

LEIGH DAY SUBMISSION
TO THE JOINT COMMITTEE ON HUMAN RIGHTS
INQUIRY ON BUSINESS AND HUMAN RIGHTS

31 August 2016

Leigh Day

- 1) Leigh Day is a leading human rights law firm with a large international law department specialising in international corporate accountability cases.
- 2) Over the past 22 years Leigh Day has pursued numerous ground-breaking cases for people in developing countries who have allegedly been harmed by the activities of multinationals, including claims by:
 - a) 42 South African workers poisoned by mercury at a factory in Kwa Zulu-Natal (*Ngcobo & Others & Sithole & others v Thor Chemicals Holdings Ltd & Desmond Cowley*, 1995 WL 1082070)
 - b) A throat cancer victim who had worked in a uranium mine in Namibia, in which the House of Lords developed the law on forum non conveniens (“FNC”) and access to justice. (*Connelly v RTZ* [1998] AC 854)
 - c) 7,500 South African mine workers who contracted mesothelioma and asbestosis, which also entailed an important House of Lords ruling (*Lubbe & Ors v Cape Plc* [2000] 1 W.L.R 1545;
 - d) Nigerian fishing communities against oil giant, Shell for widespread oil pollution in the Niger Delta (*Bodo Community v Shell* – claim no. HT-13-295, the *Ogale Community v Shell* – claim no. HT-2015-000241, and the *Bille Community v Shell* – claim no. HT-2015-000430).
 - e) 30,000 Ivorians following toxic waste dumping in the Ivory Coast, in one of the UK’s largest-ever group actions (*Motto & Ors v Trafigura*, Case no. HQ06X03370).
 - f) 32 Indigenous Peruvians against Monterrico Metals, for alleged complicity in torture and mistreatment by the Peruvian police (*Tabra & Ors v Monterrico Metals*, case no.HQ09X02331, HQ10X01362).
 - g) Tanzanian villagers against African Barrick Gold (Acacia Mining) relating to injuries and deaths at the North Mara Mine in Tanzania (*Kesabo and others v African Barrick Gold and North Mara Gold Mine*, case no. HQ13X02118).
 - h) Thousands of South African gold miners claiming compensation for silicosis against Anglo American and Anglo Gold, in which Leigh Day worked in conjunction with local public interest lawyers eg *Alpheus Zonisile Blom v Anglo American South Africa Limited (SA)*; *Flatela Vava & Ors v Anglo American South Africa Limited* [2013] Bus. L.R. D65; *Qubeka & others v Anglo American South*

Africa Ltd and Anglo Gold Ashanti Ltd.

- i) These cases laid the foundations for *Chandler v Cape plc* [2012] EWCA Civ 525, which established the legal precedent that parent companies can have a direct duty of care to employees of a subsidiary.
- 3) Leigh Day is also acting in the first High Court case against a British company on behalf of victims of modern slavery (*Galdikas and others v DJ Houghton Catching Services and others*, Claim no. HQ14P05429).
- 4) Consequently, Leigh Day has a well-informed perspective as to the effectiveness and accessibility of judicial mechanisms in the UK for providing remedy to victims of human rights abuses by business enterprises, including specifically multinationals, and the implementation of the 'Remedy' pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) more generally.

Summary of matters addressed in these submissions

- 5) These submissions address the following issues of which we have direct experience, and which arise from the questions listed in the call for evidence:-
 - a) Accessibility and effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas:Pages 4-11
 - b) Accessibility and effectiveness of judicial mechanisms for protecting the right to effective remedy for victims of modern slavery:Pages 12 - 14

Summary of recommendations on access to effective remedy

- 6) The following recommendations to the JCHR are based on the more detailed analysis set out below:
 - a) Parliament should enact legislation requiring commercial organisations¹ with a turnover² of over £36m, to conduct and report on human rights due diligence ("HRDD") on themselves and their subsidiaries.
 - b) In view of the greater difficulty for victims of human rights abuses to pursue civil remedies against the parent companies of multinational commercial organisations ("Multinational Parent Companies" or "MPCs") and the heightened complexity of such cases, specific measures should be adopted. It is proposed that the following specific measures would apply in a defined sub-set of cases, namely where the MPC has a majority shareholding (directly or indirectly) in a subsidiary that is directly associated with the harm in question:
 - i) A procedural rule should be introduced whereby the burden of proof is reversed so that a common law duty of care on the part of the MPC will be presumed in the absence of evidence to the contrary.

¹ As defined in s54(12) of the Modern Slavery Act 2015.

² As defined in reg3 of the Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015.

- ii) Documents in the possession of majority-owned group subsidiaries should be deemed to be under the control of the MPC.
- iii) The Rome II Regulation should be reformed to ensure the non-application of Article 22 (regarding burden of proof) in such cases.
- c) Rome II should be reformed to ensure the non-application of Article 14.3(c) (regarding choice of law for assessment of damages) in claims arising from allegations against commercial organisations of human rights abuses, environmental damage or modern slavery.
- d) In all claims arising from allegations against commercial organisations of human rights abuses, environmental damage or modern slavery, the "proportionality" test should be relaxed to avoid it acting as a bar to access to justice.
- e) Qualified one-way costs shifting ("QOCS") should be extended to apply in environmental claims against commercial organisations and claims arising from modern slavery.
- f) The Modern Slavery Act should be amended to:
 - i) introduce specific civil wrongs of trafficking, slavery, servitude and forced or compulsory labour, including for victims of modern slavery in the supply chain;
 - ii) delete section 54(4)(b), which permits a commercial organisation to comply with the reporting obligation by issuing a statement that the organisation has taken no steps to ensure that slavery and human trafficking is not taking place in its supply chain or any part of its business.
- g) Parliament should consider the introduction of legislation akin to the Trafficked Victims Protection Act to enable victims of modern slavery in the supply chains of UK businesses to access remedy in the UK.

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Accessibility and effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas

Overview on access to judicial remedy

- 7) In the UK National Action Plan updated in May 2016, the UK Government sets out the actions it has taken to promote access to remedy for human rights abuses by business. Those actions focus very heavily on advising and encouraging UK companies to establish grievance mechanisms. In our experience, such mechanisms can act as a hindrance to victims' access to effective remedy. In particular, such grievance mechanisms are an entirely inappropriate forum in which to seek to provide remedy for human rights abuses such as extrajudicial killings, rape or other serious harms. Such harms ought to be remedied via judicial mechanisms.
- 8) A variety of factors, however, generally preclude human rights claims being pursued in the local courts of the jurisdiction where the harm and the relevant multinational subsidiary operations are located. These include corruption, fear of persecution and lack of access to information.
- 9) More broadly, the principal overriding impediment to victims of corporate human rights abuse being able to access judicial remedy is their inability to access lawyers with the expertise, resources, financial ability and inclination to bring complex litigation of this type in light of very significant financial risks.
- 10) Funding for legal representation is specifically referred to in the UNGPs, with regard to the costs of such claims and also the paucity of lawyers who are willing to undertake them. It is an issue of paramount importance to practical access to justice both at the host and home state levels.
- 11) Victims of human rights abuses by multinational companies operating in developing states frequently find the impediments to accessing local courts insurmountable. The ability to pursue claims in the multinational home state (whose courts will have jurisdiction over claims against the MPC), such as in the UK, may often be the only feasible avenue for victims to seek access to justice. Nevertheless, there are multiple barriers to accessing the UK courts in such cases.
- 12) The doctrine of separate corporate personality means that the circumstances in which the "corporate veil" may be pierced so as to make a shareholder liable for the conduct of companies in which it invests is very limited. In the UK, the current legal framework for pursuing claims against MPCs has focused on the direct causative acts and omissions of the MPC itself rather than the acts and omissions of its subsidiaries.
- 13) Claims against MPCs in the UK have also been faced with the prospect of overcoming jurisdiction hurdles, procedural issues (such as gaining access to internal corporate documents to prove the case, or case management procedures for running group claims) and practical issues (such as the logistics of dealing with cases where clients may be thousands of miles away and where witnesses may be afraid

to come forward).

- 14) MPC claims are therefore complex and resource-intensive. They require extensive evidence-gathering as to the conduct of the MPC, the relationship between the MPC and the subsidiary, and the extent to which the MPC's conduct or omission caused the harm complained of. They require instruction of specialist, effective lawyers to prosecute the claims and of experts upon whose evidence claimants would need to rely. Accordingly, pursuing these claims requires significant financial resources.
- 15) Victims of corporate human rights abuses invariably do not have the necessary financial resources and public funding is in practice unavailable for such cases. At present, the only option available to victims is to find lawyers who are willing to act on a "no win no fee" basis, under which the claimants' lawyers are entitled to payment if the case succeeds. This system, however, places potentially overwhelming financial strain and risk on claimants' lawyers. Cases typically last from three to five years. During that entire period, it is the claimants' lawyers who must fund the litigation. They must cover the costs of legal teams that must be sufficiently large, well-resourced and specialised to compete with the top commercial firms instructed by companies to defend the claims. They must also cover the substantial costs inherent in litigation against MPCs, such as the fees of a raft of technical experts, and extensive travel to collate evidence and witness statements, and to obtain instructions.
- 16) The result is that small public interest firms that would be inclined to act in such cases simply do not have the financial ability to undertake the level of risk that these cases entail. Large commercial firms would have the ability but not the inclination due to the conflict that would arise with their corporate clients. As a result of strategic decisions and changes in the legal environment over the past 25 years, Leigh Day has grown to a size and developed a mixture of work streams, which have enabled the firm to undertake the risk of the multinational claims. This explains why the firm has ploughed virtually a lone furrow in this area.
- 17) In recent years, there have been developments that have reduced some of the practical and legal impediments to bringing such claims. For example, removal of the *forum non conveniens* ("FNC") obstacle to claims against MPCs, following the 2005 ruling of the ECJ in the case of *Owusu v Jackson* regarding the Brussels I Regulation,³

³*Owusu v Jackson and Others* Case C-281/02. The effect of this ruling was to reduce the time and legal costs that were previously expended in order to establish the jurisdiction of the English courts at the outset of the litigation. The reduction in delays in accessing the courts has had an immediate effect in ensuring greater access to justice, particularly in cases seeking redress for debilitating and life-threatening injuries or disease. For example, in the past, many victims of asbestosis did not survive the long delays caused by jurisdictional challenges by corporate defendants: see eg *Cape plc v Lubbe* [2000]. It may be that the UK will remain a party to the Brussels I Regulation after Brexit if the UK wishes to retain access to the single market (Norway, Switzerland and Iceland are all signatories to the Lugano Convention which mirrors the provisions of Brussels I for non-EU members). However, a serious concern is that the UK will cease to be a party to Brussels I and that this will result in FNC applications and a return to the injustice created by this principle prior to 2005.

significantly reduced the risk, resources and costs and hence enhanced the viability of claims. Similarly, there has been an increased receptiveness of the courts to the notion of a parent company duty of care.

- 18) Conversely however, changes to the civil costs regime introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (LASPO), combined with European Regulation 864/2007, better known as "Rome II", have reduced the viability of international claims, particularly of smaller claims with less overall value.
- 19) Since 2009, Rome II has required damages in tort cases to be assessed by reference to local levels. The effect is that damages in international corporate human rights abuse claims are generally very low compared to the damages awarded for the same torts occurring in the UK.
- 20) Simultaneously, LASPO has caused a tightening of the "proportionality" rule, generally requiring costs to be less than damages.⁴ With Rome II resulting in relatively low damages, the proportionality rule has often been relied upon by defendant companies to seek to restrict the incurrence of costs in these complex international cases, most specifically in relation to the costs of disclosure, which is an essential tool for victims' access to evidence.⁵
- 21) LASPO has also resulted in the removal of recovery of success fees from defendants, such success fees now only being recoverable from the Claimants themselves. LASPO has thereby reduced the levels of compensation available to victims and concurrently, the financial viability of lawyers taking on the financial risk in pursuing the claims.
- 22) The combined effect of LASPO and Rome II is to reduce the viability of cases by (a) limiting the disclosure obligations of defendants (discussed further below) and hence the prospects of success, and (b) the amount of recovery of claimants' legal costs and hence their profitability.
- 23) Unless and until the complexity of pursuing such claims in the UK and the barriers referred to above are addressed, few UK lawyers or law firms will be willing or able to shoulder the financial burden or be capable of prosecuting such claims effectively, and the ability of victims of corporate human rights abuse to access judicial remedy will therefore remain limited.
- 24) The proposals outlined below seek to address some of these practical and legal

⁴ While LASPO allows consideration of other issues in determining proportionality (including public importance), post-LASPO Defendant companies have invariably argued that costs are entirely disproportionate in cases brought by (largely impecunious) claimants in international business and human rights cases.

⁵ There has been one case in which there has been judicial recognition of the importance of business and human rights abuses being aired despite the costs of disclosure being large as compared to potential quantum: *Vilca v Xtrata Ltd* [2016] EWHC 389. However, in other cases, judges have been persuaded by defendants arguing that the costs of disclosure would be disproportionate to quantum.

barriers, thereby reducing some of the financial impediments that currently limit the availability of legal representation for victims of corporate human rights abuses, while balancing the rights of defendants to a fair trial.

Liability of UK-domiciled parent companies

- 25) In the absence of an overarching legal framework and regulatory regime relating to human rights abuses by business, tort law has provided an important source of redress. Indeed, all of the corporate accountability cases that have been brought by Leigh Day have been tort-based claims in the High Court.⁶
- 26) Although the foreign operations of UK businesses are usually conducted through local subsidiaries or joint ventures, Leigh Day has brought these cases against the UK-domiciled entity within a multinational group (usually the parent company) by arguing that the UK entity is directly liable by virtue of the MPC's *de facto* control over functions, deficiencies in which caused the harm in question. This control is alleged to give rise to a legal duty if harm to individuals such as the victims should have been reasonably foreseen.
- 27) For example, in two on-going cases brought by Nigerian communities who suffer from chronic oil pollution caused by Shell's Nigerian subsidiary, it is contended by the Claimants that the MPC, Royal Dutch Shell plc is also liable by virtue of the extensive direction and control they exercise over Shell Nigeria.⁷
- 28) In bringing such claims, victims of human rights abuses are tasked with the challenge of evidencing the extent to which the UK-domiciled entity knew or ought to have known of the risk of the harm alleged, and the steps that could or should have been taken to prevent or mitigate that harm.
- 29) Quite clearly, the extent of the MPC's role in subsidiary functions which led to harm is within the MPC's knowledge. Accessing the corporate documents evidencing that role is central to the Claimants being able to prove their case.⁸ This is all the more so where other forms of evidence are difficult to ascertain, such as from witnesses such as employees or police who are often reluctant to come forward.
- 30) There are several factors that currently impede access to such information:
- a) Some companies have not made and will not make use of the UK Government's support for human rights reporting (as set out in the National Action Plan);

⁶ While Rome II provides that the applicable law will generally be that of the country where the harm occurred, in Leigh Day cases for victims in Nigeria, South Africa, Tanzania and Namibia, it has been argued that since these countries have adopted English-based tort law, the applicable law will essentially be the same as English law. In other cases, eg the *Monterrico* case, allegations have been based on provisions of the Peruvian Civil Code, which perhaps unsurprisingly are remarkably similar in practice to the English law.

⁷ *Okpabi & others, Alame & others v. 1) Royal Dutch Shell plc and 2) SPDC Ltd* [HT-2015-000241].

⁸ The paucity of cases that have been pursued in the national courts of other EU countries is noteworthy. Key reasons for this are the extremely limited procedures for disclosure of documents, and limited scope for recovery of profit costs by victims' lawyers. For example we note in Germany that disclosure is limited to documents specifically identified by claimants.

- b) MPCs often contend that they have no control over documents in the possession of overseas subsidiaries; and
- c) engaging in electronic disclosure exercises is very costly and strict application of the proportionality principle means that the opportunity for victims to elicit relevant documents may be substantially curtailed.

Recommendations:

A. Mandatory human rights due diligence (“HRDD”) and reporting

- i) It would be counter-intuitive to the UK Government’s commitment to the G7 Leaders’ Declaration (7-8 June 2015) to “encourage enterprises active or headquartered in our countries to implement due diligence procedures” for UK-domiciled entities with opaque corporate structures to be less accountable than those that demonstrate greater transparency. Yet, in the absence of mandatory reporting on HRDD, this is the practical effect.
- ii) We consider that it would be of great value to victims of corporate human rights abuses for a law to be enacted imposing a mandatory duty of HRDD and reporting on business enterprises, consistent with the UK Government’s commitment to the UN Guiding Principles. To ensure policy coherence and limit the regulatory burden, the legal duty could be imposed consistent with reporting requirements such as those under the Modern Slavery Act 2015,⁹ and/or the non-financial reporting requirements of the EU.¹⁰ We would propose a legal duty be imposed upon “commercial organisations”¹¹ with a “turnover”¹² of over £36m, to conduct and report on HRDD in respect of themselves and their subsidiaries (wherever located).
- iii) The introduction of such a requirement would have significant potential to prevent human rights abuses occurring in the first instance. In all of the cases brought by Leigh Day against UK multinationals on the basis of de facto control, it is equally alleged that the abuses could have been prevented if the relevant UK-domiciled entity had identified the risk of human rights abuses occurring and taken reasonable steps to avoid the realisation of that risk.
- iv) A reporting obligation would also ensure that even the human rights “laggards” who are the least transparent of corporations would be required to make accessible information regarding their assessments of potential human rights impacts and what steps they had taken to mitigate any adverse

⁹ The slavery and human trafficking statement under s54(4)(a) of the Modern Slavery Act.

¹⁰ Under which large public-interest entities with more than 500 employees are required to disclose in their management report relevant and useful information on their policies, main risks and outcomes relating inter alia to environmental matters, social and employee aspects and respect for human rights: see http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news

¹¹ Akin to the definition in s54(12) of the Modern Slavery Act 2015.

¹² Akin to the definition in s3 of the Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015.

impacts.

- v) It is noteworthy that in 2015 the French National Assembly took steps towards improving the accountability of French multinational corporations and passed a Bill “relating to the duty and vigilance of parent and subcontracting companies”.¹³ In essence, this statute imposes a legal obligation upon parent companies with at least 5,000 employees to conduct human rights due diligence with regard to the activities of their subsidiaries, subcontractors and suppliers abroad, failure of which would result in civil liability and would be an offence under the criminal law. If passed, this new legislation will represent a significant step in reducing barriers to “remedy” in France.

B. The burden of proof should be reversed so that a common law duty of care will be presumed to be owed by a parent company in the absence of evidence to the contrary

- i) It is proposed that this reversal would apply only in circumstances involving multinational corporate enterprises in which the parent company holds a majority shareholding (directly or indirectly) in the subsidiary whose operations directly caused the harm.
- ii) In circumstances where documents shedding light on internal corporate relationships are not accessible, for example because they have not been preserved or are in the possession of subsidiaries and the parent company claims it does not have control over the documents, this proposal will place the onus on the MPC to positively adduce documentary or witness evidence to rebut the presumption of a duty of care.

C. Documents in the possession of group subsidiaries should be deemed to be under the control of the parent company

- i) As indicated above, to avoid victims being deprived of documents which an MPC contends are outside its control as they are held by subsidiaries, we propose that documents held by subsidiaries over which a parent has a majority shareholding (directly or indirectly) should be deemed to be under the control of the parent unless it can prove otherwise.

D. Reforming Rome II Regulation (EC) No 864/2007

- i) Rome II stipulates that, in relation to tort claims, the applicable law shall be that of the country where the damage occurs unless the tort is manifestly more closely connected with another country (Article 4). Article 22 also stipulates that these applicable law provisions apply to the burden of proof.

¹³ Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, no 501, 30 mars 2015.

Consequently, any reforms to substantive (as opposed to procedural) UK law would be to no avail unless these provisions of Rome II were rendered inapplicable. In regards to the recommendations above, therefore, reform of Rome II would be required to ensure the non-applicability of Article 22 to the reversal of the burden of proof in circumstances involving multinational corporate enterprises in which the parent company holds a majority shareholding (directly or indirectly) in the subsidiary whose operations directly caused the harm.

- ii) Under Article 14.3 (c) of Rome II, the same rule applies to the assessment of damages. The effect of this is to reduce the level of compensation for victims as compared to English law equivalents. In so doing, the proportionality requirements under LASPO are more easily breached. Further, the relatively low damages levels fail to act as a deterrent against human rights violations on the part of corporations that might consider the relative “cost” of such abuses outweighed by the potential “benefit”. This disparity is wholly at variance with the goal of ensuring corporate accountability for human rights violations and Article 14.3(c) of Rome II should be reformed so as to be disapplied in claims arising from human rights abuses, environmental damage or modern slavery.

E. The "proportionality" test should be relaxed to avoid it acting as a bar to access to justice in claims arising from human rights abuses, environmental damage or modern slavery.

- i) The effect on access to justice of the strict application of this rule is outlined in the section above and is also relevant to the submissions on modern slavery below.

Costs protections for victims of corporate human rights abuse

31) Costs orders in civil cases in the UK follow the “loser pays” principle. Previously, ATE cover for the adverse costs risk was obtained by claimants and the premiums were recoverable from the defendant as part of overall costs recovery. Recoverability of these premiums was however abolished by s.46 LASPO. At the same time, in cases involving personal injury, “QOCS” was introduced, which rendered the need for adverse costs cover redundant¹⁴. QOCS does not however apply to pure environmental claims or to human rights abuse claims that do not result in a personal injury. It may not, for example, apply to claims arising from trafficking or forced labour.

32) Due to the risks involved and the magnitude of defendant’s costs ATE premiums in cases of this type are huge, typically 80-90% of the amount of the cover. Payment of ATE premiums by claimants’ would generally wipe out their damages, substantially or totally. Consequently, obtaining ATE is not an option, which means that

¹⁴ Civil Procedure Rules 44.13- 44.16.

environmental claimants and victims of modern slavery are vulnerable to adverse costs. This is a deterrent against the bringing of such claims.

Recommendation:

- F. QOCs should apply in environmental claims against multinational companies and claims arising from modern slavery.**

Accessibility and effectiveness of judicial mechanisms for protecting the right to effective remedy for victims of modern slavery

- 33) Section 54 of the Modern Slavery Act 2015 (the “Act”), which entered into force on 29 October 2015, introduced a new requirement for businesses operating in the UK with an annual turnover of more than £36 million (including the turnover of any subsidiaries) to produce an annual slavery and human trafficking statement, setting out how they are preventing slavery and human trafficking taking place in their supply chains. This is the first time that a country had introduced such a human trafficking reporting requirement.
- 34) The increased focus on supply chain transparency by the UK Government has followed a number of shocking allegations in recent years of multinational corporations profiting from products produced by forced labour.¹⁵ A recent study by the Ethical Trading Initiative also found that 71% of companies believe there is a likelihood of modern slavery occurring at some point within their supply chains.
- 35) While the UK National Action Plan places substantial emphasis on the introduction of the Modern Slavery Act, and while the increased focus by the UK Government on supply chain transparency is positive, there are significant deficiencies in the legislation and continued barriers to justice for victims of modern slavery.
- 36) Victims of modern slavery are unable to bring a civil action based on the crimes detailed in the Modern Slavery Act unless they are able to “fit” the crimes to torts such as negligence or trespass to the person. Neither human trafficking nor forced labour are, per se, actionable torts. A proposal to include specific civil wrongs of trafficking, slavery, servitude and forced or compulsory labour in the Act was debated during passage of the Modern Slavery Bill but was rejected by the House of Lords.
- 37) In our experience, it is difficult to seek redress for the full effects of modern slavery, including for the dehumanising effect it has on victims, merely by reference to existing tort law. We note that Lady Hale recently commented in the case of *Taiwo v Olaigbe and another* [2016] UKSC 31 on the fact that the civil remedies currently available for modern slavery are not sufficient:

“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

¹⁵ For example, in April 2015 migrant workers were reportedly being treated like ‘slaves’ in Spain when growing vegetables for sale in UK supermarkets, and in December 2015 the Guardian and Associated Press published shocking evidence of slave labour in Thailand’s prawn and fishing sectors, which products end up on supermarket shelves in the US and Europe: <https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand>; <http://www.ap.org/explore/seafood-from-slaves/global-supermarkets-selling-shrimp-peeled-by-slaves.html>.

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” [para 34].

- 38) At present, claimants must seek to claim for redress by way of pleading and proving multiple causes of action, thereby increasing the complexity of such litigation. As outlined above, pursuing complex claims leads to increased costs and can result in defendants seeking to rely on the proportionality rule to limit disclosure and/or expert evidence, which can prevent access to critical evidence.
- 39) Victims of modern slavery in UK business supply chains are particularly disadvantaged by the current legal framework. Whereas victims of modern slavery in the supply chains of US businesses are able to pursue civil claims against those companies under legislative provisions, no equivalent law exists in the UK. For example, seven Cambodian labourers allegedly exploited while working in Thailand’s seafood industry have recently been able to commence litigation in the United States against four seafood companies, two American importers and two Thai firms, under the Trafficking Victims Protection Act (“TVPA”). The TVPA (18 U.S. Code § 1595 - Civil remedy) provides much greater access to justice than that currently available in the UK, authorizing victims of human trafficking or forced labour to bring a civil action against whomever “knowingly benefits, financially or by receiving anything of value, from participation in a venture which that person knew or should have known” was engaged in peonage, forced labour, involuntary servitude, unlawful conduct with respect to documents, and human trafficking.
- 40) Commercial organisations are able to comply with the reporting requirement established under section 54 of the Act by simply stating they have taken no steps to ensure that slavery is not taking place in their supply chains. This runs contrary to the UK Government’s stated commitment to enhance supply chain transparency and accountability, and encourage human rights due diligence regarding supply chains.
- 41) In respect of the modern slavery statements which have been published to date, we also note that an analysis by the CORE Coalition and the Business & Human Rights Resource Centre in January and February of 2016 found that the majority of statements did not yet comply with the requirements of the Act. Out of 75 statements analysed, only 22 were signed by a director and only 9 of the statements met the minimum requirements and covered the six areas which section 54(5) of the Act suggests that modern slavery statements should include.
- 42) Civil society groups, including Liberty and Kalayaan, have also been critical of the Act’s failure to protect migrant domestic workers, one of the groups most at-risk of modern slavery. A proposed amendment to the Act which would have enabled domestic workers to change their employer (within the same sector) and extend their visas was passed in the House of Lords, only to be rejected by the House of Commons.

43) In addition, despite the expansion of legal aid to include applications for leave to enter or to remain in the UK, claims under employment law and claims for damages by victims of slavery, servitude or forced or compulsory labour, the practical reality is that legal aid for victims of trafficking is very difficult to obtain. Moreover, as outlined above, victims of modern slavery do not presently have the costs protection afforded by QOCS save to the extent that their claim relates to personal injuries.

Recommendations:

- G. As recommended above, commercial organisations should be required to undertake and report on their human rights due diligence. Consistent with this objective, Parliament should remove section 54(4)(b) of the Modern Slavery Act, which currently permits a commercial organization to comply with the reporting obligation by issuing a statement that the organization has taken no steps to ensure that slavery and human trafficking is not taking place in its supply chain or any part of its business.**
- H. The Modern Slavery Act should be amended to introduce specific civil wrongs of trafficking, slavery, servitude and forced or compulsory labour, including for victims of modern slavery in the supply chain**
- I. Parliament should consider the introduction of legislation akin to the Trafficked Victims Protection Act to enable victims of modern slavery in the supply chains of UK businesses to access remedy in the UK.**
- J. As recommended above, in claims arising from modern slavery, the "proportionality" test should be relaxed to avoid it acting as a bar to access to justice.**
- K. As recommended above, QOCS should be extended to apply in claims arising from modern slavery.**