

**LAW AND
INTERNATIONAL
DEVELOPMENT
SOCIETY**



**UNITED STATES JUDICIAL REFORM FUNDING
SOURCES AND PROGRAMS**



GEORGETOWN UNIVERSITY LAW CENTER

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Supply Chain Transparency Memorandum

I. UNITED KINGDOM

Modern slavery is a crime resulting in an abhorrent abuse of human rights. The term modern slavery is used to encompass exploitative practices including forced labour, bonded labour, human trafficking and child labour.¹ The Home Office of the United Kingdom (“UK”) published in July 2018 estimates that modern slavery costs the UK in the region of £4.3 billion per year, which means that the unit cost of this crime is only second to homicide.²

Companies are under pressure to address the issue of slavery within their supply chains.³ The UK enacted rules that seek transparency in supply chains and address the role of businesses in preventing modern slavery from occurring in their supply chains and organizations.⁴

A. HUMAN RIGHTS ACT 1998

The Human Rights Act 1998 (“HR Act”) sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (“ECHR”) into domestic British law. The HR Act came into force in the UK in October 2000.⁵ The HR Act opens the possibility to defend the enumerated rights in UK courts and compels public organizations to treat everyone equally, with fairness, dignity and respect.⁶

¹ BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, *Modern Slavery in Company Operation and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence*, p. 3. See: *Tackling modern-day slavery within global supply chains* (Dec. 2017), https://www.financierworldwide.com/tackling-modern-day-slavery-within-global-supply-chains/#.W_4zzZNKiu5.

² The Modern Slavery Act 2015 - Under Review (11 Sep. 2018), <https://www.lexology.com/library/detail.aspx?g=bdcc1ca8-06fa-4f79-9633-0aed0644cd5d>.

³ *Tackling modern-day slavery within global supply chains supra note 1*.

⁴ HOME SECRETARY, *Transparency in Supply Chains etc. A practical guide* (2017), p. 3.

⁵ EQUALITY AND HUMAN RIGHTS COMMISSION, *The Human Rights Act* (15 Nov. 2018), <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>.

⁶ The Human Rights Act, <https://www.libertyhumanrights.org.uk/human-rights/human-rights-act> (last visited 25 Nov 2018)

Article 4 of the HR Act establishes the prohibition of slavery and forced labour. It also indicates the scope of forced or compulsory labor and does not include any work done in the ordinary course of detention or during conditional release from detention; any service of military character; any service exacted in case of emergency or calamity threatening the life or well-being of the community; or, any work or service which forms part of normal civic obligations.⁷

Slavery and servitude are closely connected. However, slavery involves being owned by another person, like a possession or an object;⁸ while, servitude usually involves a requirement to live on another's property and with no possibility of changing the situation.

Forced or compulsory labour arises when a person is made to work or perform a service against their will, and where the requirement to do the work is unjust or oppressive, or the work itself involves avoidable hardship. It can cover all kinds of work and services.⁹

This right means that everyone has an absolute right not to be held in slavery or servitude or be required to perform forced or compulsory labour.¹⁰ Article 4 § 1 requires that “no one shall be held in slavery or servitude”, that is to say that there is no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.¹¹

The European Court of Human Rights has established that to interpret the concepts under Article 4 of the Convention, it relies on international instruments such as the 1926 Slavery Convention,¹² Supplementary Convention on the Abolition of Slavery, the Slave Trade and

⁷ HUMAN RIGHTS ACT 1998, Schedule 1 The Articles, article 4 (UK).

⁸ *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 Jul. 2005. *See also*: EQUALITY AND HUMAN RIGHTS COMMISSION, *Human Rights: Human Lives, A Guide to the Human Rights Act for Public Authorities*, p. 17.

⁹ *Id.*

¹⁰ *Id.*

¹¹ HUMAN RIGHTS ACT 1998, Schedule 1 The Articles, articles 4 and 7 (UK). *See*: *C.N. v. the United Kingdom*, Application no. 4239/08, Council of Europe: European Court of Human Rights, 13 Nov. 2012, para. 65.

¹² *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 Jul. 2005, para. 122.

Institutions and Practices Similar to Slavery,¹³ ILO Convention No. 29¹⁴ and Council of Europe Convention on Action against Trafficking in Human Beings and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, 2000.

B. MODERN SLAVERY ACT 2015

The Modern Slavery Act 2015 (“MSA 2015”) came into force on 29 October 2015. Its purpose is to tackle slavery and human trafficking through the consolidation of previous legislation and the introduction of new measures. The new rules it introduces are requirements for organizations in relation with their business and supply chains.¹⁵ The MSA 2015 is the first of its kind in Europe and one of the first in the world.¹⁶

1. Summary

The MSA 2015 is divided into seven parts and five schedules. The seven parts are Part 1 Offences, Part 2 Prevention Orders, Part 3 Maritime Enforcement, Part 4 The Independent Anti-Slavery Commissioner, Part 5 Protection of Victims, Part 6 Transparency in Supply Chains, and Part 7 Miscellaneous and General. Additionally, the MSA 2015 includes six schedules, Schedule 1: Slavery and human trafficking offences, Schedule 2: Enforcement powers in relation to ships, Schedule 3: Public authorities under a duty to co-operate with the Commissioner, Schedule 4: Offences to which defence in section 45 does not apply, Schedule 4A: Information gateways: specified persons, and Schedule 5: Minor and consequential amendments.

¹³ C.N. and V. v. France, Application No. 67724/09, Council of Europe: European Court of Human Rights, 11 Oct. 2012, para. 90.

¹⁴ Van der Musselle v. Belgium, Application no. 8919/80, Council of Europe: European Court of Human Rights, 23 Nov. 1983, para. 32

¹⁵ THE MODERN SLAVERY ACT 2015: A QUICK GUIDE TO WHAT IT IS AND HOW TO STAY COMPLIANT, <https://coffinmew.co.uk/the-modern-slavery-act-2015-a-quick-guide-to-what-it-is-and-how-to-stay-compliant/> (last visited Nov. 26 2018).

¹⁶ UK Modern Slavery Act 2015 – call for transparency, [https://www.ey.com/Publication/vwLUAssets/ey-the-uk-modern-slavery-act/\\$FILE/ey-the-uk-modern-slavery-act.pdf](https://www.ey.com/Publication/vwLUAssets/ey-the-uk-modern-slavery-act/$FILE/ey-the-uk-modern-slavery-act.pdf) (last visited Nov. 26 2018).

Part I of the MSA 2015 establishes the definition and elements of who is considered to have committed an offense of slavery, servitude¹⁷ and forced or compulsory labour;¹⁸ human trafficking;¹⁹ and, exploitation.²⁰ It includes the penalties for committing one of the aforementioned offenses, which go from imprisonment for a term not exceeding 12 months or a fine or both to imprisonment for life.²¹ This part also considers reparation for the victims.²²

Part 6 is the most important for this analysis since it regulates transparency in Supply Chains and introduces a self-reporting requirement under section 54 of the Act. This section provides that a commercial organization must prepare a slavery and human trafficking statement for each financial year of the organization.²³ The statement has to be published on the commercial organization's website; nevertheless, if a company does not have a website it is obligated to provide a copy to anyone that requests it within 30 days.²⁴ This statement has to include information about what steps has taken during that financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business. If the company has not taken any steps, then it has to declare so in the statement.²⁵ The scope of the statement is broader than only the steps, but also the risks of slavery and human trafficking that its supply chain could suffer, training to the staff among others.

A commercial organization for the MSA 2015 means companies or partnerships, wherever incorporated or formed, that carry their business or part of their business in the UK by supplying goods or services. The MSA 15 even includes companies domiciled outside of the UK if any part

¹⁷ MODERN SLAVERY ACT 2015, section 1 (1) (a) (UK).

¹⁸ *Id.* § 1 (1) (b).

¹⁹ *Id.* § 2.

²⁰ *Id.* § 3.

²¹ *Id.* § 5.

²² *Id.* § 8-10.

²³ *Id.* § 54 (1).

²⁴ *Id.* § 54 (7).

²⁵ *Id.* § 54 (4).

of their business is carried on in the UK. Currently a commercial organization that is subject to section 54 has to have an annual turnover of £36 million or more.²⁶

The Secretary of State is the institution in charge of enforcing the rules of the MSA 15 and bring civil proceedings in the High Court or in Scotland.²⁷ Furthermore, it can and has issue a guidance of the duties imposed to the commercial organizations, which is discussed in the next subsection.

Some argue that although the MSA 2015 was a step in the right direction, it is too heavily focused on policing, and doesn't provide protection for the victims.²⁸ However, it is important to note that the Court of Appeal declare that the Secretary of State's policy guidance was unlawful in a case ruling in February 2018. It considered that UK's obligations to victims of trafficking who require a residence permit to remain in the UK owing to their personal situation was violated since the Secretary of State's policy guidance did not give effect to the UK's obligations under Article 14(1)(a) of the Council of Europe Convention on action against trafficking in human beings.²⁹ This ruling is considered by many as a progress in protection of victims.

2. Transparency in Supply Chains etc. A practical guide

The Home Secretary under section 54 (9) of the MSA 15 issued the Transparency in Supply Chains etc. A practical guide (the "Guide").³⁰ This guide clearly states that if a business fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court to require the organization to comply. If the organization fails to comply with the injunction, they will be in contempt of a court order, which

²⁶ HOME SECRETARY, *supra note 4*, p. 8.

²⁷ MODERN SLAVERY ACT 2015, section 11.

²⁸ Slavery in the UK, <https://www.antislavery.org/slavery-today/slavery-uk/> (last visited Nov. 25 2018).

²⁹ PK (Ghana), R (On the Application Of) v The Secretary of State for the Home Department, Court of Appeal - Civil Division, February 08, 2018, [2018] EWCA Civ 98.

³⁰ HOME SECRETARY, *supra note 4*.

is punishable by an unlimited fine³¹ Failure to comply is define as not publishing the statement on the company’s website if they were to have one.³²

Aside from legal penalties, failing to comply could cause reputational damage to the company; and, as the guide establishes consumers, investors and Non-Governmental Organizations can engage and/or apply pressure where they believe a business has not taken sufficient steps.

The Guide also gives more information about who is required to comply since it gives specific information about how to calculate the total turnover, which includes the turnover of that organizations and of all its subsidiaries even if they are not operating in UK.³³

C. MODERN SLAVERY (TRANSPARENCY IN SUPPLY CHAINS) BILL [HL] 2016-17

The Modern Slavery (Transparency in Supply Chains) Bill [HL] 2016-17 (“Modern Slavery Bill”) was brought from the Lords and received its first reading in the Commons on 30 November 2016. This Modern Slavery Bill was expected to resume its second reading debate on Friday 24 March 2017; however, the order was not moved so the bill has effectively been dropped by its sponsoring MP and will not progress any further.³⁴

Its purpose was to require commercial organizations and public bodies to include a statement on slavery and human trafficking in their annual report and accounts; and, to require contracting authorities to exclude from procurement procedures economic operators who have not provided such a statement; and for connected purposes.³⁵

³¹ *Id.*, p. 6.

³² *Id.*

³³ *Id.*, p. 8.

³⁴ Modern Slavery (Transparency in Supply Chains) Bill [HL] 2016-17, <https://services.parliament.uk/bills/2016-17/modernslaverytransparencyinsupplychains.html> (last visited Nov. 25 2018).

³⁵ *Id.*

D. RECOMMENDATIONS

The MSA 15 and the Guide have to be promoted even more so that people will understand the importance of the role of companies in the fight against slavery, servitude, forced or compulsory labour, human trafficking, and exploitation.

The publication of the organization's statement in its website might not be enough for the public to be able to punish their behavior. The Home Secretary should have a bigger role in supervising the content of the statements and then if the measures the organization is taking are not enough, it should report to the public those companies.

II. The California Transparency in Supply Chains Act

The 2015 California Transparency in Supply Chains Act³⁶ (TISCA or “the Act”) requires large companies doing business in California to disclose to what extent, if any, they:

- Engage in verification to evaluate and address risks of human trafficking and slavery;
- Conduct audits of suppliers to evaluate supplier compliance with company standards regarding human trafficking and slavery;
- Require direct suppliers to certify that foreign production inputs comply with laws regarding human trafficking and slavery;
- Maintain accountability standards for employees or contractors that fail to meet company standards regarding human trafficking and slavery; and

³⁶ Ann.Cal.Civ.Code § 1714.43 (West 2012)

- Provide company employees and management with direct responsibility for supply chain management training on human trafficking and slavery and how to mitigate risks associated with human trafficking and slavery.

The Act only affects companies with gross annual revenue of greater than \$100,000,000. These companies must make their disclosures available to the public via their company web pages. The only remedy under the Act is an action brought by the California Attorney General in the form of injunctive relief.

The practical effect of the Act is limited. Notably, the Act does not place any affirmative duties on companies doing business in California beyond making the required disclosures. Thus, a company may “disclose” that it has not done anything to confront human trafficking and slavery in its supply chains and still be in compliance with the law.³⁷ While it enforces transparency, the Act relies upon the court of public opinion to punish companies for failures to eradicate slavery and human trafficking in their supply chains.³⁸

Although a federal statute mirroring TISCA has not yet been passed, Representative Carolyn B. Maloney of New York has introduced a bill entitled the Business Supply Chain Transparency on Trafficking and Slavery Act of 2018 to the House of Representatives

³⁷ See *Barber v. Nestle*, 154 F.Supp.3d 954 (holding that Nestle, a corporation doing business in California, is only required by TISCA to report whether or not it does the five activities of which the Act requires disclosure.)

³⁸ It is unclear whether or not the Act has had the desired effect on consumers, as many consumers do not actively seek or care about this information. See Shannon O'Neil, *Beyond Supply Chain Transparency Laws* (2016). <https://www.cfr.org/blog/beyond-supply-chain-transparency-laws>.

Committee on Financial Services.³⁹ The statute would have a similar effect to TISCA on large companies by requiring publically traded corporations to disclose, via annual reports to the SEC, their efforts to fight slavery and human trafficking in their supply chains.⁴⁰ The new statute would also require these corporations to disclose this information on their website in a similar manner as required by TISCA. It is unclear whether or not the bill, if passed, would create a major impact beyond that of TISCA.

III. Australia

Australia's government plans to introduce a new modern slavery legislation in the next few months (September) that is similar to the UK legislation. It would require about 3000 commercial organizations to report on slavery, trafficking, servitude, forced labor and forced marriage. Statements would be stored in an accessible public repository, and the government also promised to establish an anti-slavery business engagement unit and to lead by example by publishing its own commonwealth procurement statement.

A new regional bill was also passed by the New South Wales parliament in June 2018. This bill also contains company reporting requirements, introduces certain public modern slavery functions and procedures, and establishes preventative enforcement powers and penalties for various slavery and reporting offences. Organizations with a business presence in New South Wales and an annual turnover of more than 50 million Australian Dollars have to produce a slavery and human trafficking statement. Similar to the UK act, the statement should cover the

³⁹ H. R. 7089. 115th CONGRESS, 2nd Session.

⁴⁰ See David Segall, *Congress can fight human trafficking and forced labor*.
<https://bhr.stern.nyu.edu/blogs/congress-can-fight-human-trafficking>.

organization's operations and supply chains and due diligence undertaken to identify risks of forced labor.

IV. Hong Kong

The Hong Kong legislative council members proposed a draft modern slavery bill, arguing that Hong Kong's laws fail to meet the minimum global standard for addressing modern slavery and that legislative action should be taken to diminish the risk of being shamed or even sanctioned.

The drafted modern slavery bill of 2017 would require certain companies to publish annual slavery and human trafficking statements. It would also introduce new indictable criminal offences related to slavery, enabling money laundering prosecutions to be brought against offenders, and would empower courts to make special preventative orders. In addition, the bill would empower victims to bring civil claims against perpetrators or others who benefitted financially, or received anything of value, through involvement in a venture that they knew, or should have known, would involve slavery.

The modern slavery bill was discussed at a meeting of the panel of security of the legislative council on June 5, 2018, but the parties did not reach a consensus regarding the bill. The discussion will continue at a later date. The Legislative council has not confirmed the timetable for this discussion at this stage.

There is an existing legal framework in Hong Kong imposing potential criminal liability for human trafficking for the purposes of slavery, prostitution and forced labor. In addition suspecting that any property represents the proceeds of such offenses (wherever they are

committed) also triggers anti money laundering regulatory requirements under separate legislation, potentially giving rise to reporting obligations and restrictions on dealing.⁴¹

V. France

In February 2017 the French Parliament adopted a new law establishing a duty of vigilance for businesses, requiring them to monitor their company and supply chains for human rights and environmental protection violations. It also requires them to publish an annual risk report assessing the real impact of these policies.

In their report businesses are required to identify the risks that accompany their activities as well as their subsidiaries and subcontractors. After identifying risks they must describe the ways they are working to mitigate the risk of human rights violations and institute alert systems to track potential risks. Companies must fulfill their due diligence and take steps to eliminate forced labor in supply chains and evaluate the effectiveness of the monitoring policies put in place. The bill closely resembles the UK's modern slavery act, although the French law applies to fewer companies. The French law does not use profits as a criterion for reporting, but instead focusses on the size of the company. Only about 150 businesses will be affected by the new rules.

The French law lays out specific reporting requirements. Companies that fail to monitor themselves or publish reports can be reported by victims or concerned parties. However this practice can bring an unfair burden of proof for victims who already face a severe imbalance of power. Even if an incident occurs, if a company can verify that it has implemented a vigilance plan, it can be found not liable for any damages. Unlike the laws in the UK and the US, French

⁴¹ <https://www.lexology.com/library/detail.aspx?g=8b3da899-f523-4ece-b7c1-36a1bc03edcc>

companies that fail to comply with the law can face possible financial penalties totaling as much as 10 million Euros.⁴²

In order to prevent getting a fine it is recommended that companies take the following things in account; 1) it is important for companies to have a global vision of the risks they face in all their countries of operations. For some countries it might be advisable to have fine-tuned risk maps, including identification and detailed reviews of the risks specific to the company's operations and identification of vulnerable groups who experience different risks, severity and impacts of human rights violations than others. 2) to prevent serious violations companies should be proactive, raise the capacity of their own staff and collaborate with and train their own business partners on human rights and environmental risk management.⁴³

VI. General challenges for corporations

Under the modern slavery legislations of the various countries discussed above similar challenges for corporations arise. We identified the following main challenges:

- 1) Determining how far is far enough when engaging in supply chain due diligence.
- 2) Obtaining accurate and complete information on third parties or country specific human rights risks.
- 3) Managing responsibility for impacts caused by third parties.

VII. General recommendations

- 1) Mapping the business and supply chains.

⁴² <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>

⁴³ <https://www.bsr.org/en/our-insights/blog-view/frances-due-diligence-law-is-your-company-ready>

- 2) Addressing modern slavery and human rights in the company's code of conduct and obtaining input from external experts.
- 3) Setting up an internal governance structure on modern slavery and human rights at both the operational and leadership levels.
- 4) Including modern slavery provisions in supplier contracts, and requiring suppliers to do the same with their subcontractors.
- 5) Conducting specific modern slavery risk assessments across the company's own operations and suppliers.
- 6) Disclosing any risks identified, detailing mitigation plans and demonstrating that these findings inform a company's business decisions.
- 7) Providing tailored modern slavery training to employees and suppliers.