



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HRC/BLC/EEas: 1703231

6 May 2019

Mr Jonathan Smithers  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [sarah.sacher@lawcouncil.asn.au](mailto:sarah.sacher@lawcouncil.asn.au)

Dear Mr Smithers,

### **Modern Slavery Act – Draft Guidance**

Thank you for the opportunity to contribute to a Law Council submission to the Department of Home Affairs regarding the *Modern Slavery Act 2018 – Draft Guidance for Reporting Entities* (“draft guidance”).

The Law Society’s response is informed by its Human Rights and Business Law Committees.

### **General observations**

The Law Society welcomed the passage of the *Modern Slavery Act 2018* (Cth) (“the Act”), and we similarly support the development of the draft guidance document by the Modern Slavery Business Engagement Unit (“MSBEU”) in the Department of Home Affairs. In the Law Society’s letter dated 13 July 2018 regarding the *Modern Slavery Bill 2018* (Cth) (copy **attached**) we suggested that businesses will require clear and comprehensive guidance on what constitutes substantive compliance and the Government should consult widely on the draft guidance material. In making this recommendation, the Law Society referred to the guidance material provided under the UK scheme,<sup>1</sup> which was relatively rudimentary, and we suggested that the nature of this guidance may have affected the effectiveness of the UK’s reporting requirement. The Law Society is therefore pleased that the draft guidance is a comprehensive document, and that the Home Affairs Department has allowed sufficient time for consultation from interested stakeholders. We believe that by providing business with adequate support and guidance, the Department of Home Affairs can assist with creating a culture of compliance and a “race to the top”, as envisaged in Assistant Minister Hawke’s second reading speech.

The Law Society also supports the use, in the draft guidance, of the UN Guiding Principles on Business and Human Rights (“UNGPs”) to frame and explain each criterion that businesses will be required to address in their Modern Slavery Statements. The UNGPs are the recognised global standard for preventing and addressing business-related human rights

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<sup>1</sup> UK Home Office Department, *Transparency in Supply Chains etc. A practical guide* (published 29 October. Last updated 22 October 2018).

harm, and will provide a useful reference point for businesses seeking to comply with the requirements of the Act.

While the Law Society notes the draft guidance states that the MSBEU is not equipped to provide detailed advice about modern slavery risks in specific sectors, we recommend that – as and when capacity permits – the MSBEU develop sector-specific guidance to complement the comprehensive guidance for reporting entities. In preparing any sector-specific guidance, the MSBEU may wish to utilise the OECD guidance about due diligence in key sectors and industries,<sup>2</sup> and adapt it for the Australian context as appropriate.

The Law Society also recommends that the guidance for reporting entities be a ‘living document’ subject to regular update and review. Topics for inclusion in future editions of the guidance could include: how a reporting entity can evolve and improve its Modern Slavery Statement year-on-year; and guidance for reporting entities that fall within the scope of both the NSW and Commonwealth modern slavery legislation, building on the “learn more” box at page 16 of the draft guidance.

### Specific recommendations

The Law Society has a number of suggestions, in addition to the above, for how utility of the draft guidance could be improved.

- *Target audience(s) for Modern Slavery Statements.* People preparing a Modern Slavery Statement for their entity may find it useful to see an articulation of the audience categories that are likely to read their statement. These audiences could include the Minister, the Department of Home Affairs and – once the statement is published on the Modern Slavery Statements Register – interested members of the general public and non-governmental organisations.
- *Geographic and rule of law risks.* At pages 63 and 64 of the draft guidance, the MSBEU may wish to mention specific resources businesses can refer to in order to assess modern slavery risks, including the Walk Free Foundation *Global Slavery Index* and the World Justice Project *Rule of Law Index*.
- *Assessing the effectiveness of actions being taken to assess and address modern slavery risks.* Section 16(1)(e) of the Act states that a Modern Slavery Statement must “describe how the reporting entity assesses the effectiveness of... actions” taken to assess and address modern slavery risks. The section of the draft guidance explaining this criterion could be improved by including recommendations and examples of best practice for measuring the effectiveness of specific actions taken to assess and address modern slavery.
- *Definition of ‘operations’.* Section 16(1)(b) of the Act states that a Modern Slavery Statement must describe the structure, operations and supply chains of the reporting entity. At page 25 of the draft guidance, the term ‘operations’ is relatively broadly defined. It would be helpful if the MSBEU could clarify in this section whether reporting entities are expected to consider their customer-side risks and, if so, suggestions for credibly identifying links to modern slavery within customer relationships.
- *Engaging with suppliers.* Appendix 2 of the draft guidance contains helpful suggestions for working with suppliers to assess and address modern slavery risks. Reporting entities may find it useful if this section were to also include guidance on responding to risks in situations where they have limited leverage over a supplier.
- *Hypothetical examples.* At page 25 the draft guidance includes an example of the terms ‘structure’, ‘operations’ and ‘supply chains’ as applied to a hypothetical building

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<sup>2</sup> OECD Guidelines for Multinational Enterprises, ‘Sectoral Guidance’. Available at: <https://mneguidelines.oecd.org/sectors/>

company. It may be helpful to include similar examples for service-based industries such as the legal profession, financial services and media firms.

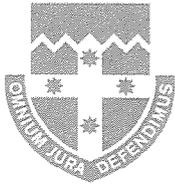
Thank you for the opportunity to contribute to the Law Council's submission regarding the draft guidance. Questions may be directed in the first instance to Andrew Small, Policy Lawyer, at (02) 9926 0252 or [andrew.small@lawsociety.com.au](mailto:andrew.small@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, reading "Elizabeth Espinosa". The signature is written in a cursive, flowing style.

Elizabeth Espinosa  
**President**

Enc.



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HRC/DHvk:1562434

13 July 2018

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Chief Executive Officer  
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DX 5719 Canberra

By email: [natasha.molt@lawcouncil.asn.au](mailto:natasha.molt@lawcouncil.asn.au)

Dear Mr Smithers,

**Modern Slavery Bill 2018 (Cth)**

Thank you for your memo dated 29 June 2018 seeking the contribution of the Law Society of NSW in respect of a Law Council submission on the Modern Slavery Bill 2018 (Cth) (the "Bill"). The Law Society's response is informed by its Human Rights Committee.

While the Law Society welcomes the introduction of the Bill, notable is the absence of a number of features that would have assisted with creating a culture of compliance and 'race to the top' as envisaged in Assistant Minister Hawke's second reading speech.

The Law Society is disappointed to note that the threshold for reporting set by the Bill is \$100M, which is higher than the level both the Law Council and the Law Society has recommended.

The Law Society is also disappointed to note that the Bill does not include financial penalties for non-compliance. In the Law Society's view, this aspect of the proposed model undermines the reporting scheme, and is inconsistent with the Government's aim to regulate the conduct of business in order to achieve the aim of addressing modern slavery in supply chains.

The Law Society suggests that the Law Council advocate for financial penalties to be introduced after a three year review period, if poor reporting standards warrant it.

The Law Society continues to support the inclusion of the following features (in order of significance), in the legislation, as well as part of the infrastructure for compliance:

1. A public list of reporting entities. Assistant Minister Hawke's second reading speech suggests that the Bill will create transparency where "Businesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputations." A public list of the entities required to report under the legislation would be the first step in creating such transparency.
2. Public procurement incentives for compliance. As noted in our previous submissions to the Law Council, an effective driver for compliance would be to include the requirement

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for reporting entities to comply with the legislation in order to be eligible for public tenders.

3. Robust repository of modern slavery statements. Such a repository should be easily searchable, well maintained and current. As noted in our previous submissions, it should provide information on the entities that are required to comply with the reporting requirement, and the status of their compliance.

As the legislation does not include penalties for non-compliance, the burden of driving compliance will fall largely on civil society and investors carrying out the necessary scrutiny. The role of the repository will be particularly crucial in this regard. We understand that this is has been the experience of the UK scheme. It may be that governments will be comfortable commenting on strict compliance issues (that is, has an entity that is required to report, made such a report?). However, governments may not wish to publicly scrutinise the content of reports, or highlight weak reporting as this will be perceived to be critical of business. In our view, it is unlikely that governments will comment on the content and quality of the reports (that is, are the reports sufficiently detailed? Do they comply with the spirit of the legislative requirements?).

In the Law Society's view, only sufficiently detailed information will create impetus for change in corporate approaches to human rights, and this is an issue that goes to the impact of the legislation. The Law Society understands that in the UK, third parties already operate a register of statements, and also conduct an analysis on compliance and content of the reports.

4. Quality guidance required. Business will require clear guidance on what constitutes substantive compliance. Such guidance should be clear and comprehensive, and we submit that the Government should consult widely on the draft guidance material. We understand that the guidance provided under the UK scheme was relatively poor, and this may have affected the effectiveness of the reporting requirement
5. Public awareness campaign. The Government should carry out a public awareness campaign targeted at both business and consumers, which should include measurable outcomes and rolling evaluations of the effectiveness of the campaign.

Thank you for the opportunity to provide comments. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, at (02) 9926 0354 or [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,



Doug Humphreys OAM  
President