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PO Box 1473
Wellington 6140, New Zealand

Contributors:
Professor Muhammad Azizul Islam, *University of Aberdeen*
Professor Pamela Abbott, *University of Aberdeen*
Professor Craig Deegan, *University of Tasmania*
Ms Fiona Gooch, *Traidcraft Exchange (UK)*
Dr Shamima Haque, *University of Aberdeen*
Professor Chris Van Staden, *Auckland University of Technology*

Feedback on a legislative response to Modern Slavery and Worker Exploitation, Forced Labour, People Trafficking and Slavery both in New Zealand and internationally

It is a great pleasure to make a submission and provide feedback on your proposed legislation to address modern slavery and worker exploitation, both within New Zealand and internationally. Our team comprises international researchers interested in corporate accountability in relation to modern slavery within global supply chains, and we welcome the Committee's discussion document titled '*Discussion document: A legislative response to modern slavery and worker exploitation*' (New Zealand Government, 2022). We have read the proposals and questions highlighted in the *Discussion Document* and we have limited our comments to those areas where we believe our knowledge and experience may assist the Committee. By specifically focusing on global clothing and fashion industry supply chains, we refer to the following questions in the discussion document (New Zealand Government, 2022):

- Whether you support the proposed *'Graduated approach incorporating both the disclosure and broader due diligence'*, to new supply chain legislation. (Q3 and Q3A)
- Do you agree that 'medium' and 'large'-sized entities should be required to annually report on the due diligence they are undertaking to address modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains? (Q7); What information should be compulsory for entities to provide in their annual disclosures? (Q7A)
- How far across an entity's operations and supply chains should it be expected to undertake due diligence apply? (Q9); What could reasonable due diligence activity look like at different supply chain tiers, and how could this be defined or reflected in the legislation? (Q9A)
- What comparable legislation do you think we should consider in developing the penalties framework for this legislation? (Q19)
- Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society? (Q27) And if independent oversight is required, what functions should the oversight mechanism perform? (Q27A)

Our submission, while not limited to the above questions, comments on the key proposals and answers to the above questions. We focus on the importance of an independent watchdog for global clothing and fashion industry supply chains. Before addressing the above questions and key recommendations for the legislation, we highlight the following research findings from different research projects conducted via international collaborations.

Highlights of our findings from different international research projects

The first research paper (Islam, Deegan and Haque, 2021) reports on an investigation into whether the use of social or factory audits by global clothing retailers and their suppliers operating in Bangladesh upheld human rights and moral standing at the garment factories around the time of two major factory disasters in Bangladesh (the Tazreen fire in 2012 and the Rana Plaza collapse in 2013). The research, based on a series of interviews (between 2012 and 2014) and reviews of articles in the news media and NGO documents, found that although the (western) retailers sourcing from factories at Rana Plaza had social audit mechanisms in place, these did not protect the workers from a factory owner who forced them to work in an unsafe building. These workers do not have the luxury of thinking about their safety as the most immediate problem for them – and their dependents - is having money for food and shelter. During these two major disasters, social audits had been carried out but failed to save workers from the fire or the collapse. This research also found that global retailers and their suppliers often use social audits as symbolic and ritual strategies that help maintain existing inequalities rather than protect workers' welfare. Looking at workers' everyday journeys at Tazreen and Rana Plaza, it is evident that death and human suffering could have been prevented if forced labour (modern-day slavery) had been eliminated.

The effectiveness of Modern Slavery Acts relies upon companies which casts significant doubt over the robustness or objectivity of such audits, before, perhaps naively, simply believing the information being produced by apparently independent third-party auditors/assurance providers. In an in-depth investigation of compliance audits undertaken of the supply chains of global retailers or multinational corporations (MNCs) in the context of the Bangladesh garments industry, Islam, Deegan and Gray (2018, p. 214) – the second research paper we refer to – reports:

> *What seems to have emerged is a complex interplay of motives, assumptions and influences. The actual conduct of a social compliance audit is predominantly a requirement instituted by the MNC as a pre-condition of the supply contract. There is very little evidence that, all things being equal, the MNCs exert much in the way of resources or effort to assess the reliability of these audits, which appear to have a symbolic role and allow the MNC to continue to make claims that appear to play well with western consumers (. . .) Consequently, the audits are generally of a cursory nature and we found little evidence that they make much constructive impact on the lives of workers and communities. Such accountability as is owed to the relatively powerless workers and communities remains largely undischarged . . . Thus, a social compliance audit becomes a ritualistic practice that supports MNCs' maintenance of legitimacy to the wider community rather than creating real accountability.*

The third research paper (Islam and Van Staden, 2021) provides a critical review of the UK Modern Slavery Act 2015. Based on a series of interviews with anti-slavery activists and experts in the UK and a review of all existing regulations (including the UK Modern Slavery Act), this research found that the call for supply chain transparency within the Act is restricted by the limited disclosure requirements, limits to the range of entities

required to publish modern slavery statements. The Act fails to provide the means to hold regulated organisations responsible for their part in contributing to or driving modern slavery supply chain operations in the developing world. While traceability of the suppliers and their factory locations is a critical aspect of transparency, the Act does not have a specific provision for companies to disclose their factory locations. There is no penalty for non-compliant companies (retailers), and there is little legal scope to hold organisations accountable for (modern) slavery practices. There is no specific requirement for a third party or independent audit or verification of employment practices in supply chains. Regulators (including the anti-slavery commission) are mainly influenced by corporate interests rather than protecting the real victims (workers) of the global supply chains. This is reflected in the risk minimisation provision within the Act, which focuses on retailers' risk management and not the workers' risk of becoming the victims of slavery. Modern slavery disclosure attempts to reduce business risk but does not address or reduce the risks of those falling victim to modern slavery.

The fourth research paper (Islam et al., 2022) is based on the findings from a project funded by the UK Arts and Humanities Research Council (AHRC) via a research call by the Modern Slavery and Human Rights Policy and Evidence Centre (Modern Slavery PEC), explored the impact of the ongoing Covid-19 pandemic on women working in Bangladesh's ready-made garment (RMG) industry. Based on a series of interviews with garment workers in Bangladesh, NGOs and development agencies (ILO, UN), trade union leaders, garment suppliers (manufacturers) and concerned Government officials in Bangladesh, this research found that the disruptions from Covid-19 exacerbated interrelated vulnerabilities in economic security, job security, food security, housing security and health and wellbeing, resulting in female workers struggling to support themselves and their families. These devastating impacts on workers were exacerbated by and, in some cases, directly caused by retailers and brands selling into the UK and other markets in the Global North. There was an increase in sexual and verbal abuse and symbolic violence, mainly from line supervisors pushing women to work faster to meet unrealistic production targets. Social/factory auditors did not always include women's equal rights issues in their audits, and 40% of auditors surveyed did not audit the right to trade union recognition. This work and our review of other studies focussing on the Global South or developing world suggest that the retailers' unfair practices are not unique to Bangladesh. Retailers mistreat suppliers in all the countries in the Global South they purchase from. Based on the findings from this research, the authors recommended that the UK Government consider introducing a fair purchasing regulator, an independent watchdog (i.e., a Fashion Watchdog). Such a regulator could investigate and fine brands and retailers if they breached a statutory fair-purchasing code in their dealings with garment manufacturers, particularly located in developing world.

Our feedback and recommendations on the new legislation

We wholeheartedly support introducing legislation to 'achieve freedom, fairness and dignity' in the operations and supply chains of entities and *address modern slavery and worker exploitation, both in New Zealand and internationally* (New Zealand Government, 2022). We hope this new legislation will send a clear message to retailers in New Zealand and other developed countries and their suppliers based in the developing world that New Zealand is committed to eliminating the root causes of slavery and exploitation in global fashion and clothing supply chains. In this section, we will restrict our suggestions to the 'Independent Watchdog' along with the refined and '*graduated approach incorporating both the disclosure and broader due diligence'* (the graduated approach is a proposal within the *Discussion Document,* New Zealand Government, 2022). We also

believe that the way the *graduated approach incorporating both the disclosure and broader due diligence* has been suggested in *the Discussion Document* may not lead to substantive changes on the ground of the global supply chains (that is, livelihoods of the factory workers).

Below are our responses to your specific questions and recommendations.

Suggestions on the proposed due diligence and disclosure requirements [based on, but not limited to, questions Q3, Q3A, Q7, Q7A, Q9 and Q9A, New Zealand Government, 2022)

We appreciate that the *Discussion Document* emphasises both 'Disclosure-based legislation' (which is the most common legislation across the world, it was first enacted by California and gradually enacted by other regimes including the European Union, Switzerland, the United Kingdom, Australia) and 'Due diligence legislation' (introduced in France, Germany and Norway) and proposes a '*Graduated approach incorporating both the disclosure and broader due diligence'* (New Zealand Government, 2022). We find this proposal one step forward in addressing modern slavery problems and transparency within global supply chains. However, we are concerned about the contents and provisions covered under both the disclosure and the due diligence requirements. The prescribed or proposed disclosure and due diligence requirements (on pages 15 and 60 within the Discussion Document, New Zealand Government, 2022) do not mandate a third-party or independent auditor for retailers (based in New Zealand) to perform periodic or ongoing factory audits (for example, annual or quarterly factory audits) in the supply chains. It has a provision '*commissioning third-party audits of suppliers' compliance with human rights and employment standards (including using certification and assurance schemes developed by industry bodies or associations'* (p15, 56, 60 within the Discussion Document, New Zealand Government, 2022) but this provision is not clear whether audits are mandatory for retailers or who is responsible (retailers or suppliers or both) for factory audits. If suppliers (and not the retailers) are the only responsible party to appoint a third-party or independent audit, the law may have assumed that the retailers are 'superiors' or 'good actors' and suppliers are the 'culprits' or 'bad actors' who only need surveillance/audit. Our research (for example, Islam and Van Staden, 2021; Islam, Deegan and Haque, 2021; Islam et al., 2022) suggest that retailers are also responsible for poor working conditions and slavery in the factories in the Global South. This is because they are often involved in 'price reduction' 'delayed payment' 'unreasonable production targets', and so on. We also need to rethink that it is not third-party audits (proposed as a part of the due diligence approach) alone to create transparency, it is also about how the audits (and audit results[1]) could be used to create positive change (Islam, Deegan and Haque, 2021).

[1] In discussions about transparency there is frequently a muddle about disclosure of locations, and the disclosure of issues identified in supply chain audits. Retailers or brands themselves chose the manufacturers that they buy from and can make it a requirement that they are informed about where products are made. Brands can accurately publish the locations where items are made in their supply chain. Given the widespread manipulation of social audit results, either due to worker coaching, or bribery of auditors, the fact that the information about working conditions is about information relating to third parties (worker – supplier), the data disclosed from social audits at supplier locations by retailers and brands is unlikely to be accurate.

While the Discussion Document (New Zealand Government, 2022) proposes *Small and Medium-sized entities need to do due diligence for supply chains and operations inside NZ (*p. 54) and *Large entities need to do due diligence (including audit) on international supply chains and operations as well* (p. 60), we suggest that irrespective of the size (small, medium or large) and categories (private sector, public sector or non-profit), every entity needs to do due diligence for supply chains operating in New Zealand or internationally. As slavery is an unethical issue like bribery, sensible civil society urges regulators to maintain zero-tolerance against such unethical practice wherever it takes place.

Some of the most concerning disclosure and supply chain traceability issues have not been clearly highlighted in the *Discussion Document*. There is considerable concern among global civil societies over the lack of traceability of the products produced in global clothing chains. Do we really know who produces our garments and under what conditions in Bangladesh, India, or China? Islam and Van Staden (2021) explored the lack of adequate provision on the disclosure of factory locations within the UK Modern Slavery Act. We recommend that to eliminate slavery via supply chain transparency, it is an essential requirement for retailers to disclose all their factory locations so that everyone concerned can easily trace the slavery-free production.

What is most important is to make public the locations of where products are made, particularly the labour-intensive stages of production, which are the stages of production most susceptible to situations where suppliers, as managers, choose to reduce their human resources budget, which is a budget that they often regard as a variable cost. Essentially the squeeze on cost/prices, to a level where it is impossible to pay a living wage, generates a situation where managers employ the cheapest possible labour, leaving workers at risk of being treated like modern slaves.

Some global retailers have already started disclosing their factory locations (first tier only). Still, we recommend that retailers disclose factory/supplier locations in their annual Modern Slavery Statements (whether it is the first tier, second tier or third tier). In line with findings within Islam and Van Staden (2021), to achieve the regulatory objective, the Committee should give less attention to retailers' risk management and more attention to eliminating workers' risk of becoming the victims of slavery. The *Discussion Document* is also unclear about the extent of the 'supply chain' being addressed. That is, should it include only Tier 1 suppliers or go further back in the supply chain? The guidance here needs to be precise. Within the Australian context, it has become clear that many organisations required to produce Modern Slavery Statements have restricted their analysis to Tier 1 suppliers only. The priority needs to be to disclose production locations (manufacturing or agriculture, or mining) where the risk of modern slavery exists.

If it is not feasible to disclose lots of small-scale production units, then where the products are aggregated should be disclosed. For example, the location where cocoa is split up into cocoa mass, butter and liquor or a tea factory where small scale tea farmers deliver their green leaf tea. The workers and small-scale farmers will usually know the name of the next stage of processing/delivery. So, if these "nodal" locations where products are aggregated are disclosed, then worker rights bodies or relevant external parties can complain about any violations of workers' rights to a concerned brand/retailer buying from that aggregating location, on the basis it is likely the brand is buying product that they have worked on.

The *Discussion Document* requires entities to identify and assess the risk of modern slavery and worker exploitation in their supply chains and operations. It is not clear how risk is defined and operationalised in the document or the intention of the regulator concerning risks. Is this financial risk for global companies or the risk of the sole breadwinner of a family dying or getting injured in a factory accident? We suggest that the entities not be allowed to get out of due diligence because the financial risk seems low in comparison to revenue and/or profits, but that any risk of injury, death, or human exploitation in supply chains and operations be considered to meet the risk threshold.

Based on our research findings, we observe that existing supply chain disclosure regulations and human rights due diligence approaches enacted in different countries in Global North are not effective tools to eliminate modern slavery and exploitation in the global supply chains. They do not have enforcement capacity to achieve regulatory aims. The existing laws do not have penalties for non-compliant actors (Islam and Van Staden, 2021). Existing modern slavery acts are much more problematic during a crisis (such as the Covid-19 pandemic or the Rana Plaza disaster). For example, the UK Modern Slavery Act remained silent or inactive during the Covid-19 pandemic when UK retailers fueled slavery and exploitation of women workers in Bangladeshi garment factories via unfair/unethical practices such as sudden cancellation of orders already in the production line (Islam et al., 2022). Due to the sudden cancellation of orders by retailers, workers were paid insufficient to live on, because suppliers felt that they had insufficient income from their retailers (buyers) to pay living wages and maintain workers' rights. Such findings led Islam et al. (2022) to recommend to the UK Government to consider introducing a fair purchasing regulator, an Independent Watchdog or a 'garment trade adjudicator', which could investigate and fine brands and retailers if they were found to breach a statutory fair purchasing code in their dealings with garment suppliers anywhere in the world, including the Global South. And hence, we recommend the New Zealand Government to introduce an 'Independent Watchdog' along with the 'refined and *graduated approach incorporating both disclosure and broader due diligence'*.

Suggestions on the proposed penalty and independent oversight mechanism [based on questions but not limited to Q19, Q27 and Q27A, New Zealand Government, 2022)

The *Discussion Document* highlights penalty provisions within the existing laws in New Zealand (the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, Financial Markets Conduct Act 2013, and Health and Safety at Work Act 2015 - financial penalties for non-compliance by body corporates under these acts can range from $600,000 up to $5million) which could be a good base for penalty mechanisms for the new legislation (page 68, New Zealand Government, 2022). We agree with this, but we are not sure whether these existing regulatory mechanisms can hold companies accountable for their overseas operations or supply chain practices. Concerning a possible penalty framework, existing modern slavery legislations in other countries do not have credible mechanisms to hold companies accountable for fueling slavery in the global supply chains. Despite this, we argue that other nations will follow when one nation comes up with a workable mechanism. We strongly suggest introducing an 'Independent Watchdog(s)' or 'regulator(s)' who can fine or penalise companies depending on whether they violate or breach the modern slavery act and/or fair purchasing code. The fines that the regulator can impose have to be large enough that they act as a deterrent to the large brands/retailers. A retailer's core business is buying for resale. The price at which the retailers buy products significantly impacts the profit margin that the retailer will earn on the items it buys for resale. This means that

penalties for ensuring that retailers purchasing practices are fair need to be large enough to ensure that they are greater than the profitability of purchasing practices which are unfair and abusive towards suppliers.

We are concerned over these statements in the *Discussion Document*, '*We do not consider criminal penalties are likely to be appropriate, noting that existing criminal penalties cover situations where a person is directly involved in modern slavery offending. We would be interested in any views you may have regarding other comparable legislation to inform the development of an appropriate penalty framework'* (page 68, New Zealand Government, 2022). 'Modern slavery' is an unethical issue comparable to other unethical issues such as 'bribery'[2]. If bribery is considered a criminal offence (for example, under the UK Bribery Act 2010, bribery is criminal offence), why shouldn't we consider 'modern slavery' a criminal offence under any circumstances and wherever this is occurred. The above statement (proposal) seems to protect corporate interests rather than the real victims of slavery, that is workers in the global supply chains.

We are also concerned about how the '*independent oversight mechanism'* has been defined in the *'Discussion Document'* (New Zealand Government, 2022). We find this a misunderstood mechanism. The *Discussion Document* considers the UK Commissioner (along with other countries' commissioners under the Modern Slavery Acts) as having independent oversight '*across the modern slavery sector as part of fulfilling these duties, maintaining relationships with enforcement, inspection and support agencies, local authorities, charities, NGOs, faith groups, business, and academia* (page 71, New Zealand Government, 2022). The fundamental limitation of the UK Commissioner is that it does not have enforcement and penalty mechanisms which could hold UK retailers accountable for violation/negligence of human rights in factories they buy from in the developing world (Islam and Van Staden, 2021). The UK Commissioner faces criticism from civil society groups for protecting corporate interests more than the real victims (workers) of the global supply chains (Islam and Van Staden, 2021). We argue that the independent oversight mechanism(s) should be a mechanism that can impose penalties for breaching relevant codes and laws. These mechanisms need to operate independently of Government, which is why we call these 'Independent Watchdog(s)' described below. If the New Zealand Government has concerns about retailers' practices contributing to modern slavery, then it needs to establish a regulator with a remit to deter unfair purchasing practices. Purchasing for resale in the New Zealand market is an activity that would be appropriate for the New Zealand Government to regulate. The scope of such regulation would apply to both retailers and brands headquartered in New Zealand and those businesses whose headquarters are elsewhere but are selling into the New Zealand market. It is important that retailers (competitors) operating in the New Zealand market are treated equally, if the New Zealand Government is going to deter the sale of consumer items made by modern slavery in their supply chains.

[2] Most businesses do not intend to bribe or to treat people as modern slaves. These outcomes are consequences of a single-minded pursuit of financial objectives, in a context where deterrents are not sufficient. Where the penalties are insufficient, or the mechanism to prosecute a business, or senior individuals in businesses is not viable, then businesses do not see the need to prioritise operating within the law. In addition, when businesses see that their competitors are operating in a manner that is fueling demand for modern day slaves to achieve low prices, then a race to the bottom in terms of business practices occurs. This is the current context of the international clothing retailing sector.

A focused fair purchasing regulator exists in the UK to deter abusive and unfair buying practices in the UK food and grocery retailing sector[3]. More recently, the EU has passed a directive on Unfair Trading Practices in the Agriculture sector, recognising imbalances of power in food/agriculture supply chains[4]. This imbalance of power in retailers' supply chains with large market shares enables them to apply unfair and unethical purchasing practices to their weaker suppliers. This, in turn, is passed onto workers in the form of abusive working conditions and slavery. Clothing retailers have long been known to apply unfair and abusive purchasing practices to their suppliers. The short notice changes to purchasing practices, and systematic dumping of risks onto suppliers when Covid disrupted trade, exposed the scale of how bad purchasing practices could become, with devasting impacts on workers.

The New Zealand Government should introduce an Independent Watchdog, a regulator to bring about improvements. An Independent Watchdog as a regulator can stop abusive purchasing practices (which drive demand for workers to be treated as slaves) combined with due diligence and updated and enforced labour laws (including the modern slavery act). The Watchdog would guide, investigate, and penalise retailers for any buying practices which breach any law and statutory code. The Watchdog's task should include:

a. the Watchdog being able to initiate investigations of unfair purchasing practices based on information gathered and provided, but not necessarily based on specific complaints;
b. a whistle-blower procedure so that complaints about the statuary code/law can be made to the Regulator in confidence;
c. complains being submitted by third parties who have witnessed a breach of the statutory code/law;
d. (overseas) producers/suppliers not being identified in any published reports on the outcome of investigations.

The above points have been made to recognise the climate of fear that suppliers live under. Suppliers are unwilling to complain about their retailers/buyers for fear of losing future orders. Therefore, despite many unfair practices being a breach of contract, in some cases causing suppliers to close down operations, they do not take their buyers to court.

The cost of a Watchdog could be covered by applying a levy on the brands/retailers, which made retailers with worse practices and taking more of the regulator's time pay more (This is how the UK fair purchasing regulator, Groceries Code Adjudicator, operates).

Researchers (Islam et al., 2022) in collaboration with a UK based global trade justice NGO, Traidcraft Exchange, have recommended to the UK Government that it introduce a Fashion Watchdog, which would focus on stopping abusive, sometimes unlawful purchasing practices in the retail garment sector[i].

[3] See, https://www.gov.uk/government/organisations/groceries-code-adjudicator
[4] See https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/unfair-trading-practices_en

We recommend that the New Zealand Government introduce an Independent Watchdog(s) to ensure that New Zealand retailers and businesses are not operating in a manner profiting from the use of modern-day slaves in their global supply chains.

In addition, as explained above it is critical to require businesses operating in the New Zealand market to disclose details of their supplier locations in the (proposed) Annual Modern Slavery Statements. Disclosure of production and processing locations has already happened in garments, tea, and palm oil sectors, just to name a few.

Watchdog mechanism(s) can deter businesses from engaging in modern-day slavery and create mechanisms that can facilitate and encourage victims (onshore and offshore) *to bring claims against businesses, leading to penalties and/or compensation for victims*.

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[i] http://www.traidcraft.org.uk/fashion-watchdog