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**SCHOOL
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Department of Justice Consultation

Modern Slavery Transparency in Supply Chains

Submission by Queen's University School of Law*

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EXECUTIVE SUMMARY

This report is written in response to the DOJ Consultation on Transparency in Supply Chains. The requirement for companies (earning over a particular threshold) to produce a statement on transparency is set out in s.54 of the *Modern Slavery Act 2015*. This document focuses on key issues of interest.

1. We identify issues around definition and how the definition most widely used on modern slavery applies to human trafficking. In the context of supply chain management, this is not helpful and does not inform companies embarking on this requirement.
2. We analyse the requirements of the TISC, focusing on the key aspects. We note the importance of specificity but see this as an opportunity to align Northern Ireland with other countries who have moved beyond disclosure towards due diligence. We propose regulatory alignment at some point in future (with advances within the EU and elsewhere) and propose that TISC is a starting point for a more process and care driven structure.
3. We make recommendations on how to improve the TISC from the perspective of business, states (and CSOs) and victims. On business, we recommend the creation and publication of a TISC statement template. Further we advocate for a central repository for the hosting of all TISC statements. We recommend that TISC reports take a ‘value set’ approach and are published across all tiers of the organisation, and that TISC compliant organisations are rewarded in the form of access to grants, public procurement opportunities etc. For states, we promote and recommend the creation of a Northern Ireland Independent Anti-Slavery Commissioner. We see this role as working within the Independent Anti-Slavery Commissioner remit but recognising the unique socio-economic, post conflict, Northern Irish Society. The Northern Ireland Anti-Slavery Commissioner would work with businesses (at all levels in Northern Ireland) to support, promote and educate on the value of TISC to their organisation, business relationships, and wider society. Finally, we make recommendations around victim support. We advocate expanding our definition and understanding of the supply chain and to put in place special legislative supports for “vulnerable” groups. We recommend unpacking ‘economic coercion’ and addressing how this could be embedded within the law. Finally, we recommend inserting workers’ voice in TISCs, both in terms of their views on the proposed statement and in gathering data for the statement.

INTRODUCTION

The *Modern Slavery Act 2015* is a UK piece of legislation designed at combatting the effects of modern slavery. It is supplemented in devolved regions with the *Human Trafficking and Exploitation (Scotland) Act (2015)* and The *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) (2015)*. One of the provisions of the Modern Slavery Act, s.54 – Transparency in Supply Chains statements (TISC) - applies to all jurisdictions within the UK. S.54 (1) establishes that a commercial organisation (that meets the turnover threshold) must prepare a slavery and human trafficking statement for each financial year of the organisation. S. 54 (4) addresses what this statement is, namely, either a statement of the steps that an organisation has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business, or, that a statement is produced outlining that the organisation has taken no such steps. There are two interesting preliminary points here: first, that the statement focuses on **preventing** modern slavery (note the *Northern Ireland Draft Modern Slavery Statement of Prevent, Protect and Pursue*) and that the statement is not limited to the company’s own business (including subsidiaries) but rather *any of its supply chains*. S.54 (5) outlines what the statement should contain whilst ss. 6 looks at who signs it off. Finally, s.54 (7-8) looks at the publication of the statement. Whereas not all aspects of the *Modern Slavery Act* apply to Northern Ireland, s.54 does.

Northern Ireland is a politically fragmented, post conflict region heavily reliant on the public sector with a private sector dominated by SMEs.¹ The regional economy lags in productivity and suffers a skills gap compared both to the Republic of Ireland and to the rest of the UK.² It is the poorest region in the UK, as measured by household income.³ While Brexit is an issue across the UK, it is keenly felt in Northern Ireland where concerns around the Northern Ireland Protocol, lie not just with increased paperwork for business but remind us of how economic and political matters are intertwined.

This challenging landscape is at one and the same time a driver of economic vulnerability and the context within which the region’s business will respond to any human rights implications arising from their operations. Beyond that, whereas for other countries in the UK, the focus will be on disclosure in supply chains, Northern Ireland’s economy suggests that regional businesses, SMEs are likely to act *within* those supply chains. Northern Ireland SMEs will face a complex environment where they will be subject to public regulation and to the private

¹ Ciaran O’Kelly, Ciara Hackett, Clare Patton and Samantha Hopkins, “Business (and Human Rights) as usual? Covid-19 implications on the Northern Ireland Business and Human Rights Landscape” *forthcoming*, Northern Ireland Legal Quarterly

² See PM Flynn, ‘Productivity and the Northern Ireland Economy’ (NERI Working Paper Series, December 2016), *NERI Working Paper Series*; N. Hewitt-Dundas, B Andréosso-O’Callaghan, M Crone M, and S Roper , ‘Knowledge Transfers from Multinational Plants in Ireland: A Cross-Border Comparison of Supply-Chain Linkages’ (2005) 12 *European Urban and Regional Studies* 23; J FitzGerald and ELW Morgenroth, ‘The Northern Ireland Economy: Problems and Prospects’ (2020) 49 *Journal of the Statistical and Social Inquiry Society of Ireland* 64; R Johnston, F Ruane, and L Heery, ‘Competitiveness on the Island of Ireland’ (2019) 48 *Journal of the Statistical and Social Inquiry Society of Ireland* 175, 177.

³ Feargal McGuinness, ‘Household Incomes by Region’ (House of Commons Library briefing paper, 25 April 2018) < <https://commonslibrary.parliament.uk/research-briefings/cbp-8191/> > accessed 3 December 2020

regulatory governance that their corporate and public clients build into supply contracts. Engaging with these issues will be a challenge long-term for the business sector in Northern Ireland, and indeed the Department of Justice.

Nonetheless, we suggest that this be seen as an opportunity, the chance for the business community in Northern Ireland to meet and exceed requirements under s.54 of the *Modern Slavery Act*, by aligning with other developments in this space in other jurisdictions, notably the EU. If Northern Ireland hopes to become a centre for business in the wake of Brexit (and a connector between the UK and EU), issues such as supply chain transparency afford the opportunity for forward thinking. Positive engagement is already apparent, for instance through the collaborative work emerging from the Northern Ireland Business and Human Rights Forum (part of the NIHRC). It is crucial that Northern Ireland's particular circumstances be engaged with and responded to through such initiatives.

This report is split into three parts. Part one addresses definitions on slavery, human trafficking, and modern slavery. Part two provides an in-depth analysis on s.54 Modern Slavery Act, and specifically the proposed contents of the statement (as set out in s. 54 (5)). Finally, part three considers how transparency in supply chain statements might be improved for business, government, and victims.

I. CONTEXT AND DEFINITIONS

Modern Slavery falls within the umbrella of contemporary forms of slavery. Whereas slavery has long since been interrogated in international laws, modern slavery has a more recent journey. Issues emerging on modern slavery rest on the **failure of a general definition**, and of the fact that **‘acting’ to prevent modern slavery places a (negative) obligation on corporations**, entities not typically thought to be within the remit of international law. The *Northern Ireland Draft Strategy on Modern Slavery* focuses on three key themes of **protect, prevent, and pursue**. However, when it comes to *corporate* responsibility for modern slavery, focus within the UK appears to be on the ‘prevent’ strand. Certainly, within the UK, the *Modern Slavery Act* requirements under s.54 (and the Transparency in Supply Chains statement) centre on reporting on the supply chain rather than acting to improve standards more generally. This challenges the UK state duty to protect against modern slavery insofar as it is not a collaborative relationship with business in combatting the issue. The UK is an outlier in this regard with many other countries and regions around the world moving to due diligence requirements, which compel companies to demonstrate how they exercised a duty of care in their business relationships. Due diligence itself is not without fault. Within supply chain management, the extent of corporate responsibility varies to the company itself (and its subsidiaries) to the whole value chain. Further, inconsistencies persist on the extent of (if any), corporate liability.

This section focuses on issues of definition and context. It looks at how modern slavery emerged as an offset of slavery, and contemporary forms of slavery. Second, it addresses the types of legislation that exists on Modern Slavery and what format these take.

1. Definitions

A. Slavery

i. *International Law*

Slavery as a concept has long captured attention in international law. The prohibition of slavery is a peremptory norm, or *jus cogens*. This means it is a fundamental principle of international law accepted by the international community of states as a norm. No derogation of duty is permitted. The centrality of the prohibition of slavery persists in the *Universal Declaration of Human Rights*. Article 4 states, “no one shall be held in slavery or servitude; slavery and the slave trade will be prohibited in all their forms”.⁴ More recently, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Girls (the Palermo*

⁴ UDHR (1948)

This was not the first international treatise on slavery. Many predate the UDHR. E.g., *1926 Slavery Convention* (which aimed to confirm and advance the suppression of slavery on land and by sea) provided a definition of slavery (Article 1) which was later updated and expanded in the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (see Article 7). Also, of relevance is *Forced Labour Convention* (1930) no. 29 (which considers forced and compulsory labour) (article 1) and the *ICCPR* which looks at servitude and forced labour (art. 8) and the *Abolition of forced Labour Convention 1957*, (No. 105) art. 1. The ILO Forced Labour Convention was supplemented with the *ILO Protocol of 2014 to the Forced Labour Convention, 1930* Art. 1. In this, signatory states commit to measures to providing victims with protection and access to effective remedies such as compensation, and to sanction perpetrators.

Protocol) provides the first internationally recognised definition of human trafficking.⁵ Human trafficking is an integral (albeit non-exclusive) tenet of modern slavery. The definition set out in the Palermo Protocol is as follows:

- (a) The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age.⁶

Three key elements shape the definition; **an act, a means, and a purpose.**⁷ This definition is limited in its focus on a particular type of modern slavery. However, it provides guidance as to how we should think about the concept, particularly with the elements of the definition, and the overarching theme of ‘exploitation’.

Case law has also provided some instruction on defining ‘slavery’ in international law. In *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic (2002)*,⁸ the International Criminal Tribunal became the first international court to interpret slavery as the provisions laid out in the 1926 Slavery Convention (article 1). The tribunal in the case concluded that the definition of slavery included all the various forms of contemporary (i.e., not just chattel slavery). This is important as it makes a nod to ‘modern slavery’ in its inclusion of ‘contemporary’ forms. *Hacienda Brasil Verde Workers v Brazil, Inter-American Court of Human Rights Series (2016)* expanded declaring that **slavery was not limited to legal ownership of people**. The Court expounded that the Slavery Convention 1926 encompassed both *de jure* and *de facto* slavery- where a person has the legal status of a slave, and where even if slavery is abolished, the person is held in the position of slavery respectively.⁹ This is useful when situated alongside the strands of **an ‘act’ a ‘means’, and a ‘purpose’** as

⁵ 2237 UNTS 319 (2000) (Palermo Protocol), art. 3

⁶ Ibid. Note, this definition is replicated in the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) at para. 70

⁷ For an analysis of this, QUB HRC Modern Slavery Submission, Available at <<https://www.qub.ac.uk/research-centres/human-rights-centre/FileStore/Fileupload,1015157.en.pdf>> (last accessed 22 April 2021) at 16.

⁸ The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković [2001] IT-96-23-T & IT-96-23/1-T

⁹ *Hacienda Brasil Verde Workers v Brazil, Inter-American Court of Human Rights Series [2016]* For an overview of this case see Tatiana Gos (2017) *Hacienda Brasil Verde Workers v Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights (Oxford Human Rights Hub)*, Available at <<http://ohrh.law.ox.ac.uk/hacienda-brasil-verde-workers-v-brazil-slavery-and-human-trafficking-in-the-inter-american-court-of-human-rights/>> (last accessed 6 May 2021)

established in the *Palermo Protocol*. However, implementation is a problem. For example, eleven countries have not fulfilled their obligations under the *1926 Slavery Convention*, the *1956 Supplementary Convention*, nor indeed the *ICCPR*. Those member states that are signatories to the *1926 Convention* are bound to punish contravention related to slavery. After the 2002 ICJ ruling, this would extend to modern slavery. The *1956 Supplementary Convention* goes further, requiring signatories to criminalise slavery, to check practices or institutions within their domestic law relating to slavery and to impose penal sanctions on violators.¹⁰

The developments above focus on states. However, modern slavery, and in particular supply chain management also addresses the role of corporations in respecting human rights within the supply chain. An important debate, therefore, is whether corporations have positive obligations for human rights. At an international law level, the status of corporations has been subject to debate for several years. The standard approach of international law was to divide the international legal system into ‘subjects’ and ‘objects’. Under this approach only states were subjects of the law. And that is why those international laws discussed above bind member state signatories. Higgins and Alvarez have argued that a more helpful approach to understanding international law is to remove the dichotomy of ‘subjects’ and ‘objects’ and instead focus on participants.¹¹ States are participants, but so too are individuals, international organisations (e.g., the IMF), corporations and even NGOs. The role of non-state actors (which would include corporations) in international law has been explored by both Zerk and Clapham.¹² The status today of corporations is that they are participants in the international legal framework. They do have ‘negative’ duties under international human rights law,¹³ but the scope and reach of their positive obligations remains the subject of intense scrutiny.¹⁴ Negative responsibilities require corporations to report on their behaviours (and in some cases, albeit not the *Modern Slavery Act* or the *TISC*) demonstrate how they exercised an appropriate standard of care to avoid any adverse human rights impact.

ii. *European Law*

At a European level, the *European Convention on Human Rights* guides. Article 4 prohibits slavery and forced labour. From this, other initiatives inform. In *Rantsev v Cyprus and Russia*, the European Court of Human Rights (ECHR) declared a particular obligation to punish and prosecute any act aimed at maintaining a person in a situation of servitude, slavery or forced

¹⁰ art. 5, Supplementary Convention (n. 4)

¹¹ Jose E Alvarez, ‘Are Corporations Subjects of International Law?’ (2011) 9 Santa Clara Journal of International Law 7, 31 and Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, 2nd edn (Oxford: Clarendon Press, 2010) 50.

¹² Jennifer Zerk *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006 Cambridge University Press) p. 74; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 78-80.

¹³ See for example the obligation to respect human rights and avoid causing any negative human rights impacts – this is set out in Pillar II of the United Nations Guiding Principles on Business and Human Rights.

¹⁴ David Bilchitz, ‘A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s framework and the Guiding Principles in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the corporate responsibility to respect?* (Cambridge University press 2013) at 107 – 137. See also Stephen Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale Law Journal 443- 545, at 496. Here Ratner argues that corporations generally should not have positive obligations – this seems to be grounded in practical pragmatism rather than in any normative debate.

labour.¹⁵ More recently, the ECHR in *L.E. v Greece*, *European Court of Human Rights* explicitly described penal law as the required mechanism to address acts contrary to the prohibition of servitude, the slave trade, slavery and forced labour.¹⁶ The *EU Trafficking Directive* 2011 requires member states to introduce laws to protect victims and prohibit trafficking.¹⁷ It also imposes legal liability. In recognition of the role of corporations in modern slavery, the *EU 2014 Directive on non-financial and diversity information disclosure*¹⁸ requires companies to provide information on their respect of human rights. This will be extended later this year with the 2021 European Parliament proposed mandatory human rights and environmental due diligence laws.¹⁹

B. Contemporary Forms of Slavery (including Modern Slavery)

In March 2020, the Human Rights Council appointed a UN Special Rapporteur on contemporary forms of slavery, Tomoya Obokata. It defines contemporary forms of slavery, such as traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery like conditions, domestic servitude, sexual slavery, and servile forms of marriage.²⁰ It is noted that contemporary forms of slavery involve hidden populations, some of which perform illicit work. It also can involve the most vulnerable in our society, it can happen in isolated areas (both geographically or if working in violent or unstable regions).²¹ Contemporary forms of slavery exist as *much as a state of mind*, even after it has formally ended.²² This necessitates focus on victim support. But beyond, those who are at risk of contemporary forms of slavery are vulnerable. This vulnerability may be exacerbated by a fear of speaking out, of an unawareness of one's rights and indeed the need to survive (and provide food and shelter for their families).

Defining 'modern slavery' is difficult. Guidance from various sources of law typically focus on either slavery, or specific aspects such as human trafficking, and focuses on binding states rather than recognizing the various agents who might cause, contribute, or have a direct link with modern slavery. For example, the *Modern Slavery Act* specifically defines the offences of '[s]lavery, servitude and forced labour' (by mirroring art. 4 ECHR) but does not explicitly define modern slavery. Northern Irish and Scottish instruments take a similar approach.²³ The overarching theme that unites and binds these various definitions is the focus on "exploitation". The laws that inform, guide, and obligate on modern slavery typically focus on state duties and corporate responsibilities. Given the nature of this consultation, it is important to focus on how

¹⁵ Case of Rantsev v. Cyprus and Russia ECHR (2010) 25965/04

¹⁶ *L.E. v Greece* ECHR (2016) 71545/12

¹⁷ Directive 2011/36/EU

¹⁸ Directive 2014/95/EU

¹⁹ Lara Wolters (Rapporteur) Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs (2020/2129(INL) < https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf> Report adapted by the European Parliament Legal Committee on the 27th January 2021.

²⁰ Special Rapporteur on contemporary forms of slavery, including its causes and consequences (OHCHR) Available at < <https://ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>> (last accessed on 6 May 2021)

²¹ *Ibid.*

²² *Ibid.*

²³ The Human Trafficking and Exploitation (Scotland) Act (2015) (s.4), The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) (2015)

corporate responsibilities around modern slavery are articulated in laws. For the most part, these can be categorized into three main types, disclosure, due diligence, and liability. Disclosure obligations mean that companies have a responsibility to tell the truth on material issues and facts relating to business transactions. It is company reporting and does not oblige a corporation to behave in a certain way. Due diligence is very much a trend in this space. It requires more from corporations than disclosure legislation and specifically, how the corporation exercised a duty of care in all aspects of its business. It also requires a higher level of evaluation on the company's past, present and future relations. However, as it does not always come with sanctions, due diligence may prove ineffective as it is guidelines for large corporations to follow, rather than a mandatory duty of care with sanction for non-compliance. Liability refers to the 'responsibility of one's actions or omissions.' Liability in companies would mean holding businesses and large corporations accountable for their actions. This implies sanctions, usually administrative fines, or civil liability. Liability initiatives were promised with the proposed *Swiss Responsible Business Initiative*, but this ultimately failed to garner sufficient support from the cantons in 2020.

2. Context: Modern Slavery Legislation

A. Disclosure Legislation

Existing domestic legislation on Modern Slavery falls within these three categories: disclosure legislation, due diligence legislation and legal liability. Disclosure legislation focuses on reporting information only. Examples of this type of legislation include the *Modern Slavery Act (UK)*,²⁴ the *California Supply Chains Transparency Act*,²⁵ and the *EU Non-Financial Reporting Directive*.²⁶ A forthcoming initiative that, in its current format appears to follow a similar trajectory is the proposed *Modern Slavery Act (Canada)*.²⁷ These are characterised by their requiring companies to disclose efforts to identify and mitigate human rights risks. They can be distinguished from other initiatives by the fact that they do not place any obligation on companies to conduct any specific due diligence. They are, therefore, reactionary, reporting after the fact, and focus on reporting and mitigating (i.e., **preventing** (to use the language of the Northern Ireland Strategy on Modern Slavery), rather than **protecting or pursuing**).

B. Due Diligence Initiatives

Due diligence initiatives have been popularised and advanced on an international platform by the *United Nations Guiding Principles on Business and Human Rights (UNGPs)*.²⁸ These rest on three pillars: (I) the State duty to protect human rights, (II) the corporate responsibility to respect human rights and (III) the right to access an effective remedy in the event of a negative human rights impact. The framing of the corporate responsibility to respect human rights is an important addition to international guidelines in the space, as it is the first time that corporate obligations are set out in an international legal document. The corporate responsibility to respect human rights is an *expectation* of responsibility rather than a voluntary assumption.²⁹ In this way then, it sits apart from, although complementary with corporate social responsibility (CSR) initiatives. How this pillar is realised is through procedural obligations such as human rights due diligence. These are referenced in foundational principle 15, in addition to operational principles 17-24. Principle 17 informs:

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights' due diligence. The process should include assessing actual and potential human rights

²⁴ Modern Slavery Act, 2015 (specifically s.54)

²⁵ California Transparency in Supply Chains Act (2010). Also of relevance, s. 1502 Wall Street Reform and Consumer Protection Act (2010)

²⁶ Directive 2014/95/EU. A similar initiative in the US is the Tariff Act, 1930

²⁷ Bill S216, Modern Slavery Act, Available at < <https://openparliament.ca/bills/43-2/S-216/>> (last accessed 22 April 2021) (Bill is currently before the Senate)

²⁸ Guiding Principles on Business and Human Rights (2011) *OHCHR* Available at < https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (last accessed 19th April 2021)

²⁹ A nice discussion of this can be found here: Enrico Partiti, "Polycentricity and polyphony in international law: Interpreting the corporate responsibility to respect human rights" (2021) 70 (1) *International and Comparative Law Quarterly* 133-164, at 139.

impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed.³⁰

Whereas this initiative marked a departure for how we think about corporate responsibilities, it is important to note that the responsibilities set out in the UNGPs focus on negative obligations, that is, a focus on **preventing** human rights impacts, and **addressing adverse impacts**, rather than a positive obligation to improve the human rights of all those which it might impact. This does have a knock-on effect for modern slavery in that it simply requires corporations to prevent modern slavery in the supply chain, rather than protecting individuals and pursuing perpetrators. Nonetheless, it is generally heralded as the “end of the beginning” in conversations about corporate responsibilities.

Accepted by states and business, as well as complementary initiatives such as the *OECD Guidelines for Multinational Enterprises*, the *OECD Guidelines for Responsible Business Conduct* and the *ISO26000*, a trend after the UNGPs has been for national legislation to embrace mandatory human rights due diligence. This has included the field of modern slavery, and in particular supply chain management. Due diligence requirements typically involve a legally binding positive obligation on corporations. Transparency expectations range from publishing a vigilance report, to annual reports and submitting to the competent authority. The extent of due diligence can involve the company’s own operations (via subsidiaries) or, the company’s own operations (via subsidiaries) *and* the whole value chain. Examples of this include the Netherlands’ *Child Labour Due Diligence Bill*,³¹ the *Modern Slavery Act* (2018) (Australia)³² and the *EU Conflict Minerals Regulation*.³³ Forthcoming initiatives include the *German Supply Chain Bill* (draft Bill adopted in March 2021),³⁴ and the European Parliament’s planned mandatory human rights and environment due diligence (also known as the *European Parliament Due Diligence Report*).³⁵ Still more which are currently under consideration in their respective parliaments include, the *Dutch Parliamentary Responsible Business Conduct Bill*,³⁶ the *Austrian Parliamentary Supply Chain Bill*, the *Belgian Parliamentary Duty of Vigilance Bill* and the *Norwegian Government Transparency Bill*. A final point of note is that sometimes, these due diligence processes may have inbuilt remediation or liability. This is the case with

³⁰ Principle 17, Guiding Principles on Business and Human Rights (2011) *OHCHR* Available at <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (last accessed 19th April 2021)

³¹ Dutch Child Labour Due Diligence Bill (adopted but not yet in force).

³² This statute can be distinguished from the UK in that the company’s anti-slavery statement must discuss the due diligence and remediation the company performs. *Modern Slavery Act*, (2018)

³³ EU Regulation 2017/821. As a result of this, EU Importers are required to comply with and report on due diligence obligations in the importing of tin, tantalum, and tungsten. These raw materials are used for mobile phones, technology, jewelry etc. and generally come from high risk or conflicted areas

³⁴ Loning, “The Draft German Corporate Due Diligence Act” (*Briefing Paper*, April 2021) Available at <<https://www.loening-berlin.de/wp-content/uploads/2021/04/LoeningBriefingPaperGermanCorporateDDAct2021.pdf>> (last accessed on 21 April 2021)

³⁵ European Parliament sends a strong signal for mandatory human rights due diligence (March 2021, uni-europa.org) Available at <<https://www.uni-europa.org/2021/03/european-parliament-sends-a-strong-signal-for-mandatory-human-rights-due-diligence/>> (last accessed 21 April 2021)

³⁶ This initiative is interesting in that it is grounded in the *OECD Guidelines for Responsible Business Conduct* exclusively (i.e., it does not reference the UNGPs)

the French ‘*Devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*’ (devoir de vigilance)³⁷ currently and will be the case for the *European Parliament Due Diligence Report* (strict liability). Of those provisions under consideration, fault-based liability is under discussion in the *Dutch Parliamentary Responsible Business Conduct Bill*, and the *Austrian Parliamentary Supply Chain Bill*. Strict liability is an option (along with fault based joint/several liability) under the *Belgian Parliamentary Duty of Vigilance Bill*.

C. The Modern Slavery Act (UK)

The *Modern Slavery Act 2015* is a piece of disclosure legislation that applies to the UK. It is supplemented in the devolved regions with the *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015* and the *Human Trafficking and Exploitation (Scotland) Act 2015*. The reporting requirements of the *Modern Slavery Act* are set out in s. 54 and the Transparency in Supply Chains statement. Supporting this, is the *Northern Ireland Strategy on Modern Slavery* which is centred on three key principles: Prevent, Protect and Pursue. We previously responded to a consultation on the strategy.³⁸ Our observations on that consultation (as it pertains to supply chains) can be summarised as follows:

1. References to supply chains in the strategy are minimal, linked only to the goal of preventing modern slavery.
2. There was a tendency to refer to public procurement impacts concerning supply chains. Whereas this is indeed important, and indeed may be reflective of the region’s unique history and traditional reliance on the public sector it is not sufficient.
3. We welcome the reporting requirements set out in s.54 of the Modern Slavery Act, but we note the limitation of not aligning transparency regulation with legal liability violations.

We echo these concerns in this consultation report. But moreover, **we urge the Department of Justice to take into consideration the limitation of the failure to define Modern Slavery in future policy directions in the space.** Beyond, we are in favour of companies reporting on their supply chains in an endeavour to promote transparency. However, **the Department of Justice, the Northern Ireland Executive and indeed the UK Government need to be aware that the reporting requirements established by the TISC statement (within s.54) are minimal and do not reflect advances in the space at an EU level and indeed at an international level.** If we, as a region, are to align ourselves with the market standard on supply chains and human rights, **we need to be considering the importance of due diligence processes as a minimum.** Disclosure does little to help victims or change behaviour especially when this is delinked from responsibility for remediation to victims, or sanctions.

³⁷ Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. The French law has a fault-based liability grounded in general negligence principles; it offers remedy in the form of compensation. This act has recently seen some interesting application – see for example in the recent case against Total. For more, see “Climate Change Litigation against Total: a first victory for the NGOs and local authorities (11 Feb 2021, Sherpa), Available at <<https://www.asso-sherpa.org/climate-change-litigation-against-total-a-first-victory-for-the-ngos-and-local-authorities>> (last accessed 21 April 2021)

³⁸ QUB HRC Modern Slavery Submission, Available at <<https://www.qub.ac.uk/research-centres/human-rights-centre/FileStore/Fileupload,1015157,en.pdf>> (last accessed 22 April 2021)

II. The Transparency in Supply Chain initiative

Transparency in supply chains (TISC) is a vital aspect of the corporate responsibility to respect human rights set out in Pillar II of the UNGPs. S.54 of the Modern Slavery Act 2015 (MSA) is not as effective as intended in this respect: while s.54 has contributed to awareness-raising and a broad commitment to minimising (notably not eradicating) modern slavery, it is in its present form unable to substantively increase TISC. The legislation only creates a framework, not explicit rules, leaving compliance to the discretion of companies. The *Northern Ireland Modern Slavery Strategy* is similarly limited in its consideration of TISC. This means that, as the Independent Anti-Slavery Commissioner found, ‘corporate modern slavery statements [are] patchy in quality, with some companies failing to produce them at all’.³⁹

Reporting to date is limited and lacking in quality and substance. This is in part ‘[d]ue to the scale, distribution and covert nature of coercive revenue yield [:] traditional auditing and accounting systems – even those adapted toward human rights – will struggle to capture and interpret indicators of slavery.’⁴⁰ **Therefore, we advise that businesses see reporting obligations as an opportunity to report to the standard required in other jurisdictions⁴¹ and take a proactive approach to transparency.**

(a) Organisation structure and supply chains

A more in-depth consideration of this area is vital, as ‘organisational and supply chain dynamics... give rise’ to modern slavery.⁴² Moreover, supply chain structures, and their interconnectedness, by their very nature constrain detection of modern slavery through much of a business’ operation.⁴³ **The Corporate Justice Coalition (CJC, formerly CORE Coalition) provided some recommendations, however these have not been implemented widely, and would benefit from regulatory support.**

The CJC stated: ‘A company should provide an accurate overview of its operations including its products and services, its suppliers and its countries of operation’.⁴⁴ Suggested issues for reporting include:

- Main products/services/customers
- Company structure and subsidiaries, including outside the UK

³⁹ Independent Anti-Slavery Commissioner, ‘Calling on the FTSA 100 companies to combat modern slavery’ (2018)

⁴⁰ Robert Caruana and others, ‘Modern Slavery in Business: The Sad and Sorry State of a Non-Field’ (2021) 60 *Business & Society* 251, 264.

⁴¹ ‘MEPS: Companies must no longer cause harm to people and planet with impunity’ (Press Release, 29-03-2021) <[www.europarl.europa.eu/news/en/press-room/20210304IPR99216/meps-companies-must-no-longer-cause-harm-to-people-and-planet-with-impunity?xtor=AD-78-\[Social_share_buttons\]-\[linkedin\]-\[en\]-\[news\]-\[pressroom\]-\[corporate-due-diligence-and-corporate-accountability\]](http://www.europarl.europa.eu/news/en/press-room/20210304IPR99216/meps-companies-must-no-longer-cause-harm-to-people-and-planet-with-impunity?xtor=AD-78-[Social_share_buttons]-[linkedin]-[en]-[news]-[pressroom]-[corporate-due-diligence-and-corporate-accountability])> (accessed 20 April 2021)

⁴² Caruana and others (n40) at 252

⁴³ *Ibid.* at 256

⁴⁴ ‘CORE coalition: Recommended content for a modern slavery statement’ (June 2017) <<https://respect.international/wp-content/uploads/2017/10/Recommended-Content-for-a-Modern-Slavery-Statement-CORE-2017.pdf>> (accessed 15 April 2021)

- Structure of supply chains
- Location countries of company operations, manufacturing activities and sourcing
- Whether suppliers are engaged seasonally and the percentage of employees on temporary/ seasonal contracts
- Internal procedures to ensure adequate procurement pricing, prompt payment and good planning

The issues created by the supply chain structure are exacerbated by the lack of legal accountability for corporations engaging with subsidiaries, suppliers or contractors which engage in modern slavery. Greater transparency is therefore vital at the company level, to allow regulators and stakeholders to more easily expose corporate relationships leading to modern slavery. Much discussion centres around the extent or depth of such reporting. We recommend that reporting is undertaken on a mandatory basis at *minimum* throughout Tier 1 of a supply chain. A deeper dive into the supply chain would be preferable (similar to what is being promised by the *European Parliament Due Diligence Report*): companies can ‘obscure their connection to human trafficking through multi-tiered supplier relationships in which the human trafficking occurs not in the direct supplier relationship but rather indirectly through second- and third-tier supplier relationships’.⁴⁵ A transparency requirement detailing relationships through all tiers is therefore necessary to adequately encompass all relevant business relationships.

(b) Company policies in relation to slavery and human trafficking

UNGP 15 provides that a company should have ‘a policy commitment to meet their responsibility to respect human rights’.⁴⁶ The *Irish National Action Plan*, for example, recognises that companies should ‘develop human rights focused policies and reporting initiatives’.⁴⁷ This extends further than a mere statement of such commitment, to policies outlining ‘expectations of personnel, suppliers, business partners and others... *directly linked* to business operations, products and services’.⁴⁸ Such policies, while widely-utilised by companies generally, have little concrete framework for their implementation and promotion. Mere ‘aspirational claims about [companies’] commitments to addressing... global supply chains’⁴⁹ (rather than substantial ones) are insufficient to meet this threshold.

To create a TISC culture, implementation of specific policies by companies should be mandated, *at a minimum* (sufficient oversight to ensure implementation of the policies in practice is also required). Such necessary policies, outlined by the CJC, could include:

⁴⁵ Harry J Van Buren and others, ‘Business and Human Trafficking: A Social Connection and Political Responsibility Model’ (2021) 60 *Business & Society* 341, 344

⁴⁶ Benn F Hogan and others, ‘Irish Business and Human Rights’ (Trinity Business School, 2020) 4

⁴⁷ *Ibid.* at 5 (emphasis added)

⁴⁸ CORE (n. 44)

⁴⁹ Genevieve LeBaron and Andreas Rühmkorf, ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ (2017) 8 *Global Policy* 15, 23

- Policies concerning business relationships e.g., supplier code of conduct
- Recruitment policy
- Procurement policy
- Whistle-blowing procedures
- Migrant labour policies
- Child labour policy
- Child protection policy
- Gender policy
- Supplier code of conduct
- Employee code of conduct
- Policies concerning remedy and compensation for labour rights abuses
- Policies concerning staff training and awareness-raising around modern slavery
- Details of any internal enforcement mechanism

These are evidently wide-ranging, and the exclusion of any one of these from the operational remit of a company would have severe consequences for their impacts on modern slavery issues in their supply chains. The *California Transparency in Supply Chains Act 2015*, for example, recommends disclosure of *mandatory* policies such as ‘internal procedures for determining whether employees or contractors are complying with company standards regarding slavery and human trafficking’,⁵⁰ as well as suggesting disclosing the company’s Code of Conduct. In the UK, supported by the UN-backed *Principles for Responsible Investment*, certain investors aim to ‘develop better policies, processes, and procedures for engagement with invested companies, to address modern slavery in their operations and business relationships’.⁵¹ Such a model has support in the Netherlands and Asia Pacific, and could be beneficial in the Northern Ireland context, alongside mandating inclusion of certain policies.

(c) Due diligence processes

A ‘human rights due diligence process to identify, prevent, mitigate and account for how [companies] address their impacts on human rights’ is required under UNGP 15. **In both the Modern Slavery Act and Northern Ireland Strategy, there is no requirement to conduct any level of due diligence, mandatory or otherwise.** Conversely, there is a growing worldwide movement towards not only due diligence legislation, but mandatory due diligence for companies on human rights issues (HRDD). Draft legislation is under consideration at the

⁵⁰AG California DoJ, ‘California Transparency in Supply Chains Act: A Resource Guide’ (2015) 18

⁵¹ James Cockayne, ‘Working with the Financial Sector to Correct the Market Failure of Modern Slavery’ (2020) 6(1) BHRJ 159, 161

EU level, in Austria, Germany and the Netherlands.⁵² France adopted their own HRDD *loi du vigilance* in 2017. In the Republic of Ireland, the Irish Coalition on Business and Human Rights is advocating for mandatory, gender responsive HRDD legislation,⁵³ and across Europe many other civil society organisations are advocating similarly. The UK Joint Committee on Human Rights has also recommended the introduction of legislation mandating HRDD ‘both for their subsidiaries and across their whole supply chain.’⁵⁴

We highlight four key failings of the non-inclusion of due diligence, mandatory or otherwise, in the Modern Slavery Act and Northern Ireland Strategy. First, **few companies provide detail on their due diligence process:** in 2016 H&M and ASOS were the only companies that detailed incentives for suppliers to comply with their code of conduct. Clear due diligence provisions would limit this lack of engagement.

Second, **there has been little-to-no repercussion for companies which have not submitted a statement,**⁵⁵ with the effect of creating a ‘race *at* the top’ (among complying companies) rather than the ‘race *to* the top’ anticipated prior to enactment of the Modern Slavery Act. Indeed, compliance with the act can involve simply stating that no steps have been taken by the company to ensure that its supply chain is free from slavery and human trafficking.⁵⁶ The most recent findings show that out of 18,491 companies required to adhere to the Modern Slavery Act, only 14,869 did so.⁵⁷ Meanwhile modern slavery exists in one in ten UK supply chains.⁵⁸ A mandatory HRDD law would make considerable inroads into this lack of engagement with the existing legislation (and has been supported in the UK context notably by ASOS,⁵⁹ among other companies). The UK Bribery Act 2010, including criminal liability with the defence of due diligence, may be a more effective model than the transparency clause of the Modern Slavery Act in this regard.

Third, **the Modern Slavery Act does not require companies to *improve* their standards where they have been found lacking.**⁶⁰ This limits effectiveness of any provisions concerning TISC. Fourth, **there must be a clarification as to how far down the supply chain any due**

⁵² ‘National & regional movements for mandatory human rights & environmental due diligence in Europe’ (BHR Resource Centre) <www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/> (accessed 4 May 2021)

⁵³ Hogan and others (n 46) at 5

⁵⁴ Joint Committee on Human Rights, ‘Human rights and business 2017: promoting responsibility and ensuring accountability’, 59

⁵⁵ ‘Briefing for Second Reading Modern Slavery (Transparency in Supply Chains) Bill’ (Corporate Justice Coalition, July 2016)

⁵⁶ Ekaterina Aristova, ‘Mandatory Human Rights Due Diligence in the UK: To Be or Not to Be?’ (BHR Resource Centre, 23 Jun 2020) <www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-uk-to-be-or-not-to-be/> (accessed 4 May 2021)

⁵⁷ Home Office, ‘Independent review of the Modern Slavery Act: final report’ (GOVUK, May 2019) <www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report> (accessed 24 April 2021)

⁵⁸ ‘How effective has the modern slavery act been’ (Odesma, 9 January 2018) <odesma.co.uk/blog/effective-modern-slavery-act> (accessed 25 April 2021)

⁵⁹ Beth Wright, ‘UK: ASOS calls for mandatory human rights due diligence legislation’ (BHR Resource Centre, 29 Apr 2021) <www.business-humanrights.org/en/latest-news/uk-asos-calls-for-mandatory-human-rights-due-diligence-legislation/> (accessed 4 May 2021)

⁶⁰ LeBaron and Rühmkorf (n 49) 20

diligence process should be carried out. Whereas the remit of the Act appears to be the whole value chain, in practice it seems limited to Tier one suppliers.

(d) Risk assessment and management

Adequate risk assessment can limit complicity by companies in modern slavery. Companies must recognise areas within their supply chains where there is a higher risk of slavery occurring. Although supply chain mapping has, as stated, become difficult for companies operating through many relationships, adequate management of supply chains can enhance risk assessment more broadly. For example, in the food production and processing industry, improved supply chain control can minimise food safety risks food safety.

Most statements mention risk assessment, but do not go into sufficient detail. The UK Joint Committee on Human Rights found that ‘35% of statements say nothing on... risk assessment processes... [and] two-thirds do not identify priority risks’,⁶¹ ‘[instead] simply disclosing general information about their existing policies.’⁶²

A fixed standard of information to be included in risk assessments is required,⁶³ for which the CJC recommendations provide some guidance. First, **an assessment of risks linked to modern slavery is required** (for example, regarding high-risk sectors such as agriculture, lack of regulation and labour rights in source countries, complex employment arrangement, or the presence of vulnerable workers). **This should be company-specific and cannot be in the form of a tick-box exercise.** Second, they advocate **reporting of impact assessments undertaken**, including evidence from those affected by corporate operations. This is an important emphasis, as **policies themselves are (and should) not (be) the end goal of transparency requirements**: what is needed is an understanding of how the company affects those stakeholders with which it interacts. Third, **reports should outline actions both planned and undertaken**, including how these have been prioritised, in addressing modern slavery, monitoring, and evaluating mitigatory measures, and reporting on modern slavery.

(e) Key performance indicators to measure effectiveness of steps being taken

The CJC made four key recommendations for ‘good reporting’ in this respect,⁶⁴ which we expand upon. First, they recommended ‘disclosure of any identified instances of modern slavery and the results of corrective action plans’. This should be implemented as part of the mandatory disclosure recommendation, creating greater accountability and comparability of companies, and reinstating the aim of a ‘race to the top’ concerning transparency engagement.

Second, ‘information on company-level grievance mechanisms, number of completions and resolutions’ is required. While useful, this could be better embedded in corporate practice. We suggest that **companies also publish their *process of dealing with complaints*** – including

⁶¹ Joint Committee (n. 54) at 37

⁶² Justine Nolan, ‘Hardening Soft law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?’ (2018) 15(2) Brazilian Journal of International Law 65, 71

⁶³ Hinrich Voss and others, ‘International supply chains: compliance and engagement with the Modern Slavery Act’ (2019) 7(61) Journal of the British Academy 61

⁶⁴ CORE (n. 43)

the duration of that process.⁶⁵ Further, restricting data to company-level grievances stifles potential for guidance. Non-judicial grievance mechanisms, some of which consider supply chain issues (e.g., the OECD National Contact Point system, and the World Bank Grievance Redress Service),⁶⁶ can provide instruction. For example, their recommended ‘remedies’ focus on changing (and improving) policies and procedures within corporations and supply chains, which is of especial relevance in the context of TISC.⁶⁷

Third and relatedly, ‘details on remedy and compensation provided for labour rights abuses’ should be included. Providing an account is useful in embedding a culture of transparency, legitimacy, responsibility, and accountability. **We recommend that the government act as intermediaries in interpreting ‘remedy’ in any supporting guidance on the TISC.** We, in the Global North, tend to associate remedy with judicial processes and financial outcome. However, remedy is much more all-encompassing; the UNGPs outline:

*Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.*⁶⁸

We believe that **the government should have a responsibility here to educate and inform businesses of the wide spectrum of remediation that may fall under remedy and redress.**

Fourth, any performance indicators used, and how these inform business decisions, should be included. Any company metrics of ‘effectiveness’ must be a mixture of internal measurements and external (conducted by grassroots organisations and trusted NGOs). There must be recognition that those most vulnerable to cycles of modern slavery within complex supply chains (typically, migrant workers, women, persons with disabilities, those who are homeless, members of the LGBTQI+ community here) are fearful and distrustful of employers. They may feel that they are trapped in ‘economic coercion’ and are therefore uncomfortable with disclosures.⁶⁹ Beyond, they may be also distrustful of CSOs (particularly established ones).⁷⁰ To overcome, we suggest Lundy’s model of participation which we believe provides a useful

⁶⁵ Principle 66, Tripartite Declaration of Principles concerning multinational enterprises and social policy (2017) <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (accessed 20 April 2021) This might be a useful comparator for how procedure might be understood by businesses.

⁶⁶ National Contact Point, OECD <www.oecd.org/investment/mne/ncps.htm> (accessed 19 April 2021); World Bank Grievance Redress Service <www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service> (accessed 19 April 2021)

⁶⁷ Guiding Principles on Business and Human Rights (2011) *OHCHR* <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (accessed 19 April 2021) see particularly, Pillar III.

⁶⁸ Commentary, Principle 25, UNGPs, *ibid*.

⁶⁹ Genevieve LeBaron and Ellie Gore, ‘Gender and forced labour: Understanding the links in global cocoa supply chains’ (2019) *Journal of Development Studies* 56, 1095

⁷⁰ Tara J Melish, ‘Putting ‘Human Rights’ back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights’ in Cesar Rodriguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge 2017) 76

way to think about meaningful engagement with vulnerable groups (i.e., beyond children and young people).⁷¹

We recognise such measurements of ‘effectiveness’ may be difficult to implement. Therefore, we **emphasise the opportunity for businesses to engage in ‘experimental’ participation** (i.e., bottom-up participation: grassroots NGOs, charities, workers’, and victims’ groups informing corporations on better shaping their practice)⁷² alongside established NGOs. This gives voice to those affected, or vulnerable to being affected, recognising the valuable role they can play in shaping their (and our collective) future.

Further, we recommend that:

- The metrics and performance indicators are available in the range of languages used not only by subsidiaries and sub-contractors, but also by those that work for the organisation (*regardless of the tier in the supply chain*).
- Any metrics and performance indicators must be accessible. For those with limited literacy skills we recommend that there is a suitable method of informing them of the work done. We recommend that visual, hearing or learning impairments should not be an impediment to accessing information produced by the company.
- Metrics and performance indicators must be consulted regularly and not fall into the trap of complying solely with the TISC (i.e., an annual consultation). We suggest that this is a rolling process.
- We advise working with initiatives such as the EITI principles of implementation to guide on monitoring progress.⁷³

(f) Training on modern slavery and trafficking

Deeper engagement with modern slavery training at the company level is required, given the Northern Ireland Strategy focus on training for authorities such as the PSNI or judiciary. This was recognised by the CJC recommendations, which set out five key recommendations, considerably expanded upon here.

First, **specific training sessions on modern slavery should be undertaken by companies**, to raise awareness of both the crime itself and how to raise complaints. The uptake and content of this training should be publicised, as part of awareness-raising, and similarly employees should be engaged more deeply in identifying modern slavery issues. The content of the training will necessarily differ from sector to sector: ‘firms can contribute to remedying structural injustice even if their nexus to human trafficking is not as strong as that of other firms’.⁷⁴ Equally, those most closely engaged with modern slavery issues will differ across

⁷¹ Space, Voice, Audience and Influence. For more see, Laura Lundy ‘Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child’ (2007) 33(6) British Educational Research Journal 927

⁷² Cesar Rodriguez-Garavito, ‘Business and Human Rights: Beyond the End of the Beginning’ in Cesar Rodriguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge 2017) 11-47.

⁷³ EITI Base Code <www.ethicaltrade.org/resources/eti-base-code> (accessed 20 April 2021) Other resources including the Implementation Principles are available on the website.

⁷⁴ Van Buren and others (n 45) at 363.

sectors, from front office staff, to drivers, to human resources managers. A ‘holistic approach [therefore] requires identifying [specific] indicators in each situation’.⁷⁵

Second, **all relevant company decision-makers should receive training on issues pertaining to modern slavery; this training should again be disclosed.** Further, moving training from a voluntary requirement to a mandatory one would be beneficial, as seen in the *California Transparency in Supply Chains Act 2010*. This enables greater comparability and accountability of companies for their policies. At this upper level, the focus should be on ‘closing entry points of human trafficking’ into the supply chain⁷⁶ – for example through introducing policies requiring training of supplier companies as well as the ‘home’ company.

Third, and relatedly, **those suppliers which have received training and capacity-building should be identified in disclosure.** Building on this, suppliers which have *not* received such training should be similarly identified, along with the reasons for their being excluded from modern slavery training. Fourth, there should be evidence that training has been provided to groups at risk, to make them aware of their rights. In line with the third point, it should be outlined why certain groups and not others, considering the context of the companies. This is to ensure there are no gaps in application of modern slavery training.

Finally, and most importantly, **there should be proactive engagement through training.** The CJC Recommendations highlighted the importance of noting the frequency of training and evaluating its effectiveness. However, this must be extended: evaluation should be used to *develop* training to achieve maximum effect; the evaluation is not the end goal.

Conclusion

Relevant companies should recognise that the s.54 Modern Slavery Act requirements are the bare minimum among global reporting standards. Companies in Northern Ireland should take this opportunity to consolidate their reporting obligations from elsewhere (such as France, the Netherlands, Norway, Germany, and EU, which focus on due diligence rather than disclosure). This approach offers companies the potential to evolve their reporting and move beyond the ‘restricted visible horizon’ of tier 1 suppliers.⁷⁷ This is an opportunity for innovation, and to be forward-thinking. It also provides organisations with the potential to align their Corporate Social Responsibility (CSR) aims with reporting requirements, and specifically go ‘beyond the law’.⁷⁸ Further, it aligns closely with Pillar II UNGPs which set out an *expectation* of responsibility (via human rights due diligence) rather than a voluntary assumption of responsibility (typically CSR).

Ultimately, specificity is key to any regulatory developments: a ‘general statement opposing human rights violations, while well-intentioned, does not suffice.’⁷⁹ The UNGPs envisage a

⁷⁵ Ibid. at 364

⁷⁶ Ibid. at 361

⁷⁷ CR Carter et al, ‘Toward the theory of the supply chain’ (2015) 51 (2) *Journal of Supply Chain Management*, 89-97, cited in Caruana and others (n40)

⁷⁸ Doreen McBarnet, 2009 ‘Corporate Social Responsibility Beyond Law, Through Law, for Law’ University of Edinburgh, School of Law, Working Papers.

⁷⁹ Californian Resource Guide, n 50

‘smart mix’ of voluntary and mandatory measures to support their implementation.⁸⁰ If Northern Ireland expects to compete as a centre for private companies, it needs to ensure that regulations, guidance, and policy reflect the equity in private sector obligations.

⁸⁰ Hogan and others (n 46) at 5.

III. Rethinking TISC

s.54 of the Modern Slavery Act (MSA), relates to Transparency in Supply Chains and applies to all commercial organisations that supply goods/services and have a total turnover equal to or exceeding £36m, a figure set by the Secretary of State. The purpose of this section is to present a series of recommendations considering how the approaches to TISC regulation can be improved for (i) business (ii) states and CSOs, and (iii) victims.⁸¹ The approach to these recommendations, therefore, is to consider the unique challenges faced and experiences learned by each stakeholder in the supply chain. This informs the recommendations and offers a bespoke approach tailored to best meet the (sometimes) competing needs of stakeholders while working toward the overarching objective of supply chain transparency. It is in the best interests of all stakeholders to have confidence that organisations operating in NI, as part of the wider UK, have robust procedures in place to ensure that goods and services provided have been acquired honestly and free from exploitation. In this context, approaches to TISC for business is considered first, then for states and CSOs, and this section closes with consideration of approaches to TISC for victims.

A. Business

i. Overview

When creating a slavery and human trafficking statement in a financial year, commercial organisations, whose main objective is to return a profit, will seek to complete this task as cost-efficiently as possible. Businesses must accurately calculate operating costs and so, as a beginning point for approaches to TISC for the commercial sector, clear and accessible reporting structures must be put in place. **It is important to minimise vague TISC requirements of business and place transparency for all at the heart of the supply chain.** Transparency in the supply chain begins with *transparency of reporting procedures*, businesses should be clear about what is expected of them.

Large commercial organisations are well-equipped with analysts that can interpret data and work towards the implementation of complex measures that ensure optimal business output. This includes factoring costs associated with legal reporting requirements, so long as they clearly understand the legal framework within which they operate. Drafters seeking to reform s.54 to put ‘teeth’ into this part of the Act so that all businesses take seriously their responsibilities to check their supply chain⁸² must ensure that reforms to the reporting process can be operationalised, accessible, and effective. This means that a comprehensive template detailing the depth of information required should be distributed to all eligible businesses (i.e.,

⁸¹ This approach draws from the triple helix model of innovation that synthesises approaches of university-industry-government interactions.⁸¹ This theory is helpful to frame the challenges faced in global supply chains because the functions, objectives, and knowledge brought by each key group in a triple helix model are used to identify and close gaps that are not necessarily noticed by other key groups because their expertise or experiences lie elsewhere. For more, see Yuzhuo Cai and Henry Etzkowitz, ‘Theorizing the Triple Helix model: Past, present, and future’ (2020) *Triple Helix Journal* <<https://doi.org/10.1163/21971927-bja10003>> accessed 05 May 2021.

⁸² Frank Field and other, ‘Independent Review Of The Modern Slavery Act 2015: Final Report’ (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 5 May 2021.

turnover equal to or exceeding £36m) well in advance of the reporting due date. Equally, guidance should also be made available to the sizeable, small, and medium (SME) industry operating in Northern Ireland as to how they can voluntarily comply with ethical supply chain processes.

ii. *Recommendation for business*

The *Paris Agreement* is a legally binding international treaty on climate change that came into force in 2016. It has been adopted by 196 countries with the goal of limiting global warming and reaching global net-zero emissions.⁸³ For this to be achieved, the Paris Agreement works on a 5-year cycle of increasingly ambitious climate action carried out by the participating countries which are required to submit action plans known as Nationally Determined Contributions (NDCs) that detail the steps they will take to reduce their greenhouse gas emissions and build resilience to adapt to the impact of rising temperature.⁸⁴ To track this, countries establish an Enhanced Transparency Framework (ETF). Starting in 2024, countries will submit transparency reports on the actions taken and the progress in climate change mitigation, adaptation measures, and support structures. These reports will be reviewed, and the information gathered will feed into a *global stocktake* which will assess the collective progress towards the long-term climate goals. In turn, these will lead to recommendations for countries to set more ambitious plans in the next round.⁸⁵

To assist commercial organisations in achieving transparency in their supply chains, there can be no room for vagueness in the reporting structure and system. The state must provide a comprehensive TISC framework, like the ETF, that feeds into a national (or even an eventual global) *supply chain stocktake*. UK governments have been advised that:

companies should not be able to state they have taken no steps to address modern slavery in their supply chains, as the legislation currently permits, and that the six areas of reporting currently recommended in guidance should be made mandatory [and] that **Government should set up a central repository for statements**; that the Independent Anti-Slavery Commissioner should monitor transparency; sanctions for non-compliance should be strengthened; and that Government should bring forward proposals for an enforcement body to enforce sanctions against non-compliant companies.⁸⁶

We recommend building on this, and beyond, that the central repository be viewed as the TISC framework (housing all the relevant information). **Companies should be provided with a template TISC statement outlining the exact information that is required of them.** These should be understood to be less than *statements* and more like TISC *action plans*, akin to the

⁸³ H Briggs, 'What is the Paris climate agreement and why did the US rejoin?' (*BBC*, 22 April 2021) <<https://www.bbc.co.uk/news/science-environment-35073297>> accessed 01 May 2021.

⁸⁴ United Nations Climate Change, 'The Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 01 May 2021

⁸⁵ *Ibid.*

⁸⁶ Field (n. 82) at 14, (emphasis in original)

NDCs under the Paris Agreement or the State National Action Plans on Business and Human Rights.⁸⁷

The TISC statement or *action plan* template must contain exact metrics that provide businesses with the opportunity to report actions and plans in key areas. To foster a culture of **supply chain transparency**, we recommend that TISC reporting is mandatory throughout the entire global supply chain, not only throughout tier one but through tier two, tier three, and so on. As was demonstrated with the complex data being coherently collected and managed under the Paris Agreement – complex data *can* be collected, and transnational corporations will find the resources to do this when it is required of them by law. There will not be TISC until businesses produce transparent data on their supply chain (that can then be scrutinised by states and CSOs as well as, importantly, be examined by businesses themselves). **Reflecting backwards** means that businesses should report on how they have mitigated against known supply chain abuses over the previous reporting period. This must explicitly include company policies in relation to slavery and human trafficking.⁸⁸ Human rights due diligence reporting must also be included within the TISC action plan.⁸⁹ Per contra, **planning forward** means that businesses should report on how they plan on strengthening their supply chain over the coming reporting period and outline the long-term sustainable plans that they have put in place at each axis of vulnerability within their supply chain. Planning forward is an opportunity for business to examine weaknesses in company policy and due diligence, strengthen these, and demonstrate to stakeholders that they are committed to working towards an honest, ethical, and clean supply chain. **Explicitly outlining TISC supports** is the responsibility of reporting commercial organisations to outline their wider policies, throughout their business, that supports all stakeholders in achieving the corporate goal of TISC throughout their operations. **State support** within the reporting framework means that there should be the option for industry to report gaps at local, national, and international level that expose their supply chain to vulnerabilities and request state support in addressing these gaps. This reporting approach is a *set-value framework*⁹⁰ (as opposed to a vague supply chain reporting framework), that allows all stakeholders to evaluate the functioning of each node of the supply chain, enabling a *supply chain stocktake* of Northern Ireland and UK businesses by interested stakeholders.

The implementation of set values provides coherent guidelines for commercial organisations to follow by building upon the existing framework of mandatory annual reports. This offers improved transparency by enabling scrutiny of the steps a company has undertaken to-date, which is to the benefit of all stakeholders such as CSOs who wish to monitor TISC performance. This type of universal in-depth reporting also enables comparative analysis by businesses within institutional fields - allowing companies to carry out horizontal, vertical, and diagonal comparative analysis of supply chain performance. When businesses within an

⁸⁷ OHCHR, ‘State national action plans on Business and Human Rights’ (no date) <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx> accessed 5 May 2021.

⁸⁸ This was discussed in detail in section II. (b) above (at 15-16)

⁸⁹ See section II. (c) above (at 16-17)

⁹⁰ See for example the UK Government’s ‘Value Framework’ that is a comprehensive framework detailing exact nuances of government decision-making at Gov.UK, ‘Explaining the “ Value Framework” (UKG, April 2016) <<https://www.gov.uk/government/publications/nda-value-framework-how-we-make-decisions/explaining-the-value-framework#when-we-apply-the-value-framework>> accessed 06 May 2021.

institutional field (for example, supermarkets) can more easily evaluate rival business performance in an area falling within corporate social responsibility (CSR), or business and human rights (BHR), this encourages isomorphic behaviour, insofar as, for example, recognising responsible conduct by rivals in *their* supply chain management might have reputational and performance-related benefits for them⁹¹ Consequently, each rival business copies this behaviour to also benefit from potential rewards - thus moving toward a win-win situation for stakeholders invested in improving TISC.

iii. *The value of reward*

A comprehensive set-value framework provides a reference point for TISC-compliant business to be rewarded (via public recognition of an honest supply chain). Performance is improved when there is a reward attached to the effort.⁹² For example, concerning climate change, the UK government recently announced a £1bn fund to help reduce greenhouse gas emissions, directly assisting businesses comply with not only legal obligations but also CSR responsibilities.⁹³ Moreover, the Business and Human Rights Resource Centre recently suggested that the public procurement spend could be used as leverage with businesses during public contract tendering processes in order to incentivise companies to work towards improving their human rights due diligence.⁹⁴ In the context of these examples, **the state should consider offering monetary rewards (for example, through a grant-based system that would feed back into the local economy) to companies that have met specified targets within the TISC set-value framework.** One recommendation for how this could work is through the creation of a tier system wherein achieving different TISC set values within the reporting framework would net proportionate rewards. For example, achieving the ‘floor’ (i.e., the minimum required for a monetary reward) would wield x where x is the amount netted – but achievements moving toward the ceiling (i.e., a totally transparent supply chain) would wield $x+y$ – where y would be an additional percentage.

The other reward that a set-value reporting framework would bring to compliant organisations is the positive media promotion and recognition of those businesses that meet specified targets. This, in turn, translates to consumer and investor confidence. Due to the power of social media, CSOs, activists, as well as companies themselves, can reach large numbers of stakeholders to communicate ethical business practices and encourage custom be given to socially responsible companies.⁹⁵ Spotlighting those companies that are performing well based on reliable and comprehensive data is of wide-reaching value throughout the supply chain.

⁹¹ Pavel Castka and Michaela A. Balzarova, ‘ISO 26000 and supply chains—On the diffusion of the social responsibility standard’ (2008) 111 *International Journal of Production Economics* 274.

⁹² Panneerselvam Baskar, ‘A Study of the Impact of Rewards and Recognition on Employee Motivation’ (2015) 4 *International Journal of Science and Research* 1644.

⁹³ Fiona Harvey, ‘Government to announce £1bn fund to help reduce emissions’ (*The Guardian*, 17 March 2021) <<https://www.theguardian.com/environment/2021/mar/17/government-to-announce-1bn-fund-to-help-reduce-emissions#:~:text=The%20government%20will%20spend%20more,plans%20set%20out%20on%20Wednesday>> accessed 01 May 2021.

⁹⁴ Business & Human Rights Resource Centre, ‘Modern Slavery Act: Five years of reporting’ (*February 2021*) <https://media.business-humanrights.org/media/documents/MSR_Embargoed.pdf> accessed 01 May 2021

⁹⁵ IHRB and Chowdhury Center for Bangladesh Studies at UC Berkley, ‘The Weakest Link in The Global Supply Chain: How the Pandemic is Affecting Bangladesh’s Garment Workers’ (*May 2021*)

iv. *The value of accountability*

First, the UK government should introduce fiscal penalties under the Modern Slavery Act concerning failure to meet statutory obligations under the Act.⁹⁶ TISC reporting is central to this and so non-compliance or subpar performance in TISC reporting will incur financial penalties.⁹⁷ **Fiscal penalties for non-compliance with TISC reporting is highly endorsed by the authors of this report.** In addition to this, the publication of noncompliance data has the inverse effect on non-compliant TISC-reporting organisations contra compliant TISC-reporting organisations. Having access to TISC (non)compliance data will lead activists and CSOs to ‘name and shame’ errant organisations which can result in a loss of confidence from both investors and consumers, leading to financial costs in addition to statutory penalties.⁹⁸ Such losses in a competitive market mean that non-compliance with TISC reporting will become unsustainable. To not meet the targets set would mean that a company would at some point struggle to function, or at least, remain competitive.

In sum, recommendations for **TISC reporting for business** are:

- i. A comprehensive TISC reporting template should be drawn up and made publicly available on a central repository. The responsible state department should ensure that all communication around reporting requirements is sufficiently clear and transparent for businesses to understand how to report coherently and efficiently.
- ii. To ensure supply chain transparency, reporting is mandatory throughout all tiers of the supply chain.
- iii. The report should follow a set-value framework and demand robust and rigorous data that will:
 - a. look *backwards* at TISC compliance that has been achieved in the previous reporting period and detail *how* this has been achieved;
 - b. look *forwards* at TISC compliance that will be achieved in the forthcoming reporting period and establish *how* this will be achieved;
 - c. identify the broader support structures the organisation has put in place to continue to build TISC to achieve ‘ceiling’ rather than ‘floor’ compliance;
 - d. identify TISC gaps at local, national, and international levels that the state can assist to address TISC issues.
- iv. TISC compliant businesses should be rewarded but in ways that are more likely to feed back into the local community through job creation (such as grant access or favoured access to public procurement spend).

<https://www.ihrb.org/uploads/reports/IHRB_Chowdhury_Center_-_How_the_Pandemic_is_Affecting_Bangladesh_Garment_Workers_-_Apr_2021.pdf> accessed 01 May 2021

⁹⁶ As outlined and recommended in Field (n 82) at 43. This would align it with initiatives in France, Germany, Australia and EU.

⁹⁷ Ibid.

⁹⁸ Ibid

B. States and CSOs

i. *Overview*

The commercial sector will benefit from legislation that clearly establishes their role and responsibilities and in a way that makes encourages businesses to take an embracive approach in examining their supply chains (for e.g., highlighting state, consumer, and investment support for businesses who engage fully in TISC approaches and reporting). For its part, the state must take this opportunity to ensure that the reporting process for supply chains is awake to the complexities of global supply chains. The knowledge and experiences of each party should be considered because each has something unique to contribute. In the case of commercial organisations, they have the resources and the motivation (via reputational gains or losses) to clean up their supply chains. However, the state has law-making capacity and obligations under international human rights law⁹⁹ as well as duties under domestic law¹⁰⁰ and the UNGPs¹⁰¹ that map onto modern slavery and TISC. Consequently, it is the state that must bear the burden of ensuring that reforms of TISC regulations are robust and will effect real change.

ii. *Building a bridge between commercial TISC recommendations and state TISC recommendations*

We above advised (and supported) a central repository for Modern Slavery Act reporting along with a single reporting deadline.¹⁰² Coherence of reporting within the commercial sector is critical for the state to ensure not only transparency but also accountability. For Northern Ireland (and the broader UK) to bring forth a truly innovative framework to TISC, the entire kaleidoscope of company supply chain activity must be examined for reporting purposes. For the approach to TISC to be improved for the state, there must exist robust mechanisms that allow the state to spot and address regulatory gaps that allow unethical behaviour to flourish. In this context, Field recommends that the state appoint an independent Anti-Slavery Commissioner.¹⁰³ To build on this and assist the Northern Ireland government adequately monitor TISC-compliance in Northern Ireland, **it is recommended that a Northern Ireland Anti-Slavery Commissioner be appointed prior to the development of the central repository and the associated decision-making process that this will bring.** An independent Anti-Slavery Commissioner in Northern Ireland (Northern Ireland Commissioner) would bring concrete benefits for the state in improving its TISC-reporting approach, as it stands at the foothills of this opportunity to build a system capable of effecting real-world change in supply chains. Reporting cannot be a tick-box exercise and must be of real value. **One way that a Northern Ireland Commissioner can ensure that TISC reporting is effective is through the development of key performance indicators.**¹⁰⁴ We have outlined how these might be developed in response to TISC reforms at section three and recommend that these are read

⁹⁹ See (n 4, n 5, n 8 and n 9)

¹⁰⁰ See (n 24)

¹⁰¹ See (n 28)

¹⁰² Home Office, 'Transparency in supply chains consultation: Government response' (*GOV.UK*, 22 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf> accessed 01 May 2021

¹⁰³ As recommended by the Modern Slavery Act review, see Field and others (n 82) 14.

¹⁰⁴ See section II. (e) above

alongside the recommendation that a Northern Ireland Commissioner is appointed and tasked with the development of these metric and performance indicators.

Further, while Brexit has and will bring various challenges to all businesses in the UK, Northern Ireland faces unique challenges and opportunities. In addition to the different EU trade system in NI, this jurisdiction has the ‘highest concentration of small and medium sized businesses anywhere in the UK, making up 99.9% of all businesses and generating three quarters of all private sector income and employment’.¹⁰⁵ Or put differently, the UK governments should give greater thought to the role of the SME sector in the supply chain, and this applies to Northern Ireland specifically, given the concentration of the SME sector in this jurisdiction. The appointment of a Northern Ireland Commissioner would ensure that the TISC system put in place would fully meet the nuanced needs of this jurisdiction. By way of explanation, TISC mandatory reporting will fall to those companies with a turnover of, or exceeding, £36m. However, from a Northern Ireland perspective, the role that the SME sector in Northern Ireland will play *as part* of the UK-wide supply chain must be reviewed. For example, a company that operates solely in GB with no other footfall or an office in Northern Ireland and has a turnover of £36m or over is not of concern to the government in NI. However, if businesses in Northern Ireland form nodes on the supply chain of the GB company, then the working environment and actions of these smaller entities become much more important. Their actions become part of the accountability process of UK-wide TISC actions. It is, therefore, in the best interests of the governments in *all* UK jurisdictions to work together to support *all* UK businesses become TISC-compliant, not only those who meet the current £36m turnover criteria. In this context and focussing only on NI, it is recommended that the government focus support for TISC-reporting compliancy across all businesses, including the SME sector. In this context, it is recommended that **the central repository also contain voluntary statements from all business enterprises who operate as part of a supply chain (i.e., most businesses), with a view to making mandatory TISC-reporting for all businesses as part of the future agenda for supply chain transparency.** This would ensure a cleaner and more honest supply chain.

iii. The Value of Coherence

Encouraging coherence across all UK jurisdictions and including SME businesses in voluntary TISC compliance could lead to several benefits for the state. For example, increased transparency will foster public (consumer) trust in businesses operating in the UK and this can only be a positive development for the local economy. Relatedly, a world leading TISC system gives confidence to investors in companies operating in Northern Ireland that ethical, CSR, and BHR concerns are mitigated against within a robust TISC framework. Further, transparency within supply chains could result in more equitable competition between SMEs and larger businesses because supply chains across businesses of all sizes should be ‘clean’ thus eradicating the use of cheap labour to lower costs (a strategy more likely to be employed by companies with higher turnovers and more complex supply chains).

¹⁰⁵ Swinton Business Trends, ‘Northern Ireland’ (*Swinton Business*, no date) <<https://www.swinton.co.uk/business/business-trends/northern-ireland>> accessed 05 May 2021.

iv. *The role of CSOs*

The state must engage with CSOs and provide them with resources (where appropriate or applicable) and ensure that information is accessible. In recent years, NGOs and CSOs, including the Corporate Justice Coalition, have called for the UK to adopt a mandatory due diligence law requiring parent companies to oversee the activities of their global supply chains.¹⁰⁶ This demonstrates the kind of key role that CSOs play in, more broadly, illuminating contemporary social issues, as well as, more specifically, the law on modern slavery and their support in reforming TISC approaches. CSOs are a cornerstone in a well-functioning society, and it is recommended that the Northern Ireland Commissioner, the central repository, and the comprehensive TISC set-value framework¹⁰⁷ are made fully accessible to relevant CSOs and the system is established as a living system. In other words, where CSOs highlight gaps, inconsistencies, weaknesses, or flaws, that the state works with them to evolve the system to continue working to reach the ‘ceiling’ of TISC compliance of corporations operating in the UK.

In sum, recommendations for **TISC reporting for states and CSOs** are:

- i. A **Northern Ireland Anti-Slavery Commissioner be appointed** prior to the development of the central repository. The Northern Ireland Commissioner should advise on the development of the central repository as well as having core input in the design of the template TISC statements/actions plans. Whereas they would work with the Independent Anti-Slavery Commissioner, their role would recognise the unique situation of Northern Ireland government, economic and society.
- ii. Key Performance Indicators should be developed, and the Northern Ireland Commissioner should be involved in the drafting.
- iii. Voluntary statements should be encouraged from the SME sector and assistance from the state should be given to businesses in this sector. Consideration ought to be given to making TISC reporting mandatory for these businesses (within reason).

¹⁰⁶ Dalia Palombo, ‘Does the UK have an international duty to adopt a mandatory due diligence obligation law on business and human rights?’ (*Corporate Justice Coalition*, August 25th, 2020)

<<https://corporatejusticecoalition.org/news/does-the-uk-have-an-international-duty-to-adopt-a-mandatory-due-diligence-obligation-law-on-business-and-human-rights/>> accessed 01 May 2021

¹⁰⁷ See III. A.

C. Victims

i. *Overview*

The current approach to Transparency in Supply Chains has consistently been business-oriented with victims largely excluded. Whereas provisions for victims in modern slavery generally are quite strong,¹⁰⁸ within the TISC, they are not referenced. This does a disservice to victims, and indeed fails to recognise the role of corporations in not only **preventing** modern slavery, but also their potential role for **protecting** victims and **pursuing** those that engage with modern slavery practice. We recognise that this would require a realigning of corporate purpose for human rights obligations (including modern slavery) but, it is within the remit, and of academic debate on the topic.¹⁰⁹ To improve the approach for victims, we need to move away from the business-centred approach to one that centres victim's rights. We need to fully integrate and realise the tenets of the business and human rights movement which focuses on the centrality of victims. We recommend two possible routes: one, expanding the definition of supply chains and, two, the consultation of workers in creating annual statements.

ii. *The Definition of Supply Chains*

In this era of global corporations and increased outsourcing, supply chains have become increasingly complicated¹¹⁰ and involve many global players. This results in many victims slipping under the radar and being denied justice because the current reporting requirements in the UK¹¹¹ do not require a detailed examination of every aspect of supply chains. To improve this, an increased list of aspects of the supply chain that companies must report on is needed. As identified by Corporate Justice Coalition (formerly CORE), several companies are already doing so and provide a good example going forward, namely the fashion retailer ASOS in its breakdown of each structure involved in the production process.¹¹² The Australian approach to reporting requirements may also provide guidance here in its six mandatory requirements¹¹³ which was purposely designed to highlight the hidden aspects of supply chains and make them more visible.¹¹⁴ Also of interest is the *European Parliament Due Diligence Report* which would cover all aspects of the value chain.

Specific recognition for vulnerable groups (including race, gender, immigration status, post-conflict background etc. with women being one of the most vulnerable groups, making up 71%

¹⁰⁸ (n. 23)

¹⁰⁹ Bilchitz (n. 14)

¹¹⁰ Department of Justice and Organised Crime Task Force 'Northern Ireland Modern Slavery Strategy 2019-2020' <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/modern-slavery-strategy-2019-2020.pdf>> Accessed 20 April 2021.

¹¹¹ Modern Slavery Act 2015, s54.

¹¹² CORE, 'Modern Slavery Reporting: Weak and Notable Practice' (CORE, June 2017) <https://corporatejusticecoalition.org/wp-content/uploads/2017/06/Core_ExamplesFINAL.pdf> Accessed 1 May 2021.

¹¹³ Modern Slavery Act 2018, s16 (Australia).

¹¹⁴ Kayte Lewis, 'Creating Responsible and Transparent Supply Chains in Australia' (Voice Advocates, 22 March 2019) <[https://www.voiceadvocates.com/single-post/2019/03/22/creating-responsible-and-transparent-supply-chains-in-australia#:~:text=The%20Australian%20Government%20has%20introduced,be%20readily%20scrutinized%20by%20consumers.&text=At%20both%20Federal%20and%20State,the%20Acts\)%20have%20now%20commenced](https://www.voiceadvocates.com/single-post/2019/03/22/creating-responsible-and-transparent-supply-chains-in-australia#:~:text=The%20Australian%20Government%20has%20introduced,be%20readily%20scrutinized%20by%20consumers.&text=At%20both%20Federal%20and%20State,the%20Acts)%20have%20now%20commenced)> Accessed 28 April 2021.

of the 40.3 million victims worldwide) needs legislative footing.¹¹⁵ Through legislation, targeted policies and actions can be taken to mediate the risks of modern slavery within supply chains. Whereas scope for this already exists,¹¹⁶ this needs to be clearer, and supported with further regulatory refinement to support those groups among the most vulnerable in our society (and value chain).

We also recommend acknowledgement of coercive control that keep victims trapped in slavery, mainly through its criminalisation or at the very least, recognition of its existence in employer-employee relationships. This would enable companies to identify practices of coercive control, therefore affording protection and remediation to victims. This has parallels to the work discussed above (in section II) on economic coercion.¹¹⁷ Such provisions can be found in existing domestic violence law following the push to include coercive control as abusive behaviour.¹¹⁸ While Tasmanian law provides a blueprint for the criminalisation of economic abuse,¹¹⁹ the recent change in our law in the widening of the definition of abusive behaviour to include coercive control provides an excellent example as to how such behaviour that traps victims in cycles of exploitation may be criminalised.¹²⁰ While this currently only exists in intimate relationships, it could also potentially encompass employee- employer relationships and at the very least, it provides a definition of coercive behaviour that could create an offence or guide companies in their examinations.

iv. Consultation with Workers

Under current reporting requirements, workers' views on companies' efforts are absent. As such, the full picture of the effectiveness of such measures is lost and instead, only an overview by companies of the steps they have taken is captured. Whereas much of this is grounded in the national (UK) approach to corporate governance, much could be learned from the German two tier model of governance where workers are involved in the running (and reporting) of an organisation.

Capturing the perspective of workers at each level of the supply chain, would allow companies to evaluate the effectiveness of their policies as well as aid authorities in the investigation of modern slavery practices by providing a comprehensive picture of practices over a longer period, therefore allowing for earlier identification of any abuse. Such an effort would also allow companies to fulfil their obligations to carry out human rights due diligence and track the effectiveness of their responses under principles 17 and 20 of the UNGPs¹²¹. This could be

¹¹⁵ Kate Hodal and Chris Kelly, 'Trafficked Into Slavery on Thai Trawlers to Catch Food for Prawns' *The Guardian* (London, 10 June 2014) <<https://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing>> Accessed 20 April 2021. The large number of Burmese migrants employed on Thai shipping vessels demonstrates the effects of displacement of workers from conflict; Walk Free, 'Stacked Odds' (Walk Free, 2020) <<https://www.walkfree.org/reports/stacked-odds/>> Accessed 24 April 2021; Walk Free, 'Global Estimates of Modern Slavery' (Walk Free) <<https://www.walkfree.org/projects/global-estimates-of-modern-slavery/>> Accessed 24 April 2021.

¹¹⁶ Modern Slavery Act 2015, s1(4)(a).

¹¹⁷ LeBaron and Gore (n. 69)

¹¹⁸ Kayte Lewis and Sophie Bouhalis, 'Walking on Eggshells- Coercive Control' (Voice Advocates) <<https://www.voiceadvocates.com/single-post/walking-on-eggshells-coercive-control>> Accessed 28 April 2021.

¹¹⁹ Family Violence Act 2004, s8 (Tasmania).

¹²⁰ Domestic and Civil Proceedings Act (Northern Ireland) 2021, s2.

¹²¹ United Nations, Guiding Principles on Business and Human Rights (OHCHR 2011).

accomplished through regular surveys with workers in the different levels of the supply chains on their opinions of any new policies taken by companies, in addition to a reporting mechanism specifically designed for workers to report any instances of abuse. Whereas there are challenges to this, we recommend using ‘experimental’ participation techniques with local CSOs to encourage involvement by all those in the supply chain. Further, and again as noted above in section II (e), we note the value of the Lundy model of participation here in giving voice, space, and audience to those who work in the supply chain. The 2018 Australian Act provides a possible basis for the inclusion of such an effort in legislation through its requirement that companies describe the process of consultation taken in their efforts to create their annual statements¹²²

Such an effort could be accomplished using technology¹²³ for workers to record their answers and to report any instances of abuse, therefore providing results and allowing for action to be taken earlier in response to any reports in a more timely fashion than under audits.¹²⁴ Existing endeavours that companies in the UK can sign up to include the work by the Issarra Institute¹²⁵ and the ‘Tech Against Trafficking’ initiative in collaboration with the UN¹²⁶ which focusses on mapping and analysing existing tech- focussed initiatives to tackle modern slavery.¹²⁷

There are several issues that companies must be aware of. First, to safely collect reliable data from workers, there should be an effort to use technology that workers are already using, such as smartphones, through the development of apps instead of simply passing on new and complicated forms of technology.¹²⁸ Secondly, companies should be inclusive in the voices collected and aim to have a mix of experiences included based on workers’ race, gender, nationality, language etc. In keeping with this, the technology should also be accessible with the languages it is available in and training should be provided on its use. Finally, companies should consider non- tech options, such as collaboration with local NGOs and trade unions in their efforts to prevent modern slavery.¹²⁹ The WEST principles, especially their first three principles of building integrity and purpose with workers can provide a useful guide for companies.¹³⁰ These recommendations are not without their own concerns (for example privacy rights under *Article 8 of the ECHR*) but they provide a blue print for further discussion on improving the regulatory landscape for victims via transparency reporting.

¹²² Modern Slavery Act 2018, s16(1)(f) (Australia).

¹²³ Impactt, ‘Best Practice Guide to Improving Transparency in Global Supply Chains by Addressing Modern Slavery’ (Impactt, 8 November 2016) <<https://impacttlimited.com/best-practice-guide-to-improving-transparency-in-global-supply-chains-by-addressing-modern-slavery/>> Accessed 24 April 2021.

¹²⁴ Issarra Institute, ‘Inclusive Labour Marketing’ (Issarra Institute) <<https://www.issarainstitute.org/inclusive-labour-monitoring>> Accessed 1 May 2021.

¹²⁵ Ibid.

¹²⁶ Tech Against Trafficking, <<https://techagainstrafficking.org/>> Accessed 1 May 2021.

¹²⁷ Peter Nestor, Allison- Hope Dunstan and Hannah Darnston, ‘Announcing a New Collaboration Using Tech to Combat Human Trafficking’ (BSR, 28 June 2018) <<https://www.bsr.org/en/our-insights/blog-view/announcing-a-new-collaboration-using-tech-to-combat-human-trafficking>> Accessed 1 May 2021.

¹²⁸ Issarra Institute, ‘What is ‘Worker Voice’ in the Context of Global Supply Chains?’ (Issarra Institute, 2020) <https://44f2713d-a205-4701-bba3-8d419653b4b6.filesusr.com/ugd/5bf36e_29160d3cfe05485e835b14c4d3dc43de.pdf> Accessed 1 May 2021.

¹²⁹ Ibid.

¹³⁰ WEST Principles, <<https://westprinciples.org/start-with-integrity-and-purpose/>> Accessed 1 May 2021.

In sum, recommendations for enhancing TISC for victims are:

- i. **Widening the legislative definition of supply chains to encompass the whole supply chain and not just Tier 1 suppliers.** Within this, **there needs to be special recognition of vulnerable groups** with guidance on how to best engage with these whilst recognising their status as rightsholders. Further, **we recommend that consideration be given to addressing coercive control in employee-employer relationships.** This would build on the work of LeBaron and Gore on economic coercion and recognise the unique situation that vulnerable workers might find themselves in.
- ii. **We recommend involving the whole value chain in the data collection phase of the statement compilation.** This involves making use of technology to collect information from all levels of the supply chain. Whereas we note that this might have an impact on the article 8 (ECHR) rights of workers (right to a private life), we believe that if this is done in a way that is proportionate and necessary, it will improve conditions and led to a reduction in the numbers of workers embroiled in modern slavery.

IV. Conclusion

Working towards enhanced transparency in supply chains is to be welcomed. The work that the DOJ has done in this regard, even in commissioning consultation responses, demonstrates the commitment by the department to enhancing the Modern Slavery Strategy for Northern Ireland. The purpose of this report therefore was not only to applaud the developments that have occurred in the region but encourage the department to see this as an opportunity. Northern Ireland is unique within the UK for many reasons. Central to this area is the impact of Brexit, access to the EU market and the local business infrastructure. Northern Ireland is as much part of the supply chain as the gatekeepers of said supply chain. With a private sector dominated by SMEs, there is an opportunity here for the department to educate and promote transparency. We would urge the Northern Ireland government to think beyond the base-line requirements of s.54 Modern Slavery Act 2015 which is limited in its focus on disclosure, and not aligned with the state duty to encourage and promote due diligence (as per the *United Nations Guiding Principles on Business and Human Rights*). By creating an environment of due diligence as well as reforming the TISC from the perspective of key stakeholders, we believe that Northern Ireland can signal their presence within the United Kingdom, with an outward looking focus on transparency to align them to global leaders in the field.