



Law Council
OF AUSTRALIA

Modern Slavery Bill 2018

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its Business and Human Rights Committee, the Law Society of South Australia, the Law Society of New South Wales and the Law Institute of Victoria for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Modern Slavery Bill 2018 (**the Bill**).
2. The Law Council considers addressing modern slavery to be of paramount importance and has previously made submissions related to this issue, including to the Attorney-General's Department,¹ the Joint Standing Committee on Foreign Affairs, Defence and Trade,² the Joint Committee on Law Enforcement Inquiry into Human Trafficking,³ and the Committee's Inquiry into Slavery, Slavery-like conditions and People Trafficking.⁴ The Law Council also published a report in conjunction with Anti-Slavery Australia on *Establishing a National Compensation Scheme for Victims of Commonwealth Crime in relation to victims of human trafficking*.⁵
3. The Law Council congratulates the Government on the introduction of the Bill and welcomes the proposed inclusion of a Modern Slavery reporting requirement for corporations and other entities operating in Australia. The Law Council is pleased to note improvements to the model proposed for reporting requirements in 2017, including that the Government will be subject to the reporting requirements, and that the 'worst forms of child labour' is included in the definition of 'modern slavery'.
4. There are, however, notable areas for improvement to increase the prospects of the Bill and the subsequent proposed regulatory framework creating a culture of compliance and a 'race to the top'. The Law Council's two major concerns are that the revenue threshold for attracting the reporting requirements (\$100 million) is set too high to achieve the Bill's stated aims, and the lack of penalties in the legislation for non-compliance with the reporting requirements means there is little incentive for entities to report.
5. The Law Council recommends that the threshold be revised to \$60 million, and the legislation be amended to include financial penalties for non-compliance, and/or a requirement that entities bidding for Government contracts must be up-to-date on reporting, if required to report. At the very least, these should be matters for express consideration when the legislation is reviewed in three years.
6. Further, the Law Council is concerned that the Government has missed the opportunity with this legislation to enact some of the key recommendations made by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its report *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (*Hidden in Plain Sight* report). Key omissions include the creation of an Anti-Slavery Commissioner to provide guidance and a mechanism through which concerns regarding company operations in relation to human rights violations or modern slavery may occur, and a

¹ Law Council of Australia, *Submission to the Attorney-General's Department* (2 November 2017) <www.lawcouncil.asn.au/resources/submissions/modern-slavery-in-supply-chains-reporting-requirement>.

² Law Council of Australia, Submission No 60 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017).

³ Law Council of Australia, Submission No 21 to the Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Human Trafficking* (15 February 2016).

⁴ Law Council of Australia, Submission 29 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Slavery, Slavery-like conditions and People Trafficking* (2 October 2012).

⁵ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) <<https://lawcouncil.asn.au/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

national compensation scheme for victims of modern slavery. The Law Council urges the Government to consider amending the Bill and/or enacting other legislation to include these matters, or at the very least, consider including these matters when the legislation is reviewed in three years.

7. The Law Council has also made a number of other recommendations to strengthen the Bill, including:
 - (a) omit the reference to ‘within the meaning of the *Corporations Act 2001* (see section 21 of that Act) in the definition of ‘carrying on business in Australia’, and clarify its meaning in subsequent guidance, so that foreign parent companies with revenue above the threshold may be captured;
 - (b) amend proposed section 16 (mandatory criteria for modern slavery statements) to make clear that if an entity considers that it does not have any modern slavery risks, that it is required to explain why it does not, and the processes it uses to arrive at this determination;
 - (c) the Commonwealth should work with New South Wales to harmonise reporting criteria and ensure there is only one central registry for modern slavery statements; and
 - (d) should the Bill pass, the Government should support the Act by ensuring it maintains a robust repository of modern slavery statements, produces quality guidance for entities required to report, conducts outreach and awareness, review the Bill against Australian Institute of Criminology research, and consider further action to removing barriers to report for victims of modern slavery in Australia.

The proposed revenue threshold

8. The Bill, if enacted, will require entities that meet the \$100 million revenue threshold to report on the risks of modern slavery in their operations and supply chains and actions to address those risks. The Law Council considers that the \$100 million revenue threshold is too low, and prefers a threshold closer to \$60 million, being approximately equivalent to the UK Modern Slavery Act (**UK MSA**) threshold. The Law Council notes that the threshold in the *Modern Slavery Act 2018* (NSW) (**NSW MSA**) is set at \$50 million.⁶
9. In any case, the Law Council considers that a principled approach to setting a threshold amount should be adopted, as previously expressed.⁷ The threshold should be set at a figure that corresponds with the purpose of the legislation, being to address modern slavery risks in the supply chains of goods and services,⁸ by requiring companies which are large enough to influence suppliers to report.⁹ Further, when setting the threshold amount, the Government should take into account:

⁶ *Modern Slavery Act 2018* (NSW) s 24(1)(b).

⁷ Law Council of Australia, Submission No 60 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017) [51]; Law Council of Australia, *Submission to the Attorney-General's Department on the Modern Slavery in Supply Chains Reporting Requirement* (2 November 2017) [26] <www.lawcouncil.asn.au/resources/submissions/modern-slavery-in-supply-chains-reporting-requirement>.

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 15 (Alex Hawke, Assistant Minister for Home Affairs).

⁹ *Ibid* 16.

- (a) the likelihood that some Australian multinationals will be required to report under both the Australia MSA and the UK MSA, and that consistency is preferable;
 - (b) existing reporting requirements in Australian legislation, such as in NSW MSA and the *Corporations Act 2001* (Cth) (**Corporations Act**), and the confusion and compliance costs that may result from the same entity being classed differently under different legislation; and
 - (c) data about entity turnover already collected by, or capable of collection by, government entities such as the Australian Securities Investment Commission or the Australian Tax Office, to determine which companies are required to report.
10. Further, the Law Council is concerned that the Bill does not capture the Australian subsidiaries of a foreign parent company with global consolidated revenue that exceeds the reporting threshold, but whose operating subsidiary in Australia's revenue does not. For example, a Chinese parent company with \$100 million revenue, with a subsidiary in Australia with \$50 million revenue, would not need to report, but an Australian parent company with \$100 million revenue, with a subsidiary in Australia with \$50 million revenue, would need to report. This creates an uneven playing field between Australian headquartered companies and foreign headquartered companies.
11. At present, the Bill only captures the foreign parent if it 'carries on business in Australia, a State or a Territory within the meaning of the Corporations Act 2001 (see section 21 of that Act)'. However, section 21 of the Corporations Act sets a relatively high threshold for 'carrying on business' in Australia and is addressed towards the circumstances in which an entity must register as a foreign corporation, an entirely different regulatory context.
12. The Law Council considers that a more common-sense approach should be adopted to determining whether an entity 'carries on business' in Australia. This could be achieved by omitting the reference to 'within the meaning of the Corporations Act 2001 (see section 21 of that Act)' from the definition of 'carries on business' and providing more detail in published guidance developed in consultation with business, civil society, and other relevant stakeholders. The Law Council notes a similar approach has been taken in the UK in relation to the UK MSA and the *Bribery Act 2010* (UK) and their respective guidance documents.¹⁰

Penalties or compliance drivers to incentivise compliance

13. The Law Council is concerned that the Bill does not include financial penalties for non-compliance. In the Law Council's view, this aspect of the proposed model undermines the reporting scheme and is inconsistent with the Government's aim to addressing modern slavery in supply chains. The Bill also does not include compliance drivers, such as requiring entities that bid for Government contracts to have complied with their reporting requirements to date.
14. In his Second Reading speech, Assistant Minister Hawke claimed that 'businesses that fail to take action will be penalised by the market and consumers and severely tarnish

¹⁰ See *Modern Slavery Act 2015* (UK) s 54(2) and UK Home Office, *Transparency in supply chains etc.: A practical guide* (2017) [3.5]-[3.8] <<https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>>; *Bribery Act 2010* (UK) s 7(5) and UK Ministry of Justice, *The Bribery Act 2010 Guidance* (2011) [36] <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

their reputations'.¹¹ The Law Council considers that these potential consequences may be overstated. First, it assumes that the market and consumers are informed of companies' non-compliance, but it is unclear how they will be informed, when the legislation does not provide for the publication of a list of companies that have not reported, or even a list of companies required to report.

15. Second, it assumes that, with the knowledge of non-compliance, the market and consumers will respond appropriately, but some studies indicate that the corporate social responsibility of a company hardly influences consumers.¹² Finally, it assumes that companies are concerned about the reputational risks of non-compliance, however this is only likely to be the case for the few consumer-facing companies with brand recognition.¹³
16. Given the unreliability of leaving compliance incentives to the market and consumers, in the Law Council's view, penalties or compliance drivers are preferable to incentivise reporting. The inclusion of penalties and compliance drivers in the legislation is consistent with driving a culture of compliance and 'race to the top'. As the Law Council has previously expressed, penalties need not be imposed in the first instance of non-compliance, but must be capable of being imposed as last resort for entities that continue to flout their obligations after guidance and warning.¹⁴ The Law Council notes that the NSW MSA has penalties for non-compliance,¹⁵ and adopting penalties at the Commonwealth level would ensure consistency.
17. The Law Council notes that both the UK MSA and the *Californian Transparency in Supply Chains Act 2010* include provisions for the Secretary of State and Attorney General respectively to seek injunctive relief against entities which fail to report to enforce compliance. Similar provisions could be included in the Australian legislation. However, as noted above, the Law Council's preference would be for financial penalties, particularly because recent reports from the UK show that reporting requirements were not being properly met, notwithstanding the threat of injunctive proceedings.¹
18. At the very least, consideration should be given to requiring the Government, after a reporting period, to publish a list of names of entities which were supposed to report in that period but failed to do so.

Other issues

Anti-Slavery Commissioner

19. The Law Council is concerned that the Bill does not establish an Independent Anti-Slavery Commissioner (**Commissioner**). In the Law Council's view, the case for an Anti-Slavery Commissioner was well-made in the *Hidden in Plain Sight* report, which notes that it would complement the existing roles of the Attorney-General's Department and

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 15 (Alex Hawke, Assistant Minister for Home Affairs).

¹² See for example, D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC, Brookings Institution Press, 2005) 73.

¹³ See Law Council of Australia, *Submission to the Attorney-General's Department on the Modern Slavery in Supply Chains Reporting Requirement* (2 November 2017) [53]

<www.lawcouncil.asn.au/resources/submissions/modern-slavery-in-supply-chains-reporting-requirement>.

¹⁴ *Ibid* [60]-[61].

¹⁵ Modern Slavery Act (NSW) s 24.

the Ambassador for People Smuggling and Human Trafficking.¹⁶ The Law Council notes that the NSW MSA creates a role for a Commissioner.¹⁷

20. As the Law Council has previously suggested, in terms of the reporting requirement, the Commissioner's functions could include providing guidance to businesses on complying reporting requirement, operating the database of Modern Slavery Statements, preparation and publication of a list of entities required to report. The Commissioner's role could also include oversight of the implementation of the National Action Plan to Combat Human Trafficking and Slavery, as well as well as advocating for and promoting action to combat modern slavery through wider-ranging policy initiatives.

Content of reporting requirements

21. The Law Council considers that the mandatory reporting criteria in proposed section 16 of the Bill are generally appropriate. However, they still leave open the possibility of an entity stating that it has no risks and therefore not needing to explain what it has done to address those risks. The Law Council considers that this section should be amended to make clear that if an entity identifies that it has no risk, it should be required to state why it considers it does not have any risk and the processes it uses to make this determination.
22. As the Law Council has previously noted,¹⁸ action on modern slavery must form part of the Australian Government's overarching commitment to human rights and human rights obligations. The Law Council was pleased to note in the Explanatory Memorandum that the 'Australian Government will encourage entities to make use of the UNGPs [United Nations Guiding Principles on Business and Human Rights] and other relevant frameworks to help them identify, prioritise and respond to modern slavery risks'.¹⁹
23. However, the central requirement of the UNGPs, namely the obligation to conduct human rights due diligence, is absent from the reporting requirements, nor are the UNGPs cited in the Bill nor the Minister's Second Reading Speech. In the Law Council's view, aligning action on modern slavery with the UNGPs, which represent international best practice and already guide the reporting of many multinational companies, is essential.
24. The Law Council is concerned about the overlap between the Commonwealth and New South Wales reporting regimes, including the different criteria against which reporting entities are required to report.²⁰ The Law Council encourages the Commonwealth to work with New South Wales to harmonise reporting criteria, to avoid entities captured by both regimes having to produce two statements, and to reduce the compliance costs and confusion that occurs from entities being subject to two reporting regimes.

Publication of statements

25. The Law Council considers that the Bill should be amended to require companies to publish their Modern Slavery Statements on their websites, as required by the UK Act. While compilation of statements in a central registry is crucial, statements published to

¹⁶ Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017) [4.61].

¹⁷ Modern Slavery Act 2018 (NSW) s 9.

¹⁸ See for example, Evidence to Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Melbourne, 1 August 2017, 20 (Fiona McLeod).

¹⁹ Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [127].

²⁰ Compare Modern Slavery Bill 2018 (Cth) s 16 with *Modern Slavery Act 2018* (NSW) ss 24(4), 24(5).

the websites of companies are likely to increase their visibility with their consumers, investors and other stakeholders.

26. In addition, the Law Council recommends that the Commonwealth work with New South Wales to ensure that there is only be one central register for modern slavery statements produced under both jurisdictions. Two parallel registers will only make it more difficult for interested stakeholders to find information about companies required to report and may make it more difficult to compare companies if different information is provided by each registry.

National compensation scheme for victims of modern slavery

27. For many years, the Law Council has supported introducing a national compensation scheme for victims of modern slavery, setting out the case for doing so in detail in its 2016 publication, *Establishing a National Compensation Scheme for Victims of Commonwealth Crime*.²¹ At least four Federal Parliamentary inquiry reports have recommended the introduction of a federal compensation scheme for victims of modern slavery,²² most recently the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, in its *Hidden in Plain Sight* report.²³
28. The Law Council considers that the Government should heed these recommendations to introduce a national compensation scheme for victims of modern slavery, if not through amendment to this Bill, then in a timely fashion following its passage.

Beyond the Bill

29. As the UK experience has shown, clear guidance for entities required to report is essential to ensure the production of high-quality statements, which in turn are essential for civil society to identify and report on trends and the effectiveness of the reporting requirements on reducing modern slavery in supply chains.
30. Therefore, assuming the passage of the Bill, the Law Council and its Constituent Bodies make the following suggestions regarding measures the Government may consider adopting to support the implementation of the Modern Slavery Act, should the Bill pass:
- (a) robust repository of modern slavery statements: while the Law Council commends the Government's plans, enshrined in the Bill, to create a central repository for Modern Slavery Statements, it urges the Government to ensure the repository contains sufficient information to allow for thorough analysis of reporting entities' compliance. In addition to previous suggestions made by the

²¹ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) <<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

²² Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) [3.88] (recommendation 2); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) xviii (recommendation 6); Joint Standing Committee on Law Enforcement, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (2017) xii, 35-37; Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) [6.133] – [6.136].

²³ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) [6.133] – [6.136]; see also, Law Council of Australia, *National Compensation Scheme for victims of modern slavery a watershed recommendation* (7 December 2017) <<https://www.lawcouncil.asn.au/media/media-releases/national-compensation-scheme-for-victims-of-modern-slavery-a-watershed-recommendation>>.

Law Council,²⁴ the Law Society of New South Wales has suggested that it should be easily searchable, well-maintained, and current, as well as providing information on the entities required to report, and the status of their compliance;

- (b) quality guidance for entities required to report: clear and comprehensive guidance should be provided by the Government to reporting entities to ensure compliance does not become a 'tick box' exercise. It is fundamental, for example, that any guidance clearly explain the meaning of key terms that are not defined in the legislation, such as 'supply chains' and 'operations'.²⁵ The Government should consult widely and publicly on the content of any guidance, and the guidance should be made available to reporting entities well before they are required to report.
- (c) outreach and public awareness: the Law Society of New South Wales has suggested a public awareness campaign targeted at both business and consumers, regarding the modern slavery risks in supply chains, which should include measurable outcomes and evaluations for the campaign;
- (d) review Bill against Australian Institute of Criminology research: the Law Institute of Victoria has suggested that any review of the Modern Slavery Act take into account the Australian Institute of Criminology's ongoing research in labour trafficking, child labour, force labour and exploitation in Australia; and
- (e) removing barriers to reporting for victims of modern slavery in Australia: while companies reporting modern slavery risks in their supply chains is important, so too is employees experiencing modern slavery reporting it. As the Law Council has previously noted, an individual's migration status may prevent them from informing authorities that they have experienced labour exploitation.²⁶ The Law Institute of Victoria has recommended that the Government consider formally separate labour issues reported to the Fair Work Ombudsman and immigration issues within the domain of the Department of Home Affairs, in this Bill, or through other appropriate mechanisms.

²⁴ Law Council of Australia, *Submission to the Attorney-General's Department* (2 November 2017) [51] <www.lawcouncil.asn.au/resources/submissions/modern-slavery-in-supply-chains-reporting-requirement>.

²⁵ See also Law Council of Australia, *Submission to the Attorney-General's Department* (2 November 2017) [32]-[35] <www.lawcouncil.asn.au/resources/submissions/modern-slavery-in-supply-chains-reporting-requirement>.

²⁶ Law Council of Australia, Submission No 36 to the Senate Standing Committees on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work (Protecting Vulnerable Workers) Amendment Bill 2017 (Cth)* [4]; Law Council of Australia, *Justice Project Consultation Paper: People Who Have Been Trafficked and Exploited* (August 2017) 19-20.