



By Geoffrey D. Cruikshanks

## Two Cheers for the Modern Slavery Act?

Though more than 150 years have passed since the abolition of slavery in the United Kingdom, there are an estimated 21 to 35 million people working under slave-like conditions globally. In a recent attempt to address this shameful statistic, the UK enacted the Modern Slavery Act in October 2015.

While serving as UK Home Secretary, Prime Minister Theresa May has described the Modern Slavery Act (MSA) as 'a truly groundbreaking provision' and sees it as a force that will elevate employment standards through greater transparency and leveling the playing field for businesses:

By increasing supply chain accountability, more workers will be protected and consumers will have greater confidence in the goods and services they buy. That is why the transparency in supply chains provision is world leading and will bring the change that is so vitally needed.

Amongst numerous innovative measures, the new law provides for:

- The consolidation of existing slavery and trafficking offences
- The formation of an independent Anti-Slavery Commissioner to make way for good practice on the prevention of modern slavery offences and victims identification
- The introduction of two new civil orders to enable courts to place restrictions on those convicted of modern slavery offences, or those awaiting conviction
- Mechanisms for seizing traffickers' assets and redistributing compensatory funds towards victims
- The creation of a new statutory defence for slavery or trafficking victims compelled to commit criminal offence
- The provision of child trafficking advocates

However, what has caught the eye in the corporate world is a new reporting requirement. The MSA creates an obligation on companies to report what efforts they have made to eradicate offences of human trafficking and slavery from their supply chains. As of 31 March 2016, businesses with annual turnover of £36 million (about US\$50 million) will be required to publish 'Slavery and Trafficking Statements' in their annual financial statements. This statement will set out what steps have been taken

to ensure that the company and, importantly, its supply chain are free of modern slavery.

The MSA not only applies to British companies but to ‘any organization with a total turnover of £36 million carrying on a business in the UK’. Its extraterritorial reach is therefore similar to that of the UK Bribery Act, which was enacted in 2011. However, unlike the Bribery Act, which relies on enforcement by a single (and grossly under-resourced) government regulator, the MSA will be monitored by numerous stakeholder groups. As the notes accompanying the legislation state:

It will be for consumers, investors and Non-Governmental Organizations to engage and/or apply pressure where they believe a business has not taken sufficient steps.

This emphasis on public oversight is unique in that it seeks to incentivize compliance with the threat of reputational damage, and not just regulatory enforcement actions.

### **What is modern slavery?**

The MSA breaks down modern slavery into three separate offences: slavery; servitude and forced or compulsory labor; and human trafficking. As defined in the MSA, the key element of slavery is behavior that deprives the victim of his or her freedom and treats that individual as if they were capable of being owned. Servitude and/or forced labor is an obligation, imposed by coercion to provide services coupled with the inability of the victim to change his or her condition. Servitude also implies an obligation of the victim to live on another person’s property.

Human trafficking requires that a person arranges or facilitates the travel of another person with a view to that person being exploited — even if the victim consents to the travel. Modern slavery can exist in almost any area of commerce but is most prevalent in the construction, fashion, electronics, food and drink, and pharmaceutical and cosmetics sectors. The countries worst affected are, not surprisingly, those where multinationals pursue cheap labor, including India, China, Pakistan, Indonesia, Bangladesh and Thailand. Yet we must also look at our own backyards — there are an estimated 8,300 people living in modern slavery in the UK and some 60,000 in the US.

### **Will the Modern Slavery Act prevent modern slavery?**

The MSA does not create an offence of strict liability but, as described above, it obligates a company to make a statement detailing what steps have been taken to ensure that slavery and human trafficking are not occurring in its supply chain (an organization may also make a statement that it has not taken any steps, though the reputational risk in doing so is substantial).

Can we therefore expect a new cottage industry of MSA statement writing? The MSA focuses on reporting rather than prescribing specific actions. To date, much of the legal commentary about complying with the Act has focused on form over substance, with little attention paid to how an organization might effectively mitigate the risk of slavery in its supply chain. Cynics might conclude that in the absence of strict liability, MSA compliance will evolve into a ‘tick-the-checkbox’ exercise that over time will become meaningless.

In their MSA reports, companies will be expected to describe their anti-slavery policies, risk assessments, supplier questionnaires and training programs. On the surface, each of these steps creates an expectation of compliance among employees and suppliers. But how many companies will do their utmost to uncover underlying facts, however inconvenient they might be? How many of them will challenge the information provided by the person who has the biggest incentive to mislead? And how many will visit the premises of their suppliers (and their suppliers’ suppliers) to speak directly to those who might be enslaved?

The requirement to describe process rather than be accountable for facts is a weakness in the legislation. However, there is at least an opportunity for companies to demonstrate that their actions are louder than the words of their competitors’ carefully crafted MSA statements.

## Finding out.

Taking meaningful action to ensure an organization and its supply chain are without violations of the MSA requires a proactive approach. 'Finding out' means more than asking a supplier if he meets the standards he has agreed to in a contract or learned about in a training program – although that might be a good place to start. The obvious weakness in this kind of passive approach brings to mind the question formerly asked of foreigners on US visa waiver forms upon arrival in the country: “Are you now, or have you ever been, a terrorist?” The point is obvious: having committed his crime, we have to expect that the offender will deny it.

There can be no certainty of discovering slavery in any of its forms when the incentive to conceal is so strong, but the chances improve considerably when an independent investigation takes place and, most importantly, when there is direct contact with those who could be the enslaved. Site visits and interviews with current and former workers provide insights that could never be obtained from desktop research or supplier questionnaires alone.

## Modern Slavery Act: spirit or letter, actions or words, three cheers or two?

Undoubtedly the MSA is a force for good but ultimately its value should be measured by the improvement of people's lives and not the eloquence of organizations' reporting statements. Progress will only occur when organizations are moved by the spirit, and not just the letter, of the new law. That will require meaningful MSA audits, including site visits and interviews with suppliers and their employees. To quote Prime Minister Theresa May again:

It is simply not acceptable for any organization to say, in the twenty-first century, that they did not know. It is not acceptable for organizations to ignore the issue because it is difficult or complex. And it is certainly not acceptable for organizations to put profit above the welfare and wellbeing of its employees and those working on its behalf.

She might have added that 'knowing' means 'finding out' and that 'finding out' cannot be done from a conference room in corporate headquarters.

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