have been significant changes in the BHR legal and regulatory landscape since the last NAP. Internationally, the big change lies in the 2023 update of the OECD Guidelines. This edition

³⁵ Shelley Marshall and Justine Nolan, The promise of sectoral human rights due diligence, in Claire Methven O’Brien and Larry Cata Backer (eds) *New Legal Norms on Human Rights Due Diligence* 2024 Routledge

³⁶ Ibid.

³⁷ Ibid.

³⁸ This could take many forms. See for example the Marshall and Nolan reference (supra fn 36) which considers a role for state in funding HRDD initiatives (Dutch multilateral approach), the state as a supervisory authority (the proposed EU CSDDD), an investment in resources to assist supply chain due diligence (similar to the Uyghur Forced Labor Prevention Act (US) (2021). Another, albeit more extreme suggestion, is for the state to mandate stakeholder engagement and participation.

renames the Guidelines – now the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct – and offers more guidance on due diligence, continuous learning around remediation and on the need to protect vulnerable groups (Human Rights Defenders etc).³⁹ This is a view that seems to be echoed and extended in the negotiations around a Treaty on Business and Human Rights, particularly apparent in the fourth draft text of the proposed binding instrument published in July 2023.⁴⁰ This coincides with the proposed EU Corporate Sustainability Due Diligence Directive (CSDDD) (discussed more fully below). The prospect of this directive suggests that there may be more active participation by the EU in Treaty Negotiations going forward.⁴¹ This would be a marked departure from the position with previous drafts of the proposed binding instrument and could lead to significant ramifications for national approaches to BHR.

From a regional perspective therefore, momentum for business and human rights regulatory initiatives is growing, with States across Europe and beyond drafting and implementing national mHRDD measures. The second NAP should ensure the transposition and implementation of the not yet finalised EU corporate sustainability reporting directive, the proposed due diligence directive (CSDDD), and the proposed regulations on deforestation, batteries, sustainable products and forced labour when each comes into force, to ensure baseline harmonisation with other Member States. But it is imperative to also recognise that EU legislation represents a floor and not

³⁹ Organisation for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (OECD 2023)

⁴⁰ Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (July 2023)

<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf> (accessed 4 Sept 2023)

⁴¹ For more see, Karolin Seitz, 'After the EU Corporate Sustainability Directive is before the UN Treaty' *Global Policy Forum* (August 2023)

https://www.globalpolicy.org/sites/default/files/download/Briefing_0823_EU%20mandate%20negotiations_UN%20treaty.pdf (accessed 4 Sept 2023)

a ceiling on Member States' ability to hold corporations accountable.⁴² For example, ahead of the upcoming CSDD trilogue negotiations, there remains considerable concern that the final directive will exclude the finance sector from certain due diligence obligations or leave its inclusion up to Member States' discretion.⁴³ As such, **it is imperative that the second NAP commits to transposing and implementing EU BHR regulations in a timely manner, ensuring that any gaps in regional initiatives are adequately addressed via national legislation.**

The peculiarities created by the UK's departure from the EU, combined with Northern Ireland's relationship with the EU and Ireland as a result of the Windsor Agreement also requires both recognition and consideration by the second NAP. Whereas more detail on the specifics of cross border cooperation is discussed below in 5.1, we wanted to highlight an example of one of the outworkings of the Windsor Agreement. The EU's Conflict Minerals Regulation 2017/82 addresses trade in so-called conflict minerals: tin, tungsten, tantalum and gold (known as 3TG).⁴⁴ The Regulation requires EU-based importers of these minerals to ensure their minerals are sourced responsibly, with special attention paid to risks associated with the Democratic Republic

⁴² It is important too to recognise the limitations of national legislation (for example the French vigilance laws). See *NGOs v La Société Total Energies SE (2023) Jugement Rendu en Etate de Refere* N°RG 22/53942- N°352 J – W- B7G- CXB4M N°: 2/MC Here, the court argues it is not their role to refine what is meant by the vigilance law, or indeed what it is to be a vigilant corporate. The argument is that the concept is too new for the courts to direct on it but beyond that they seem to be implying it is for the stakeholders involved to reach consensus on what it means. **This underscores the importance of a clear NAP in providing clarity and points of reference to all stakeholders within BHR relationships.**

⁴³ The EU Parliament's CSDDD position includes the financial sector, in contrast to the Council's opinion which would make applicability to financial services the decision of Member States. The Commission's proposal acknowledges the role of the sector but limits the scope of financial institution's obligations. See Begum Kilimcioglu 'How does the Financial Sector Relate to the EC's Proposal for CSDDD?' 22 February 2023 *EJIL:Talk!* <<https://www.ejiltalk.org/how-does-the-financial-sector-relate-to-the-european-commissions-proposal-for-a-corporate-sustainability-due-diligence-directive/>> (accessed 4 September 2023). Note that at a neighbouring local level, the UK have recently had a consultation on the regulation of ESG rating providers which deals with some issues within the financial sector. This might be of interest and relevance to the Irish government if the CSDDD excludes the financial sector.

⁴⁴ <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821>> (accessed 5 September 2023). Noted thanks to Dr. Ciaran O'Kelly, QUB School of Law, for identifying this peculiarity.

of Congo or adjoining countries.⁴⁵ This EU regulation came into force *after* Brexit, so is not in force in Great Britain. Because Northern Ireland remains in the EU Single Market, the Regulation applies,⁴⁶ with the UK Foreign Office acting as the ‘competent authority’ for the purposes of the regulation. This example reinforces the need for the second NAP to consider the implications of a Northern Ireland within the EU single market (and a GB that sits outside it) and the relationship between Northern Ireland and Ireland on these BHR type issues.

Compounding all this however, is the idea that BHR is (or at least should be) ‘holistic’. It is more than just laws and compliance. Rather it is a way of thinking, a way of participating in societal and business relationships. **It is important that this NAP recognises the potential of a holistic approach to BHR. This might include how it encapsulates ideas of participation, education, remedy and engagement within the BHR framework.**

5. Selected Issues for consideration

5.1 BHR as a cross border issue

The geographical landscape of Ireland/Northern Ireland necessitates recognition of the existence of the border, and the BHR issues that can occur because of and beyond said border. Until relatively recently the border has been something of a regulatory barrier. Whereas there has always been a unique relationship between Northern Ireland and Ireland, this has been compounded and

⁴⁵ Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas 2017 (OJ L2017/130).

⁴⁶ Under the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020; Chiara Macchi, ‘A Glass Half Full: Critical Assessment of EU Regulation 2017/821 on Conflict Minerals’ (2021) 13 *Journal of Human Rights Practice* 270, 283.

extended by the implications and outworkings of Brexit and the Windsor Framework. Despite BHR governance within Northern Ireland being aligned with the rest of the UK,⁴⁷ the relationship between Northern Ireland and Ireland ensures it will not play out that way. For example, limited cooperation does already occur on cross border issues such as modern slavery but, at the same time the border is “a post-conflict conduit for human trafficking with a character all of its own.”⁴⁸ The legacy of the Troubles created networks and routes across the border to segue away from arms and associated smuggling into people trafficking.⁴⁹ Yet another legacy of the Troubles (on both sides of the border) lies within public health. The interplay of legacy and systemic ill health is worth noting. Rates of mental health concerns and addiction issues have in the past been attributed to the Troubles and intergenerational trauma. We believe that this is an issue for island-wide cooperation as an ongoing BHR concern.⁵⁰ **The development of the second NAP needs to incorporate an**

⁴⁷ Criminal Justice Inspection Northern Ireland; A consultation was completed in October 2022 with a view to introducing legislation. See Department of Justice, ‘Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking’ (Department of Justice 2022) <<https://www.justice-ni.gov.uk/consultations/consultation-measures-strengthen-response-modern-slavery-and-human-trafficking>> (accessed 18 Aug 2023).

⁴⁸ Ciaran O’Kelly, Ciara Hackett, Samantha Hopkins and Clare Patton (2023 (in press)) ‘Covid 19 as a lens to investigate local approaches to Business and Human Rights: The case of Northern Ireland’ Northern Ireland Legal Quarterly. See also, Paul Ainsworth, ‘Three People Screened in Armagh as Part of Human Trafficking Investigation’ *The Irish News* (Belfast, 15 June 2023) <https://www.irishnews.com/news/northernirelandnews/2023/06/15/news/three_people_screened_in_armagh_as_part_of_human_trafficking_investigation-3355473/> (accessed 18 Aug 2023).

⁴⁹ For instance, Henry McDonald and Rory Carroll, ‘How IRA and the Troubles “industrialised” People Smuggling in Ireland’ *The Guardian* (21 December 2020) <<https://www.theguardian.com/uk-news/2020/dec/21/how-ira-and-the-troubles-industrialised-people-smuggling-in-ireland>> (accessed 18 Aug 2023).

⁵⁰ Finola Ferry and others, ‘Traumatic Events and Their Relative PTSD Burden in Northern Ireland: A Consideration of the Impact of the “Troubles”’ (2014) 49 *Social Psychiatry and Psychiatric Epidemiology* 435; Siobhan O’Neill and others, ‘Patterns of Suicidal Ideation and Behavior in Northern Ireland and Associations with Conflict Related Trauma’ (2014) 9 *PLOS ONE* e91532; Margaret McLafferty and others, ‘Population Attributable Fractions of Psychopathology and Suicidal Behaviour Associated with Childhood Adversities in Northern Ireland’ (2018) 77 *Child Abuse & Neglect* 35. Montserrat Fargas-Malet and Karola Dillenburger, ‘Intergenerational Transmission of Conflict-Related Trauma in Northern Ireland: A Behavior Analytic Approach’ (2016) 25 *Journal of Aggression, Maltreatment & Trauma* 436; E Mark Cummings and others, ‘Examining Bidirectional Pathways Between Exposure to Political Violence and Adolescent Adjustment in Northern Ireland’ (2019) 48 *Journal of Clinical Child and Adolescent Psychology* 296. Brendan P Bunting and others, ‘Lifetime Prevalence of Mental Health Disorders and Delay in Treatment Following Initial Onset: Evidence from the Northern Ireland Study of Health and Stress’ (2012) 42 *Psychological Medicine* 1727, 1735; Healthcare Quality Improvement Partnership, ‘National Confidential Inquiry into Suicide and Safety in Mental Health: Annual Report: England, Northern Ireland, Scotland, Wales’ (2023) <<https://sites.manchester.ac.uk/ncish/reports/annual-report-2023/>> (accessed 20 Aug 2023).

island wide approach to BHR. This involves advancing all-island issues, consultation on all-island issues and holistic participation on all-island issues.

Regarding the advancement and harmonisation of all-island business and human rights issues, we highlight the mandate of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland under Article 2 of the Windsor Framework, and their joint work in conjunction with the Irish Human Rights and Equality Commission on the all-island dimensions of human rights and equalities after Brexit. This work has already highlighted substantive divergences in human rights and equalities between Britain and Northern Ireland and between Northern Ireland and the rest of the EU.⁵¹ The three Commissions could provide a platform for BHR action on an all-island basis, feeding into the monitoring body on key BHR areas that require further protection. Likewise, the Northern Ireland Business and Human Rights Forum, facilitated by the Northern Ireland Human Rights Commission, could also be used as a point of contact and consultation to further enhance cross-border and all-island corporate accountability.⁵² **With this in mind, we recommend that the next NAP makes appropriate space for the three human**

2023). Siobhan O'Neill and Rory C O'Connor, 'Suicide in Northern Ireland: Epidemiology, Risk Factors, and Prevention' (2020) 7 *The Lancet Psychiatry* 538; Margaret McLafferty and others, 'Suicidality and Profiles of Childhood Adversities, Conflict Related Trauma and Psychopathology in the Northern Ireland Population' (2016) 200 *Journal of Affective Disorders* 97; Rory C O'Connor and Siobhan M O'Neill, 'Mental Health and Suicide Risk in Northern Ireland: A Legacy of the Troubles?' (2015) 2 *The Lancet Psychiatry* 582.

We are also aware of Covid as a Public Health issue and also Infant Feeding Practice (which will feature in a response submitted by colleagues at Leeds and QUB).

⁵¹ See for example, ECNI, NIHRC and IHREC, 'European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland' (February 2023) <<https://www.ihrec.ie/app/uploads/2023/04/Commissions-Policy-Recommendations-Report-on-divergence-of-rights.pdf>> (accessed 4 Sept 2023).

⁵² Northern Ireland Human Rights Commission, 'NI Action Plan on Business and Human Rights - As committed to by the Northern Ireland Business and Human Rights Forum' (March 2019) <https://nihrc.org/uploads/general/Northern_Ireland_Action_Plan_on_Business_and_Human_Rights.pdf> accessed (4 Sept 2023).

rights and equality Commissions and that they are utilised and adequately supported as a conduit for BHR issues on an all-island basis.

We further note the recommendation by the HRU on the need for benchmarking studies, such as the study conducted by Trinity College Dublin, to be repeated every 2-3 years to assess the success of BHR policies in Ireland and to ensure Irish-domiciled businesses understand their responsibility to respect.⁵³ We would further highlight the ongoing work of academics at Queen's University Belfast in partnership with the Northern Ireland Human Rights Commission on an equivalent Northern Ireland-focused assessment.⁵⁴ **We recommend that the next iteration of the Irish NAP includes commitment on the continuation of these assessments that is inclusive of an all-island perspective.**

5.2 Modern Slavery

Modern Slavery and Supply Chain Management is a key feature of the BHR landscape. It has deserved focus within the UNGPs on Business and Human Rights, and indeed within the various due diligence spin offs from the OECD Guidelines for Responsible Business Conduct. Despite this, incidences of modern slavery persist. National legislation exists in various jurisdictions.⁵⁵ Whereas these are limited, and we have critiqued aspects of them elsewhere, nevertheless they demonstrate a national commitment to an issue that has underpinned the business and human rights

⁵³ Human Rights Unit, 'Review of implementation of National Plan on Business and Human Rights 2017-2020' (2021) Department of Foreign Affairs, 9. Human Rights Unit, 'Review of implementation of National Plan on Business and Human Rights 2017-2020' (2021) Department of Foreign Affairs, 36 <<https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf>> (accessed 4 September 2023).

⁵⁴ Marisa McVey, 'Benchmarking business and human rights in NI' (forthcoming) 2024.

⁵⁵ Modern Slavery Act (UK) 2015, Modern Slavery Act (Aus) 2018, Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff (the Act) (Canada) 2024 (forthcoming).

movement since its inception. This national commitment is not evident in the Irish context. We would argue that modern slavery is a key example of the importance of cross border cooperation on business and human rights issues. Whereas there is a commitment between the PSNI and the Gardaí on issues of sex trafficking; where, how and if this relates to slavery in the supply chain (beyond sex trafficking) is unclear.⁵⁶ We believe that the second NAP should consider the regional positioning on Modern Slavery. **We believe that it is imperative that a national policy (as a minimum) is developed on Modern Slavery. As is noted elsewhere in this response, there are several large global firms with a European base in Ireland. This number has increased since the UK's departure from the EU, particularly in areas of finance and tech. Beyond that, the existence of the land border between Northern Ireland and Ireland also requires a policy positioning that may extend beyond human trafficking to incorporate supply chains. We would also encourage a strong policy positioning on modern slavery within traditionally micro, small and medium enterprises. This includes factory workers, fisheries and farms. Within this, we would encourage particular consideration be given to those who are marginalised or vulnerable, or those at risk of being so.**

5.3 Remedy

As a field, BHR focuses on remedying the victim for the human rights impact that they have experienced. This is what distinguishes BHR from, say, CSR i.e. the redress of victims. Indeed, the previous NAP has made some headway in this area. The Irish NAP has been mentioned (and

⁵⁶ Joint Action Task Force (2015) - this was established under the Fresh Start Agreement to tackle cross jurisdictional organised crime. This does include human trafficking but it is unclear if it extends to other aspects of modern slavery. The value of this relationship was recently questioned by Catherine Murphy TD, in a written question to Minister for Justice Simon Harris, <<https://www.oireachtas.ie/en/debates/question/2023-05-03/277/>> (accessed 5 September 2023)

celebrated) for its commitment to investigating the state of remedy within its borders.⁵⁷ The *Review of Remedy* is a useful and worthy publication, and we commend the development of such work.⁵⁸ In addition, the legal advances in the areas of Mediation, and Anti-Corruption have indicated some commitment to improving the legal infrastructure.⁵⁹

Despite these advances, we would argue that NAPs generally have been too modest around remedy, especially given that this is a redeeming characteristic of the BHR movement and one which looks like being a main- if not central- feature of any potential binding instrument. We would argue that the second NAP needs to prioritise Remedy and Access to Remedy. In so doing, we would recommend that particular reference be paid to vulnerable and marginalised groups. **We recommend that as a minimum the second NAP addresses the recommendations set out in the Review of Remedy.**⁶⁰ These are comprehensive and, we believe, worth pursuing. We have identified some specific areas of concern below. These are not exhaustive.

5.3.1. Foreign Direct Liability issues

Since the last NAP, there have been huge developments on foreign direct liability for human rights impacts in another jurisdiction. Traditionally NAPs have avoided making concrete commitments

⁵⁷ Radu Mares, "Liability within corporate groups: parent companies' accountability for subsidiary human rights abuses" in Surya Deva and David Birchall (eds) *Research Handbook on Business and Human Rights* (2020 Edward Elgar), 446, 460. (Along with the UK and Italian NAPs (both 2016))

⁵⁸ Rachel Widdis, (2020) *Review of Access to Remedy in Ireland* An Independent Report commissioned by the Department of Foreign Affairs under the auspices of the National Plan on Business and Human Rights 2017-2020

⁵⁹ Mediation Act (2017); Criminal Justice (Corruption Offences) 2018. Another noteworthy development is the establishment of the Advisory Council against Economic Crime and Corruption. This was set up in 2022 and whereas it is too soon to have a keen sense of its contribution, it is something that can perhaps be mirrored elsewhere in Ireland.

⁶⁰ Rachel Widdis, (2020) *Review of Access to Remedy in Ireland* An Independent Report commissioned by the Department of Foreign Affairs under the auspices of the National Plan on Business and Human Rights 2017-2020 p.48

on this issue.. However, with developments such as *Vedanta*,⁶¹ *Okpabi*⁶² and *Milieudefensie et al., v Shell*,⁶³ it is increasingly clear that the EU and the UK (and states within the EU) are the jurisdictions where these issues are increasingly being unpacked, understood and championed. Due to the nature of these types of actions (as a measure of last resort, with many cases settling rather than going to court) a lot of the commentary is speculative. Nonetheless, this is a huge and pressing issue and we would recommend that the second NAP spends some time unpacking their policy position on this. Clarity on foreign direct liability is crucial. Under the UNGPs there is no concrete obligation to provide access to courts within a particular jurisdiction.⁶⁴ However, an area of focus in the potential binding instrument lies in improving the accessibility of remedy for all impacted by human rights violations. Beyond this, other barriers occur around jurisdictional concerns on availability of legal basis, access to relevant documentation and evidence, financial burdens and representation. This is further compounded in Ireland with Legal Aid being expressly forbidden in these types of actions.⁶⁵ In addition, the failure to allow for third party funding (compared to other jurisdictions like the UK) raises questions over the Irish government's commitment to providing equitable access to justice.⁶⁶ This is particularly the case with marginalised and vulnerable groups.⁶⁷ The first NAP had the following action: Review how best

⁶¹ *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

⁶² *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC

⁶³ *Milieudefensie et. al v Royal Dutch Shell* (2021) C/09/571932 HA ZA 19-379 (English judgment) (Netherlands) - this is the first case in this area to be successful on its merits. Routes to FDL have been discussed in other jurisdictions. It has not been successful in the US in recent years (the limiting of the Alien Torts Act to those issues which sufficiently touch and concern the United States).

⁶⁴ The 'home' v 'host' argument. An excellent overview of these issues was presented by Lucas Roorda, FDL and Due Diligence, *The Current State and Future Trajectories of Human Rights Due Diligence Laws: New Legal Norms on Human Rights Due Diligence* <<https://www.thecpe.org/projects/research-projects/volume-1-new-legal-norms-on-human-rights-due-diligence-larry-cata-backer-and-cla-ire-methven-obrien-eds/>> (accessed 6 Sept 2023)

⁶⁵ s. 28 (9) (a) (ix) Civil Legal Aid Act 1995, See also *Friends of the Irish Environment CLG v Ireland and the Attorney General* (only natural persons can access legal aid)

⁶⁶ Note the recent Law Commission Consultation Paper on Third Party Litigation Funding, (July 2023) <https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/62671> Accessed 7 Sept 2023

⁶⁷ This is especially noteworthy given Irish commitments to fundamental rights (see the constitution) but beyond that there is the possible route to foreign direct liability under the constitution also. See *Bunreacht Na hEireann*

to ensure remedy for potential victims overseas of human rights abuses by Irish companies, with a focus on barriers to justice, including legal, procedural or financial barriers. We believe that the second NAP needs to develop this action more concretely. **We strongly recommend that the second NAP focuses on foreign direct liability.** Again, context informs. With the UK exit from the EU, and subsequently firms establishing their EU base in Ireland, there may be more of these types of cases before the Irish courts.

5.3.2 The National Contact Point

The OECD Guidelines for Multinational Enterprises (as it then was) established the existence of a complaints mechanism where an alleged breach of the guidelines occurred. This is the National Contact Point. The Irish National Contact Point has been quiet since its inception with very few specific instances lodged.⁶⁸ Now, three cases have been ‘successful’ (for victims) under this route to remedy (from a procedural point of view). Considering the current financial limitations on pursuing an action through the courts, it is even more important that more is done to publicise the NCP as a route to remedy. Specifically, we believe that more could be done to educate on how the NCP works, and for whom; accessibility (the website is not currently accessible) and as a minimum the publication of the Peer Review of the NCP (which had been due to be completed in 2021). **We fully endorse the recommendations set out in the Review of Remedy regarding NCPs.** This

(1937) Article 29.8 For a comprehensive overview of this issue within the Irish context see, Rachel Widdis, (2020) *Constructing Accountability in Business and Human Rights: An Investigation of the Development of Foreign Direct Liability Litigation and Feasibility in Ireland* (PhD Thesis) Available <<http://www.tara.tcd.ie/bitstream/handle/2262/94293/e%20THESIS%20Rachel%20Widdis%20final.pdf?sequence=3&isAllowed=y>> (accessed 6 Sept 2023). However we would note that there is nothing against non profit public interest cases.

⁶⁸We are not going into detail on this point due to limitations in time and space. However, we have conducted research on this in recent years. For a comprehensive overview and critique of the Irish NCP, see Ciara Hackett, Ciaran O’Kelly, and Clare Patton (2019) ‘The case of the Irish National Contact Point for the OECD Guidelines for Multinational Enterprises: Challenges and opportunities for the business and human rights landscape in Ireland, 61 (1) Irish Jurist 99-123

office needs to be staffed by an educated (in the complexities of BHR) full time office, focussed solely on NCP issues and adequately resourced. We recommend that the second NAP takes some time to consider routes into remedy within the Irish context. We note that this includes state based judicial remedy as well as state based non judicial remedy (and operational grievance mechanisms more generally). We think that whereas Widdis completed very valuable work on this point,⁶⁹ it is now time for the NAP to advance her contribution and lead concrete policy proposals and improvements grounded in her recommendations to ensure that those who need to access this route to remedy know how and where to do so.

5.3.3 Historical Human Rights Impacts

In recent years, Ireland has been attempting to come to terms with the historical human rights abuses that took place in Mother and Baby Homes across the island.⁷⁰ Some of these abuses relate to corporate activity, including illegal and unethical vaccine and infant formula milk trials conducted on children in institutions without consent by Glaxo Laboratories and the Wellcome Foundation (now subsumed into GlaxoSmithKline (GSK)).⁷¹ In February 2023, it was reported that GSK had repeatedly rejected demands to pay reparations for their role in the trials, citing the time lapse between the trials and the investigation, and the Commission's lack of evidence of

⁶⁹ Rachel Widdis, (2020) *Review of Access to Remedy in Ireland* An Independent Report commissioned by the Department of Foreign Affairs under the auspices of the National Plan on Business and Human Rights 2017-2020

⁷⁰ Department of Children, Equality, Disability, Integration and Youth, 'Final Report of the Commission of Investigation into Mother and Baby Homes' (January 2021) <<https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/?referrer=http://www.gov.ie/en/campaigns/2f291-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/#specific-issues>> (accessed 5 Sept 2023). For an assessment and critique of the investigations see, for example see Mairead Enright and others, 'Mother and Baby Homes Commission of Investigation Report - Draft Alternative Executive Summary' (2021) <<https://www.tudublin.ie/media/website/news/2021/main-news/Draft-September-24.pdf>> (accessed 5 Sept 2023).

⁷¹ Chapter 34 of the Commission's report.

adverse injury from the trials (a claim which has since been disputed by survivors).⁷² GSK's response to the Business and Human Rights Resource Centre on the subject in August 2023 stated that the company was already offering information requests to former residents of the mother and baby homes, believing this to be the 'most valuable way to support those seeking further transparency in relation to the trials'.⁷³ This example demonstrates the need for companies domiciled or operating in Ireland to develop an 'archival bent' to their responsibility to respect human rights, centring rightsholders as part of this process rather than dictating what measures the company deems most valuable to survivors.⁷⁴ As O'Kelly et al., highlight, throughout the trials, the companies failed in their responsibility to respect human rights, not least in their weak appreciation of the Nuremberg Code.⁷⁵ The UNGPs further require requisite stakeholder engagement, to help ensure that any grievance mechanism meets the needs of those it is intended to serve.⁷⁶ **It is therefore imperative that any human rights due diligence process and remedy mechanisms envisioned in the next Irish NAP have the capacity and expertise to provide the**

⁷² Arthur Beesley, 'GSK repeatedly rejected State demands to pay reparations for vaccine trials on children' (27 February 2023) *Irish Times* <<https://www.irishtimes.com/politics/2023/02/27/gsk-repeatedly-rejected-ministers-efforts-to-get-it-to-pay-reparations-over-vaccine-trials/>> accessed 5 Sept 2023; See also: Tanya Sillem, 'Survivors of mother-and-baby homes criticise Commission's vaccine trials findings' (17 January 2021) *RTE* <<https://www.rte.ie/news/mother-and-baby-homes/2021/01/17/1190207-mother-baby-home-vaccine/>> (accessed 5 Sept 2023).

⁷³ Business and Human Rights Resource Centre 'GlaxoSmithKline responded re reparations for vaccine trials on children in mother and baby homes' (8 August 2023) <<https://www.business-humanrights.org/en/latest-news/glaxosmithkline-responded-re-reparations-for-vaccine-trials-on-children-in-mother-and-baby-homes/>> (accessed 5 September 2023).

⁷⁴ Ciarán O'Kelly, Ciara Hackett, Samantha Hopkins and Clare Patton 'Businesses, Remedy and Vaccine Trials: Reflections on the Business and Human Rights issues in the Irish Mother and Baby Homes Report' (14 April 2021) *Business and Human Rights Journal Blog* <<https://www.cambridge.org/core/blog/2021/04/14/businesses-remedy-and-vaccine-trials-reflections-on-the-business-and-human-rights-issues-in-the-irish-mother-and-baby-homes-report/>> (accessed 5 Sept 2023); See also on the need for historical redress of BHR issues: Kristian Høyer Toft, 'Climate Change as a Business and Human Rights Issue: A Proposal for Moral Typology' (2019) 5(1) *Business and Human Rights Journal* 1.

⁷⁵ Ciarán O'Kelly, Ciara Hackett, Samathan Hopkins and Clare Patton 'Businesses, Remedy and Vaccine Trials: Reflections on the Business and Human Rights issues in the Irish Mother and Baby Homes Report' (14 April 2021) *Business and Human Rights Journal Blog* <<https://www.cambridge.org/core/blog/2021/04/14/businesses-remedy-and-vaccine-trials-reflections-on-the-business-and-human-rights-issues-in-the-irish-mother-and-baby-homes-report/>> (accessed 5 Sept 2023).

⁷⁶ UNGPs Principle 31.

opportunity for redress for historical business and human rights abuse, centring rightsholders as part of any remediation process.

5.3.4 Education

As clearly evidenced above and throughout, Business and Human Rights is a global issue but it has, and will continue to have, local relevance and a local lens that needs qualified understanding. With this in mind, we think that there is much to be said for increased education on Business and Human Rights issues within government, civil service and civil society. BHR education has the potential to provide cross-disciplinary training to existing and policymakers, professionals and advocates to raise awareness of both global and local human rights impacts of business enterprises, and build capacity to better promote the protect, respect, remedy framework.⁷⁷ We note that there are already examples of this teaching and training being undertaken at certain universities across Ireland,⁷⁸ and would strongly advocate that this momentum is bolstered by the Irish Government. As such, **we would recommend that the next NAP outlines governmental investment in universities across Ireland to strengthen existing programmes and build capacity to become knowledge hubs for the advancement of business and human rights education.**

6. Conclusion

Business and Human Rights is facing an exciting trajectory. As momentum gathers around how best to protect those at risk of a human rights impact, new regulatory initiatives intersect with

⁷⁷ Anthony Ewing, 'Promoting Business and Human Rights Education: Lessons from Colombia, Ukraine and Pakistan' 6(3) *Business and Human Rights Journal* 607.

⁷⁸ See, for example BHR undergraduate and postgraduate modules offered at the Law School at Queen's University, Belfast: <https://www.qub.ac.uk/courses/postgraduate-taught/international-human-rights-law-llm/#modules> and the individual courses at in the Business School at Trinity College Dublin: <https://www.tcd.ie/business/programmes/executive-education/programmes-for-individuals/business--human-rights-principles--and-practices/>.

increased business focus on how best to meet their human rights obligations. For National Action Plans, there is an opportunity to contribute effectively to the debate. We urge the second NAP to take on board the comments and recommendations made within this consultation.

BHR applies to all businesses. The Irish government's approach to BHR should reflect this. It's BHR strategy must also recognise and encompass Northern Ireland, Northern Irish business and the interactions between Northern Ireland and EU on trading issues. The NAP should be clearly worded, with opportunities to seek clarity and update information through the lifecycle. The developments regarding implementation and monitoring should be built upon and advanced. The legal and regulatory environment of BHR is ever changing and this needs to be reflected in the commitments of the NAP. Specifically, we would expect to see mHRDD having a key role. We would also envisage a commitment to the effective (and quick) transposing of legal developments in the EU to national levels. We would like to see a policy proposal on Modern Slavery. BHR is centred around those who have (or are at risk of) experiencing a human rights impact. We believe that much is needed in this aspect. Specifically we need to see a clear commitment to advance the recommendations of the Review on Remedy from the first NAP actioned. Commitment on the standpoint on foreign direct liability, the accessibility of the National Contact Point and its offices and the historical aspect of BHR impacts would demonstrate the centrality of access to justice to the NAP. Finally, stakeholder participation is crucial. It is no longer enough to consult for views. Rather full participation in the design, development, realisation, and evaluation of BHR commitments is required to realise the true potential of a 'holistic' BHR within this jurisdiction.