What is next for human rights due diligence?

Dr Irene Pietropaoli

Calls for HRDD laws are growing globally, with 'failure to prevent' model already in the UK anti-bribery legislation. How can they effectively address modern slavery in business supply chains?

We want laws to improve our lives, to be effective, and we expect an efficient use of limited government's resources. But extensive research, including one commissioned by the Modern Slavery PEC and carried out by the Bingham Centre for the Rule of Law and the Bonavero Institute of Human Rights, shows that the UK Modern Slavery Act's transparency in supply chains regulations, requiring large businesses operating in the UK to report on modern slavery risks in their supply chains, have been widely considered to be ineffective.

Our research mentioned above found that, while in other regulatory models for corporate accountability the enforcement and monitoring is typically performed by the government, the Modern Slavery Act relies exclusively on civil society pressure for its enforcement.

In a time of major challenges affecting business activities and the economy in general - Brexit, the COVID-19 pandemic, Russia's invasion of Ukraine - the UK government may be reluctant to introduce additional regulations for business. Yet, in the UK corporate regulatory environment there are already a range of legal strategies where a more hands-on is par for the course. Gender pay gap reporting requirements, consumer protection, tax, anti-bribery laws, health and safety regulation, and environmental laws, for example have been quite effective in preventing, addressing, and bringing about accountability for corporate harms.

The government's role in these regulatory models ranges from quasi-administrative functions to investigations and inspections, to civil and criminal sanctions. Mechanisms such as Health and Safety Executive compliance inspectors, fines, strict liability, directors' liability, and prosecutions serve an important role in enforcing accountability and increasing effectiveness. The UK government should consider similar measures for modern slavery to increase accountability and bring about substantial changes in corporate behaviour.

In particular, the UK Bribery Act 2010 contains a 'failure to prevent' mechanism: Section 7 provides for a duty on companies to prevent bribery and creates a criminal offence where a person 'associated' with the company bribes another person. This is a strict liability, coupled with a defence of 'adequate procedures', which is a due diligence defence.

The potential of criminal prosecution or state-based sanctions has a significant impact on corporate behaviour. While so far only two companies have been convicted of Section 7 offences, the threat of prosecution has resulted in most companies adopting stronger anti-bribery programmes. In addition to convictions, six so-called Deferred Prosecution Agreements have been approved in cases involving section 7 offences - which are generally desirable outcome for a corporate and wider society. The Bribery Act model provides an incentive for companies to avoid sanctions by implementing adequate due diligence procedures, while the Modern Slavery Act only imposes reporting requirements with no sanction for non-compliance.

The UK government does acknowledge that there is a greater need to take a more active role in holding businesses to account in relation to modern slavery in supply chains. In September 2020, the government committed to a number of tougher measures, including the planned introduction of civil penalties for non-compliance and launching of an online registry for modern slavery statements.

However, the pressure is growing to introduce human rights due diligence (HRDD) regulations, which would encompass modern slavery, with the support for such laws growing even amongst businesses themselves. For example, former CEO of

ASOS Nick Beighton argued that disclosure under section 54 'is largely voluntary and taking meaningful action is easily avoided', recommending the introduction of mandatory human rights due diligence legislation to level up the playing field for well-meaning businesses.

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Internationally, first France, then Germany and Norway, have adopted HRDD regulation the past few years. Last week, following the publication of a 2020 study led by the British Institute of International and Comparative Law (BIICL, Modern Slavery PEC's parent organisation), the European Commission published its Draft Directive on Corporate Sustainability Due Diligence, which would establish mandatory human rights and environmental due diligence directive at the EU level.

In the UK, a coalition of civil society organisations, also supported by 36 large British companies, are calling for the introduction of a similar mandatory HRDD law. This ongoing legislative campaign is based on a 2017 recommendation from the UK Joint Committee on Human Rights for a legislation modelled on the Bribery Act and a study published by BIICL and Quinn Emanuel in 2020 on a UK failure to prevent mechanism for human rights harms. setting out a possible model law.

Modern slavery, as a human rights issue, would be covered by any law that requires corporate due diligence for human rights harms. The European Commission Directive for example covers expressively the prohibition of all forms of slavery and forced labour. The Commission is also preparing a new legislative proposal on decent work that would ban products made by forced labour. More evidence is needed to understand how effective forced labour import bans are in practice, the Modern Slavery PEC found.

These regulatory models could be looked at and translated into the modern slavery sphere. While there is a need of more evidence on what would work best, looking for inspiration at models that work - such as a failure to prevent model - would be a good place to start. As evidence increasingly points to the need for enhanced corporate regulation, the Modern Slavery PEC is currently researching the effectiveness of HRDD laws considering the existing evidence on these developments and their relevance in relation to the UK modern slavery legal framework. The analysis is due to be published in April - watch this space.

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