THE CLOTHES ON OUR BACKS, THE SKIN OFF THEIRS:

The gendered dimensions of human rights violations in the garment industry, and possible protective mechanisms in New Zealand's supply chains

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The world as we know it has grown increasingly dependent on the "fast fashion" garment industry. Consumers continue to demand the same goods at ever-decreasing prices, prompting manufacturers to cut corners when it comes to due diligence processes, and in turn rely on the products of modern slavery. Widespread use of modern slavery hidden in supply chains has become one of the most serious human rights issues of our time. This issue disproportionately effects women and girls, with many garment workers being women and girls in low-income countries. This article dissects this issue further by investigating the intersection between modern slavery in the garment supply chain and its gendered dimensions. This is an important question to ponder given that New Zealand has no due diligence mechanisms in place, despite the majority of its garment supply being sourced from overseas suppliers, and a public and parliamentary interest in establishing a framework to regulate such supply. The following discusses the policy aspects of the gendered issue at hand, followed by comparisons of weak-form and hard-form international due diligence models. Ultimately, this article concludes that, as a starting point, New Zealand should adopt a hard-form approach, like the French model of due diligence. New Zealand should then go further with its legislative framework and strive to set a "gold-standard" in combatting modern slavery, by addressing the problems that current hard-form models have.

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I INTRODUCTION

As evident from the following quote by Reba Sikder, an 18-year-old garment worker and survivor of the Rana Plaza collapse in Bangladesh,[1] modern slavery has long-lasting and harrowing impacts on its victims: [2]

> The following morning when I came, I saw that many of my co-workers were standing outside, they were in a dilemma, in fear [because of the cracks that had appeared through the building on that day]. Our management started yelling at us to go inside or we would not be paid. [Then] I heard a boom, and everything was collapsing. I saw that many of my co-workers were trapped, many of them dead. Everyone is crying, as well as me, asking to save our lives.

Modern slavery is a grave global human rights issue, which is often exacerbated by the intersections of gender inequality, poverty and cultural norms.[3] Modern slavery does not have a singular definition, but it is used generally to refer to situations that people cannot leave due to coercion, abuse of power, threats, violence and deception.[4]

The garment industry is a prominent commercial sector where modern slavery in supply chains poses a huge human rights issue. It is also a sector which highlights the intersectionality of such an issue, with female workers from developing nations making up the majority of the garment production and textile industry.[5] Stories of workers such as Sikder provide a glimpse of the coercion, abuse of power and threats faced by workers in the garment industry, as well as the unsafe working conditions, hours and menial wages

1 International Labour Organization "The Rana Plaza Accident and its aftermath" (April 2013) <www.ilo.org>.

2 Sikder was just 12 years old when she started working in the garment factories in Bangladesh. She survived the Rana Plaza collapse by crawling through the rubble and bodies of fallen co-workers to find her way out over two and a half days. To read more about her horrific recollection of the collapse, see Taylor Brady "Bangladeshi garment worker shares story on escaping collapsed factory" (19 February 2014) Daily Collegian <www.dailycollegian.psu.edu>.

3 United Nations Meetings Coverage and Press Releases "With 40 Million Forced into Modern Slavery, Third Committee Expert Urges States to Protect Rights of Women, Girls, Companies Must Remedy Violations" (press release, 26 October 2018).

4 International Labour Office *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (September 2017) at 9.

5 Walk Free *Stacked Odds: How lifelong inequality shapes women and girls' experience of modern slavery* (11 October 2021) at 91.

which are all notable elements of modern slavery.[6] Many garment companies adopt multinational supply chains to maximise commercial gain, outsourcing laborious tasks to countries where the cost of human labour is significantly lower.[7] The human rights compliance of such chains is often difficult to track.[8] To increase their transparency and compliance several jurisdictions have adopted their own due diligence laws.

This article explores domestic due diligence measures from various jurisdictions, and assesses whether they protect their supply chains from contributing to human rights abuses in the garment industry. Currently, New Zealand has no mandatory domestic due diligence laws, making it difficult for the average New Zealand consumer to attain the full picture of the production of our clothes. Recently, more than 37,000 New Zealanders signed a petition organised by Trade Aid and World Vision asking Parliament to introduce legislation requiring public and private entities to report on the risks of modern slavery in their supply chains and the steps they are taking to mitigate such risks.[9] Consequently, Parliament's Petitions Committee, which includes representatives from all current parties, has recommended that the Government "bring legislation addressing modern slavery before the House as soon as possible while allowing for adequate policy development and public consideration".[10]

Ultimately, this article aims to determine whether New Zealand should follow any one international model of due diligence laws, or if we can go further and develop our own "gold standard". To answer this question, Part II of this article will discuss the human rights abuses faced by women and children in the garment industry to illustrate the gravity of this conversation. Women and children, particularly in developing nations, are disproportionately affected by the garment production industry. Part III will address the roots of due diligence

6 Sanchita Banerjee Saxena "Beyond the Accord: Disrupting the unequal power relationships between global brands, suppliers and workers is essential for an ethical, sustainable industry" *The Daily Star* (online ed, 24 April 2021).

7 Walk Free *Beyond compliance in the garment industry: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (October 2020) at 18.

8 Business and Human Rights Resource Centre *Modern Slavery in Company Operation and Supply Chains: Mandatory Transparency, Mandatory Due Diligence and Public Procurement Due Diligence* (September 2017) at 3-4, 15 and 20.

9 Jamie Ensor "Modern slavery: Petition accepted by Michael Wood as Government convenes group to advise on possible legislation" (29 June 2021) Newshub <www.newshub.co.nz>.

10 Jamie Ensor "Modern slavery: MPs back introducing legislation 'as soon as possible' after petition signed by thousands" (21 February 2022) Newshub <www.newshub.co.nz>.

laws and corresponding international frameworks. These frameworks may provide a foundation for the protection of the rights of women and children trapped in modern slavery in the garment supply chain. Parts IV and V will dive deeper into the current due diligence laws and international obligations New Zealand has in place, as well as the current status of New Zealand supply chains. Part VI will introduce and discuss due diligence models from the United Kingdom and France, which are at different ends of the spectrum regarding legislative robustness. Drawing on the recent release of a White Paper to tackle modern slavery in New Zealand, the "soft-form" United Kingdom model will be used interchangeably with the term "transparency legislation".[11] Finally, Parts VII and VIII will discuss which model New Zealand should adopt, and what factors ought to be considered further if New Zealand is to strive to have the gold standard model of law.

II A BRIEF OVERVIEW OF THE HUMAN COST OF FASHION

To determine whether New Zealand should invest time and resources into addressing this issue further, the true extent of modern slavery in the garment industry on a global scale must be canvassed. Given the opacity of industry supply chains, exact numbers of those affected are hard to estimate. However, the Global Estimates of Modern Slavery 2021 reported that there were 50 million people living in modern slavery in 2021.[12] Of these, 27.6 million people were in forced labour, a statistic which has increased by 2.7 million people between the 2016 and 2021 global estimates.[13]

The issue of modern slavery in the garment industry's supply chains has become a gendered issue, one that puts vulnerable women and girls at high risk. When discussing possible policy developments in this area, it is imperative

11 Christina Stringer and others *Toward a Modern Slavery Act in New Zealand– Legislative landscape and steps forward* (University of Auckland, September 2021) at 7–14. Notably, the White Paper distinguishes between these two terms, as a "transparency legislation" or soft-form model only requires companies to publish an annual statement with steps they have or have not taken to fulfil their obligations. Contrastingly, a "due diligence" or strong-form model requires companies to "undertake responsibly business activity", meaning they cannot opt out of their obligations. Generally, this White Paper has a much broader approach in addressing the issue of modern slavery in New Zealand, such as covering criminality clauses, duty of care and abuse of workers outside of the garment industry. Such topics fall outside of the narrow focus of this paper.

12 International Labour Office, Walk Free and International Organisation for Migration *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (September 2022) at 2.

13 At 2.

to inquire how effective any proposed legislative tool will be in countering the exploitation of vulnerable women and children trapped in opaque supply chains. Current preliminary discussions by the Ministry of Business Innovation and Employment (MBIE) have briefly touched on gendered elements of modern slavery, but it must be ensured that any legislation drafted and enacted protect the most vulnerable workers—at whatever stage in the supply chain they may be found.[14]

A The gendered issue

The 2021 Global Estimates of Modern Slavery indicate that women and girls comprise over half (54 per cent) of those in modern slavery.[15] This statistic is likely higher when analysing data from the garment industry alone, which shows that approximately 80 per cent of all garment workers (including those not affected by modern slavery) are women.[16] The demographic that is most vulnerable are women and girls in developing countries.[17]

Further, a recent discussion by the International Labour Organisation (ILO) revealed that the gendered issues within modern slavery tend to worsen in times of crisis, such as the COVID-19 pandemic.[18] Pre-COVID-19, women in regions where the global labour in the garment industry is concentrated faced low access to social protection, and had limited means of employment.[19] Such regions (of which the Asia-Pacific is one example) also tend to have deep-rooted gender roles which assign an unequal share of the unpaid work around their own homes to women.[20] Studies have shown that, compared to the global average, women in the Asia-Pacific region perform four times as much unpaid care at home than their male counterparts.[21]

14 Stringer and others, above n 11, at 7–14. See also Selwyn Gordon Coles and Kathryn Helen Brunt "What is modern slavery legislation and does New Zealand need it?" (2021) NZLJ 300.

15 International Labour Office, Walk Free Foundation and International Organisation for Migration *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (September 2022) at 19. An earlier study found that women and girls make up 71 per cent of all modern slavery victims: International Labour Office and Walk Free Foundation *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (September 2017) at 5.

16 Clean Clothes Campaign "Gender: Women workers mistreated" <www.cleanclothes.org>.

17 International Labour Organization "The Rana Plaza Accident and its aftermath" (April 2013) <www.ilo.org>.

18 Irene Genzmer "COVID-19 and beyond: Making gender equality a reality" (paper presented at the International Labour Organization webinar, June 2020).

19 Genzmer, above n 18.

20 Genzmer, above n 18.

21 Genzmer, above n 18. The global average is three times as much unpaid work as their male counterparts.

As a result, women suffer precarious employment conditions in sectors such as the garment industry and have little time and resources to participate in other activities, for example upskilling or unionising.[22] Moreover, in times of crisis, such as the pandemic, policy making with appropriate and built-in gender responses is generally absent from such industries.[23] This may be partly because there is an overrepresentation of women in the workforce, and an underrepresentation of women in leadership, policy making and management.[24] This means that the voices of victims, and consideration of their vulnerability and exploitation, are often not included when developing due diligence laws. Consequently, current due diligence models often do not have far-reaching and meaningful impact on the lives of victims.[25]

B Occupational hazards

Turning to the working conditions faced by such workers, women and girls in particular have reported constant fear of physical, verbal and sexual abuse and harassment at the workplace.[26] There have also been many reports documenting that garment factories adopt discriminatory practices in their hiring process, where women applicants are asked if they are married or planning to have children — going as far as to make them sign documents wherein they agree to not have children throughout the course of their employment.[27] Those who refuse to comply with such terms are not hired.[28]

If hired, workers face menial pay and heightened occupational hazards. For example, in 2019 the legal minimum wage for garment workers in Bangladesh was BDT 8,000 (approximately NZD 139) a month.[29] However, local campaigners for workers' rights state that this is far below the reported

22 Genzmer, above n 18.
23 Genzmer, above n 18.
24 Genzmer, above n 18.
25 For example, see discussions about the limited practicality of the United Kingdom and French due diligence laws in Section VI below, and how their practical effects either do not have enough teeth to bring meaningful change to victims in supply chains, or how they unrealistically place the burden of proof on the victims themselves.
26 Human Rights Watch "Combating Sexual Harassment in the Garment Industry" (12 February 2019) <www.hrw.org>.
27 Clean Clothes Campaign, above n 16.
28 Clean Clothes Campaign, above n 16.
29 Sarah Butler "Why are wages so low for garment workers in Bangladesh?" The Guardian (online ed, 22 January 2019) <www.guardian.com>.

BDT 16,000 (approximately NZD 277) needed to live a comfortable life in Bangladesh.[30]

As mentioned in the introduction of this article, a notable disaster which brought the occupational hazards of the garment industry to the world's attention was the collapse of the Rana Plaza building in Dhaka, Bangladesh in 2013. This incident claimed the lives of at least 1,132 people and injured at least 2,500 more.[31] Reports of this incident revealed that the building fell far short of domestic construction legislation requirements. Survivors state it was common for workers to be concerned about the physical signs of structural weaknesses in the building, and how on the day of the collapse, many workers refused to enter the premises due to visible deterioration of the building.[32] It was the threats of deducted pay from the owners of the factory that convinced workers to go into the building on that ill-fated day.[33]

Turning to specific occupational hazards within the garment industry, perhaps some of the most harrowing can be found in tanneries. A Médecins Sans Frontières report found that children as young as eight were being exposed to toxic cocktails of harmful chemicals for hours every day across several Bangladeshi tanneries.[34] These children belong to migrant families who live in poverty and cannot access government-funded health care. The tanneries where they work are flouting domestic occupational safety laws and ratified international treaties which forbid the employment of children under 18 in harmful and hazardous work.[35]

III THE ROLE OF DUE DILIGENCE LAWS

Whether it be a gendered issue which harms the most vulnerable populations, or occupational hazards which have the capacity to claim thousands of innocent lives, due diligence laws provide some safeguards against horrific working conditions and industry "norms" by regulating supply chains to various extents.[36]

30 At 30.

31 International Labour Organization, above n 17.

32 Brady, above n 2.

33 Brady, above n 2.

34 Sarah Boseley "Child labourers exposed to toxic chemicals dying before 50, WHO says" The Guardian (online ed, London, March 2017) <www.theguardian.com>.

35 Human Rights Watch Toxic Tanneries: The Health Repercussions of Bangladesh's Hazaribagh Leather (October 2012) at 79–87; and United Nations Convention on the Rights of the Child (UNCRC) 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 32(1).

36 Genevieve LeBaron and Andreas Rühmkorf "The domestic politics of corporate accountability legislation: Struggles over the 2015 UK Modern Slavery Act" (2019) 17 Socioecon Rev 709 at 710–721.

Such laws provide a means by which exploitative corporations can be held accountable.[37] Corporations may face consequences, such as sanctions or even a ban on trade with certain jurisdictions, until they demonstrate compliance with due diligence standards; thus halting exploitation of vulnerable workers around the world.[38]

This element of accountability provides a significant incentive for New Zealand to develop due diligence laws and processes. At the very least, it would signify our condemnation of all forms of modern slavery.[39]

IV THE DEVELOPMENT OF DUE DILIGENCE LAWS

Due diligence frameworks date back to Roman law, where they were used as "an objective standard of expected conduct" in both contract and tort law.[40] Should one fail to comply with the objective standard of conduct, they would be held liable for acts of negligence.[41] This common principle of imposing liability for failure to meet a standard of care which results in harm to another is still recognised in common and civil law jurisdictions alike.[42]

In international law, due diligence has played an important role in the responsibility of States for private actors.[43] In respect of modern slavery issues in the garment industry, some States have attempted to curb the issue of exploitation by developing domestic due diligence laws. The following section provides a brief overview of the international law in which domestic due diligence laws are rooted.

37 At 710–711.

38 For example, see the discussion on French Due Diligence Part VI below.

39 As per our obligations under various international human rights conventions. Though not the main topic of this paper, LeBaron and Rühmkorf, above n 36, give additional information on factors that may influence a country's domestic commitment to anti-slavery legislation, including political, social and international law obligations. See also Selwyn Gordon Coles and Kathryn Helen Brunt "What is modern slavery legislation and does New Zealand need it?" (2021) NZLJ 300 at 300. Considering New Zealand's socio-political obligation, Coles and Brunt note that a World Vision and Trade Aid petition, now accepted by the New Zealand government, stated that "modern slavery goes against our kiwi values. New Zealand's identify as a nation is built on kindness, fairness, equality, and sustainability." The petition was signed by over 37,000 kiwis before being presented to Parliament.

40 European Commission *Study on due diligence requirements through the supply chain: Final Report* (Publications Office of the European Union, January 2020) at 158.

41 At 158.

42 At 161.

43 At 158.

A United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) is one such comprehensive international law framework in which domestic due diligence laws are rooted.[44] The UNGPs provide a set of principles and processes that States and businesses should consider to prevent, mitigate or redress human rights-related abuses by business enterprises.[45] Such processes include the development of, and compliance with, domestic due diligence processes and the State duty to protect.

In a White Paper, Stringer and colleagues note that the UNGPs define corporate due diligence as "identify[ing], prevent[ing], mitigate[ing], and account[ing] for adverse impacts on human rights, not only in their operations but through their supply chains".[46] The authors also note that the UNGPs "make clear that human rights due diligence is not exhausted by completion of a checklist, but requires respect for human rights in all aspects of business conduct".[47]

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44 United Nations Human Rights Office of the High Commissioner *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva, 2011). See also Stringer and others, above n 11, at 8. In this White Paper, Stringer and colleagues note that the UNGPs have acted as a bridge between State and corporate responsibility, through the formulation of their "Protect, Respect and Remedy" framework. Under this framework, States are subject to a duty to protect individuals against human rights violations by third parties - including business enterprises. The UNGPs note that states may breach their international human rights obligations "where such abuse can be attributed to them", and they have failed to take appropriate steps to prevent, investigate and punish private actor's abuse.

45 Stéphanie Lagoutte "The UN Guiding Principles on Business and Human Rights: A Confusing 'Smart Mix' of Soft and Hard International Human Rights Law" in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds) *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, Oxford, 2017) 235 at 235–238. Note that the "duty to protect" is not covered in the scope of "due diligence law" as defined by the most recent White Paper on modern slavery, Stringer, above n 11, at 8. However, for competition, UNGPs 1,2 and 3 outline the "duty to protect" workers by the State, though this is largely related to businesses domiciled in the jurisdiction that are committing human rights abuses.

46 Stringer and others, above n 11, at 8.

47 At 9. Note that though outside the ambit of this paper, the UN is currently revisiting the concept of binding international legal duties for multinational enterprises should they breach their obligations to uphold the human rights highlighted under relevant UNGPs. The authors notably highlight Article 6 in the proposed Treaty, which stipulates that "states shall take all necessary legal measures to ensure enterprises subject to their jurisdiction respect human rights […] through due diligence". This will be subject to legal liability in domestic law, which is why ensuring that New Zealand enacts effective domestic due diligence standards that produce a meaningful pathway to liability for multinational enterprises is vital. Not doing so would mean any such ground-breaking international treaties would not have tangible domestic impacts once ratified by New Zealand.

When considering industries that target specific vulnerable subsets of the populations, such as women and children in the garment industry, UNGP 12 is the most relevant.[48] UNGP 12 clarifies that it is the responsibility of business enterprises to respect human rights. Its attached commentary states that, as a minimum, the protected rights include the fundamental rights expressed in the International Bill of Human Rights and the fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.[49] However, in industries such as the garment industry where vulnerable subsets of the population, including women and children, are disproportionately affected, businesses may need to consider additional standards. Such additional standards may be imposed by United Nations instruments, which have elaborated further on the rights of women and children.[50]

Notably, a key part of the commentary on UNGP 12 states that the responsibility of business enterprises to respect human rights is distinct from the issues of legal liability and enforcement, which remain defined largely by domestic provisions in relevant jurisdictions.[51]

B Additional standards and instruments which may be relevant to UNGP 12

1 For children

Regarding children's rights, the Convention on the Rights of the Child (UNCROC) and the Worst Forms of Child Labour Convention (WFCLC) set out specific standards in international law that set safeguards against child labour.[52] For example, the WFCLC has an entire section dedicated to prohibiting child labour "which, by its nature … is likely to harm the *health*, *safety* or morals of children".[53] Additionally, the ILO has added further recommendations for dangerous industries, including the garment industry,

48 United Nations Human Rights Office of the High Commissioner, above n 44, at 13.

49 At 14. This states that the International Bill of Human Rights consists "of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights".

50 United Nations Human Rights Office of the High Commissioner, above n 44, at 14.

51 This point will become more relevant when discussing case studies from the United Kingdom and France in Part VI below.

52 *Convention on the Rights of the Child*, above n 35; and *Worst Forms of Child Labour Convention* (signed 17 June 1999, entered into force 19 November 2000).

53 *Worst Forms of Child Labour Convention*, above n 52, art 3 (emphasis added).

prohibiting any work that is done with dangerous machinery, equipment and tools, or any work in an environment which may expose children to hazardous substances, agents, processes or temperatures which are damaging to their health.[54] There is also a ban on working under particularly difficult conditions, such as working for long hours.[55]

2 For women

Article 11 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) outlines the rights that a woman has in her place of employment. It outlines that member States *shall* take *all* appropriate measures to combat discrimination against women in the field of employment to ensure gender equality.[56] Sub-articles that apply to the abuse that women face in the garment industry are as follows:[57]

> The right to the same employment opportunities, including the application of the *same criteria for selection in matters of employment*;[58]
>
> The right to *social security*, particularly in cases of retirement, unemployment, sickness, invalidity, old age and other incapacity to work, as well as the right to paid leave;[59]
>
> The right to the protection of *health and to safety* in working conditions.[60]

C New Zealand's response to the UNGPs

All treaties brought under UNGP 12, discussed above, have been ratified by

54 *Worst Forms of Child Labour Recommendation* No. 190 (1999), Recommendation 2(3)(a)–(d). In terms of effectiveness of International Labour Organization's recommendations in New Zealand, given New Zealand is a founding member, such recommendations should have considerable impact on future domestic policies drafted in this area.

55 *Worst Forms of Labour Recommendation*, above n 52, recommendation 2(3)(e).

56 *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UTS 1 (opened for signature 18 December 1979, entered into force 3 September 1981), art 11(1) (emphasis added).

57 Article 11(1).

58 Article 11 (1)(b) (emphasis added). See also discussion of the Clean Clothes Campaign, above n 16, which contains a blatant example of the gender-discriminatory practices faced by women. This source discussed how many garment production factories were requiring women to sign documents declaring they would not start a family for the course of "employment" with the factory. Pregnant women were simply not "hired".

59 Article 11 (1)(e) (emphasis added). See Global Estimates, above n 4, for further discussion on how women are not being paid the minimum wage or get sick leave.

60 Article 11(1)(f) (emphasis added). See "Occupational Hazards" in Part II above for discussion on how women are being denied any such rights to safety at work.

New Zealand.[61] However, the UNGP remains "soft law" in New Zealand until it is explicitly incorporated into domestic law. There has been some discussion of support for the UNGPs in domestic human rights forums and bodies. Notably, the first New Zealand Business and Human Rights forum took place in 2016.[62] The purpose of this forum was to provide an avenue for discussion between business and human rights experts regarding how businesses and the New Zealand government can uphold various human rights discussed under the UNGPs.[63] The issues with this forum were two-fold. First, because a plan of action was not the aim of this forum, there was no discussion of hard-line approaches or inquiries towards meaningful domestic implementation of the UNGPs.[64] Secondly, it was a missed opportunity to address human rights abuses that New Zealand may inadvertently play a hand in when it comes to regulating supply chains based overseas.

Though there have been preliminary indications of enacting domestic legislation to combat modern slavery in supply chains, there is no draft Bill available at the time of writing. This makes it impossible to measure just how effective the incorporation of and commitment to the UNGPs is in any forthcoming Modern Slavery Act.[65] However, the final part of this article suggests a route to meaningful implementation of the UNGPs in New Zealand, so that any resulting framework in this space provides a platform for the protection of those who are being exploited in their workplace abroad.[66]

D OECD Guidelines and New Zealand's response

Prior to the development of the UNGPs, the Organisation for Economic Co-operation and Development (OECD) had developed a comparatively "softer"

61 See discussions of UNCROC, WFCLC and CEDAW in Section B above.

62 New Zealand Human Rights Commission "Commission launches first Business and Human Rights Forum" (9 August 2016) <www.hrc.co.nz>.

63 New Zealand Human Rights Commission, above n 62.

64 New Zealand Human Rights Commission, above n 62.

65 Jamie Ensor, above n 10. In this article, MBIE addressed the Parliament's Petitions Committee, stating that it is currently considering several regulatory design elements to address modern slavery in which "… we are drawing from the United Nations Guiding Principles on Business and Human Rights when considering options." MBIE added that its key considerations included the obligations to be placed on businesses, such as transparency, reporting and due diligence, as well as whether an Office or Commission is to be set up to monitor compliance, and potential penalties for breaches. Further information on such key considerations has not yet been made public.

66 Such as the victims of the garment industry, whose exploitation provides our population with the benefit of extremely cheap clothing.

set of guidelines (OECD Guidelines) for multinational enterprises (MNEs).[67] The OECD Guidelines "clarify the shared expectations for business conduct of the governments adhering to them, and provide a point of reference for enterprises and stakeholders", defining what responsible business conduct should look like.[68] Initially, at the time of their formation in 1984, member states were only obligated to promote the OECD Guidelines, and accompanying recommendations to MNEs were non-binding.[69] MNEs were only advised to comply with national laws, and "encouraged to make a positive contribution to economic and social progress in the countries of operation".[70] This, and the scarce mention of international standards of human rights, saw reform take place in 2000. New Zealand is a party to the latest 2011 guidelines.

Under New Zealand's responsibilities, the Government has delegated upkeep of compliance with the OECD Guidelines to the National Contact Point (NCP). For New Zealand, this is the MBIE. They act to:[71]

(a) Promote the OECD Guidelines on a national level;
(b) Handle any inquiries and discuss any matters related to the OECD Guidelines;
(c) Assess and investigate any 'specific instance' complaints lodged against a multinational enterprise operating or headquartered in New Zealand; and
(d) Report annually to the OECD Investment Committee on NCP activities.

The New Zealand Government has gone on record to state its commitment in promoting the OECD Guidelines.[72] To reflect this, MBIE issued a summary of MNE guidelines to aid government agencies and enterprises by making the comprehension of this new framework more digestible, and, in theory,

67 Eva van der Zee "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?" 40 Legal Issues Economic Integration 33 at 37-38.
68 The Organization for Economic Co-operation and Development *OECD Guidelines for Multinational Enterprises* (2011) at 15.
69 John Ruggie and Tamaryn Nelson *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (John F Kennedy School of Government, May 2015) at 2.
70 Ministry of Business, Innovation and Employment "OECD guidelines for multi-national enterprises" (22 December 2021) <www.mbie.govt.nz>.
71 Ministry of Business, Innovation and Employment, above, n 70.
72 Ministry of Business, Innovation and Employment, above, n 70.

easier to implement.[73] However, upon further analysis, it becomes clear that such approaches to the OECD Guidelines have not been as successful as intended. For example, in their latest report to the OECD, the New Zealand NCP did not conduct or report any studies about the level of awareness that New Zealand-based MNEs had about the OECD Guidelines.[74] The report also failed to adequately document the promotion of the OECD Guidelines in New Zealand by the NCP.[75] This goes to show that even with the background of established, endorsed or ratified international obligations and treaties (be it the UNGPs, its "softer" version of OECD Guidelines, or UN Treaties) it is difficult to achieve supply chain transparency for our imports without an accompanying meaningful domestic framework for due diligence.

Overall, international law instruments can often be less effective if they are not incorporated into domestic law.[76] It is up to individual member States of such international law instruments to ensure that they implement a domestic framework which requires MNEs to comply with all international instruments previously ratified by said State. The following section will discuss the current lack of transparency and traceability in New Zealand garment supply chains in more depth, to further illustrate the effect of New Zealand not having any due diligence laws with teeth.

V THE CURRENT STATUS OF DUE DILIGENCE IN NEW ZEALAND SUPPLY CHAINS

Most clothing sold in New Zealand is at least partially produced through global supply chains and then imported. As discussed, because New Zealand does not yet have its own due diligence laws, there are no government instruments for conducting thorough risk assessments of problematic supply chains of garment producing MNEs. However, New Zealand has committed to eliminating modern slavery on a public and political front.[77] Notably, in

73 Ministry of Business, Innovation and Employment "OECD Guidelines for Multinational Enterprises-New Zealand NCP Report to the OECD" (2015) <www.mbie.govt.nz>.

74 Ministry of Business, Innovation and Employment "National Contact Point reporting questionnaire 2020" (2020) < www.mbie.govt.nz>.

75 Ministry of Business, Innovation and Employment, above n 74, at 13-14.

76 Such as the United Nations Principles specific to the protection of women's and children's rights, as well as the UNGPs and OECD Guidelines discussed in this section (though the latter are not binding obligations once domestically ratified).

77 Jamie Ensor, above n 9 and n 10. In these articles, Ensor outlines a 30,000 signatures strong petition presented by the Public to Parliament, asking for more transparent supply chains, and the Government's response in stating that a due diligence framework to combat modern slavery is imminent.

March 2021, MBIE published a plan of action where Action 16 aimed to "[c]onsider introducing legislation requiring businesses to report publicly on transparency in supply chains, to help eliminate practices of modern slavery".[78] As a legal development, this is still only planned and at a consultation stage.

The closest tangible tool for increased transparency in supply chains are annual reports issued by a non-governmental organisation (NGO) named Tearfund in partnership with Baptist World Aid Australia.[79] In their 2019 annual report, exploring the New Zealand garment supply chains, Tearfund identified that transparency and traceability are the main indicators of due diligence in supply chains by companies.[80]

A Traceability

Tearfund identifies traceability as a key pillar in which a company can invest to build its strong support of labour rights within its supply chains.[81] In situations where companies do not make any efforts towards traceability and there are no mandatory due diligence laws in the country of importation, it becomes very difficult for various stakeholders to ensure that workers involved in the production of goods are not being exploited. The latest report by Tearfund stated that while 69 per cent of companies could demonstrate tracing all final stage suppliers, only 18 per cent have traced all input suppliers, and just 8 per cent have traced all raw material suppliers.[82] This can be problematic because the exploitation of vulnerable workers often starts at the early stages of production in industries like garment manufacturing. These stages often go untraced and unaccounted for where there are no effective due diligence frameworks.[83]

B Transparency

Regarding transparency, the report by Tearfund revealed that its key limitation is the voluntary participation of companies that either import to, or are based in, New Zealand.[84] Only 75 per cent of companies approached by Tearfund

78 Ministry of Business, Innovation and Employment *Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery* (December 2020) at 14.

79 Tearfund and Baptist World Aid *The 2019 Ethical Fashion Report: The Truth Behind the Barcode* (April 2019). See also Coles and Brunt, above n 14, at 302.

80 Tearfund, above n 79, at 8.

81 At 8.

82 At 8.

83 At 8.

84 At 15–17.

submitted transparency statistics from any part of their supply chains.[85] Further, many opted to only submit the late stages of their production.[86] Low transparency is one of the most influential determinants in the Tearfund analysis, and may result in receipt of a low grade in the annual report. Tearfund states that "companies are graded based on a combination of publicly available information", and the transparency disclosed.[87]

A vital flaw of using the Tearfund report for analysis of corporate due diligence is that, even if companies receive a low grade, non-compliance means there is little to no damage to their commercial bottom lines because there is no legislative instrument that requires either transparency or traceability. The impact on companies that do not comply could be limited to public exposure, scrutiny by special interest groups or staunch ethical consumers, and members of the general public that come across the small-scale distribution of the Tearfund annual reports.

C Transparency and traceability of New Zealand brands — is our status quo effective?

For conscious consumers, there is a common narrative that buying "New Zealand-made" must mean that such products are not tainted by elements of modern slavery. When buying "New Zealand-made", it is assumed that workers are not being exploited due to strong domestic health and safety and employment laws. However, according to the Tearfund report, the majority of the businesses in the New Zealand-based fashion industry have moved part, or most, of their manufacturing offshore to China or countries in Southeast Asia.[88] This is in line with the global trend of companies opting for cheaper production to enlarge their profit margins.[89] The mass outsourcing of the labour behind "New Zealand-made" fashion means that consumers may unknowingly and proudly buy "locally-made products", not knowing that those products are a result of forced labour in overseas sweatshops.

A scandal that perhaps best illustrates the lack of transparency and traceability in New Zealand supply chains today is the WORLD brand

85 At 8.
86 At 8.
87 At 8. Tearfund stated that transparency shows a company's willingness to be accountable to "consumers, civil society and workers", making it easier for these groups to work together to uphold worker's rights.
88 At 10.
89 At 10.

incident. Owner and Chief Executive Officer Denise L'Estrange-Corbet had long been a champion of New Zealand-made ethical fashion, making a point of calling out competitors for saving money by outsourcing labour to overseas factories with substandard working conditions, instead of paying higher wages domestically.[90] However, a 2018 investigation revealed that WORLD brand had been selling t-shirts, sweatshirts and sweatpants manufactured in Bangladesh and China.[91] They had bought the clothes through AS Colour, and had added further embellishments, also made in China, to "personalise" the design to their brand. Earlier, Co-Founder Francis Hooper had stated that though it is "very hard" for businesses to survive today without outsourcing labour, "we refuse to make our collections in a third world country".[92] When pressed about the inconsistency in statements and actions, L'Estrange-Corbet insisted that WORLD had done nothing wrong, recognising that "it is illegal in New Zealand to not state where the clothes are made on the clothing tag".[93]

All WORLD clothing tags read "made in New Zealand". L'Estrange-Corbet justified this by stating that there is nothing misleading about such tags, as the tags themselves are made in New Zealand, even though the clothes that the tags are attached to may not be.[94] At the time that this news story broke, AS Colour had only received a C+ rating in the 2018 Tearfund Ethical Fashion Guide, despite displaying many public statements on their website about anti-child labour supply chains.[95]

This clearly demonstrates that the status quo for New Zealand is not working. Given the lack of regulations in the garment production and supply industry, companies are free to project a brand driven by widely accepted societal values and norms, while doing nothing to follow such values in their business practices. The lack of legislative and/or judicial mechanisms calling for transparency and traceability in the garment supply chain has seen a number of other brands in New Zealand get high grades on their anti-modern slavery

90 Madeline Chapman "T-Shirts from Bangladesh. Sequin patches from China. Sold by WORLD as 'Made in New Zealand'" (7 May 2018) The Spinoff <www.thespinoff.co.nz>.

91 Chapman, above n 90.

92 Chapman, above n 90.

93 Chapman, above n 90.

94 Chapman, above n 90; see also Tearfund and Baptist World Aid *Ethical Fashion Guide Aotearoa New Zealand 2018* (April 2018) at 7.

95 Chapman, above n 90. AS Color appears to have improved its transparency and traceability grade to A- in subsequent Tearfund reports, above n 79, at 5.

policies, yet considerably lower grades in their implementation of such policies. Such brands include Trelise Cooper, Tigerlily, Ralph Lauren and Oxford.[96]

Instead of relying on NGOs to do the heavy lifting, effective legislative reform in New Zealand is imperative. Otherwise, if given free range, there will likely always be powerful, wealthy garment companies that will condemn the use of modern slavery in their supply chains publicly, yet lack any effective measures to counteract it.

The following sections will cover case studies of the domestic due diligence instruments found in the United Kingdom and France, which are polar opposites. The contrast between these opposite approaches to due diligence will reveal which path New Zealand should follow in enacting an effective domestic due diligence model. Delving into these case studies will also highlight the key pitfalls in those jurisdictions that we must avoid to ensure we do not recreate the same legislative gaps.

VI GLOBAL CASE STUDIES ON DUE DILIGENCE INSTRUMENTS

A The "weak-form" United Kingdom approach: Introduction to the Modern Slavery Act 2015 (UK)

The Modern Slavery Act 2015 (UK) (MSA) was enacted with the purpose of enabling the United Kingdom to lead efforts in identifying and supporting victims of modern slavery and human trafficking.[97] The MSA reaffirms many of the same human rights commitments that are seen in the European Convention on Human Rights, as it specifically prohibits any practices of slavery, servitude and forced compulsory labour.[98]

At the time of its enactment, the MSA was perceived to be a landmark legislation,[99] as it makes direct reference to the protection of the child. For example, s 3(6)(a) states that securing services from children and vulnerable persons is forbidden. However, a closer look at its mechanisms reveals that there are many gaps within its structure. As a recently released New Zealand

96 A full list of the grades allocated to brands can be found in the Tearfund report, above n 79, at 6.

97 The Rt Hon Frank Field MP, The Rt Hon Maria Miller MP and The Rt Hon Baroness Butler-Sloss "Independent Review of the Modern Slavery Act: Second interim report: Transparency in supply chains" (22 January 2019) at 19.

98 United Kingdom Home Office "Modern Slavery Bill–European Convention on Human Rights" (June 2014) at 2.

99 The Rt Hon Frank Field MP and others, above n 97, at 19.

White Paper suggests, this model of due diligence law is better described as "transparency legislation", as it lacks the structure that would require companies to change their behaviour.[100] The following sections will analyse the mechanisms of s 54 of the MSA to bring these gaps to light.

1 First criticism: MSA's "mandatory obligations" are voluntary obligations in practice

(a) Purpose of s 54

At first, the Modern Slavery Bill (which later became the MSA) did not contain any mandatory or voluntary obligations requiring companies to disclose the status of transparency in their supply chains.[101] However, after insistent campaigning and subsequent widespread public support driven by the Transparency in Supply Chains Coalition, the Home Secretary amended the Bill to include transparency in the overall purpose of this section.[102] As a result, s 54 has the purpose of mandating transparency in supply chains.

(b) Practicality of s 54

Section 54(1) states that under the MSA, multinational companies operating in the United Kingdom with a global annual revenue of at least £36 million must prepare a slavery and human trafficking statement for each financial year of their operation.[103] Such statutory language indicates a mandatory obligation for garment companies to issue public statements regarding the use of slave labour in their supply chains, which they must then make publicly available for consumers to read. Further, the MSA framework provides that:

(a) Company statements must be published in a place of prominence on the Homepage of the company's website.[104]

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100 Stringer, above n 11, at 6. The authors add that such a framework allows companies to state they have not taken any steps under the Act, and still meet their legal obligations despite not improving their transparency.

101 Rt Hon Baroness Butler-Sloss, Rt Hon Frank Field MP and Rt Hon Sir John Randall MP *Establishing Britain as a world leader in the fight against modern slavery*: *Report of the Modern Slavery Bill Evidence Review* (Modern Slavery Bill Evidence Review, December 2013) at 14.

102 Taskin Iqbal "The efficacy of the disclosure requirement under s.54 of the Modern Slavery Act" (2018) 39 Company Lawyer 3 at 6.

103 Modern Slavery Act 2015, s 54(1) (UK). See also Home Office "Guidance: Publish an annual modern slavery statement" (12 March 2019) <www.gov.uk>.

104 Section 54(7)(a)–(b).

(b) Should the company not have a website, it must provide a copy of its statement to anyone who makes a written request for one. This must be delivered within 30 days of receipt of request by the company.[105]

However, the publication of a company's slavery and human trafficking statement is no more important than its actual contents. When it comes to defining what such reports should consist of, there is a notable drop in the standards in the statutory language. For example, "slavery and human trafficking statement for a financial year" is defined as a statement of the steps the company has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business.[106] In lieu of such actions, the MSA states that the report can be replaced by "a statement that the organisation has taken no such steps."[107] This becomes problematic when read alongside later sections of the MSA that use voluntary statutory language but have the purpose of outlining what such reports should contain. For example, s 54(5) states that an organisation's report *may* include information on its structure, business supply chains, policies regarding slavery and human trafficking, and its due diligence processes to combat these issues.[108]

In practice, this means that companies can be lenient with the wording they choose to include or, in many cases, exclude from their reporting statements. Companies can effectively hide the true depth of the human rights abuses in their supply chains, or remain wilfully ignorant of them, in turn allowing their consumers to do the same. An example of this can be seen in the recent Boohoo.com plc. Group (Boohoo.com) incident.[109] Despite having a turnover of £856.9 million in 2019, and hence coming under the scope of the MSA, whistle-blowers revealed that Boohoo.com's supply chain in Central England had workers earning £3.50 an hour, less than half the legal minimum wage.

Adding an intersectional lens, most of the workers were women of colour, who reported accepting poor working conditions because they were afraid of losing their jobs.[110] While Boohoo.com insists that it is investigating its supply

105 Section 54(8).
106 Section 54(4)(a)(i)–(ii).
107 Section 54(4)(b).
108 Section 54(5).
109 Kieran Guilbert "Back whistleblowers to stop abuses, says UK anti-slavery tsar after Boohoo fallout" Reuters (10 July 2020) <www.reuters.com>.
110 Guilbert, above n 109.

chains in light of these reports, its latest modern slavery statement under the MSA states that the company has "mapped our suppliers" and "ensure[s] that workers' rights are protected".[111] This illustrates how the flexible statutory language in the MSA can allow companies to be avoidant when it comes to reporting on supply chain regulation and transparency. There have been recent law reform proposals in this area in the United Kingdom, though such proposals are still under review by the United Kingdom Parliament at the time of writing. Regarding the scope of this article, the independent review of the MSA made three main recommendations:[112]

(a) First, businesses should not have the option to publish a modern slavery statement claiming they have taken no steps to address modern slavery in their supply chains. They must produce statements with the steps they have taken in this direction.
(b) Companies need to consider the risk of modern slavery throughout the entirety of their supply chains in their statements. Omission of any stage in their supply chain will need to be explained in such statements.
(c) Companies must name a Board member who is personally accountable for production of its modern slavery statements. Failure to produce such statements will be an offence under the Directors Disqualification Act 1989 (UK).

If implemented, these recommendations may push corporations to produce more accurate statements. However, with the little momentum and enthusiasm gathered in Parliament since its introduction, the current status of the MSA as a "toothless tiger" remains.[113]

111 Boohoo *The Boohoo Group: Modern Slavery Statement* (August 2021) at 7. Despite this, US Customs and Border Protection declared in the same year that they have enough evidence to launch an investigation on use of slave labour against Boohoo, as they are "not doing enough to stop forced labour in their Leicester factories". This was not addressed in Boohoo's statement under the MSA. For more see Martin Brunt "Boohoo facing possible US import ban after allegations over use of slave labour" (2 March 2021) <www.news.sky.com>.

112 Home Office *Independent Review of the Modern Slavery Act 2015: Final Report* (May 2019) at 23–24.

113 Ergon Associates *Modern slavery reporting: Is there evidence of progress?* (October 2018). This idiom for the MSA comes after many noticed its ineffectiveness following observations that often companies fail to update their statements annually. Instead, they recycle their previous reports, with little repercussions, despite providing the public with misleading data.

2 *Second criticism: Are there effective sanctions in the MSA?*

Currently, there are no effective "teeth" in the MSA. Critics state that despite the appearance of mandatory statutory language in some sections, overall, the MSA does nothing to create civil or criminal liability for non-compliance by corporations.[114] At most, a company may face a fine for contempt of court, should it fail to comply with an injunction for specific performance.[115] Given the watered-down statutory language of the MSA,[116] such instances of specific performance are unlikely to occur.[117] Further, a disclosure-only clause such as s 54 provides little guidance, requirements or incentives for garment companies to remove or mitigate the use of modern slavery in their supply chains, even after they are discovered. There is no express duty for companies to take steps to reduce the harm and exploitation of vulnerable workers in such circumstances. Moreover, in subsequent statements, companies can simply choose to omit any newly unearthed evidence of modern slavery in their supply chains and provide no further comments on their failure to reduce their reliance on modern slavery.[118]

Some have suggested that the only effective solution here is to introduce punitive measures for offending companies.[119] A proposed reframing of the United Kingdom model centrally featured a "failure to prevent" mechanism.[120] This mechanism created civil liability for damages if companies failed to meet their due diligence responsibilities under the MSA.[121] Under the "failure to prevent" mechanism, a company may defend itself against civil claims by demonstrating it conducted "reasonable human rights due diligence", proven on the balance of probabilities.[122] Such a mechanism has the potential of transforming the MSA from a "tick-box" activity to an Act with real teeth. The "teeth" come in the form of a burden of proof for a company to show not only

114 Iqbal, above n 102, at 7.
115 At 7.
116 Which makes s 54 less mandatory and more voluntary in terms of the level of disclosure required by companies under the MSA.
117 Iqbal, above n 102, at 7.
118 See Boohoo, above n 111, where the latest Boohoo MSA statement failed to acknowledge possible import bans the company may face in the US due to its use of slave labour.
119 Guilbert, above n 109.
120 Irene Pietropaoli and others *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (British Institute of International and Comparative Law, 2020) at 6.
121 At 39.
122 At 55.

its robust due diligence plans, but also its compliance with them.[123] However, at the time of writing, all such proposals have been met with limited interest from Parliament, with the Government refraining from any firm commitments to MSA reforms for the time being.[124]

3 *Third Criticism: Does the MSA provide sufficient means of public scrutiny?*

Previously, experts had criticised the lack of mechanisms for public scrutiny under the MSA.[125] The theory was that though the public had access to modern slavery statements published by companies, there was no central registry that compiled such statements. Considering that the United Kingdom government required companies to issue such statements with the purpose of providing stakeholders such as consumers, investors, and non-government organisations with a tool to scrutinise corporate supply chains, this seemed like a huge oversight.[126] Prior to further reform, it was effectively expected that independent stakeholders use their own time and resources to monitor corporate compliance with the MSA, which was very unlikely to occur, given the massive global scale of many companies' supply chains.

However, following consultation with interest groups regarding the importance of increased transparency in supply chains, the United Kingdom government announced that it was launching a modern slavery registry "to provide a platform for organisations to share the positive steps they have taken to tackle and prevent modern slavery".[127] Though this is a positive step towards expanding the "teeth" under s 54 of the MSA, recent analysis by MBIE has still classified the United Kingdom approach as a "general disclosure" approach which retains much of its other weaknesses.[128] For example, despite the creation of a central registry, the flexibility in the content of this reporting is still not

123 Ekaterina Aristova "Mandatory Human Rights Due Diligence in the UK: To Be or Not to Be?" (23 June 2020) Business & Human Rights Resource Centre <www.business-humanrights.org>.

124 House of Commons Environmental Audit Committee *Fixing fashion: clothing consumption and sustainability: Government Response to the Committee's Sixteenth Report* (Eighteenth Special Report of Session 2017–19, June 2019).

125 Irene Pietropaoli and others, above n 120, at 37–18.

126 Patricia Carrier and Joe Bardwell "How the UK Modern Slavery Act can find its bite" (24 January 2017) Open Democracy <www.opendemocracy.net>.

127 The Home Office "Government launches modern slavery statement registry" (11 March 2021) <www.gov.uk>.

128 Ministry of Business, Innovation and Enterprise *Discussion Document: A Legislative Response to Modern Slavery and Worker Exploitation–Towards freedom, fairness and dignity in operations and supply chains* (April 2022) at 37.

explicitly prescriptive. MBIE states that though the United Kingdom approach was "ground-breaking when first introduced", more proactive approaches have since been adopted internationally.[129]

B The "strong-form" French Approach

1 Introduction to French Anti-Modern Slavery Laws[130]

Like the MSA, the French Corporate Duty of Vigilance Law (FVL) also does not go so far as to implement a "failure to prevent" mechanism. However, there are other notable features which make the French counterpart of the MSA more effective, earning it the reputation of a "strong-form" approach to countering modern slavery through a legislative lens.

(a) Strong(er) mandatory statutory requirements

First, under art 1, the law specifies that companies domiciled in France not only have to identify risks within their supply chains and prevent violations, but also that such preventative measures "must be *adequate* and *effectively implemented*."[131] This bypasses the issue of inconsistent language, as seen in s 54 of the MSA, as companies cannot simply engage in a "box ticking" exercise of publishing anti-modern slavery statements with little to no substance.[132] Secondly, companies that come under the FVL must include these measures in a publicly available "vigilance plan". Such plans must include "reasonable vigilance measures" that are implemented by companies to aid in risk identification and prevention of human rights abuses in their supply chains.[133] Unlike the MSA, the FVL follows its prescriptive statutory language with concrete and detailed expectations of what companies must include in their public statements.

However, in the early stages of the FVL, many statements issued by companies contained very brief vigilance plans.[134] In some cases, there was barely any mention of company-specific policies, with some companies

129 At 37.

130 The Responsible and Ethical Private Sector Coalition against Trafficking "French Corporate Duty of Vigilance Law (English Translation) European Coalition of Corporate Justice" (2016) <www.respect.international.com>. Note that this form of law was recognised to be the strongest model of due diligence law both by MBIE, above n 128 at 37, and the White Paper, above n 11, at 6.

131 Sandra Cossart "What lessons does France's Duty of Vigilance law have for other national initiatives?" (27 June 2019) <www.business-humanrights.org>.

132 Cossart, above n 131.

133 Cossart, above n 131.

134 Cossart, above, n 131. The majority of these statements were issued between 2018–2019.

submitting pre-existing generic policies instead. At the time of writing, there have been no policy suggestions to reform this area of law, nor any official government monitoring of whether companies are following the strongly prescriptive legislative requirements.[135] Therefore, the lacklustre contents of such early company statements are yet to be held accountable for their opacity, and the overall lack of effective public scrutiny persists.

(b) Judicial mechanism for compensation for victims

Arguably the most stand-out feature of the FVL is its creation of a judicial mechanism.[136] In France, "any interested party may ask a judge to issue an order for a company to comply with the law".[137] Should a company fail to comply with the law, and its failure result in damages to a third party, that third party may request compensation under common civil liability law.[138] Though this provision imposes mandatory human rights due diligence obligations, it is not without its glaring issues.

2 Loopholes in the FVL

(a) What is the true effectiveness of the judicial mechanism?

The FVL was one of the first in the world to introduce a formal civil redress for victims of corporate wrongs.[139] However, its structure casts serious concerns about its effectiveness and practicality for victims of modern slavery.[140] This is because this judicial mechanism largely leaves the burden of proof on the victims of human rights violations, as it is an obligation of process, rather than an obligation of results.[141]

This raises particular concern for vulnerable women and children trapped in the opaque supply chains of the garment industry. These victims already suffer from the massive power imbalance between them and their local employer, let alone the large commercial conglomerates that collect the products of their labour.[142] To expect grossly underpaid, oppressed and intimidated employees

135 Cossart, above, n 131 .
136 Cossart, above n 131 .
137 Cossart, above n 131.
138 Cossart, above n 131.
139 Cossart, above n 131 .
140 Cossart, above n 131 .
141 Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" (2017) 2 (Business and Human Rights Journal 317 at 321.
142 Global Estimates of Modern Slavery, above n 4.

to bring a cause of action in a foreign jurisdiction they do not understand, and successfully find the resources to prove a causal link between breach and harm, is not realistic.[143]

(b) Uncertainty about companies covered by FVL, and lack of a central registry

Another glaring shortcoming of the FVL is the absence of an official list of companies covered. The only substantive measure for bringing companies under the FVL is the requirement for a company to have either 5,000 employees in France, or 10,000 employees globally, including the company's subsidiaries. In the context of multinational companies, which subcontract their labour to cheaper manufacturing companies in developing nations, classifying which companies can be held liable for violations can become very difficult.

Further, unlike the United Kingdom, France still faces the pitfall of the lack of a centralised registry. There is no official government entity with the responsibility of monitoring corporate compliance of the FVL.[144] In lieu of government monitoring, civilians have attempted to address such legislative gaps by launching a website that provides a non-comprehensive list of companies covered by the law, and any relevant public statements that each company has issued.[145] This, however, lacks the legal weight of a national register of companies covered by the law.

VII WHAT MODEL SHOULD NEW ZEALAND ADOPT, AND WHAT COULD BE IMPROVED?

The United Kingdom approach is on the softer end of the spectrum and the French on the harder end. However, although both exist on opposite ends of the spectrum, each approach has its own gaps and there is room for both pieces of legislation to improve. Such gaps could mean further exploitation of the labour of women and children in the garment industry, which may go unaccounted for. However, both models take a step in the right direction. New Zealand needs to follow these nations to uphold our signalled commitment to the OECD Guidelines and UNGPs, and to reduce our part in the exploitation of vulnerable children and women globally. The question is, which model should New Zealand adopt?

143 Cossart, Chaplier and Beau De Lomenie, above n 141.

144 Cossart, above n 131.

145 Cossart, above n 131. The website is named "vigilance-plan.org" and is a joint project between NGO entities like Sherpa, CCFD-Terre Solidaire and the Business & Human Rights Resource Center.

This is a heavy question, which would require extensive policy discussions and empirical evidence. The former has already been launched by MBIE, which at the time of writing has published a discussion document,[146] a summary document,[147] and conducted a public consultation period regarding its unfinalised plans for a legislative response to modern slavery.[148] Such documents from MBIE have promising starts, with MBIE acknowledging that New Zealand's focus to date has been on addressing direct exploitation by employers in a domestic setting, with no measures to regulate broader operations and supply chain practices with international ties.[149]

Such a framework is insufficient to address modern slavery, prompting MBIE to propose legislation that "places responsibilities on, and encourages collaboration between, government, organisations and consumers".[150] Notably, the MBIE discussion document goes as far as to state that the soft-form, or "general disclosure", approach in the United Kingdom has been ineffective in incentivising detailed and accurate disclosures from organisations, as well as failing to lead to a critical change of behaviour across businesses, investors and consumers.[151] Therefore, MBIE does not propose to use this model in a New Zealand context.

Instead, a high-level summary of the proposed legislation for New Zealand takes a tiered approach to corporate responsibility in this space, where the level of responsibility is determined by a business's revenue. The tiers are split into "small", "medium", and "large" entities, with revenue thresholds of less than $20 million, $20–50 million and over $50 million respectively.[152] The associated responsibilities at each tier are set out at Appendix A below.

As the proposed legislation is still in the consultation period, the scope of many key words has not been defined. For example, at the time of writing, MBIE is still collecting opinions on key points such as "whether entities should be required to remedy the harms they have caused or contributed to".[153] Exact

146 MBIE *Discussion Document*, above n 128.
147 MBIE *Summary Discussion Document: A Legislative Response to Modern Slavery and Worker Exploitation* (April 2022).
148 The consultation period opened on 8 April 2022 and closed on 7 June 2022. MBIE *Summary Discussion Document*, above n 147, at 3.
149 MBIE *Summary Discussion Document*, above n 147, at 8.
150 At 42.
151 MBIE *Discussion Document*, above 128, at 37
152 MBIE *Summary Discussion Document*, above n 147, at 12.
153 At 12.

penalties are also yet to be determined, but there is a chance they could range from $600,000 up to $5 million.[154]

In MBIE's preliminary plans, there is a notable lack of commitment and direction towards measures which would improve protection for vulnerable children and women in supply chains. For example, MBIE is still seeking views as to whether victims should have the ability to bring a claim leading to penalties, with one of the drawbacks stated to be "a more adversarial or litigious system".[155] MBIE states that the intention is to take "an inclusive and positive approach to improvement and change, rather than a primarily punitive approach".[156] However, such hesitancy to implement penalties for corporate entities arguably leans the proposed framework more towards the MSA end than the FVL end of anti-modern slavery legislation.

It is clear that the FVL has an implementation flaw in moving the burden of proof for remedial relief for victims onto the victims themselves, but the United Kingdom, much like the current New Zealand position, shies away from any substantive discussions about remedies for victims in general. Our government should take a stronger stance in this space and consider providing increased avenues for victims to lodge their grievances and seek relief against exploitation. This is discussed in the following section.

Other methods of adopting a hard-law approach to anti-modern slavery legislation may include the starting point of vital preliminary components, such as using strong, mandatory legislative language to impose due diligence obligations in line with UNGPs and OECD Guidelines. Once mandatory requirements have been imposed on companies, the next flaw to fix is monitoring compliance. Here, New Zealand should establish a centralised registry of company statements stemming from their mandatory obligations. The following sections of this article explore existing examples of strong statutory language and public registries to see if they would suit a New Zealand context.

A A judicial mechanism

MBIE's reluctance to implement punitive measures for breaches of the proposed Act must be reassessed through a victim-protection lens. This can be done by shifting the burden of proof to companies instead of vulnerable victims of

154 MBIE *Discussion Document*, above n 128. Such existing frameworks include the Anti-Money Laundering and Counter Financing of Terrorism Act 2009.

155 MBIE *Discussion Document*, above n 128, at 68.

156 At 16.

modern slavery, as seen under FVL. The companies exploiting slave labour of women and children for garment production are largely multimillion, if not multibillion, dollar conglomerates. If the burden of proof is not shifted to them, such companies have the knowledge, power, money and access to legal resources which will allow them to simply out-litigate or prolong matters against under-resourced and uneducated victims. This would only extend the pre-existing power imbalance between the employer (exploiter) and the employee (victim).

Any proposed legislation in New Zealand must avoid this glaring flaw if it aims to reinforce our commitment to international human rights instruments such as the UNCROC, WFCLC and CEDAW. If a company is in breach, the punishment of civil liability must be such that not only holds the company accountable, but more importantly, redresses victims.[157]

B Switzerland: Strong proposed statutory language and clear-cut consistency with UNGPs

Any legislative development must start with a clear purpose and statutory language which reflects the UNGPs. The New Zealand government seems determined to monitor modern slavery in supply chains but appears non-committal in the proposed statutory language.[158] A jurisdiction that has shown examples of considering strong statutory language in this area is Switzerland. Although Switzerland does not have legislation specific to the mitigation of modern slavery in their commercial supply chains, heated conversations by NGOs have demanded change.[159] After the failure of the Swiss Parliament to legislate effective due diligence laws for corporate supply chains, a coalition for corporate justice gathered over 100,000 citizen signatures on the Responsible Business Initiative (RBI).[160]

Of particular note is that the RBI sought to impose due diligence obligations on Swiss companies, which would be explicitly consistent with their obligations under the UNGPs. It also included liability for breaches by them or other subsidiaries. The Swiss Senate remained reluctant to adopt

157 In the article detailing Reba Sikder's trauma after the Rana Plaza collapse, above n 2, she is quoted asking for compensation for her and her fellow survivors.

158 This is largely because any development is still in the consultancy phase.

159 Industri-all Global Union "Swiss to vote on holding multinationals responsible for supply chains" (23 October 2020) <www.industriall-union.org>.

160 Industri-all Global Union, above n 159.

such clear-cut transparency and due diligence laws for corporations, instead adopting a narrower proposal. The proposal was put to a public vote on 29 November 2020 and, even though the RBI won by a narrow majority, it failed to win support in a majority of Swiss cantons as required by Swiss law.[161]

This outcome was arguably not a surprise, as the Swiss government made pleas to the public in the lead up to the vote, asking them to vote in clear opposition, given the strength that the proposed reform had.[162] Much of the hesitancy displayed by the Swiss government was embedded in the balance of economic interests of the nation with human rights.[163] Such economic worries were exacerbated by the COVID-19 pandemic, which may have influenced voters further.[164]

One of the stand-out protections that the suggested reform offered against modern slavery was its requirement of compliance with several international treaties. This would effectively incorporate principle 12 of the UNGPs into domestic law. The proposed wording in the suggested reform is attached in Appendix B below.

Having clear-cut wording which specifically mentions UNGP 12 is a vital step towards combatting modern slavery in the garment chain. This is because, as discussed in Part IV, this technique allows other international instruments such as UNCROC, WFCLC and CEDAW to be considered when imposing due diligence standards on corporations. In particular, UNGP 12 states that where business enterprises engage the labour of "specific groups that require particular attention", including women and children, treaties specific to their rights may be considered. Given art 101a(2)(a) of the proposed Swiss Bill only requires a "minimum" of international human rights treaties to be considered, this open-endedness allows for a more specific take on human rights protection for vulnerable workers.

If New Zealand was successful in implementing a similar framework, this would directly incorporate UNGPs obligations into domestic law, requiring multinationals to act in accordance with them. It would also reduce the heavy

161 British Broadcasting Company "Swiss vote to reject Responsible Business Initiative" (29 November 2020) <www.bbc.com>.

162 Switzerland Federal Council "Objects of the popular vote of November 29, 2020" (July 2020) <www.admin.ch>.

163 Hinrich Voss and others "International supply chains: compliance and engagement with the Modern Slavery Act" (2019) 7 Journal of the British Academy at 71.

164 British Broadcasting Company, above n 161.

reliance on NGOs and other stakeholders that currently occupy this space, such as Tearfund. Additionally, because the OECD Guidelines are essentially a "soft-form" version of the UNGPs, compliance with them would also be easier. Of course, the economic concerns that were raised in Switzerland were not without merit, and similar discourse would likely take place in New Zealand. However, when engaging in this discourse it is imperative that a balancing exercise is undertaken between economic interests and human rights. The fact that economic concerns are raised should not immediately result in the dismissal of compliance with international human rights obligations, which is evident in the garment industry world-wide.

C Australia: A centralised registry

A pitfall of both the United Kingdom and French laws is the lack of a centralised register. Thus far, MBIE remains open to the concept of establishing a regulatory public registry under a potential New Zealand modern slavery legislation but its scope remains unclear.[165]

An example of an effective public registry is found in Australia. In 2018, Australia developed a significant legislative instrument to combat modern slavery, with the enactment of the Modern Slavery Act 2018 (Australian Act). Similar to its United Kingdom counterpart, the Australian Act requires businesses and other organisations with a revenue of $100 million to report annually on the risks of modern slavery in their operations and supply chains. Such businesses must also outline what actions, if any, have been taken to assess and address these risks in "Modern Slavery Statements."[166] These annual statements must be approved by organisations' boards of directors or equivalent bodies and then signed by either a director or designated member.[167]

Unlike its legislative counterparts in both the United Kingdom and France, the Australian Act requires the Australian government make all Modern Slavery Statements available online through a centralised, government-managed register. This consolidated document repository allows the Australian

165 MBIE *Discussion Document*, above at 128, at 72. MBIE is seeking opinions on the scope and requirement such a registry may have. For example, they have considered options such as accepting voluntary statements, or a central "hub", which provides toolkits and other guidance for entities. It should be noted that the former option may result in an ineffective registry given its voluntary nature, as seen in the United Kingdom under the MSA.

166 Australian Home Affairs *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (2018) at 5.

167 Australian Home Affairs, above n 166, at 64.

instrument to overcome one of the principal criticisms of the prior legislative models. Without this step, interested parties can only view a transparency statement on a company's website or, if the company does not have a website, by requesting a copy of the statement, making it difficult for interested parties to determine which companies are complying with the law.

Should a public registry be implemented in New Zealand, there would be no need for civil special interest groups to step in and create their own "toothless" registry, as seen in France. All interested stakeholder groups can compare and contrast the due diligence obligations and compliance of all brands that come under the ambit of our legislation. Ultimately, key considerations including transparency and traceability of supply chains would not be left to the limited resources of NGOs such as Tearfund.

VIII CONCLUSION

This article was written with regard to the depth of pain in the stories of victims such as Sikder.[168] Modern slavery has produced much of the "everyday" wardrobes of billions around the world. Due to its multinational operations, the garment industry has not faced consequences proportionate to the human cost of its production. The garment industry has many ugly sides, from being a gendered issue and the exploitation of the most vulnerable, to the posing of occupational hazards. Its human rights violations are seemingly endless and severe.[169] Even the international human rights instruments, such as the UNCROC, WFCLC, CEDAW, UNGPs and OECD Guidelines, which are designed to protect the most vulnerable victims of the garment industry, fail to effectively do so. Where international instruments fail to have enough bite in domestic settings, even domestic instruments can have glaring issues that do not deliver justice to victims in a practical way. Soft-form "transparency" based approaches, such as that of the United Kingdom, are too general in their language to have real effect,[170] while hard-form due diligence approaches as used by France falter at the final stage of delivering accountability through judicial mechanisms.[171]

New Zealand is in a prime position to uphold its human rights-abiding record and go one step beyond all domestic legislative attempts to date. New

168 Brady, above n 2.
169 Human Rights Watch, above n 26.
170 Home Office, above n 127.
171 Cossart, Chaplier and Beau De Lomenie, above n 141.

Zealand has made a step in the right direction by committing to address modern slavery in international supply chains. However, the lack of commitment to effective language and mechanisms at its consultation stage leaves room to ponder the effectiveness of any proposed laws in this area. By learning from what went wrong overseas, and using the FVL strong-form model as a starting point, we could create a gold standard in due diligence protection of our garment supply chains. There is a clear need for strong, mandatory legislative language to achieve this. Such language must incorporate international human rights obligations into domestic due diligence standards for companies domiciled both here and internationally. There also needs to be a centralised monitoring registry to ensure company compliance with such laws, and a judicial mechanism of justice that does not put more burden on victims.[172]

This is a deeply complex policy discussion, and this article has only focused on a human rights-based dimension of that. This article is not intended to overlook or undermine the suffering and importance of other demographics of victims impacted by modern slavery. Rather, this article presents a specialised argument for tackling a specific sector with a clear gendered issue, with the hope of invoking deeper conversations about how to tackle modern slavery overall. This article is also limited in that it does not discuss economic aspects, such as varying revenues or the number of employees in companies, and how that ought to be incorporated in proposed modern slavery legislation. Any future developments in this area would also have to balance the interests of small and large businesses alike, and the extent to which supply chain laws should apply at each end of the business scale. However, such an assessment cannot simply allow certain entities to forgo their corporate social responsibility in combatting modern slavery in their supply chains. Any laws passed in this area must keep human rights protection at its core. By adopting this legislative ethos, New Zealand can ensure that it does not inadvertently co-sign or contribute to horrors such as the incident that took place at the Rana Plaza, which still haunts its survivors to this day.

172 Cossart, Chaplier and Beau De Lomenie, above n 141.

Appendix A: High-level summary of proposed responsibilities by MBIE:[173]

		Small <$20m	Medium $20-$50m	Large >$50m
1.	Take reasonable and proportionate action if they become aware of: • modern slavery in their **international** operations and supply chains, or • modern slavery or worker exploitation in their **domestic** operations and supply chains.	✓	✓	✓
2.	Undertake due diligence to prevent, mitigate and remedy modern slavery and worker exploitation **by New Zealand entities where they are the parent or holding company or have significant contractual control.**	✓	✓	✓
3.	Disclose the steps they are taking to address: • modern slavery in their **international** operations and supply chains, and • modern slavery and worker exploitation in their **domestic** operations and supply chains.		✓	✓
4.	Undertake due diligence to prevent, mitigate and remedy modern slavery in their **international** operations and supply chains, and modern slavery and worker exploitation in their **domestic** operations and supply chains.			✓

173 MBIE *Summary Discussion Document*, above n 147, at 14.

Appendix B: Proposed wording for legislative reform in Switzerland[174]

Art 101a Responsibility of business

1 The Confederation shall take measures to strengthen respect for human rights and the environment through business.

2 The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles:

a. *Companies must respect internationally recognised human rights and international environmental standards*, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.

b. Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; *take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards*, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due

174 Gregor Geisser and Alexandre Müller *The Swiss Responsible Business Initiative (RBI): Discussion and legal assessment* (2021) at 28 (emphasis added). The article by Geisser and Müller is referred to as the official legal assessment of the proposed framework by the original organisers for such law reform, the Swiss Coalition for Corporate Justice (SCCJ). On its website, the SCCJ confirms that under the proposed Art 101a, the "internationally recognised human rights and environmental standards" include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and core conventions from the International Labour Organisation. Therefore, the effect of Art 101a would be to bring these key international human rights instruments directly into domestic law. For more information, see "About the Initiative" and "The initiative text with explanations" Swiss Coalition for Corporate Justice <www.corporatejustice.ch>. See also Pedro R Borges de Carvalho and Amy Pearl Douglas "Mandatory corporate due diligence in Switzerland: the upcoming referendum on the Responsible Business Initiative" (24 November 2020) Oxford Human Rights Hub <www.ohrh.law.ox.ac.uk> for further details on the link between UNGP 12 and the Responsible Business Initiative.

diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind.

c. *Companies are also liable for damage caused by* companies under their control where they have, in the course of business, *committed violations of internationally recognised human rights or international environmental standards*. They are not liable under this provision, however, if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

d. The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law.