

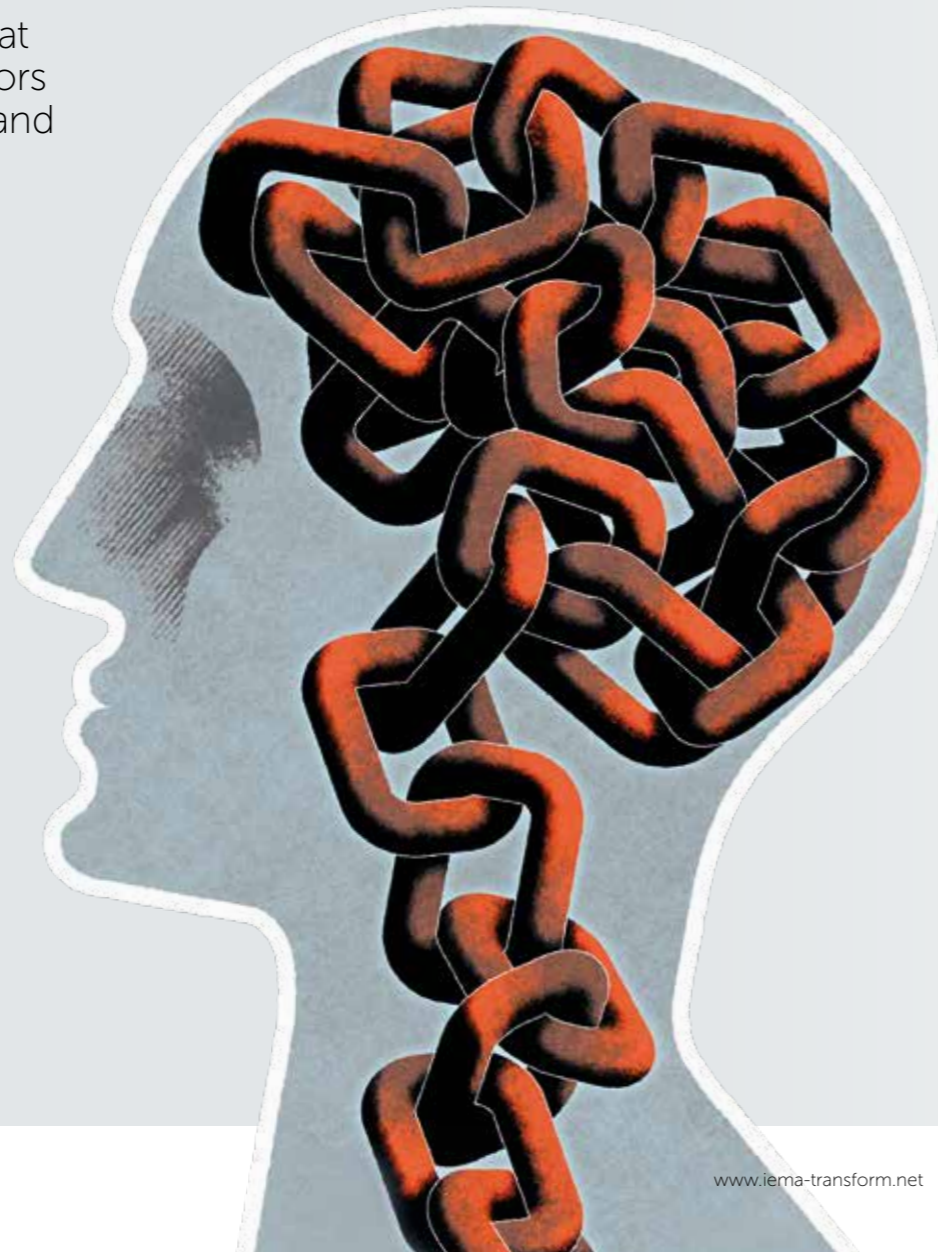
The right side of the law

Colleen Theron looks at the legal liabilities directors face over human rights and modern slavery

The International Labour Organisation estimates that nearly 40.3 million people in the world today are held in modern slavery, including 24.9 million in forced labour. This means that there are 5.4 victims of modern slavery for every 1,000 people in the world.

A complex and expanding regulatory web now governs global business and human rights violations, and companies can be held criminally liable for any direct use of forced labour, or involvement in human trafficking. There is an increasing global trend for strengthening the accountability of institutions to ensure that senior managers are held personally liable for instances of corruption and bribery. This is reflected in the changes being made to UK corporate governance regulation and to the UK Criminal Finances Act 2017. Corporate directors can no longer afford to remain ignorant of modern slavery in their supply chains.

This article will look at the corporate director's fiduciary duty to monitor and eliminate modern slavery, with reference to the UK Modern Slavery Act 2015, the



recent reforms to the UK Corporate Governance Code, and in particular Section 172 of the Companies Act 2006.

Directors' duties

Both the modern slavery act (MSA) and the amendments to Section 172 include increased reporting requirements for directors and companies, in order to ensure that companies provide information on how they are managing their social and environmental impacts. This includes steps they are taking to combat modern slavery in their organisations and supply chains.

Section 172 imposes a general duty on every director to act in good faith to promote the success of the company for the benefit of shareholders. When making decisions and setting policies, directors must consider effects on the supply chain, the community, the environment and the company's reputation. The new legislation requires the strategic report for a financial year to include a statement on how directors have given regard to the matters set out in Section 172. This is to be published on the company website.

Section 54 of the MSA requires organisations that meet the threshold of the legislation to publish annual slavery and human trafficking statements. The statement has to be approved by the board of directors (or equivalent managing body) and signed by a director (or equivalent).

The board of directors is responsible for the governance of their company, and there are now multiple human rights-related legal risks to business that expose directors and officers to personal liability if they fail to address human rights, or misrepresent the effectiveness of corporate human rights governance.

In addition to statutory duties, directors also have fiduciary duties. A fiduciary relationship is a relationship of trust, placing a duty on company directors to act within in good faith, ethically, and in the best interests of the company.

Incurring liabilities

Where a director is found liable for breach of Section 172 to the extent that they have not complied with the requirements of publishing the statement on the website, they can be found guilty of an offence, liable on summary conviction to a fine.

Under Section 54 there is no criminal liability for a director who fails to comply with the provisions of the MSA, although they can be held personally liable for criminal liability in the event that they are found guilty of human trafficking offences.

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Directors may, however, be found liable for breach of fiduciary duties where, for example, they have failed to exercise their duties of good faith, or not made a business judgment in good faith, or acted deceitfully or dishonestly. Examples of failure to act with reasonable care, skill and due diligence when signing off the annual modern slavery statement include:

- Failing to get enough information to understand the risks to the business
- Not getting the approval of the board for the statement
- Not ensuring the statement complies with the requirements of the law
- Failing to exercise due care and diligence when determining what steps the company is taking, or should be taking, to tackle slavery in the organisation and its supply chains
- Failing to act in good faith in the company's interests as a whole (for example, not providing the resources needed to identify the risk of slavery in supply chains, or dismissing any risk in the first place)
- Failing to ensure that public disclosure

is underpinned by robust records of company due diligence procedures.

Good governance

The establishment of good corporate governance rules and sufficient due diligence processes may protect directors from allegations that they have breached their duty of care. Directors should consider how they can discharge their duty under Section 172, as well as meet their fiduciary duty under the MSA, by taking the following practical steps:

- Consider the culture of the company and make it consistent with 'doing the right thing'
- Understand the legal disclosure requirements relating to modern slavery and human rights in all the jurisdictions the company operates
- Consider how the company's activities and the board's decisions will impact on its suppliers, customers, employees, the community and the environment
- Consider whether sufficient information has been provided to make informed decisions
- Understand which policies and procedures need to be put in place to ensure the company has proper due diligence processes, and to support the company's culture and strategy
- Consider what training is required to ensure directors understand how to manage the risk of human rights abuses and modern slavery, and provide guidance
- Understand the impacts of Section 172 considerations for directors of subsidiary groups and joint venture companies.
- Ground any commitments in business-specific frameworks, such as the UN Guiding Principles on business and human rights.

It is also important however, not to just adopt a checklist approach, but to consider modern slavery reporting as part of holistic corporate risk management. 📌

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