

The Modern Slavery Act 2015

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Introduction

1. The *Modern Slavery Act 2015* (“**MSA**”) came into force on 29 October 2015. It seeks to address the growing scourge of forced labour and human trafficking within these shores. It does so by creating various criminal offences in relation to holding another person in slavery or servitude or requiring them to perform forced labour, and also in relation to the movement of persons with a view to exploiting them. However, MSA also has a broader aim. Part 6 of MSA contains provisions requiring transparency in supply chains. Businesses above a specified level of turnover are required to provide a statement setting out the steps taken in the course of a financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains. The purpose is to require businesses:

“to be transparent about what they are doing and will increase competition to drive up standards”¹ (Theresa May when she was still Home Secretary).

2. In this paper, I shall:
 - a. Give a brief overview of the key provisions of MSA.
 - b. Focus on the transparency in supply chains (“**TISC**”) provisions, looking at the relevant regulations and guidance and considering in particular:
 - i. Who has to make a TISC statement?
 - ii. What should a TISC statement contain?
 - iii. What are the enforcement mechanisms under the MSA and the consequences of failing to provide a TISC statement?
 - c. Consider the effectiveness of such statements.

Overview

3. The statistics relating to forced labour and trafficking are shocking:
 - a. Estimates suggest that that 21 million people worldwide are the victims of modern slavery;

¹ *Transparency in Supply Chains etc – A practical guide*. Guidance issued under s.54(9) of MSA.

- b. In 2013, there were 13,000 victims in the UK alone.
 - c. In 2015, 3,266 potential victims of human trafficking or modern slavery were referred to the National Referral Mechanism – the UK’s framework for referring and supporting victims. This is almost 40% up on 2014².
 - d. The likelihood is that the overall numbers affected have similarly increased;
 - e. The number said to be trapped in the supply chains of big business around the world is said to be over 45 million.³
4. The vast majority of this abuse is at the hands of private individuals or enterprises rather than state organs. Whilst about a quarter are exploited for sexual purposes, forced labour for commercial purposes accounts for a much greater proportion.
5. So what does the MSA do about forced labour? First and foremost, it creates a new offence of holding another person in slavery or servitude. Section 1, MSA provides:

1 Slavery, servitude and forced or compulsory labour

(1) A person commits an offence if—

(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.

(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.

(4) For example, regard may be had—

(a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;

² MSA: Recent Developments. HC Briefing Paper Number 07656, 22 July 2016 at 5.1. The figure for 2016 is 3,805 referrals: UK Anti-Slavery Commissioner’s letter to MPs, 3 April 2017.

³ Global Slavery Index

- (b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).
- (5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.
6. “Slavery”, “Servitude”, “Forced Labour” and “Compulsory Labour” are to be construed in accordance with Art 4 ECHR. Thus, as provided by the Guide to Art 4, ECHR (2nd ed):
- a. **Slavery** is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (*Siliadin v. France*, § 122);
 - b. **Servitude** means “an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of slavery” (*Seguin v. France* (dec.); *Siliadin v. France*, § 124);
 - c. **Forced or compulsory labour** means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (*Graziani-Weiss v. Austria*; *Stummer v. Austria* [GC], § 118).
7. Section 2, MSA provides that it is an offence for a person to arrange or facilitate the travel of another person (“V”) with a view to V being exploited. A person is exploited for these purposes if V is the victim of behaviour which involves the commission of an offence under s. 1 or which would involve the commission of an offence if it took place in the UK.
8. Note that by s.4, MSA, it is also an offence to aid and abet, counsel or procure the commission of an offence under s.2. Thus it is an offence to aid and abet a person to traffic another person for the purposes of holding them in servitude or making them perform forced labour.
9. As one would expect, the penalties for these offences are severe; life imprisonment for those committing the principal offences under ss.1 and 2 and up to 10 years (on indictment) for those assisting the commission of such offences: s.5, MSA.

10. Section 8 provides the Court with the power to make reparation orders but only against a person who has been convicted of an offence under ss. 1, 2 or 4 (or against a person who has had a confiscation order made against them and is later convicted of one of those offences).

11. The remainder of MSA makes provision for:

- a. Prevention Orders (under Part 2 - where there is a risk that a defendant may commit a slavery or human trafficking offence and it is necessary to make such an order for protection purposes);
- b. Enforcement powers in relation to ships (Part 3);
- c. The creation of the new office of Independent Anti-Slavery Commissioner (Part 4); and
- d. The protection of victims (Part 5 – including a special defence for those coerced into committing an offence under the Act).

12. Section 47 in Part 5 makes provision for victims to receive legal aid in certain circumstances by introducing amendments to the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO). Section 32A(2) of LASPO now provides that legal aid is available in respect of:

(2) Civil legal services provided in relation to a claim under employment law arising in connection with the conduct by virtue of which an individual who is a victim of slavery, servitude or forced or compulsory labour is such a victim, but only where—

(a) the services are provided to the individual, or

(b) the individual has died and the services are provided to the individual's personal representative.

13. The Claimant in *Hounga v Allen* [2014] UKSC 47 might well have qualified for such assistance had she not had the support of the Anti-Trafficking and Labour Exploitation Unit.

14. *Hounga v Allen* was mentioned in the very recent decision of the Supreme Court in *Taiwo v Olaigbe* [2016] UKSC 31. In *Taiwo v Olaigbe*, a Nigerian migrant domestic

worker employed in London was subject to exploitation and mistreatment by her employer. There were various breaches of employment law including being required to work continuously without rest periods, failing to pay national minimum wage and making unlawful deductions from wages. There was more serious mistreatment in the form of starvation and physical and mental abuse described as “*systematic and callous exploitation*”. The claimant managed to escape and brought a complaint before the Employment Tribunal. Her claims under the *National Minimum Wage Act 1998*, *Employment Rights Act 1996* and the *Working Time Regulations 1998* were all upheld. However, her claim under the *Equality Act 2010* for discrimination on the grounds of race failed. The Tribunal found that the claimant’s treatment was not because she was Nigerian or black but because her migrant status had made her vulnerable to exploitation. Thus, although she was awarded about £35,000 in respect of her monetary claims, she was not awarded anything to compensate her for the humiliation, fear and severe distress that the mistreatment caused her.

15. The issue before the Supreme Court was whether mistreatment on the grounds of migrant status could give rise to a claim of race discrimination. It was held that it could not. Immigration status was not a protected characteristic under the 2010 Act. As Baroness Hale (giving the sole opinion) stated:

“26 ...The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status. As [Counsel] pointed out, on behalf of Mr and Mrs Akwivu, it had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way.”

16. Recognising that Employment Law protection was deficient in this regard, Baroness Hale had this to say about MSA:

“34 It follows that these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out

to workers such as these, along with the other remedies which it does have power to grant.”

17. There has been no indication thus far that Parliament will take up Baroness Hale’s invitation.

18. In *H v Ishmail* [2017] IRLR 228, Simler P set aside a deposit order made against a trafficking victim on the basis that it was not possible for her to comply and disproportionately restricted access to justice. The Claimant’s status as a victim of trafficking entitled to special protection was said to be an “essential consideration” (at [25]).

Section 54 – TISC statements

19. Section 54 provides as follows: Regulations

54 Transparency in supply chains etc

(1) A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation.

(2) A commercial organisation is within this subsection if it—

(a) supplies goods or services, and

(b) has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(b), an organisation’s total turnover is to be determined in accordance with regulations made by the Secretary of State.

(4) A slavery and human trafficking statement for a financial year is—

(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.

(5) An organisation’s slavery and human trafficking statement may include information about—

(a) the organisation’s structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) 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;

(e) 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;

(f) the training about slavery and human trafficking available to its staff.

(6) A slavery and human trafficking statement—

- (a) if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent);
- (b) if the organisation is a limited liability partnership, must be approved by the members and signed by a designated member;
- (c) if the organisation is a limited partnership registered under the Limited Partnerships Act 1907, must be signed by a general partner;
- (d) if the organisation is any other kind of partnership, must be signed by a partner.
- (7) If the organisation has a website, it must—
 - (a) publish the slavery and human trafficking statement on that website, and
 - (b) include a link to the slavery and human trafficking statement in a prominent place on that website's homepage.
- (8) If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.
- (9) The Secretary of State—
 - (a) may issue guidance about the duties imposed on commercial organisations by this section;
 - (b) must publish any such guidance in a way the Secretary of State considers appropriate.
- (10) The guidance may in particular include further provision about the kind of information which may be included in a slavery and human trafficking statement.
- (11) The duties imposed on commercial organisations by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.
- (12) For the purposes of this section—

“commercial organisation” means—

 - (a) a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, or
 - (b) a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and for this purpose “business” includes a trade or profession;

“partnership” means—

 - (a) a partnership within the Partnership Act 1890,
 - (b) a limited partnership registered under the Limited Partnerships Act 1907, or
 - (c) a firm, or an entity of a similar character, formed under the law of a country outside the United Kingdom;

“slavery and human trafficking” means—

 - (a) conduct which constitutes an offence under any of the following—
 - (i) section 1, 2 or 4 of this Act,
 - (ii) section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (c. 2 (N.I.)) (equivalent offences in Northern Ireland),
 - (iii) section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc),
 - (iv) section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking for exploitation),
 - (v) section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (slavery, servitude and forced or compulsory labour), or
 - (b) conduct which would constitute an offence in a part of the United Kingdom under any of those provisions if the conduct took place in that part of the United Kingdom.

20. The *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015/1833* (“the 2015 Regulations”) provide that the prescribed turnover for the purposes of s.54(2)(b) is £36 million. The Government has issued Guidance under s.54(9).

21. In applying this provision, the key questions are as follows:

- a. Who has to make a statement?
- b. What must the statement contain?
- c. What are the consequences of not making a statement?

I shall consider each in turn.

Who has to make a TISC statement?

22. Only “Commercial Organisations” are subject to the requirement. A commercial organisation within the meaning of s.54 is a body corporate or partnership carrying on a business or any part of a business within the UK. At present, public bodies are not subject to the requirement even though “*many contract and agency workers end up working on government contracts and this type of labour is particularly vulnerable to exploitation*”. There was a House of Lords Private Members’ Bill seeking to add public bodies to s.54⁴. Whilst this was a commendable aim, one can envisage great difficulties in identifying which public bodies should be so required and whether there ought to be a financial threshold applied to them as well. It may be said that such bodies are already required to act ethically in contracting and procuring given their public procurement and best value obligations. Perhaps unsurprisingly, the Bill appears to have been dropped as of 24 March 2017.⁵

23. Only commercial organisations carrying on a business or part of a business in the UK and having a turnover of more than £36 million need to comply. This covers more organisations than might first seem apparent. The Financial Times estimated in July 2015 that about 12,000 commercial companies would be affected by the requirement.⁶

⁴ <https://goo.gl/NzQW3V>

⁵ <http://services.parliament.uk/bills/2016-17/modernslaverytransparencyinsupplychains.html>

⁶ Briefing Paper (ibid) at p.12

(Some reports suggest that over 30,000 statements have already been made⁷ but that figure includes multiple statements from the same organisation so there may still be many companies failing to comply).

24. The total turnover of a commercial organisation is the turnover of that organisation and the turnover of any of its subsidiary undertakings: Reg. 3 of 2015 Regulations. Guidance clarifies that these subsidiary undertakings can include those operating wholly outside the UK (at 3.2). Thus an organisation based in the UK with only £20 million turnover, would be caught by the Act if it has a subsidiary or subsidiaries elsewhere in the world with turnover exceeding £16 million. However, the same would not necessarily apply if the positions were reversed with the subsidiary in the UK and the (larger) parent based overseas.
25. As to whether an organisation is carrying on business in the UK, the Guidance provides that the Courts will be the “*final arbiter*” taking into account the particular facts in individual cases (at 3.5). The Government says that it expects a “*common sense*” approach to be taken in determining whether an entity is carrying on a business. It is made clear, however, that the key issue is whether it engages in commercial activity irrespective of the purpose of that activity. Thus, a commercial activity which is not for profit or purely charitable in purpose would still be caught.
26. A business will be carried on in the UK if it has a “*demonstrable business presence in the UK*” (at 3.8). If a subsidiary based in the UK is acting completely independently of its parent or other group companies based elsewhere in the world then the parent and those other companies will not have a demonstrable presence in the UK and would not be caught.
27. Whilst these provisions appear fairly simple at first sight they may still provide potential loopholes for businesses in complex corporate structures to avoid the requirement to produce a TISC statement. For example a parent company may be able to structure its dealings with a UK subsidiary with less than £36 million turnover in a way that suggests that the parent has no demonstrable business presence in the UK. In that scenario, neither the parent nor the subsidiary would be required to provide a statement.

⁷ www.tiscreport.org

28. The requirement to produce a TISC statement applies in respect of any organisation whose financial year ends on or after 31 March 2016. If the financial year ended between the commencement of the MSA (29 October 2015) and 31 March 2016 then there is no requirement to publish a statement for that financial year. The MSA does not specify a particular time by which a statement is to be published, although the Guidance does “encourage” organisations to do so within 6 months of the FYE (at 6.4).
29. If the turnover drops below £36 million in subsequent years, the obligation to make a statement does not continue during those years.

What must the TISC statement contain?

30. A slavery and human trafficking statement for a financial year is:
- a. a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business; or
 - b. a statement that the organisation has taken no such steps.
31. The TISC statement may include information about the matters set out in s.54(5), e.g. any relevant policies and its due diligence processes. However, there is no obligation to set out such matters. Moreover, companies are free to determine how much or how little detail they provide so long as they set out the steps actually taken. Annex E to the Guidance contains some helpful case studies as to the format and content of statements.
32. It is notable that the steps an organisation takes may simply refer to reliance upon third party auditors that have, say, inspected and reported upon a supplier’s factory / labour conditions / policies etc. However, there is no obligation either to ensure that standards and conditions are in fact adequate or even to ensure that such auditors are themselves doing an adequate job.
33. The TISC statement must be approved by and signed by a director, member or partner of the organisation (s.54(6)). Once approved, the TISC statement must be displayed on the organisation’s website where it has one. In complex corporate structures, the recommendation is to place the statement on “the most appropriate website” relating to

the business in the UK. If there is no website then the statement must be made available on request.

Enforcement and the consequences of failing to provide a TISC statement.

34. The enforcement mechanism chosen for the MSA is an unusual one; instead of making a person liable to a fine or imprisonment for failure to comply, the Secretary of State may apply for an injunction to enforce the obligations. (s.54(11)).
35. One may question how likely it is that such enforcement action would ever be taken. It is not clear how any infringement would be brought to the Secretary of State's attention given that there is no central repository⁸ for statements. If, as is likely, an infringement is brought to the Secretary of State's attention by a member of the public or an NGO, it seems highly unlikely that the Secretary of State would then go to the expense of seeking injunctive relief merely to get a statement published.
36. As with some other disclosures, it is likely to be members of the public and NGOs who will be most likely to test compliance, not by taking or inviting the Secretary of State to take proceedings but by the threat of adverse publicity. A company seeking to obscure or obfuscate the fact that it has not taken any steps to address modern slavery in its supply chains may quickly find itself the subject of adverse social media attention.

What's the point?

37. As we have seen, the TISC statement need not say very much and could just say (if it is the case) that no steps have been taken at all to address modern slavery. An analysis undertaken in late 2016 of statements from 27 FTSE 100 companies revealed that "*only a handful of them were reporting and demonstrating rigorous action*".⁹ The view that TISC statements are generally poor in quality is one shared by the Anti-Slavery Commissioner, who states that, "*Many fail to meet the minimum requirements of being placed on a company's home page or signed off by senior leadership*".¹⁰ Does all of that

⁸ This is a deficiency that the Private Members' Bill also sought to address. The absence of any governmental central repository has led to a number of private registries competing for business. See e.g. www.tiscreport.org

⁹ <https://business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf>

¹⁰ UK Anti-Slavery Commissioner's letter to CEOs, 4 April 2017.

mean that the whole scheme is pointless? Given that there are no actual obligations imposed on companies to ensure that there is no forced labour in their supply chains, is this just a box-ticking (and for some, a money-making) exercise?

38. There is also a danger that this will simply spawn a small industry of barely credible “auditors” to inspect suppliers and factories to give them an unwarranted seal of approval. This has happened already and continues to happen.
39. Rana Plaza was a garment factory complex in Dhaka, Bangladesh. It supplied many of the major clothing retailers in the UK, including Primark and Matalan. On 24 April 2013, the factory collapsed. 1,130 people - mostly female garment workers - died and more than 2,500 were injured. However, just a few months before the disaster, the factory was the subject of an inspection by a German certification group, TUV Rheinland, as part of a social audit commissioned by an organisation seeking to improve safety and working conditions in supply chains¹¹. Whilst it was not specifically asked to examine the structural soundness of the factory, it felt able to declare that the construction quality of the building was good.
40. Of course, it should be noted that the Rana Plaza disaster was not about modern slavery – no doubt the employees would not have claimed to have been forced to work there – but the concerns about auditors and box ticking are comparable. Following the Rana Plaza disaster, an agreement was signed by most of the major retailers obtaining garments from Bangladesh, and global labour unions, to improve fire safety and building standards in garment factories.¹² However, despite some apparent success in carrying out inspections, there was yet another major disaster just a few months ago on 10 September 2016 – this time an explosion and fire – leading to the deaths of over 30 people.¹³ Nestle and British American Tobacco were major customers of the packaging company involved.

¹¹ See European Center for Constitutional and Human Rights:

https://www.echr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-tuev-rheinland.html

¹² <http://bangladeshaccord.org/signatories/>

¹³ <http://www.bbc.co.uk/news/world-asia-37328065>

Conclusion

41. Notwithstanding the absence of any realistic enforcement mechanism and the risk that this will become yet another box-ticking exercise, the TISC statement obligations are an important step forward. Whilst the obligations on corporations are hardly onerous, they probably do have real value in highlighting a growing problem and in incentivising corporations to at least consider the issue and take some responsibility for the labour conditions in their supply chains. Some of those at the bottom of the supply chains in fact say that the responsibility for their plight extends beyond the mere corporation involved:

“Sometimes when we were working, the tears would run down our cheeks because it was so tiring we couldn’t bear it,” said Moe Pyae Soe, 33, who was trapped inside with his wife. “We were crying, but we kept peeling shrimp. We couldn’t rest ... I think people are guilty if they eat the shrimp that we peeled like slaves.”¹⁴

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¹⁴ <https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand>