The Law Society OF NEW SOUTH WALES

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17 September 2026

Dr James Popple
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By email: [redacted]

Dear Dr Popple,

STRENGTHENING AUSTRALIA'S RESPONSE TO MODERN SLAVERY IN SUPPLY CHAINS

The Law Society is grateful for the opportunity to provide comments to inform the Law Council of Australia's submission to the Attorney General Department's in relation to the consultation paper, *Strengthening Australia's Response to Modern Slavery in Supply Chains* (**Consultation Paper**). The Law Society's Human Rights, Government Solicitors, Business Law and Employment Law Committees contributed to this submission.

The Law Society strongly supports measures to eliminate all forms of modern slavery and promote accountable and responsible business practices in this area. It is vital for the integrity and effectiveness of the modern slavery regime, including for the protection of people who are at risk of, or have experienced modern slavery, that businesses are accurately and meaningfully addressing and reporting on modern slavery risks in their operations and supply chains.

Significant concerns have been raised in respect of Australia's current regime. Research from the Human Rights Law Centre et al. found, for example, that some companies adopt a "cosmetic approach" when reporting on actions taken to assess and address modern slavery risks, including a failure to undertake due diligence in relation to their own operations, and an absence of engagement with supply chain workers and/or their representatives.[1] While reporting has improved to some degree since 2019, significant gaps remain, particularly with respect to reporting on the effectiveness of the measures that entities are taking to address modern slavery.[2]

[1] Amy Sinclair and Freya Dinshaw, 'Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act' (Report, 2022) 56. See also Freya Dinshaw, Justine Nolan, Christina Hill, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss and Peter Keegan, 'Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act' (Report, 1 November 2022).
[2] Jing Jia, Richard Fisher and Zhongtian Li, 'NZ Is Finally Moving on Modern Slavery Law. What Can We Learn from Australia?' The Conversation (online, 9 September 2026).

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For this reason, the Law Society therefore supports in principle changes to the Framework which will lead to an increased focus on due diligence, and a greater emphasis on compliance and enforcement to better support the protection of those impacted by modern slavery.

In our view, however, the introduction of a new criminal offence for failing to prevent modern slavery in supply chains will not, on its own, be effective in reducing the incidence of modern slavery. For the reasons outlined below, we consider that the Government should implement the recommendations contained in the *Report of the statutory review of the Modern Slavery Act 2018 (Cth): The first three years* conducted by Professor John McMillan AO (**McMillan Report**)[3], particularly in relation to the introduction of mandatory due diligence as the next phase in Australia's modern slavery regime. If such changes fail to bring about effective outcomes, the Government could then proceed to consider an appropriately framed "failure to prevent" criminal offence.

I. The introduction of a "failure to prevent" criminal offence in the context of Australia's current modern slavery framework (**Framework)**

To date, the Framework has been based on mandatory reporting obligations prescribed by the *Modern Slavery Act 2018* (Cth) (**Act**), which requires companies with an annual consolidated revenue exceeding $100 million to submit modern slavery statements addressing seven mandatory criteria. The legislative scheme does not incorporate any civil or criminal sanctions or penalties. For example, reporting entities currently do not face penalties if they fail to submit a modern slavery statement in line with the requirements of the Act or their report is non-compliant, other than a Minister noting they have not complied with the Act under s 16A.

The McMillan Report identified an "elementary weakness" in Australia's existing regime on account of the way in which it imposed a requirement on reporting entities to "describe" their due diligence system, but not to "implement and utilise such a system".[4] It recommended a requirement for reporting entities to have due diligence systems to identify and assess modern slavery risks, and to set out their activities undertaken in accordance with such systems in their annual reporting.[5] The McMillan Report further recommended the introduction of civil penalty offences. This is reflected in Recommendation 20 for objective breaches of the reporting standards and proposed requirements around due diligence systems as follows:

> **Recommendation 20**
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> The Modern Slavery Act be amended to provide that it is an offence for a reporting entity:
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> - to fail, without reasonable excuse, to give the Minister a modern slavery statement within a reporting period for that entity
> - to give the Minister a modern slavery statement that knowingly includes materially false information
> - to fail to comply with a request given by the Minister to the entity to take specified remedial action to comply with the reporting requirements of the Act
> - to fail to have a due diligence system in place that meets the requirements set out in rules made under s25 of the Act.[6]

The Law Society supports the implementation of Recommendations 11 and 20 of the McMillan Report. In our view, the introduction of due diligence requirements, accompanied by civil penalties for non-compliance, would

[3] Professor John McMillan AO, 'Report of the statutory review of the *Modern Slavery Act 2018* (Cth): The first three years' (Final Report, 25 May 2023) (McMillan Report).
[4] McMillan Report (above n 3).
[5] Ibid, 12 (Recommendation 11).
[6] Ibid, 12 (Recommendation 20).

be a logical and meaningful next step in addressing forced labour and other forms of modern slavery in the supply chains of Australian businesses. We consider that these changes would also achieve better outcomes for people who have been subject to, or are at risk of being subject to, modern slavery practices, particularly as remediation forms a core element of due diligence.

For the reasons outlined below, we consider that the new "failure to prevent" offence should not precede the introduction of Recommendations 11 and 20 as the next step in the maturity of Australia's modern slavery regime.

a) Possible impacts of the new offence on progress to date in addressing modern slavery

While the McMillan Report identified notable weaknesses within the current statutory scheme, it found that there was strong willingness across business to combat modern slavery. For example, it noted the following positive impacts reported by stakeholders in the first three years of the Act's operations:

> The Act was said to be causing foundational change in business understanding of how modern slavery risks must be addressed – through appointment of specialist staff and creation of new internal governance procedures; adoption of auditing and supply chain mapping processes; deeper interaction with and interrogation of suppliers; implementation of new contract management systems; requirement of staff training at both executive and operational levels, adoption of complaint and grievance procedures, creation of professional networks and multi-stakeholder working groups, greater interaction with civil society organisations to enlist their support and insights, preparation and adoption of tailored guidance material and codes, and overall collaboration across business, professional and civil society networks.[7]

In our view, it is therefore important to consider improvements to the efficacy of the Act in a way that builds on the progress made by reporting entities. The Explanatory Memorandum to the Modern Slavery Bill 2018, for example, noted that the "transparency" objective "encourages businesses to strive to improve practices".[8] It was also expected that transparency would incentivise business to adopt the standards of due diligence increasingly expected by consumers, investors and markets in a "race to the top".[9]

From the commencement of the Act, entities have been encouraged to be transparent in their reporting. The *Guidance for Reporting Entities* (**Guidance**), for example, recognises that "it may take time for your entity to develop an effective response to modern slavery risk" and encourages entities to be "honest about your situation" and "honest about issues that may limit your ability to take action".[10] Further, the Guidance has acknowledged that entities may need to prioritise the risks to which they respond.[11]

We are concerned that the "failure to prevent" offence may have the result of discouraging the emphasis on transparency that has been central to the Framework and accompanying Guidance to date. It is conceivable, for example, that companies may be dissuaded from frank reporting, particularly in cases where they have actively identified a modern slavery practice within their supply chain, due to concerns that this may expose them to liability under the "failure to prevent" offence. In our view, this would be a step backwards, as transparency is in the interests of the business community as a whole, allowing businesses to learn from the experiences of others that operate in the same or comparable sectors and/or high-risk contexts and locations.

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[7] Ibid, 12 (Recommendation 20).
[8] Statement of Compatibility with Human Rights on the Modern Slavery Bill 2018 (Cth) 31 [46].
[9] Explanatory Memorandum to the Modern Slavery Bill 2018 (Cth) 2 [7].
[10] Australian Government, 'Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities' (Updated May 2023) 50. ' (Updated May 2023) 50.
[11] Ibid.

b) Limited ability of a criminal offence to give rise to tangible outcomes for victim-survivors of modern slavery

The McMillan Report found that while the Act has led to an increased understanding by business and government entities of modern slavery risks, "there is no hard evidence that the Modern Slavery Act in its early years has yet caused meaningful change for people living in conditions of modern slavery".[12] The *Guiding Principles on Business and Human Rights* (**UNGPs**)[13] and the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*[14] also recognise that companies that cause or contribute to the harms of modern slavery have a duty to remediate them.

It is possible that a criminal offence will assist victim-survivors of modern slavery in the sense that it will be a strong incentive to business to ensure that modern slavery is not occurring in supply chains. However, its impact on victim-survivors in accessing justice may be limited in some respects. First, it is conceivable the many instances of modern slavery will occur not at the level of direct, tier-one suppliers but deeper in the supply chain and outside Australia. Such complexities will make a "failure to prevent" offence difficult to successfully investigate and prosecute. Second, even if the criminal offence was made out, this would not guarantee any form of compensation etc., for the victim-survivor. At the current time, there is no Commonwealth criminal injury compensation scheme for victims of Commonwealth crime, and no national compensation scheme for victim-survivors of modern slavery. The significant limitations of state and territory victims of crime financial assistance and compensation schemes for victim-survivors of modern slavery are also well-documented.[15]

In our view, mandatory due diligence as a first step could bring about tangible outcomes. For example, if a company does identify actual examples of forced labour practices within its supply chains, it is sometimes not in the best interests of the worker, or the eradication of modern slavery more generally, that the company immediately ceases all business with the supplier. Rather, remediation in the context of due diligence means that the purchaser company may direct the supplier to respond to their findings and ameliorate working conditions. This is also envisaged in UNGP 19, which suggests that businesses may be in a position to "leverage to prevent or mitigate the adverse (human rights) impact" before considering ending the relationship.[16] The introduction of a "failure to prevent" offence may mean that, due to risk considerations, a company will immediately cease to work with any supplier where the risk of modern slavery is identified, which may do little to address the underlying conditions giving rise to modern slavery.

c) Potential overlap with existing criminal offences

Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) contain offences relating to slavery, servitude, forced labour, debt bondage, deceptive recruiting and human trafficking. For example, section 270.3(1)(c) of the Criminal Code makes it an offence to enter into a commercial transaction involving a slave. The *Proceeds of Crime Act 2002* (Cth) also applies in circumstances involving modern slavery offences. Further, Commonwealth complicity offences under ss 11.2 and 11.2A of the Criminal Code may also be available to establish corporate criminal liability. The Consultation Paper does not address the extent to which the proposed offence would overlap with, or otherwise practically interact with, these existing legislative mechanisms.

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[12] McMillan Report (above n 3) 8.
[13] United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UN Publication, 2011).
[14] Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Publishing, Paris, 2023).
[15] Australian Institute of Criminology, 'Strengthening Australia's criminal justice response to modern slavery: A rapid assessment' (Report, 2026) 33-35.
[16] Guiding Principles on Business and Human Rights (above n 13), 20-22.

II. Proposed elements of a failure to prevent offence for modern slavery

As noted above, we have concerns about the efficacy of a modern slavery offence and its desirability at this stage of the Framework's maturity. If the offence is to be introduced, however, we suggest the following considerations should be taken into account.

a) Fault element

In our discussion with our members, there has not been a consensus position on the appropriate fault element of any offence.

We note that strict and absolute liability offences are common across various Commonwealth regulatory regimes such as corporate and prudential regulation, environmental law and national security law. Some members have suggested that a strict liability offence accompanied by a reasonable steps defence explicitly grounded in the UNGPs and a clear definition of human rights due diligence would be most appropriate. This approach would place the legal onus on the corporation to demonstrate that it conducted appropriate human rights due diligence. Consequently, if a supplier uses forced labor or other forms of modern slavery, the company would be prima facie liable unless it can prove that its compliance systems, audits, and preventative protocols were robust and reasonable under the circumstances.

Other members have acknowledged that while strict or absolute liability offences may generally be considered desirable to ensure the integrity of a regulatory regime, it should be noted that, in undertaking modern slavery due diligence, companies are naturally reliant on information from third party suppliers. These constitute not only direct (Tier-one) suppliers but, in many cases, an extensive number of smaller suppliers further upstream in the supply chain based across different international jurisdictions. For example, the Australian based company may have mandated certain conditions with their suppliers and received false or inaccurate confirmation that these conditions are being complied with by the suppliers, with limited practical means of independently verifying compliance.

b) Connection to a corporation's sourced product or services

The Consultation Paper suggests that the offence, in addition to requiring a nexus between modern slavery and the goods that form part of the corporation's sourcing arrangements, could require an additional link or nexus between the corporation's conduct and the underlying criminal conduct.[17]

If a criminal offence is to be introduced, we suggest that it should require the corporation, through an act or omission, to have materially contributed to the conduct which amounts to modern slavery. This may be more appropriate than requiring "causation" as the prescribed connection, which could either be interpreted as meaning that the act of the corporation is the sole cause of the harm or, alternatively, that the company caused the harm in the sense that, without the company's action or omission, the harm would not have occurred.

c) "Reasonable steps" defence

The Consultation Paper proposes that a "reasonable steps" defence should be available where companies can demonstrate they had adequate procedures in place to prevent modern slavery in their supply chains. It is proposed that such a defence would be "determined by the courts on a case-by-case basis, having regard to the guidance and any other reasonable steps taken by the corporation".[18]

[17] Australian Government, Attorney General's Department, Strengthening Australia's response to modern slavery in supply chains (Consultation Paper, August 2026), 8 & 11.
[18] Ibid., 9.

The Law Society agrees with the need for this defence. The Consultation Paper notes that the responsible Minister would issue "clear advice as to the steps that would be considered reasonable for a corporation to take". We suggest that it is not sufficient to clarify what constitutes reasonable steps within extrinsic material where non-compliance leads to a criminal penalty. While we appreciate that factors such as a company's size and risk profile would undoubtably inform what constitutes reasonable steps, it would be appropriate for the Act or Regulations to set out the minimum due diligence requirements expected of reporting entities, to provide businesses with a reasonable degree of certainty that their practices are lawful.

d) Commencement

There will need to be a delay for commencement. We consider this particularly important given that the Framework has not yet reached a level of maturity whereby all companies engage mindfully with due diligence beyond tier-one suppliers.

III. Alternative enforcement

The Consultation Paper suggests the use of a Deferred Prosecution Agreement (**DPA**) scheme as a practical and proportionate enforcement mechanism. We note that, in discussion with our members, there was no consensus on the desirability of a DPA scheme.

While a DPA scheme does not currently exist in Australia, we note that it is not dissimilar to court enforceable undertakings accepted by corporate regulators such as the Australian Securities & Investments Commission in the sense that it provides a more flexible form of corporate regulation and an alternative to enforcement, albeit for civil as opposed to criminal offences. In that respect, a DPA scheme may offer a more appropriate alternative enforcement mechanism under the Act, with potential advantages including earlier intervention in cases of modern slavery, the facilitation of remedial measures, and the provision of compensation for victim-survivors. It is also conceivable that a DPA scheme may encourage self-reporting by companies of criminal conduct. However, its effectiveness will likely depend on the development of clear guidance regarding the practical operation of a DPA scheme, including approvals processes, eligibility criteria, ongoing compliance obligations and monitoring mechanisms.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,



Ronan MacSweeney
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