

Making Mandatory Human Rights Due Diligence Work for Homeworkers

Summary

This paper examines the issue of mandatory human rights due diligence (mHRDD) legislation from the perspective of homeworkers, the majority of whom are women and who are amongst the most precarious workers in the global labour force. We argue that whilst mHRDD has the potential to benefit homeworkers, this will only be the case if the legislation is designed with attention to their distinct situation. The paper begins with a short summary of the case for mHRDD and of recent legislative developments in the area before considering homeworkers' particular vulnerability and the possible adverse impacts that mHRDD legislation could have on them. It concludes with our initial proposals covering how these might be avoided and how the interests of homeworkers can be best protected by any new legislation. HWW would be keen to work with others to explore these issues in more depth in order to refine these recommendations.

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The Case for Mandatory Human Rights Due Diligence

Human Rights Due Diligence describes a process by which companies investigate and address the risks of their corporate practices in terms of their impact on human rights. In recent years different initiatives have set out guidance on how best to achieve this aim, focussing in particular on companies operating across international borders where the risks and challenges involved may be greater. But to date, most measures are voluntary, with no obligation on companies to comply. For example, the UN Framework and Guiding Principles on Business and Human Rights¹ (UNGPs) and OECD Guidelines for Multinational Enterprises² (OECD Guidelines) establish the main elements of human rights due diligence. These are that businesses, in their activities and relationships, should identify, prevent, mitigate and remedy impacts on human rights. The two instruments create no binding legal obligations on companies but signatory states are expected to take steps to encourage compliance. So far, states have mostly avoided passing legislation to make compliance mandatory but this is beginning to change with the recent adoption of laws in some states and parliamentary commitments to legislation in a number of European countries³ and the EU.⁴

The UNGPs and OECD Guidelines have raised awareness amongst companies of human rights issues and prompted many to develop human rights policies and make public commitments to improve their performance. However, most companies still fall far short of meeting the standards set out in those instruments and human rights abuses continue to take place in business supply chains, with little accountability for companies or redress for victims. Much tougher obligations, with sanctions for non-compliance, are therefore required. Legislation could oblige companies to conduct comprehensive due diligence on their human rights risks and make a plan to mitigate those risks thereby enabling them to prevent, or at least substantially reduce the risk of, human rights abuses

¹ United Nations Office of the High Commissioner of Human Rights, [Guiding Principles on Business and Human Rights](#), 2011.

² OECD, [OECD Guidelines for Multinational Enterprises 2011 Edition](#), 2011.

³ See the Business and Human Rights Resource Centre web page which lists initiatives for mandatory human rights and environmental due diligence in Europe: <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/> and the Business and Human Rights in Law map: <http://www.bhrinlaw.org/key-developments>

⁴ The European Commission held a consultation on potential draft legislation which closed on 8th February 2021. The proposed legal framework covers environmental as well as human rights impacts. Information about the consultation can be found here <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation>

occurring. The law could enforce this duty by sanctioning companies for failure to conduct adequate due diligence and for causing or contributing to human rights violations.

Legislation could also provide clear paths to redress for victims of human rights abuses by removing some of the barriers they face when seeking to obtain a remedy through the courts. One such difficulty lies in proving the liability of a parent company for the actions of a foreign subsidiary.⁵ Where complex corporate structures are involved it can be difficult to establish that the parent company is sufficiently close to the operations of the subsidiary to owe a duty of care to any claimants, particularly given how difficult it can be to access corporate documents. A mandatory due diligence law, requiring a company to report on all of their activities, including those of subsidiaries, will make the operations of companies and all of their business relationships more transparent, making it easier to establish where a duty of care is owed.

The cost of court cases is also a significant barrier. Such cases require complex conditional fee arrangements and litigation insurance meaning that they are only financially viable if they are of high value and there is a large group of claimants. Legislation could establish a regulator with powers to receive complaints from affected individuals and communities, conduct investigations, and order companies to pay compensation and make restitution. This would reduce the cost and complexity of filing a complaint making it much easier for victims of harm to seek redress even if their case is of a relatively low financial value.

Legislation would also benefit companies. Currently, there is little legal certainty about the standard of due diligence that is required of companies nor the human rights harms for which they may be liable. Legislation would provide clarity on these issues. Moreover, legislation which introduces binding human rights due diligence requirements would create a level playing field for companies. At present, businesses that do not carry out human rights due diligence have a competitive advantage over those that do because they avoid the cost. With the introduction of a mandatory requirement, it is those who lag behind on human rights that would be penalised.

Steps towards Mandatory Human Rights Due Diligence Legislation

Some laws focusing on specific human rights abuses are already in place, for example the UK, Australia and US state of California have introduced legislation on modern slavery. Whilst novel, these laws are limited in terms of the obligations they place on companies requiring only that they publish information disclosing the steps they have taken to identify modern slavery in their supply chains. They create no obligation to prevent, mitigate or provide a remedy if modern slavery is found and there is no government system to monitor company disclosures or assess their quality and veracity.^{6,7}

⁵ This is a complex area of law in which some progress has recently been made. See the UK Supreme Court judgement in the case of [Lungowe v Vedanta Resources](#) and the Dutch Court of Appeals judgment in the case of *Four Nigerian Farmers and Milieudefensie v. Shell*. Although ultimately successful, both cases took many years of litigation to establish that the parent companies owed duties of care to the claimants.

⁶ Business and Human Rights Resource Centre, [Modern Slavery Act: 5 Years of Reporting, Conclusions from Monitoring Corporate Disclosure](#), February 2021.

⁷ The UK government has announced it will strengthen reporting requirements in 2021: <https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains>

By contrast, in 2017, the French parliament adopted the Corporate Duty of Vigilance Law which imposes more stringent duties on companies by requiring them not only to identify but also to address all serious human rights abuses in their supply chains and creating civil remedies of fines and compensation if they fail to comply. The Dutch parliament has passed a Child Labour Due Diligence Law⁸ which is due to come into force in 2022. It applies to all companies that sell goods or services to Dutch consumers and obliges them to investigate whether their goods or services have been produced using child labour and, where they find it, to devise a plan to prevent it. Similar laws covering the full range of human rights and environmental impacts are under discussion in several European parliaments,⁹ and EU legislation¹⁰ on the matter is also in prospect.

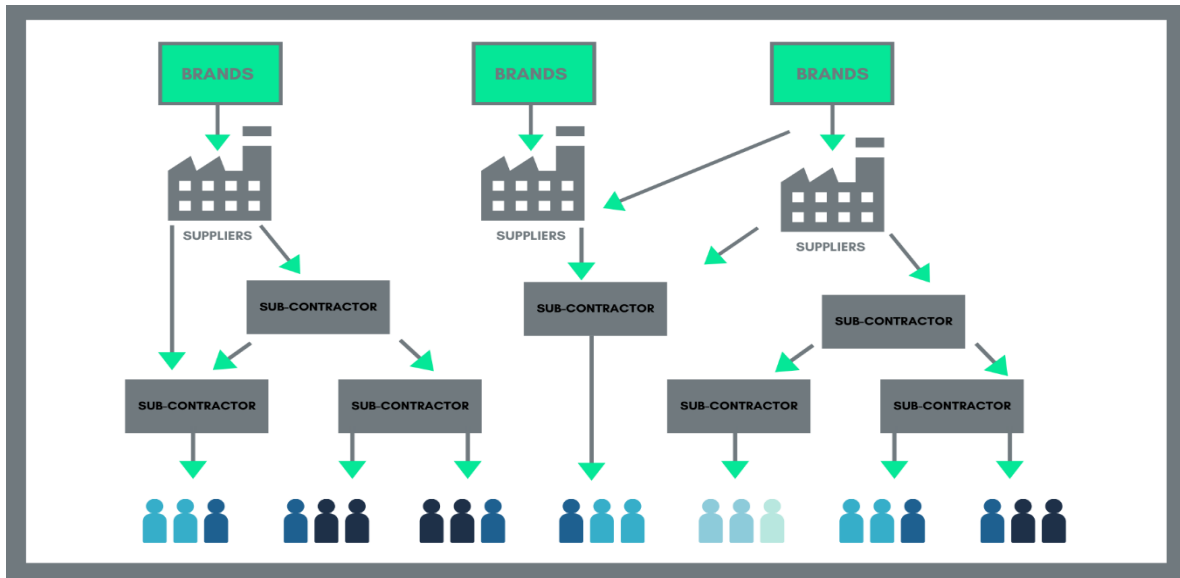


Figure 1: HRDD could require companies to investigate only the top tier of their supply chain or extend this to remote suppliers and subcontractors.

There is a wide range of possibilities in terms of what a mandatory due diligence law might cover and the nature of the requirements it might place on companies. Its remit could be limited to certain abuses judged to be the most severe or those affecting the largest number of people; it could cover only large companies or include smaller enterprises as well; it could require that companies investigate only the top tier of their supply chain or extend this to remote suppliers and subcontractors; and enforcement could take the form of an independent government-funded regulator or an industry body. Such issues are likely to be the subject of considerable debate and may result in legislative compromises. For example, Germany’s proposed law to regulate supply chains was the subject of much lobbying by German business associations and as a result has some limitations. Notably, it only covers the very largest companies and requires them to assess and respond to human rights risks among suppliers with whom they have direct relationships. For suppliers further down the supply chain, companies are only required to respond to specific incidents of abuse about which they have knowledge.¹¹ The proposed law also lacks provision for overseas victims of human rights abuses to seek remedy directly in German courts. How such issues, and the

⁸ Ropes and Gray, [Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies](#), 5 June 2019. (Appendix has English translation.)

⁹ See note 1.

¹⁰ See note 2.

¹¹ Human Rights Watch, [Germany: MPs Should Strengthen Proposed Supply Chain Law](#), 23rd February 2021.

others mentioned above, are decided in the different prospective laws will influence their effectiveness and their utility for stakeholders in supply chains, including homeworkers.

About Homeworkers



A recent ILO study (2021) estimates that prior to COVID-19 there were approximately 260 million homebased workers worldwide, representing 7.9 per cent of global employment, and 11.5 per cent of the female labour force.¹² This includes teleworkers and digital platform workers as well as industrial outworkers involved in manufacturing a wide range of products. Within the international supply chains of global brands, homeworkers are often engaged by subcontractors or intermediaries, rather than directly by first tier suppliers. Therefore, brands may be unaware of their presence or the conditions they work in.

Organisations working with homeworkers estimate that in India alone 5 million homeworkers work in textile and apparel supply chains serving both domestic and global markets,¹³ of whom 3.5 million are in the supply chains of global brands.¹⁴ In 2019-20, for example, brands that looked for homeworking in their supply chains found it in China, Italy and the UK.¹⁵

‘A recent ILO study (2021) estimates that prior to COVID-19 there were 260 million homebased workers worldwide... 8% of the global labour force’

The majority of homeworkers are women who undertake homebased work to earn money whilst taking care of children, or other relatives, or doing agricultural work. Homebased work is usually low-paid (often a fraction of legal minima) and paid by the piece; it may also be irregular. It is almost always informal, in the sense that it takes place outside formal systems of labour or social regulation. Homeworkers do not usually have any rights such as to a minimum wage, social security or a pension. They are often exposed to health and safety hazards and suffer restrictions to their freedom of association.

The irregularity and informality of their work means that when work is available, they have little choice but to accept it, even if this means working late into the night or drawing other family members, including children, into production. Low wages mean many homeworkers are indebted, often to the intermediaries who supply their work, creating risks that can approach forced and bonded labour.

¹² ILO [Working from Home: from invisibility to decent work](#), 13th January 2021.

¹³ Chen and Sinha, [Home-based workers and Urban Plans, Policies, and Practice: India in Comparative Perspective](#), December 2019.

¹⁴ Source: WIEGO, cited in Marc Bain, [A huge underclass of ghost workers are making your shirts in their homes](#), Quartz, December 17, 2015.

¹⁵ HWW's recent conversations with apparel and footwear brands.

There are many similarities between homeworkers and agricultural sector workers, including smallholder farmers and farm workers. Agricultural work is often seasonal and highly precarious; pay is low and often by the piece, and workers are unlikely to have access to social security schemes; it can be hazardous and freedom of association may be limited. Like homeworkers, smallholder farmers and agricultural workers are the least powerful actors in their supply chains and are therefore most at risk of exploitation. The risks of mHRDD for homeworkers are therefore also likely to apply to agricultural workers, meaning that the issues set out below are not niche or applicable only to a minority. As mHRDD becomes a reality, it will be increasingly important for homeworkers to build networks with agricultural workers and other informal workers to ensure that the legislation does not increase their disadvantage but rather serves to improve their status and conditions.

The Impact of Mandatory Human Rights Due Diligence on Homeworkers

Mandatory HRDD legislation has significant potential to benefit homeworkers but in order to do so it must be carefully designed and include particular requirements. Firstly, it is essential that legislation obliges companies to conduct due diligence at all tiers of their supply chains including the lower tiers, where low wages and poor conditions are more prevalent, and encompassing the subcontractors and intermediaries who may use homeworkers. If the due diligence requirement is restricted to tier one, it is unlikely that the issue of chronic low wages and the associated risks of child and forced labour will be identified or remedied. There is also a high risk that unless companies are prepared to fully absorb the costs of ensuring that their tier one suppliers comply with the new due diligence requirements, those suppliers will pass their costs on further down the supply chain resulting in even lower pay and poorer conditions for workers. This is a risk to agricultural sector workers as well as homeworkers. Small farmers face existing pressures of low prices and unpredictable schedules and are therefore very unlikely to be able to meet the extra costs of due diligence compliance. The result will be lower incomes for farmers and lower pay for farm workers.

Pay for homeworking is often very low. Access to a living income is therefore a critical issue for homeworkers. Whilst it is not explicitly recognised as a human right in international legal instruments, fundamental human rights, such as housing, health, food, and education, are not achievable without it.¹⁶ It is also an essential element in preventing forced and child labour, as both are often driven by very low and insecure rates of pay. mHRDD legislation must therefore require companies to include access to a living income in their due diligence processes.



¹⁶ See V. Nelson, O. Martin-Ortega and M. Flint, *Making Human Rights Due Diligence Work for Small Workers and Farmers in Global Supply Chains*, June 2020, chapter 5, for discussion of living wage/income as internationally recognised human right.

Homeworkers are normally paid a piece rate, and therefore calculating and paying a living income raises different issues to the payment of a living wage to waged workers. HWW has worked with the Ethical Trading Initiative to produce guidance on setting fair piece rates for homeworkers,¹⁷ which could form the basis of guidance to accompany the legislation, or of a multi-stakeholder initiative or sectoral investigation. We have also documented a recent positive case study from the leather footwear sector which used a time and motion study to calculate a piece rate that is linked to minimum wage rates.¹⁸ Following the study homeworkers saw their piece rates rise by a third on average.

If mandatory HRDD legislation is badly drafted, there is a risk it will have a negative impact on homeworkers and may result in them being cut out of supply chains and losing their livelihoods. Due diligence legislation must require that the process takes in all areas of a company's practice rather than being a marginal activity that is restricted to a company's responsible sourcing or ethical trading teams. The issues that homeworkers face, for example low pay (as mentioned above) or forced overtime, often arise as a result of business models that are based on low retail prices or companies' poor purchasing practices such as short notice changes to contracts and demanding delivery schedules. Due diligence must be a process which enables companies to identify the causal connection between their actions and negative impacts on workers and which involves them making changes to their harmful activities and business models. It will therefore only be fully beneficial if there is board level responsibility for the process and it is integrated across all decisions and practices of a company. There is a risk that mandatory HRDD legislation, if badly drafted, will have a negative impact on homeworkers as it may result in them being cut out of supply chains and therefore losing their livelihoods.

Increasing companies' requirements for transparency and provision of remedy throughout their supply chains is likely to mean that they will want to expand their knowledge of and degree of control over all the suppliers – indeed this is one of the reasons for making HRDD mandatory. However, it may result in companies simplifying their supply chains and removing from them any suppliers which are harder to reach, are not immediately transparent, and where the risks of human rights abuses are higher. For example, homeworking is by its nature harder to monitor and, as described above, it can be accompanied by serious human rights abuses such as child labour or forced labour. To reduce their risk and due diligence burden, companies may choose to eliminate homeworking from their supply chains altogether, rather than working with suppliers to improve homeworkers' pay and conditions and establish a robust and transparent monitoring regime. This would have a severe impact on homeworker livelihoods and, rather than removing homeworkers from supply chains, such a policy may have the effect of driving homeworking further underground, resulting in a deterioration in homeworkers' working conditions and their ability to access their rights. These issues are also likely to apply to other informal workers and smallholder farmers, as companies seek to consolidate their suppliers and reduce the numbers of informal workers in their supply chains.¹⁹

¹⁷ Ethical Trading Initiative, [Setting fair piece rates for homeworkers: Key principles and possible approaches](#), 2013.

¹⁸ Homeworkers Worldwide, [Better wages for homeworkers in Tamil Nadu footwear chains](#).

¹⁹ V. Nelson, O. Martin-Ortega and M. Flint, *Making Human Rights Due Diligence Work for Small Workers and Farmers in Global Supply Chains*, June 2020.

Focusing due diligence on certain very serious human rights abuses, such as modern slavery, could have a similar impact. For example, efforts to eliminate child labour in a particular supply chain may have adverse outcomes on other actors in that supply chain. In the 1990s, child labour in Pakistan’s soccer ball industry, which supplied many major global brands, was the subject of significant media attention and public outrage. A range of multi-stakeholder schemes were introduced with the goal of eliminating child labour. As child labour often arises where there is homeworking, one of the steps taken was to establish stitching centres so that the women who stitched the balls worked together in one place where the work environment could be monitored. As a result, some women who lived near the new stitching centres took up jobs there but other women who lived further away were deprived of their livelihoods.²⁰ Moreover, a study carried out by the International Labor Rights Forum in 2010 found that because of the focus on child labour, other labour rights, such as the right to a minimum wage and rights to organise and bargain collectively, were ignored. It also found that women in stitching centres faced gender discrimination, receiving lower pay than male co-workers.²¹

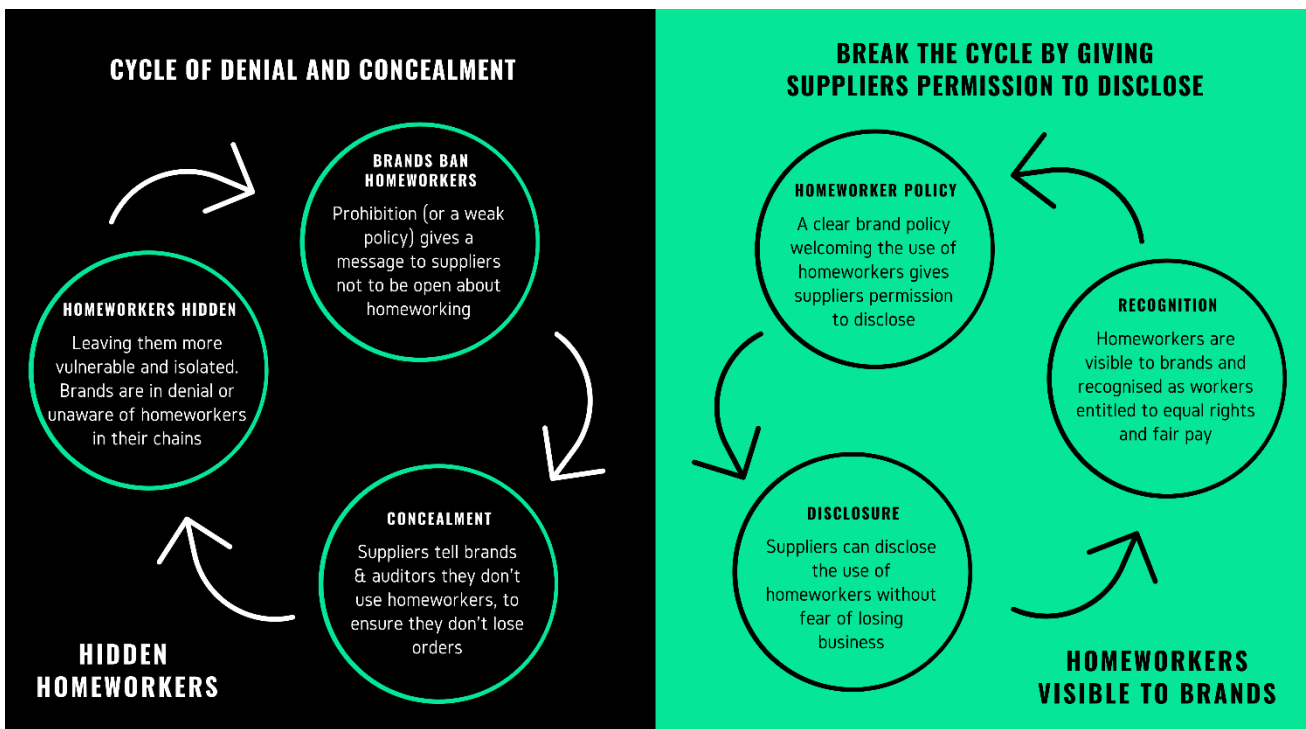


Figure 2: This chart highlights the dangers posed if brands ban homeworking in their supply chain. It proposes instead that by adopting a clear policy on homeworkers, committing to support suppliers in improving transparency and working conditions, brands give suppliers permission to disclose.

In order to prevent these adverse outcomes, due diligence legislation must require companies to consider all the human rights impacts in their supply chains in a holistic way and develop remedies which do not simply displace negative impacts. They must be incentivised to take all steps to improve conditions and protect livelihoods, stating clearly that they welcome the possible presence of

²⁰ Sehr Hussain-Khaliq, *Eliminating Child Labour from the Sialkot Soccer Ball Industry Two Industry-Led Approaches*, The Journal of Corporate Citizenship No.13, Spring 2004.

²¹ International Labor Rights Forum, *Missed the Goal for Workers: The Reality of Soccer Ball Stitchers in Pakistan, India, China and Thailand*, 7th June 2010.

homeworkers within their supply chain and commit to working with suppliers to increase transparency and improve working conditions. The legislative framework should contain guidance on homeworkers and other informal workers, such as agricultural workers, which recognises their contribution to global supply chains as well as to their own families' wellbeing; encourages their retention and progression; and sets out how companies can responsibly manage homeworking arrangements. The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector²² contains a useful module on homeworking which could provide a foundation for further, more comprehensive guidance.

Stakeholder engagement throughout the due diligence process and in particular, when developing remedies, will help prevent adverse outcomes. Homeworkers are rarely in contact with formal workplaces or trade unions and are by definition isolated in their homes. Due diligence legislation must require companies to conduct effective, comprehensive stakeholder engagement which actively seeks out such workers. This could be through the involvement of unions (where they are in contact with homeworkers), local community organisations, women's groups or other civil society actors.

The impact of any due diligence regime on homeworkers will also be determined by how it is enforced. Any legal framework must create a robust enforcement mechanism which includes legal liability for harms caused and failure to conduct adequate due diligence. It must create a regulatory authority with powers to conduct investigations, issue sanctions and develop best practice guidance for companies. The issues affecting homeworkers are complex and will take time and innovation to solve. The regulatory body must therefore have discretion on when and how to apply sanctions in order to ensure that due diligence does not have a negative impact on those it is seeking to protect. In some cases, strict policing of an issue may result in companies not being transparent about the problems they uncover in their supply chains or changing their supply chains to remove, rather than address, those problems. Where this is a risk, it may be more appropriate for a regulator to conduct sectoral investigations which focus on industry-wide practices rather than on the behaviour of individual companies.²³ This would have the advantage of providing a sophisticated understanding of how human rights abuses occur in certain sectors and create the possibility of developing remedies which apply to all of the actors contributing to those abuses.

Conclusion and Recommendations

Human rights abuses remain widespread in business supply chains despite the existence of many different voluntary initiatives to address them. Legislation to oblige companies to conduct human rights due diligence, address human rights risks, and provide remedies is therefore a welcome development. With this document, HWW has sought to raise awareness of how such legislation may

²² OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, 2017.

²³ See paragraphs 72-3 Kingsley Napley, *Report of Research into how a Regulator could Monitor and Enforce a Proposed UK Human Rights Due Diligence Law*, 21st August 2020 for discussion of advantages of market investigation powers for potential UK business and human rights regulator.

affect homeworkers and to consider what elements should be included in the legislation to maximise the likelihood that it protects their interests and prevents harm.

In summary, the legislation should:

- Cover the whole supply chain, including sub-contractors, intermediaries and homeworkers
- Include guidance to encourage responsible sourcing from homeworkers
- Explicitly recognise a living income as a human right that is covered by the due diligence duty
- Encompass all areas of a company's business operations and decision-making
- Make board members responsible for meeting the due diligence duty
- State that disengagement from suppliers using homeworkers should be a last resort
- Require companies to conduct effective and comprehensive stakeholder engagement, including with homeworkers
- Establish a well-resourced regulator with powers to issue guidance, receive complaints from victims of human rights abuses, conduct individual and sectoral investigations, and apply sanctions.

HWW recognises that the above measures are not straightforward to implement and need further research and elaboration to consider how they would work in practice. It will be necessary to include homeworkers and other informal workers in this process to ensure that mHRDD legislation addresses their concerns and creates a regulatory regime which is accessible to them. HWW is keen to work with partners to investigate these issues further and refine and strengthen these recommendations.

This paper was written by Shanta Bhavnani with contributions from Lucy Brill.

HOMEWORKERS WORLDWIDE:

HWW is dedicated to supporting homeworkers and other women workers in precarious work around the world as they fight for rights, respect and recognition as workers. We do this by supporting grassroots organising projects, pressuring companies to improve conditions for homeworkers in their supply chains, lobbying for better laws to protect homeworkers, and building solidarity with other women workers.

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