

UK consultation on enhancing modern slavery statements: beyond minimum compliance

The UK's Modern Slavery Act 2015 (the **Act**) was heralded as the first legislation of its kind globally and is thought to have inspired a number of other governments to introduce their own supply chain transparency and due diligence laws.

However, as the UK Government has come to realise following an independent review of the Act, if legal obligations are not backed up by an effective enforcement mechanism and penalties, they have very limited effect. Of the 17,000 organisations thought to be required to produce a modern slavery statement under the Act, only around 60% have published a statement and many of those statements are of poor quality¹ which is why the Government is now consulting on adding “teeth” to the modern slavery statement requirements in the Act.

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Duty to prepare a modern slavery statement

Section 54 of the Act requires commercial organisations (corporate bodies and partnerships), which provide goods or services and have an annual turnover of at least GBP36 million, to prepare a slavery and human trafficking statement each year (the **Statement**).

The Statement must set out the steps that the organisation has taken to ensure that slavery and human trafficking is not taking place in any part of its own business or in any of its supply chains. If no such steps have been taken then the statement must say so. There is no legal requirement to take steps to assess and eradicate slavery and trafficking in supply chains – it is just a duty to disclose.

The Statement must be approved by the reporting company's board of directors, signed by a director and published in a prominent place on the company's website.

¹ Home Office press release: Home Office tells business: open up on modern slavery or face further action <https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action> and UK Government Response to the Independent Review of the Modern Slavery Act 2015 at paragraphs 23-24 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf

The duty applies to companies (regardless of whether they have been incorporated in the UK or elsewhere) that carry on a business or part of a business in the UK (regardless of sector or industry). According to Home Office guidance, you need to demonstrate that the organisation has a “demonstrable business presence” in the UK².

If an organisation fails to comply with its duty under s.54 of the Act, the Secretary of State may apply to the High Court for an injunction requiring the organisation to prepare a modern slavery statement. However, to date no such injunctions have been sought.

There is no prescribed form for these Statements but s.54 does indicate six areas that a Statement may cover:

- the organisation’s structure, its business and its supply chains;
- its policies in relation to slavery and human trafficking;
- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- the training about slavery and human trafficking available to its staff.

Although the Home Office guidance states that the Government would expect organisations to cover these six areas in their Statements, this is currently not obligatory and organisations can decide which (if any) of these areas to address.

Independent review of the Act

In July 2018, the Home Office commissioned an independent review of the Act. The review, which was carried out by Frank Field MP, Maria Miller MP and Baroness Butler-Sloss, focused on the following four areas of the Act:

- the Independent Anti-Slavery Commissioner (ss.40-44);
- Transparency in supply chains (s.54);
- Independent Child Trafficking Advocates (s.48); and
- legal application (s.3: definition of exploitation, ss.8-10: reparation orders and s.45: statutory defence).

The Final Report of the Independent Review³ (**Final Report**) was submitted to the Home Secretary in March 2019 and was laid in Parliament in May 2019. The Final Report contains a summary of each of the previous four interim reports.

The Final Report contains 80 recommendations in total, 21 of which relate to modern slavery statements. The overall conclusion is that too many organisations are failing to go beyond the minimum requirements for complying with s.54 and that the lack of an effective enforcement mechanism and penalties in the Act is a significant weakness.

² Home Office: *Transparency in Supply Chains etc. A practical guide* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf

³ *Independent Review of the Modern Slavery Act 2015: Final Report* <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report>

Government response to independent review and consultation on transparency in supply chains

On 9 July 2019, the Government published its response⁴ to the Final Report and launched a consultation on transparency in supply chains⁵. **The deadline for responding to the consultation is 17 September 2019.**

Although the Government has accepted most of the recommendations made in the Final Report, it has rejected some of the recommendations made in respect of s.54 and decided to consult on others. The following is a summary of the key recommendations relating to modern slavery statements and the Government's proposed next steps.

Compliance audit – The Home Office is carrying out a compliance audit of all the organisations required to produce a Statement and has said that non-compliant organisations risk being publicly named. The Home Office has written to the CEOs of around 17,000 organisations it believes are required to produce a Statement. It is estimated that only around 60% of those organisations have published a Statement and that many of those Statements are of poor quality, containing little or no evidence of the steps taken to prevent modern slavery in the organisation's operations and supply chains⁶.

Central registry of modern slavery statements – As recommended in the Final Report, the Government will be setting up an online central repository for Statements (organisations will be required to publish their Statements on this registry as well as on their own websites), which should make it easier for investors and consumers to scrutinise and compare Statements.

Mandatory reporting areas – The Government is consulting on whether the six areas of reporting suggested in s.54 should be mandatory (on a 'comply or explain' basis for each area) and whether companies should no longer be allowed to state that they have taken no steps to address modern slavery in their supply chains, as recommended in the Final Report.

Template of information to be included in a statement – The Final Report recommended that the statutory guidance should include a template of the information organisations are expected to provide. Although the Government has accepted this recommendation, it has said that the template should be non-exhaustive and should evolve over time to reflect emerging best practice about the most effective ways to address modern slavery risks. This is so that organisations can retain the flexibility to set their own priorities based on the specific risks faced by their business.

Reporting further down the supply chain – The Final Report recommended that the Government amend the Act to require organisations to consider the entirety of their supply chains. The Government has said it will amend the statutory guidance (rather than the Act) to make it clear that organisations need to look beyond their first and second tier suppliers over time as part of a risk-based approach. The Government recognises that the process of mapping supply chains is complex and that an organisation's ability to influence suppliers may weaken further down the supply chain.

Single reporting deadline – Although this was not one of the recommendations in the Final Report, the Government is consulting on whether to impose a single reporting deadline for all organisations required to produce a Statement.

⁴ *UK Government Response to the Independent Review of the Modern Slavery Act 2015* <https://www.gov.uk/government/publications/government-response-to-the-independent-review-of-the-modern-slavery-act>

⁵ *Home Office: Transparency in Supply Chains Consultation* <https://www.gov.uk/government/consultations/transparency-in-supply-chains>

⁶ *Home Office press release: Home Office tells business: open up on modern slavery or face further action* <https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action> and *UK Government Response to the Independent Review of the Modern Slavery Act 2015 at paragraphs 23-24* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf

Changes to Companies Act 2006 and Company Directors Disqualification Act 1986 – The Government has not accepted the recommendations in the Final Report to amend the Companies Act 2006 to include a requirement for companies to refer to their Statements in their annual reports and amend the Company Directors Disqualification Act 1986 so that failure to produce a Statement, or a failure to act where instances of modern slavery have been identified, are an offence. The Government is concerned that this might lead to an overly compliance driven approach and encourage limited disclosure.

Enforcement and penalties – The Final Report recommended the gradual introduction of an enforcement mechanism with the option of civil penalties set as a percentage of turnover. The Government is consulting on what a new enforcement mechanism should look like, with one option being the introduction of a variable monetary penalty (capped at a prescribed sum) and with the Home Office sending warning letters ahead of taking formal enforcement action to give organisations an opportunity to comply. The Government has said that a new civil penalty scheme would not come into force until a minimum of one year after any other potential changes to the reporting requirement. Although the Final Report recommended that a new enforcement body be set up, the Government has said that it will consider who should carry out enforcement when it brings forward proposals for a Single Labour Market Enforcement Body.

Extending reporting requirements to public sector – The Government has confirmed its support for the public sector to be subject to the same reporting obligations as the private sector given the size of budgets many such organisations have responsibility for. The Government will publish its own Statement this year on a voluntary basis, and, from 2020-21, individual Government Departments will publish their own Statements. The Government is consulting on whether to roll out the same requirements to other public sector organisations.

Revised statutory guidance – The revised statutory guidance will be published in 2020, following the outcome of the consultation.

The Government has emphasised in its consultation that it wants to ensure that:

- the transparency and reporting requirements are as clear and straightforward as possible;
- organisations are able to retain flexibility so that they can reflect the issues that are most relevant to their particular sector and business and also reflect that different organisations will be at different stages of developing their strategy to supply chain due diligence;
- any new enforcement mechanisms are proportionate; and
- the changes are phased in to give organisations time to prepare.

Wider calls for a European-wide human rights due diligence law

In March 2019, the European Parliament called on the European Commission to adopt EU-wide legislation requiring companies to carry out human rights due diligence in their operations, investments and supply chains⁷.

The European Parliament's proposal forms part of its wider Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU⁸, in which the Parliament also calls for:

⁷ Euractiv: Table human rights due diligence law, MEPs tell Commission <https://www.euractiv.com/section/energy-environment/news/table-human-rights-due-diligence-law-meps-tell-commission/>

⁸ Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU <https://responsiblebusinessconduct.eu/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf>

- changes to the Non-Financial Reporting Directive 2014/95/EU to require companies to disclose their human rights due diligence in their annual reports, based on specific mandatory criteria;
- EU-wide legislation establishing liability of companies for environmental or human rights harm, based on the principle of reasonable care, including for damage caused by companies under their control;⁹ and
- EU-wide legislation to ensure availability of collective redress mechanisms to improve access to remedy for victims.

These proposals reflect concern that there needs to be a level playing field in light of the increasing patchwork of different due diligence requirements across EU member states (such as the UK's Act, France's duty of vigilance law and the Netherlands' child labour due diligence law). A number of companies have said they would support an EU law on human rights due diligence provided it does not expose them to increased risk of litigation¹⁰.

If the newly elected European Commission President, Ursula von der Leyen, is true to her campaign pledges to make sustainability a 'leitmotif' of her term in office and give MEPs the right to initiate legislative proposals¹¹ then the European Parliament's proposals for an EU human rights due diligence law may well see the light of day sooner than expected.

Comment

There has been a steady move, not just in the UK but also in the EU and elsewhere, towards increased corporate transparency and accountability, including on social and human rights issues in supply chains.

Reporting on modern slavery in a company's operations and supply chain forms an important part of a wider shift towards a better understanding and assessment of how organisations manage their environmental, social and governance (ESG) risks. This is being driven by a number of regulatory and other changes but none more so than investors who are seeking to better understand companies' ESG performance¹².

In a world where a brand's reputation and market value can be severely damaged overnight in the wake of a human rights or environmental scandal, due diligence is a company's first line of defence. We are fast moving away from this simply being a box-ticking exercise focused on compliance with minimum requirements, as many organisations implement well thought-out assessments of which risks are most relevant to their business and supply chains and put in place a proportionate action plan on how to manage those risks.

The move towards enhanced corporate transparency and accountability on environmental, climate and social issues shows no signs of slowing down or going away. The parallels with what Mark Carney, the governor of the Bank of England, has been saying to banks on climate change are obvious: "that which is measured can be managed" and "the more we invest with foresight; the less we will regret in hindsight"¹³.

⁹ There are clear parallels with the UK Supreme Court's decision earlier this year in the Vedanta case – see Allen & Overy: Vedanta: Supreme Court rules that Zambians can seek legal redress in the UK against parent company <http://www.allenoverly.com/publications/en-gb/Pages/Vedanta-Supreme-Court-rules-that-Zambians-can-see-legal-redress-in-the-UK-against-parent-company.aspx>

¹⁰ Euractiv: Companies will support EU law on due diligence, but need assurances on liability <https://www.euractiv.com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability/>

¹¹ ENDS Europe: Climate pledge helps German defence minister secure EU top job [https://www.endsurope.com/article/56052/climate-pledge-helps-german-defence-minister-secure-eu-top-job](https://www.endsurope.com/article/56052/climate-pledge-helps-german-defence-minister-secure-eu-top-job?utm_source=16/07/2019&utm_medium=email&utm_campaign=ENDS%20Europe%2520editorial%2520bulletin%3Futm_source%3D16%2F07%2F2019&utm_medium=email&utm_campaign=ENDS%20Europe%20editorial%20bulletin&logged_from_gated=true)

¹² Read more on how we can support you with your ESG performance: http://www.allenoverly.com/SiteCollectionDocuments/AO_credentials_for_ESG.pdf

¹³ Bank of England: Breaking the Tragedy of the Horizon – climate change and financial stability <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf?la=en&hash=7C67E785651862457D99511147C7424FF5EA0C1A>

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