



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Dr Popple,

### **Review of Australia's Modern Slavery Act**

The Law Society appreciates the opportunity to contribute to the Law Council of Australia's submission in response to the three-year statutory review of the *Modern Slavery Act 2018* (Cth) (**the Act**). The Law Society's Human Rights, Business Law and Employment Law Committees have contributed to this submission.

We refer to a number of the questions posed in the Issues Paper and provide the following responses for your consideration:

#### **Impact of the Modern Slavery Act (Questions 1-5)**

##### *Assessment of impact (Question 1)*

As set out in the Issues Paper, the 'dual aim of the Act is to increase business and government awareness of...modern slavery risks, and support entities to identify, report and address the risks'.<sup>1</sup> While the Act has certainly raised awareness in the business and wider community, in our view there is considerable room for improvement as regards identifying and reporting modern slavery risks. Further, the impact in Australia does not seem to have matured across the board to a meaningful discussion on how identified risks can and should be addressed, including through an approach that recognises and responds to the experiences of victim-survivors.

##### *Transparency Framework (Question 2)*

The 'transparency framework' is described in the Issues Paper as a means by which entities are supported to be 'responsible and transparent' in responding to modern slavery risks.<sup>2</sup> This framework relies on external forces, as opposed to compliance measures or sanctions to encourage entities to comply and address modern slavery in their supply chains.

While the 'transparency framework' or 'race to the top' approach may be seen as beneficial to the extent that it relies on market forces and reputation, rather than the overregulation of business, early evidence shows that entities in high-risk sectors are often failing to identify

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<sup>1</sup> Australian Government, *Review of Australia's Modern Slavery Act 2018: Issues Paper (Issues Paper)*, 6.

<sup>2</sup> *Ibid.*

obvious modern slavery risks. The 2022 report, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act (Paper Promises Report)*, examined 102 modern slavery statements. The findings from that research suggest that the legislative regime has not always led to tangible changes to business practices to combat modern slavery. For example:

- 77% of companies examined failed to address all mandatory reporting criteria in their statements;
- 52% of companies examined failed to identify obvious modern slavery risks in their operations and supply chains; and
- only 27% of companies appeared to be taking some form of effective action to address modern slavery risks.<sup>3</sup>

The Paper Promises Report also found that only a small number of statements (around 8%) outlined particulars or allegations of modern slavery.<sup>4</sup> Furthermore, supply chain awareness was low, with only 25% of entities disclosing countries of suppliers, with most failing to identify suppliers beyond tier 1 of the supply chain.<sup>5</sup>

As discussed further below, experiences in Australia and other jurisdictions (including the UK) have suggested that the 'race to the top' approach has its limitations, and that it is unlikely to herald an era of transformative change without additional due diligence requirements and compliance mechanisms.

#### *Due diligence (Question 4)*

Section 16(1)(d) of the Act requires the reporting entity to describe its actions to assess and address the risks of modern slavery practices in its operations and supply chains, including due diligence and remediation processes. As noted in the Issues Paper, the term 'due diligence' is not defined in the Act, but the Explanatory Memorandum to the Bill provides that the mandatory reporting terms in the Act draw on terminology and concepts used in the business and human rights context, particularly in the *United Nations Guiding Principles on Business and Human Rights* (2011) (**UNGPs**).<sup>6</sup>

Early research shows that companies are not fully complying with reporting under s 16 of the Act, including the due diligence reporting requirement.<sup>7</sup> This suggests that there needs to be more specific guidance to business on what is required in this respect. The Issues Paper does not set out the way in which 'due diligence' should be embedded more specifically or concretely in the Act. One option that has been suggested in the Paper Promises Report is 'a specific duty to prevent modern slavery, which requires companies to undertake mandatory due diligence to identify and assess salient risks in their operations and supply chains that give rise to modern slavery and to take steps to mitigate and address them'.<sup>8</sup> Under this approach 'companies would have to show reasonable and appropriate due diligence as a defence to legal liability'.<sup>9</sup>

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<sup>3</sup> Human Rights Law Centre et al, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act (Paper Promises Report)* (Feb 2022), 4-5.

<sup>4</sup> *Ibid.*, 5.

<sup>5</sup> *Ibid.*

<sup>6</sup> Explanatory Memorandum, *Modern Slavery Act 2018* (Cth), 20 [127].

<sup>7</sup> See, for example, comments in Appendix B of the Issues Paper, including those summarising findings of the Australian Council of Superannuation Investors, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act* (July 2021); Monash University Business School, Centre for Financial Studies, *Measuring Disclosure Quality of Modern Slavery Statements* (Dec 2021); Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (Feb 2022); and the Paper Promises Report.

<sup>8</sup> Paper Promises Report, 8.

<sup>9</sup> *Ibid.*

Commentators have noted that this kind of positive obligations-focused approach would bring Australia in line with the regulatory models of other jurisdictions, particularly in Europe.<sup>10</sup> Recent examples include the European Commission's Proposal for a *Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive*<sup>11</sup> or Norway's Transparency Act (or Human Rights Due Diligence law) that came into effect in July 2022, and requires companies to 'conduct due diligence in a manner proportionate to their type, size, sector, and operational context, and follow a risk-based approach'.<sup>12</sup>

The Law Society welcomes further consultation on the way in which any positive duty would be embedded and operate in the Act.

### **Modern Slavery Reporting Requirements (Questions 6 to 13)**

#### *\$100 million (AUD) threshold (Question 6)*

The Law Society supports the lowering of the threshold to consolidated annual revenue of \$50 million (AUD).

The Department of Home Affairs' preliminary modelling indicates that lowering the reporting threshold 'is unlikely to change the profile of entities' or supply chain activity already captured in the Act's reporting.<sup>13</sup> Nevertheless, we consider that the lowering of the threshold would extend reporting requirements to a significant number of additional companies in Australia (around 2,400 businesses) that should have the capacity to identify and report on modern slavery risks in their operations and supply chains. A reduction to a \$50 million (AUD) threshold also brings the Act into line with other jurisdictions, such as the UK, where the threshold is set at 36 million (GBP) (the equivalent of \$60 million AUD).

As regards concerns about compliance costs, these may not be as onerous for smaller businesses with fewer supply chains. Further, we anticipate that businesses with a turnover of over \$50 million (AUD) should have sufficient infrastructure to support this important policy objective. These entities could also use lessons learned from previous reporting cycles as precedents for their own reporting.

We note that 'a provision in the NSW Act that was repealed in 2021 would have required any commercial organisation doing business within NSW and with an annual consolidated revenue of \$50 million (AUD) to prepare an annual modern slavery statement to be published on the register'.<sup>14</sup> The Law Society will continue to advocate for this lower threshold in both NSW and the Commonwealth, while appreciating the benefits that would flow from consistency between the two schemes.

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<sup>10</sup> Herbert Smith Freehills, 'Australian Government consults on three-year review of Modern Slavery Act 2018', 24 August 2022, <https://www.herbertsmithfreehills.com/latest-thinking/australian-government-consults-on-three-year-review-of-modern-slavery-act-2018>

<sup>11</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022/0051 (COD), [https://ec.europa.eu/info/sites/default/files/1\\_1\\_183885\\_prop\\_dir\\_susta\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf).

<sup>12</sup> Business for Social Responsibility (BSR), 'The Norwegian Transparency Act: Key Insights for Business' (30 June 2022), <https://www.bsr.org/en/our-insights/blog-view/the-norwegian-transparency-act-key-insights-for-business>; see also Ropes & Gray, 'New Norwegian Mandatory Human Rights Due Diligence Law Creates Obligations for US-based Multinationals Doing Business in Norway' (15 December 2021), <https://www.ropesgray.com/en/newsroom/alerts/2021/December/New-Norwegian-Mandatory-Human-Rights-Due-Diligence-Law-Creates-Obligations-for-US>.

<sup>13</sup> Issues Paper, 28.

<sup>14</sup> *Ibid.*, 17.

### *Definition of Modern Slavery (Question 8)*

The definition of modern slavery is set out in s 4 of the Act as follows:

**modern slavery** means conduct which would constitute:

- (a) an offence under Division 270 or 271 of the *Criminal Code*; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or
- (d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

The Issues Paper suggests that ‘this potentially raises difficult definitional issues for entities as to what they should be reporting’ and questions whether more ‘generic’ language should be used instead.<sup>15</sup>

The Law Society does not agree that the Act would be better served by the use of ‘generic language’ to define modern slavery. Instead, we support more explicit and specific guidance in the Act (e.g., in relation to international conventions and guidelines, and due diligence directives) with relation to modern slavery. This could include reference in the Act to Australia’s formal ratification of the International Labour Organization (ILO) Protocol of 2014 to the Forced Labour Convention 1930 (No. 29), which will enter into force for Australia on 31 March 2023, as well as reference to other relevant international guidelines and standards including the UNGPs, the *Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises*, and the *Sustainable Development Goals* within the United Nations’ *2030 Agenda for Sustainable Development*.

In addition, it is noted that the Department of Home Affairs has previously released comprehensive guidance material which describes in detail what the term ‘modern slavery’ encompasses.<sup>16</sup> This material could be expanded if required.

### *Mandatory reporting criteria in the Modern Slavery Act (Question 10)*

At the current time, the mandatory reporting requirements are set out in s 16 of the Act.

It would be helpful to require under s 16 reporting on actual instances of risk that an entity has encountered, including what the entity did to address that risk. The Paper Promises Report highlighted the paucity of reporting by entities of specific examples of modern slavery. While non-disclosure may be required in the interests of protecting workers from retaliation or jeopardising law enforcement investigations, greater transparency on actual instances of risk could benefit the scheme.<sup>17</sup>

Further, we consider that it would be useful if the Act included a new section which focuses on the reporting of due diligence and remediation processes (currently contained in s 16(1)(d)). As described above, these processes have been neglected by many entities in the initial cycles of reporting, and creating a stand-alone section may go some way to address a ‘noticeable ad hoc approach to how due diligence has been conducted by companies and widely differing levels of effort between companies’.<sup>18</sup>

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<sup>15</sup> Ibid., 36.

<sup>16</sup> Commonwealth Modern Slavery Act 2018 - Guidance for Reporting Entities, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.

<sup>17</sup> Paper Promises Report, 66.

<sup>18</sup> Ibid., 56.

## Enforcement of the Modern Slavery Act reporting obligations (Questions 14 - 17)

### *Business compliance ethic (Question 14)*

The Paper Promises Report examined statements submitted to the Government's Modern Slavery Register by 102 companies in the first reporting cycle of the Act. The authors of the report found that 'companies are failing to comply with the mandatory reporting requirements', with less than one in four companies addressing all of the mandatory reporting requirements assessed.<sup>19</sup> Concerns were raised in relation to areas including risk assessment, remediation, measuring effectiveness and consultation. It is also of concern that 'companies are failing to identify or disclose obvious modern slavery risks' in their operations and supply chains.<sup>20</sup>

While the Paper Promises Report does cite examples of best practice reporting, there appears to be a concerning lack of a business compliance ethic as regards the Act's reporting requirements, with widespread evidence of 'superficial and incomplete' reporting.<sup>21</sup>

### *Government administrative action (Question 15)*

At the current time, a positive compliance ethic is not influenced greatly by government administrative action. Rather, the Act relies on market forces and public scrutiny, with investors, consumers, NGOs and the media required to identify circumstances of non-compliance and exert pressure on businesses to reform their reporting and practices.

One of the administrative actions recommended in the Paper Promises Report is the use of public procurement processes to reward companies that not only report in a compliant manner but that have also developed meaningful measures to address modern slavery risks.<sup>22</sup>

On the other hand, non-compliant companies could be prevented from bidding on government contracts. In this context, Western Australia's procurement regime administered under the *Procurement Act 2020* (WA), is sometimes cited as a possible model. The WA regime allows for the termination of contracts with debarred suppliers. As noted by McGaughey et al., the WA regime 'reflects a common approach both in national policies, and international rules and guidance', for example the use of debarment in UNCITRAL's Model Law on Public Procurement as well as the European Union's public procurement measures.<sup>23</sup> It should be noted, however, that it would be unhelpful if the focus shifted entirely to a reactive approach based on deterrence at the expense of a 'coherent and resourced regime' that focuses on promoting due diligence and responsible corporate conduct.<sup>24</sup>

Another administrative option is injunctive relief for non-compliance. We note that in the United Kingdom, section 54(11) of the *Modern Slavery Act 2015* (UK) (**UK Act**) allows for the Secretary of State to apply to the High Court for an injunction or specific performance to compel a company to comply with its reporting obligations. While we understand that this provision has not been used in the United Kingdom, the fact that the UK Act provides for an enforceability mechanism of this kind may provide a stronger incentive for compliance than the Australian model based on consumer/investor pressure and a 'name and shame' ethos.

### *Additional enforcement mechanisms (Question 16)*

The Law Society supports the publication of regulatory standards for modern slavery reporting to provide further guidance on how companies can identify, assess and address the risk of modern slavery across their operations and supply chains. As noted in the Issues Paper,

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<sup>19</sup> Ibid., 2.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 9.

<sup>23</sup> Fiona McGaughey, Rebecca Faugno, Elise Bant, Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143, 148.

<sup>24</sup> Ibid., 149.

regulatory standards are common across other areas of Commonwealth law, for example provisions that empower the Information Commissioner under s 26V of the *Privacy Act 1998* (Cth) to assist private entities in the development of privacy codes.<sup>25</sup>

The Department of Home Affairs has released supplementary guidance which has focussed on specific mandatory reporting criteria in an attempt to provide better guidance to reporting entities with the use of hypothetical examples showing good practice, compliant and non-compliant responses, but this material is limited in detail.<sup>26</sup>

It may be helpful for government to highlight model examples of compliant statements. It would be useful for any guidance material to breakdown the way these model examples approach the task of reporting e.g. risk assessment beyond tier 1 suppliers; particular stand-alone modern slavery policies, as well as grievance and remediation mechanisms.

#### *Civil penalties or sanctions (Question 17)*

The Law Society understands that the Government has made a commitment to introduce civil penalties or sanctions for failure to comply with the reporting requirements.

The Law Society is supportive at this stage of the introduction of penalties for those entities above the threshold that fail to report. It is noted that having completed two full reporting cycles as at 30 July 2022, eligible entities have had ample time to understand the need to report.

Before the amendments to the NSW Act were made via the *Modern Slavery Amendment Act 2021* (NSW), traditional penalties were envisaged as part of NSW's planned legislation, with a criminal penalty of up to \$1,100,000 for failing to publish a statement or providing false or misleading information. We consider that the Commonwealth Act should introduce penalties similar to those that were planned for NSW so that those entities above the threshold that fail to prepare and publish a complying modern slavery statement or provide false or misleading information are held liable. This should not be overly onerous to implement, given the way in which 'corporate financial reporting requirements impose a range of traditional penalties on directors and companies where disclosure is inadequate', for example the lodgment of a financial report under the *Corporations Act 2001* (Cth).<sup>27</sup>

We note that in addition to financial penalties, other types of penalties may be appropriate in some circumstances (e.g., barring of directors).

### **Public sector reporting requirements under the Modern Slavery Act (Questions 18-20)**

#### *Application to Australian Government agencies (Question 18)*

The Law Society supports the application of the Act to Australian government entities, noting that the Commonwealth Government is the largest procurer in the Australian market, and should show leadership in combatting modern slavery.

#### *Annual Commonwealth Modern Slavery Statement (Question 19)*

The Law Society understands the value of a consolidated annual statement, the Commonwealth Modern Slavery Statement, being prepared for all non-corporate entities, including the way in which this allows an overview of the Commonwealth's operations and global supply chains. However, we consider that there could be additional value in requiring

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<sup>25</sup> Issues Paper, 43.

<sup>26</sup> For example, Modern Slavery Act Supplementary Guidance: Good Practice Examples of Mandatory Reporting Criteria Three, August 2021, <https://modernslaveryregister.gov.au/resources/>.

<sup>27</sup> Margaret Cusenza and Vivienne Brand, "A Tiger Without Teeth"? The Forthcoming Review of the Modern Slavery Act 2018 (Cth) and the Place of "Traditional" Penalties' (2021) 38 *Company and Securities Law Journal* 152, 176.

separate reporting by some agencies that undertake high-volume procurement. The Commonwealth Modern Slavery Statement 2020-21 provides “snapshots” of some of the work of individual non-corporate Commonwealth entities, for example reference to a framework developed by the Department of Defence for managing the risks of offshore infrastructure projects. It would be helpful for larger government portfolios, such as Defence, to publish more granular and transparent reporting on specific risks and targeted interventions to address such risks.

The approach being taken to reporting in the annual Commonwealth Modern Slavery Statement seems sound, in that it is a necessary step to educate government officials about modern slavery risks in public sector procurement before undertaking targeted supply chain mapping and risk assessment and implementation. However, we would expect that for each of the named stages (‘Foundation’, ‘Discovery’, ‘Implementation’ and ‘Review’) there is more in-depth reporting of the specific actions taken by each Portfolio Agency to embed modern slavery considerations in their procurement policy and practices and how these form part of a whole-of-government approach to modern slavery.

### **Modern Slavery Statements Register (Questions 21-22)**

#### *Service provided by the Register (Question 21)*

The Law Society considers that the Register provides a valuable service, in that it functions as a ‘one stop shop’ for members of the public and other interested parties to compare modern slavery statements across different business and industry sectors. The Register is accessible and assists achieving the object of the Act to establish a transparency framework that displays business and supply chain monitoring by large entities and government.

#### *Improvements to the Register (Question 22)*

A possible improvement to the Register could include the ability to locate all statements for the one reporting entity in the one spot (rather than by separate statement). This would ensure the historical record of statements for each company is readily apparent. Another suggestion is that a compliance status indicator/ traffic light system be built into the register so users can easily determine whether an entity is compliant with the reporting requirements.

### **Administration and Compliance Monitoring of the Modern Slavery Act (Questions 23-24)**

#### *Role of an Anti-Slavery Commissioner (Question 23)*

As noted in the Issues Paper, the specific focus of this review is whether an Anti-Slavery Commissioner should play a role in overseeing and/or enforcing the Act’s reporting requirements.

As set out above, the Law Society considers that reporting should be mandatory, and the Government should ensure that companies submit accurate reports. The role of an Anti-Slavery Commissioner should, at the very least, include examining whether individual entities have properly complied with modern slavery reporting requirements. If new measures are to be introduced under the Act (e.g., the publication of a list of entities that are assessed as not complying with the Act’s reporting requirements; or recommendations around the imposition of penalties), we consider that such an enforcement role would most naturally sit with such a Commissioner.

#### *Division of responsibilities (Question 24)*

It would be a matter of funding and staffing as to whether the Anti-Slavery Commissioner would undertake the administrative, supportive and educative roles currently performed by the Modern Slavery Business Engagement Unit.

## Other issues (Question 27)

Consideration should not only focus on reporting on risk but also addressing risk, including actions that entities must take once modern slavery and a victim is identified. An 'area of marked weakness' in modern slavery statements are response strategies and grievance mechanisms,<sup>28</sup> and one study found that 46% of statements included a remediation response for modern slavery cases that may result in an adverse impact on victims.<sup>29</sup> This demonstrates that business requires far more guidance and focus on a victim-centred response.

As part of this victim-centric, human rights-informed response, the long overdue national compensation scheme for victims of modern slavery should be introduced as soon as possible, and we fully support the Law Council's efforts in this regard.

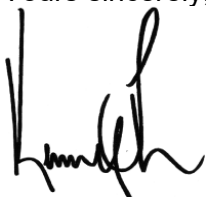
As outlined in the NSW Law Society's letter to the Law Council of 28 April 2022 regarding a national compensation scheme model, we consider that, regardless of recent beneficial amendments to the NSW victims support scheme for modern slavery survivors, a federal compensation scheme would promote greater consistency and fairer outcomes than expecting state and territory compensation schemes to cover the field. We also advocate for a victim-centric model where access to remedies is not linked to a victim's immigration status or cooperation with the criminal justice system, and consider it desirable that the scheme explicitly establish that the receiver's entitlement to social security benefits is not affected by any payment under the compensation scheme.

As also detailed in our April letter, we propose that:

- a. a victim should not be required to meet the criminal standard of proof. Rather, the civil standard of proof should apply for victims;
- b. the relevant nexus to Australia should be specified to include conduct carried out by an Australian resident or corporation regardless of where the conduct occurred, and include conduct which has caused loss or damage to any person in Australia, regardless of where the conduct occurred.
- c. eligibility should be determined on the basis that particular conduct has occurred, and there should be no requirement to prove 'harm' as part of eligibility criteria. The harm suffered should be considered in the quantification of the redress payment, as occurs under the National Redress Scheme for Child Sexual Abuse.
- d. A generous approach should be taken to statutory limitation periods.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at [sophie.bathurst@lawsociety.com.au](mailto:sophie.bathurst@lawsociety.com.au) or (02) 9926 0285.

Yours sincerely,



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Sonja Stewart

**Chief Executive Officer**

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<sup>28</sup> For example, see Issues Paper, Appendix B, where the findings of the Australian Council of Superannuation Investors, the Human Rights Law Centre, Walk Free and International Justice Mission, all referred to the inadequacy of response, remediation, grievance, and justice mechanisms.

<sup>29</sup> Domus 8.7 Index Modern Slavery Statement Benchmark, <https://www.acan.org.au/acan-blog/domus-87-index-modern-slavery-statement-benchmark-webinar>.