



Modern Slavery Governance: Basics for Boards

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human rights strategy

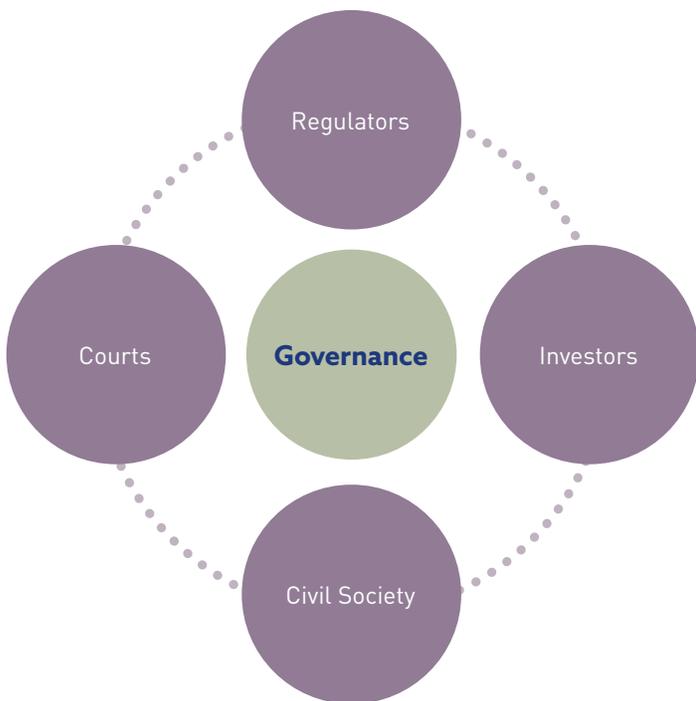
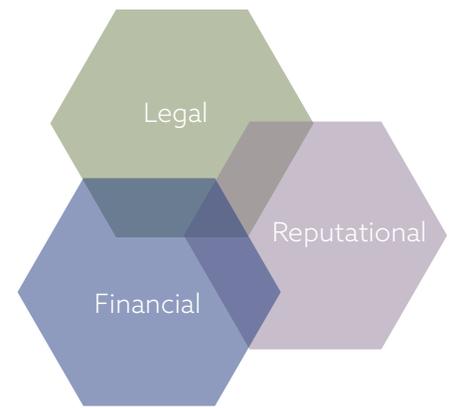
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Human Rights and Corporate Risk

For the modern business, respect for human rights is not merely an ethical expectation. It is a corporate imperative. The interplay of industry standards, legislation, and litigation has reshaped the human rights risk landscape. Corporate boards must now consider an array of legal, financial, and reputational risks when designing effective human rights strategy.

The core of such strategy is coherent governance. Corporate respect for human rights depends on the strength of relevant policies and procedures. In structure, managing human rights risk thus resembles corporate compliance with corruption and money-laundering regulation.

Scope of Corporate Human Rights Risk



This practical guide leverages the lessons of regulatory compliance to illustrate how global businesses can manage human rights risks effectively, with a particular focus on modern slavery.

Our aim with this guide is to provide a quick reference for corporate directors and officers to implement modern slavery policies and procedures that meet stakeholder expectations while navigating emerging legal risk practically and efficiently.

Understanding Modern Slavery

Definition

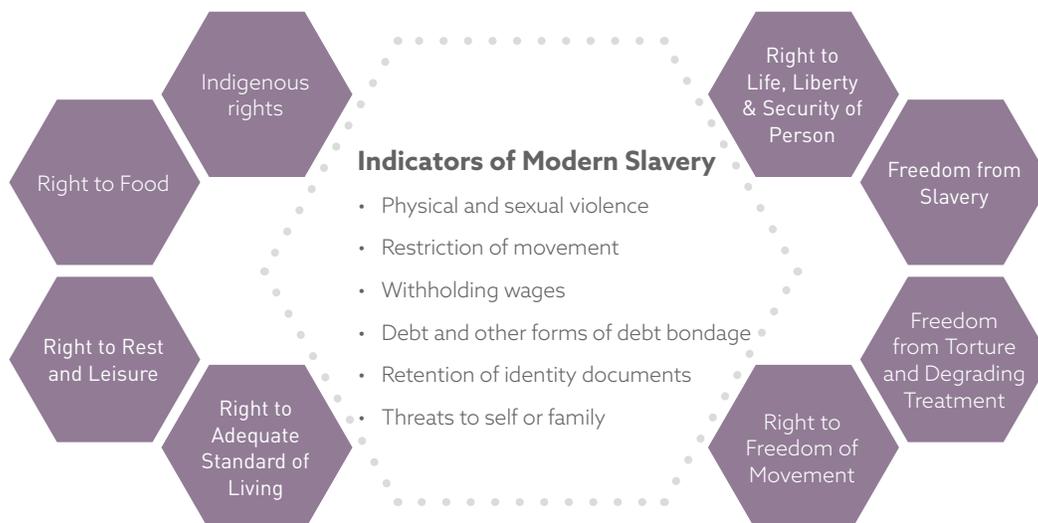
The [Palermo Protocol](#)'s definition of "trafficking in persons" has come to inform the indicators of modern slavery across jurisdictions.

"[T]he 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."

Modern slavery is a crime of many crimes. Where it exists, companies and individuals are at risk of being implicated in bribery, money laundering, fraud, and other offences.

"One of the most obvious areas of industry where corruption facilitates slavery is in the identification, transportation, control and delivery of individuals for labour. The recruitment business is an industry in its own right and the bribery of local law enforcement, immigration officers and business owners/managers is often required to move people and maintain the conditions for exploitation."

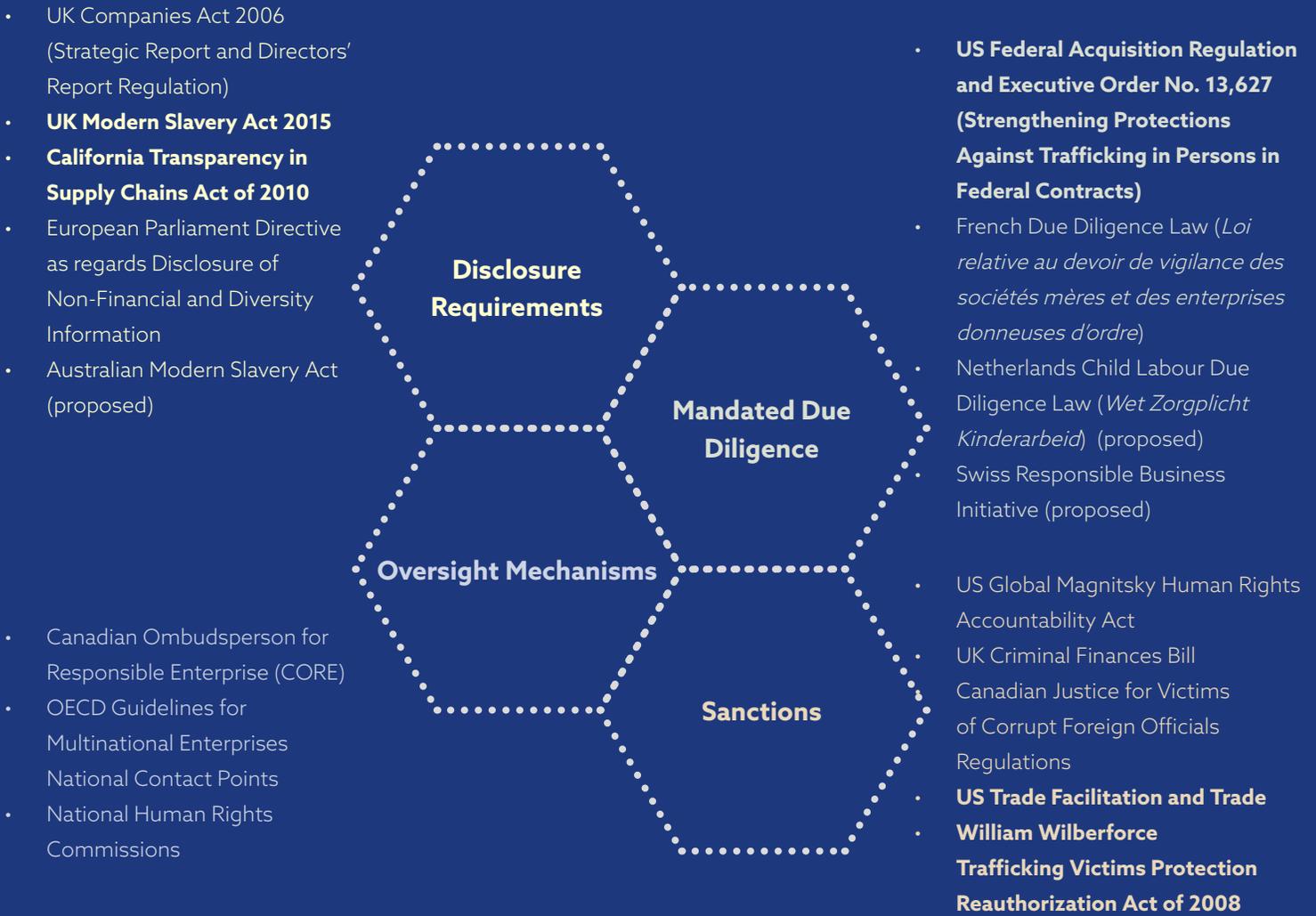
(LIBERTY ASIA & FREEDOM FUND, [MODERN SLAVERY AND CORRUPTION AT 7](#))



Modern Slavery and Business Risk

Legislation

Corporate human rights expectations have moved beyond voluntary standards. A complex and expanding regulatory web now governs global business and human rights obligations. We provide a sampling of different regulatory and quasi-regulatory approaches below. Modern slavery-specific regulation is highlighted. Annex I contains brief summaries.



In addition, many governments in countries where slavery proliferates are creating **National Action Plans for Business and Human Rights** as part of their responsibility to implement the United Nations Guiding Principles on Business and Human Rights. These plans can include both mandatory and voluntary measures for mitigating the adverse human rights impacts of business.

Litigation

Human rights-related class actions against parent companies in their home jurisdictions are increasingly common—including where a foreign subsidiary or supplier is most directly involved in the injury. These cases are nascent. Most are founded on allegations of negligence and/or misrepresentation. Regulatory expectations inform these risks by mandating disclosure or setting the duty and standard of care.

We provide a sampling of cases below. Modern slavery cases are highlighted. All cases are hyperlinked.

- Okpabi v. Royal Dutch Shell Plc. (Eng.)
 - Lungowe v. Vedanta Resources Plc. (Eng.)
 - AAA v. Unilever Plc. (Eng.)
 - Chandler v. Cape Plc. (Eng.)
 - Das v. George Weston Limited (Can.)
 - Choc v. HudBay Minerals Inc. (Can.)
 - Araya v. Nevsun Resources Ltd. (Can.)
 - Jane Doe v. Wal-Mart (U.S.)
 - **Ratha v. Phatthana (U.S.)**
- Okpabi v. Royal Dutch Shell Plc. (Eng.)
 - Lungowe v. Vedanta Resources Plc. (Eng.)
 - Das v. George Weston Limited (Can.)
 - **Doe v. Nestlé (U.S.)**
 - **Sud v. Costco Wholesale Corp. (U.S.)**
 - **Hodsdon v. Mars Inc. (U.S.)**
 - **Barber v. Nestle USA Inc. (U.S.)**
 - **Dana v. Hershey Company (U.S.)**
 - **Sherpa and ActionAid France complaint against Samsung (Fr.)**



In addition, prosecutors pursue criminal and regulatory actions against businesses and individuals for domestic instances of modern slavery (e.g., Galdikas v. DJ Houghton Catching Services Ltd. (Eng.), R v. Mohammad Rafiq (Eng.))

Director and Officer Liability

The proliferation of human rights-related legal risk, particularly when coupled with financial and reputational risk, informs director and officer liability for failing to address modern slavery across global value chains.

"[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."

(IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION, 698 A.2D 959 (DEL. CH. 1996))

The proliferation of human rights-related legal risks to businesses exposes directors and officers to personal liability for failing effectively to address human rights or for misrepresenting the effectiveness of corporate human rights governance.

"Directors' failure to actively monitor corporate supply chains could be considered bad faith and reckless disregard of trafficking, and such a risk of corporate liability may violate those directors' fiduciary duties to shareholders."

(LAURA EZELL, "HUMAN TRAFFICKING IN MULTINATIONAL SUPPLY CHAINS: A CORPORATE DIRECTORS FIDUCIARY DUTY TO MONITOR AND ELIMINATE HUMAN TRAFFICKING VIOLATIONS," 69 VANDERBILT LAW REVIEW 499 (2016))

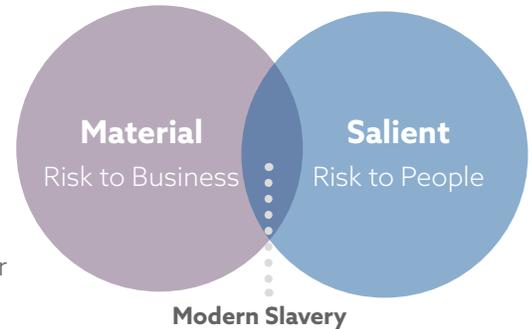
- **European Union:** Under the EU Directive on Non-Financial Disclosure, board members can be held criminally liable for failing to provide the non-financial report or for false and misleading information. The consequences for non-compliance can include imprisonment.
- **France:** Former LafargeHolcim Ltd. Chief Executive Officer Eric Olsen was placed under formal investigation and charged with funding terrorist groups as part of a French probe into the cement maker's operations in war-torn Syria.
- **USA:** The CEO of Backpage.com pleaded guilty to charges of conspiracy to commit money laundering and prostitution as a result of the company's facilitation of and profit from illicit ads placed by human traffickers.
- **Hong Kong:** The threshold to prove directors' liability has been lowered, making it easier for a director to be held liable for the company's wrongdoing as a result of negligence, without the required mental state of "knowingly" and "wilfully".

NB: Directors in banking and other financial services companies face increased risk from money laundering and proceeds of crime legislation.

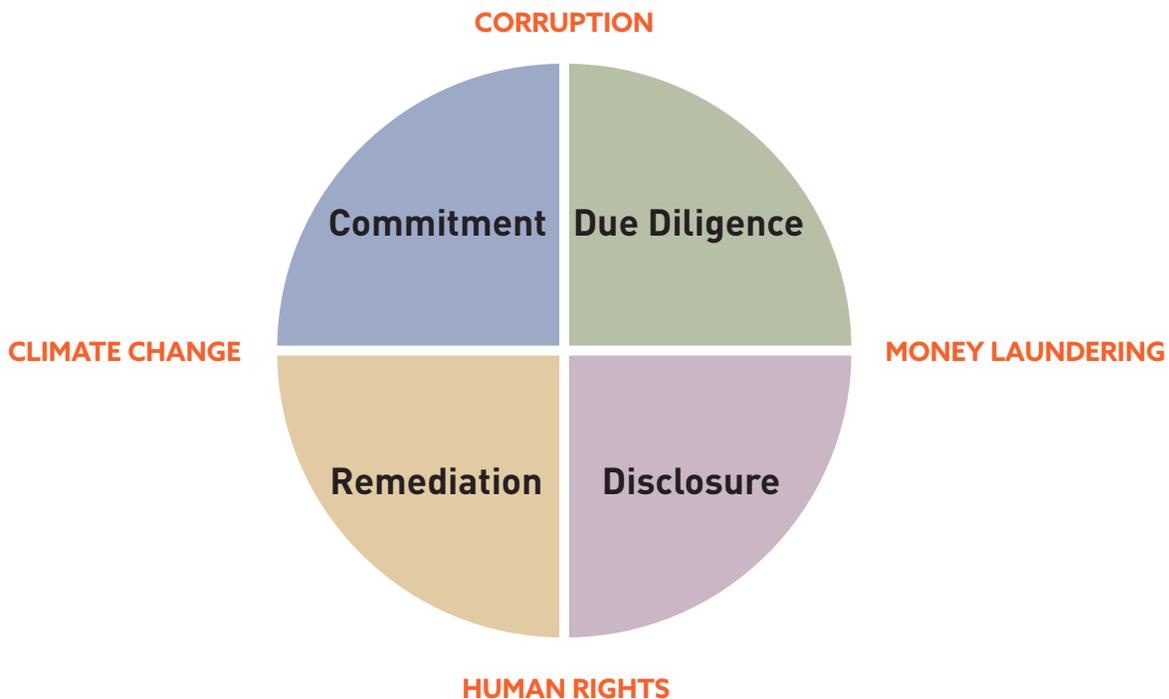
Effective Modern Slavery Governance

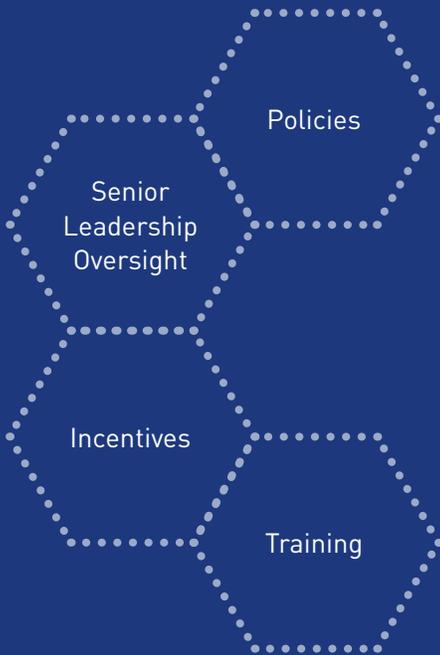
Modern slavery is among the most urgent human rights risks across corporate value chains. It exists at the nexus where risk to business meets risk to rights-holders. From the business perspective, modern slavery is material because it shapes a company's exposure to legal, financial, and reputational risk. From the rights-holder perspective, modern slavery is salient because of its severe impact on fundamental interests. No matter the angle, modern slavery is thus a priority social risk for corporate boards to address.

The Two Dimensions of Human Rights Risk



Human rights governance is very similar in form to other corporate compliance programs. It is built on four pillars: (i) commitment; (ii) due diligence; (iii) disclosure; and (iv) remediation. The similarities in structure and scope favor integrated management of a range of ESG (environmental, social, and governance) risks, including climate change, corruption, and money laundering. At a minimum, boards can leverage the structure and lessons of existing compliance programs to understand the practical contours of effective human rights governance.





Commitment

Fostering a Culture of Vigilance

*“Within a business organization, compliance begins with the **board of directors and senior executives setting the proper tone** for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, the DOJ and SEC consider the **commitment of corporate leaders to a “culture of compliance”** and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business.”*

(U.S. DEPARTMENT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT AT 57)

*“At the corporate level, companies should **explicitly prohibit these abuses in their codes of conduct, policy statements, and supplier selection and management practices**; and ensure that exploitation linked to trafficking and abuses by labor brokers is addressed.... Companies then need to raise awareness and **build capacity within their own ranks** and within those of their suppliers to take action against these abuses.”*

(VERITÉ, COMPLIANCE IS NOT ENOUGH: BEST PRACTICES IN RESPONDING TO THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT AT 4)

Key Legal Considerations

1. Companies should be cautious not to overstate the scope of their human rights commitment, which can ground **litigation risk for misrepresentation or voluntary assumption of responsibility in tort**.
 - Policies and other public representations should **focus on process not impact**, as the latter may be beyond the company's reasonable control.
 - Ground commitments in **business-specific frameworks**, e.g., UN Guiding Principles on Business and Human Rights or OECD Guidelines for Multinational Enterprises.
 - **Avoid nebulous terms**, e.g. "support for human rights", which have uncertain scope under legal or voluntary standards.
2. Modern slavery reporting at the corporate group level can allow courts to impute knowledge of risks to the board. Companies should carefully **balance senior leadership oversight with functional and subsidiary/affiliate responsibility** to ensure the parent does not claim unreasonable issue-ownership.
3. In establishing the commitment, directors, officers, and counsel should think holistically about **corporate risk and the views of material stakeholders, including employees, creditors, regulators, and consumers**. A focus on narrow, technical compliance may undermine the company's long-term value.
4. The establishment and diligent implementation of **good corporate governance rules may protect directors** from allegations that they have breached their duty of care.

Commitment

Navigating the Legal Challenges

Recommended Process

1. Comprehensively assess **material modern slavery-related risks to the business** based on operating context, relevant laws and potential litigation, investor expectations, and reputational/operational risks.
2. Identify **appropriate modern slavery standards** to address all material stakeholder expectations efficiently and comprehensively, while cohering with broader human rights commitments.
3. Conduct **gap analysis of existing policies and procedures** against identified standards to avoid overlap or conflict.
4. **Establish corporate governance rules** to ensure the implementation of adequate policies and procedures in light of the company's exposure to different risks.
5. Ensure internal **buy-in of management** across functions and high-risk subsidiaries.
6. Ensure relevant expertise informs consistent program design, while **day-to-day implementation is appropriately integrated** with functional and subsidiary/affiliate management.



Due Diligence

Proactively Identifying and Addressing Modern Slavery Risk

"Do you know how your goods are made, from raw materials to finished goods, by whom, where, and under what labor conditions?"

(US CUSTOMS AND BORDER PATROL, REASONABLE CARE: AN INFORMED COMPLIANCE PUBLICATION AT 14)

*"It is important for large organisations to be transparent and accountable, not just to investors but to other groups including employees, consumers and the public whose lives are affected by their business activity. **Due diligence processes and reporting are essential management tools that improve risk identification** and long-term social, environmental as well as financial performance."*

(UK INDEPENDENT ANTI-SLAVERY COMMISSIONER, TRANSPARENCY IN SUPPLY CHAINS: A PRACTICAL GUIDE AT 4)

*"DOJ and SEC will give meaningful credit to a company that implements in **good faith a comprehensive, risk-based compliance program**, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area.... The degree of appropriate **due diligence is fact-specific** and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation.... When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company **analyzes and addresses the particular risks it faces.**"*

(U.S. DEPARTMENT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT AT 57)

Key Legal Considerations

1. To ensure due diligence is **tailored to relevant standards** and consistent across the organization, companies should ensure precise and shared metrics of modern slavery risk.
 - Adopt reasonable **internal definitions and indicators of material terms**— including relevant rights and scope of responsibility—to ensure consistent due diligence.
2. The focus of the due diligence should be on elements of the company's value chain where **the risk of modern slavery is highest**, not where the company has the strongest or most material relationships.
3. Where directors have acted in good faith on a **sufficiently informed basis for the best interests of the company**, the business judgment rule may serve as a defense that protects directors from liability.
 - The standard for informed basis requires directors to actively seek out relevant information and to inform themselves about both the strengths and weaknesses of available options, including the risks to which particular lines of business and significant transactions may expose the company. This assessment must be mindful of the complexities of the operating context.

Due Diligence

Navigating the Legal Challenges

Recommended Process

1. Conduct structured modern slavery risk assessment that includes suppliers and business partners.

The risk assessment should consider proxies for modern slavery risk, including corruption, weak rule of law, lack of freedom of association, and indigenous rights.
2. Establish consistent process to **prioritize investigations, integration, and monitoring** based on risk to rights-holders rather than extent of business control or strength of relationship.
3. Develop **specific metrics and practical guidance for suppliers and business partners**.
4. Implement **tiered process of progressively more rigorous investigation** based on risk indicators, e.g. industry, product, region, past performance, and other ethical concerns.
5. **Engage directly** with workers, worker representatives, and communities and ensure that their views are represented in policy design and implementation, as appropriate.
6. Ensure integration and monitoring responsibility is devolved to **relevant functions and subsidiaries**.
7. **Use leverage through contract terms and cooperation with peers to incentivize change and harmonize standards** throughout the company's supply chain.



Disclosure

Proving Corporate Vigilance

Properly calibrated disclosure that is **grounded in robust internal due diligence and risk assessment** serves multiple ends in modern slavery governance. It ensures compliance with financial and non-financial reporting regulations. It **demonstrates the sincerity** of a company's commitment to investors and other stakeholders. And, in the context of investigations, disclosure can **mitigate penalties**.

*"Reporting requirements can drive **better strategic understanding of the risks and impacts** of an organisation's core activities in relation to the environment and human rights. This disclosure of these management tools allows **investors to move capital towards more sustainable, responsible organisations** and strengthen the long-term ethical sustainability of the financial system."*

UK INDEPENDENT ANTI-SLAVERY COMMISSIONER, TRANSPARENCY IN SUPPLY CHAINS: A PRACTICAL GUIDE AT 4

Key Legal Considerations

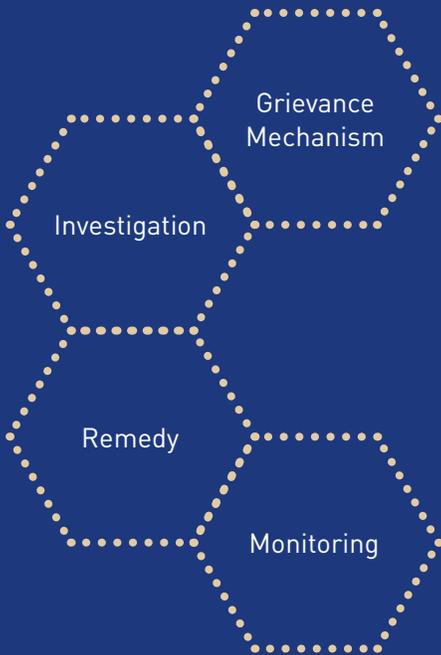
1. The threshold for disclosure of human rights risks differs fundamentally based on the disclosure context.
 - Financial disclosure should be tailored to disclose material **risks to the business**.
 - Non-financial disclosure, both mandatory and voluntary, is generally **focused on salience**, i.e. the most severe risks to stakeholders.
 - Both types of disclosure should touch on existing and planned **mitigation strategies**.
2. Companies should be cautious not to mislead regarding their human rights risks or due diligence process, which can ground **litigation risk for misrepresentation or voluntary assumption of risk** and **invite shareholder suits**.
 - Ensure **alignment between statements** in different disclosure regimes to minimize misrepresentation risk.

Disclosure

Navigating the Legal Challenges

Recommended Process

1. Select comprehensive human rights reporting framework tailored to **relevant regulatory expectations, voluntary commitments, material stakeholder expectations, and opportunities** to structure non-financial disclosure.
2. Identify **material modern slavery issues** for financial disclosure and **salient human rights issues** for non-financial disclosure.
3. Establish reasonable and precise key performance indicators to demonstrate **sincerity and continuous improvement**.



Remediation

Due Process and Effective Remedy

*“Moreover, once an allegation is made, companies should have in place an **efficient, reliable, and properly funded process** for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken.”*

U.S. DEPARTMENT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT AT 61

*“Remedy mechanisms – one of the three pillars of the UNGPs – is lacking in most reporting on modern slavery. Companies need to create complaint and grievance **mechanisms for workers in their own operations** and ensure that they are **available for workers in their supply chains**. These mechanisms should **meet key effectiveness criteria set forth by the UNGPs** by being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and (in the case of operational-level mechanisms) based on dialogue and engagement.”*

BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, MODERN SLAVERY REPORTING: CASE STUDIES OF LEADING PRACTICE AT 9

Worker Vulnerability in Global Supply Chains

Modern slavery in global supply chains generally occurs against a backdrop of public governance failures. Victims are extremely vulnerable to exploitation and are unlikely to have (meaningful) local avenues for redress.

“Human trafficking is a hidden crime, in which perpetrators take advantage of power imbalances and coerce and intimidate their victims into silence. Victims of trafficking may not know they are entitled to legal protection and may fear being prosecuted or punished for crimes or immigration violations committed as a direct result of the trafficking scheme.”

(UNITED STATES DEPARTMENT OF STATE, 2017 TRAFFICKING IN PERSONS REPORT AT 2)

“Effective anti-trafficking law enforcement efforts are inherently challenging and even the most effective governments struggle to address the crime comprehensively.”

(2017 TRAFFICKING IN PERSONS REPORT AT 6)

“Official complicity is a problem that plagues many criminal justice systems. In some countries, law enforcement personnel ignore clear signs of exploitation or actively participate in or facilitate human trafficking.”

(2017 TRAFFICKING IN PERSONS REPORT AT 9)



Key Legal Considerations

1. A fair process (or processes) to receive, process, and respond to complaints is crucial for companies to be able to explain their **good faith commitment to human rights** to courts, regulators, investors, and other stakeholders.
 - Consistency with public representations will depend on clear **internal metrics for procedural fairness**.
 - International due process standards require, at a minimum, accessibility to the relevant groups, eliminating fears of retaliation, confidentiality, and effective documentation.
2. In the human rights context, companies should set **consistent parameters for rights-compatible remedy**, to ensure alignment with standards and credibility with stakeholders.
 - International law provides the benchmarks and elements of for remedy: **restitution, compensation, satisfaction, and guarantees of non-repetition**. The company should ensure the approach meets these standards.

Remediation

Navigating the Legal Challenges

Recommended Process

1. Analyze existing company complaints or grievance mechanisms with reference to interests and context of potential victims of modern slavery to identify **material gaps in scope**.
2. Map and evaluate available **public and private dispute resolution mechanisms** accessible to potential complainants with a clear understanding of limitations created by corruption, lack of freedom to associate, lengthy proceedings, reprisals against workers by corporations, and the use of cross-claims or defamation suits to silence workers. The workers' level of awareness and knowledge of their rights and the existence of these mechanisms must also factor into this evaluation.
3. Design process or processes with reference to **internal gaps and external alternatives**. Company efforts are even more **meaningful in operating contexts with weak rule of law and governance**, a lack of freedom to associate, persecution of human rights defenders, shrinking civic space, and the use of criminal defamation to silence workers.
4. Engage with stakeholders and experts to ensure that the mechanism is **targeted to the preference, needs, and limitations** of victims in the specific operating context. Adopt a **process to educate workers** of their rights and the existence of remedial mechanisms.
5. Ensure that lessons from the grievance mechanism feed into the broader due diligence process to **enable continuous stakeholder engagement and improved governance**.

Annex I: Legislation

UNITED STATES	
Legislation	Description
California Civil Code, §1714.43 (California Transparency in Supply Chains Act of 2010)	Law requiring companies to disclose the extent to which they verify their supply chains for human trafficking and modern slavery risk and maintain internal standards and procedures to mitigate this risk
Exec. Order No. 13,627, 3 C.F.R. 13,627 (2012) (Strengthening Protections Against Trafficking in Persons in Federal Contracts)	Order requiring government contractors and subcontractors to maintain a compliance plan including policies and processes to mitigate the risk of human trafficking
Trade Facilitation and Trade Enforcement Act of 2015, 19 USC § 4301	Law (i) removing the “consumptive demand” clause in the Tariff Act of 1930 (19 U.S.C. § 1307), which allowed for importation of goods produced with forced labor if the goods were not produced in such quantities in the United States as to meet the consumptive demands of the United States, and (ii) permitting anyone with reason to believe that goods produced by forced labor are being or are likely to be imported into the United States to require the importer to produce a detailed statement demonstrating that the goods were not produced with forced labor
William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. § 1595	Law prohibiting a variety of trafficking-related acts and creating offenses for aiding the commission of these acts or conspiring to commit them. The Act permits foreign plaintiffs to bring civil actions in US federal courts and recover damages
Global Magnitsky Human Rights Accountability Act (subtitle F of title XII of Public Law 114-328; 22 U.S.C. 2656	Law authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain human rights violations and acts of corruption
CANADA	
Canadian Ombudsperson for Responsible Enterprise Responsible Business Conduct Abroad, GLOBAL AFFAIRS CANADA	Investigative authority with the primary objective of addressing complaints related to allegations of human rights abuses arising from the activities of Canadian companies operating abroad
Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) S.C. 2017, c. 21	Law imposing targeted measures against foreign nationals responsible for or complicit in gross violations of human rights or in acts of significant corruption

UNITED KINGDOM

Modern Slavery Act 2015, c. 30

Law prohibiting slavery, servitude, and forced or compulsory labor and requiring companies to prepare a slavery and human trafficking statement for each financial year regarding due diligence processes in place in relation to their business and supply chains

The Companies Act 2006 (Strategic Report and Directors' Report Regulations 2013, No. 1970, s. 414C (7)(iii) in conjunction with the Companies Act 2006, c. 46, s. 415)

Law and accompanying regulations imposing a duty on directors of quoted companies to prepare a report detailing information about human rights issues

Criminal Finances Act 2017, c. 22

Law (i) allowing the United Kingdom government to freeze the assets of human rights abusers in the UK and (ii) introducing gross human rights abuse as part of the unlawful conduct to which civil recovery powers can be applied

EUROPE

Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330/1)

Directive requiring companies to disclose relevant environmental and social information in their annual report, including information about human rights, corruption, and bribery risks

Commercial Code (Code de Commerce), arts. L. 225-102-4, L. 225-102-5 (Fr.)

Law requiring companies to institute compliance plans including reasonable due diligence measures that identify and aim to prevent severe human rights violations and environmental harms within their own operations and within those of their subcontractors and suppliers

Child Labor Due Diligence Bill (Wet Zorgplicht Kinderarbeid) (Bill adopted by the Parliament's Lower Chamber on 7 February 2017) (Neth.)

Law requiring companies to submit a statement to a regulatory authority declaring that they have carried out due diligence related to child labor throughout their full supply chain. The law permits third parties to bring enforcement actions

Swiss Responsible Business Initiative, SWISS COALITION FOR CORPORATE JUSTICE

Proposed law that, if accepted, would (i) require companies to conduct due diligence to ensure it and any companies under their legal or de facto control respect internationally recognized human rights and environmental standards and (ii) impose liability where these standards are violated and the company in question cannot prove due diligence

OTHER

Australian Modern Slavery Act
Establishing a Modern Slavery Act in Australia,
BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE

Proposed law to mandate supply chain reporting on modern slavery risk and due diligence by companies and other entities operating in Australia

Hong Kong Modern Slavery Act
Hong Kong lawmakers push for UK-style anti-
slavery law, REUTERS

Proposed law that, if accepted, would compel companies to report whether their supply chains are free from slavery and give enforcement officers wide investigatory powers

Annex II: Additional Resources

The literature on modern slavery and business obligations is rich and expanding. We provide below a sampling of additional resources to consider.

Ethical Trading Initiative, Corporate Leadership on Modern Slavery

Governance Institute of Australia, Moving beyond modern slavery statements: Performing human rights due diligence

Human Rights First, The Responsibility of Corporate Boards in Fighting Modern Slavery

Institute of Directors, Slavery: a modern problem?

Marsh, Modern Slavery Act – Increasing Exposures for Directors and Officers

PWC, The Modern Slavery Act: How should businesses respond?

Sedex, Modern Slavery and Human Trafficking

Stuff, 'The directors' bible' includes chapter on Human Rights for first time

U.S. Department of State, Trafficking in Persons Report 2017

U.S. Department of State, Verité, Made in a Free World, and the Aspen Institute, Responsible Sourcing Tool: Worker Protection