



Law Council  
OF AUSTRALIA

# Modern Slavery in Supply Chains Reporting Requirement

**Attorney-General's Department**

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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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 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, 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, its National Human Rights Committee, the Law Institute of Victoria and the Law Society of New South Wales for their assistance in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to make a submission on the Attorney-General Department's *Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement (Consultation Paper)*.<sup>1</sup>
2. The Consultation Paper outlines a model for the Government's proposed reporting requirements. Notably, the proposed model would require entities with annual revenues of \$100 million or higher to report on four mandatory criteria. Modern Slavery Statements prepared by entities would be compiled in a central registry, and there would be no sanctions for reporting entities that failed to produce a Statement. The Consultation Paper also sets out twenty-four discussion questions about the proposed model, which the Law Council has addressed in this submission.
3. The Law Council also notes the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade's (**Committee**) inquiry on Establishing a Modern Slavery Act in Australia's (**Modern Slavery Act Inquiry**) interim report, which has provided 'in principle' support for 'mandatory annual modern slavery supply chain reporting requirements to apply, above a particular threshold, to companies, businesses, organisations (including religious organisations) and Governments operating in Australia'.<sup>2</sup> The Law Council encourages the Government to take into account the relevant findings of the Committee's final report prior to finalising its proposed model for supply chain reporting requirements.
4. The Law Council generally considers the Government's proposed reporting requirements to be appropriate. In particular, the Law Council commends the Government for seeking to improve on the *Modern Slavery Act 2015 (UK) (UK MSA)* by making the reporting criteria mandatory and providing for the establishment of a central registry for modern slavery statements.
5. However, the Law Council considers that the Government's proposal requires two important changes if it is to achieve its objective of identifying and addressing modern slavery in supply chains. First, the revenue threshold for entities required to report should be lowered from \$100 million, to an amount no higher than \$60 million. This would promote consistency with the UK MSA. Second, the Law Council recommends that penalties for non-compliance with the reporting requirements be introduced. The Law Council considers that without penalties, a mandatory reporting requirement is rendered merely aspirational, as there is no enforcement mechanism, nor any consequence for non-compliance. In any case, the legislation should still include appropriate compliance drivers. For example, the Government could consider making it a term of Government contracts that any reporting entity with whom the Government contracts is required to have submitted all relevant Modern Slavery Statements, and publishing a list of non-compliant entities after the deadline for reporting has elapsed.

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<sup>1</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government*.

<sup>2</sup> Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, *Modern Slavery and global supply chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (August 2017) xvii, 48 [4.6].

6. The Law Council makes the following additional recommendations and observations:

- The proposed definition of modern slavery is appropriate and simple to understand. However, reporting entities should also be required to report on the 'worst forms of child labour'. Consideration should also be given to updating the definition of 'human trafficking' to bring it into line with international law developments.
- Reporting 'entity' should be defined broadly enough to encompass all Australian businesses, including public sector entities, and foreign businesses operating in Australia that meet the turnover threshold, regardless of corporate structure. 'Entity' should also include all entities listed on the Australian Stock Exchange (**ASX**), regardless of whether they meet the turnover threshold. The definition of reporting entity should include groups of entities that have aggregate revenue that exceeds the threshold.
- Revenue should be defined consistent with the definition provided in the Australian accounting standards in force at the relevant time.<sup>3</sup>
- 'Operations' should be defined broadly, for example, 'any operations or activities carried out, or investments held or made by an entity'. 'Supply chain' should also be defined broadly, for example, 'vertically integrated systems of production that link raw materials to finished product'.<sup>4</sup>
- Reporting entities will likely respond to the reporting requirement by conducting some degree of due diligence, which will include the employment of any number of strategies. The response of any one entity will depend on the extent of modern slavery risks in its supply chain, the entity and board's appetite for negative public relations and past reputational impacts. It is foreseeable that some entities will spend more than \$11,500 on these strategies, and others will spend less.
- The regulatory impact on entities will depend on the entity involved and how it decides to respond to the reporting requirement. However, for all entities, it is likely to include initial and ongoing administrative costs, as well as substantive compliance costs. The regulatory impact cannot be further reduced without limiting the effectiveness of the reporting requirement.
- The four reporting criteria are generally appropriate. An additional criterion should be added to the mandatory reporting criteria to address the issue of remedy. 'Due diligence' should be defined consistently with the four principles for human rights due diligence in the United Nations Guiding Principles on Business and Human Rights (**UNGPs**). If entities are required to report on the number and nature of modern slavery incidents in a reporting year, government guidance should clearly define 'modern slavery incident' to exclude unsubstantiated or trivial reports. Entities should be afforded sufficient time to develop their capacity to identify incidents.
- Government guidance should be provided which makes clear that the reporting requirements should be interpreted consistently with the UNGPs; and how entities can meaningfully comply with reporting requirements, to avoid reporting becoming a 'tick box' exercise.

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<sup>3</sup> See Australian Accounting Standards Board, *AASB 15: Revenue from Contracts with Customers* (December 2014) 47 (definition of ('income')) <[http://www.aasb.gov.au/admin/file/content105/c9/AASB15\\_12-14.pdf](http://www.aasb.gov.au/admin/file/content105/c9/AASB15_12-14.pdf)>.

<sup>4</sup> Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, *Modern Slavery and global supply chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (August 2017) 19-20, citing Anti-Slavery Australia, Submission No 156 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia*, 2017, 69.

- The central registry should be funded and operated by Government. In addition to being free, publicly available, searchable and online, the registry should:
  - contain a list of all entities required to report;
  - list the entity's financial year and reporting deadline;
  - have capability for direct upload of statements and alerts for which anyone can sign up to receive when statements have been uploaded; and
  - have capability for statements to be filtered by year, company, sector and country.
- The five-month deadline for entities to publish Modern Slavery Statements is appropriate. The deadline should be linked to the end of the entities' reporting year, to promote higher quality Statements.
- There should be an implementation period for the reporting requirement that commences from the date the legislation enters into force and which runs until the end of the next full financial year. Government guidance for entities on how to comply with the reporting requirements should be released when the legislation is introduced.
- The Law Council supports the establishment of an independent Anti-Slavery Commissioner or Ombudsman, who has a mandate to engage with relevant stakeholders and receive both formal and informal feedback on the effectiveness of the reporting requirements. An annual roundtable could be held to assess the effectiveness of the reporting requirements. An annual forum could be convened with CEOs of reporting entities, to bring the importance of effective reporting requirements to the boardroom and ensure that senior leaders' insights on the approval process as well as broader change management are considered.
- The oversight mechanism for the reporting requirements:
  - should be independent, for example an independent Anti-Slavery Commissioner or Ombudsman; and
  - could perform the following functions:
    - review reporting entities' statements for quality and effectiveness;
    - produce annual reports that publish findings on general trends of quality and effectiveness of statements;
    - provide guidance and training to the business community on the reporting requirements;
    - work with any non-compliant entities to strengthen their ability to comply;
    - oversee the National Action Plan on Human Trafficking and Slavery, as well as any future implementation on the UNGPs in Australia; and
    - make recommendations to Government on how reporting requirements might be improved or strengthened in line with feedback from stakeholders.
- The Government should not reconsider option 1 (take no action) and 2 (encourage voluntary action by the private sector). Option 2 would still impose regulatory costs on the business community, but they would be shared unequally, as opposed to equally under option 3 (introduce reporting requirements in legislation), which remains the strongest option to address modern slavery in supply chains.

## Introduction

7. With Australia's membership of the UN Human Rights Council, the international community will look to Australia for leadership on human rights. It is more important than ever for the Australian Government to lead by example to put Australia at the forefront efforts to address business-related human rights impacts internationally.<sup>5</sup>
8. The Government has already taken positive steps in this direction, including by expanding the Bali Process to include the private sector by launching the Bali Process Government and Business Forum to combat human trafficking, forced labour and related exploitation.<sup>6</sup> The Government has also said that the proposed reporting requirements will send the clear message that the Government will work with the business community to address modern slavery and will not tolerate Australian businesses benefiting from modern slavery in their operations and supply chains.<sup>7</sup>
9. The Law Council's *Policy Statement on Human Rights and the Legal Profession* commits the Law Council to promote respect for human rights by Australian corporations and other incorporated and unincorporated entities, including through implementation of the UNGPs and human rights impact assessment processes.<sup>8</sup> The Law Council also participates in the National Roundtable on Human Trafficking and Slavery. The Law Council's President, Fiona McLeod SC, was the Chair of the Working Group on Labour Exploitation, and participated in the Department of Foreign Affairs and Trade's (DFAT) multi-stakeholder forum on business and human rights. Slavery is an abuse of human rights in and of itself but also implicates a panoply of other human rights abuses as well. Therefore, the Law Council's approach to its eradication is a broad one that involves engaging with and addressing human rights abuses more broadly.
10. Therefore, notwithstanding the positive steps already taken, the Law Council encourages Government not to stop at modern slavery, but in future to consider addressing the full range of business-related adverse human rights impacts. The Government must ensure that its focus on and attempts to combat 'modern slavery' are not divorced from its overarching state duty to protect and promote human rights at international law. That duty requires state action on human rights generally, not just those practices said to constitute 'modern slavery', the precise nature of which are difficult to determine as it is a term lacking a definition in international law.<sup>9</sup> The

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<sup>5</sup> See also Law Council of Australia, *Australia's election to Human Rights Council an opportunity to lead and learn* (17 October 2017) <<https://www.lawcouncil.asn.au/resources/media/media-release/australia-s-election-to-human-rights-council-an-opportunity-to-lead-and-to-learn>>.

<sup>6</sup> See Bali Process, *Bali Process Government and Business Forum* (2017) <<http://www.baliprocess.net/bali-process-Government-and-business-forum>>.

<sup>7</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 13.

<sup>8</sup> Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key principles and commitments* (May 2017) 6 [6] <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/human-rights-policy>>.

<sup>9</sup> Michael Dottridge, 'Eight reasons why we shouldn't use the term 'modern slavery'' (17 October 2017) *OpenDemocracy* <<https://www.opendemocracy.net/beyondslavery/michael-dottridge/eight-reasons-why-we-shouldn-t-use-term-modern-slavery>>.

Government should ensure modern slavery reporting requirements form just one part of furthering Australia's broader business and human rights agenda.

11. To that end, the Law Council urges the Government to re-consider the development and implementation of a National Action Plan on Business and Human Rights. A National Action Plan would be a simple step the Government could take to signal the Government's commitment to business and human rights issues. It would also provide leadership, direction and a framework for Australian business on how to address their human rights-related impacts. This would provide much needed and sought-after guidance to Australian businesses and place them on an equal footing with competitors in international markets.<sup>10</sup>
12. However, the Law Council considers that regulation alone will not eliminate modern slavery, nor should the burden fall entirely to the private sector to persuade their suppliers to give up these practices. The Government's approach should be premised on an acknowledgment and understanding of the drivers, pressures and legal systems that create the conditions that lead to modern slavery. For example, at a recent outreach event held by the Australian National Contact Point, an international expert recently spoke of his interactions with a factory manager in India who had become disillusioned with international standards for responsible business.<sup>11</sup> The factory manager reported being told in the same week, by different representatives of the same company, to both cut costs *and* pay a living wage, consistent with the company's human rights commitment. As this example illustrates, while regulation and standards are important, in the battle against modern slavery, there must be recognition of the underlying social and economic conditions that drive its existence.
13. Therefore, in addition to regulating business, the Law Council encourages the Australian Government to supplement its regulatory action on modern slavery with development-related approaches in countries and sectors where there are higher risks of and larger numbers of people experiencing 'modern slavery'. For example, DFAT's Australian Africa Community Engagement Scheme showed that 'women smallholder farmers are able to engage with international value chains provided they are supported to understand their rights, organise and obtain support to negotiate on prices and conditions'.<sup>12</sup> Notwithstanding that the Consultation Paper was authored by the Attorney-General's Department, Law Council considers that DFAT has an important role to play in Australia's response to modern slavery and therefore welcomes and encourages cross-agency coordination.

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<sup>10</sup> Human Rights Law Centre, 'Government ignores advice of expert group on business and human rights' (Media Release, 18 October 2017), citing Professor Paul Redmond <<https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights>>.

<sup>11</sup> Speech delivered by Professor Roel Nieuwenkamp, Australian National Contact Point Event on Responsible Business Conduct (Sydney, 11 October 2017).

<sup>12</sup> ActionAid Australia, Submission No 16 to the Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's trade and investment relationships with the countries of Africa* (August 2017) 1-2; see also Department of Foreign Affairs, Defence and Trade, *The Australia Africa Community Engagement Scheme: Effective Partnerships for Sustainable Development, Program Review 2011-6* (2016) <<http://dfat.gov.au/about-us/publications/Documents/aaces-program-review-2011-2016.pdf>>.

14. It is in the context of the Law Council's overarching view on modern slavery action that the Law Council provides its recommendations and observations on the Consultation Paper. Further detail on matters relevant to government action on modern slavery, beyond those already addressed in this submission, is provided in the Law Council's submission and supplementary submission to the Committee's Modern Slavery Inquiry.<sup>13</sup>

## Responses to Consultation Paper Questions

### Is the proposed definition of 'modern slavery' appropriate and simple to understand?

15. The Consultation Paper proposes that 'modern slavery' will be defined in any legislation regarding a supply chains requirement as:

*... conduct that would constitute a relevant offence under the existing human trafficking, slavery and slavery-like offence provisions set out in Divisions 270 and 271 of the Commonwealth Criminal Code...*<sup>14</sup>

16. The Law Council generally considers this definition appropriate and simple to understand. However, the Law Council recommends that the 'worst forms of child labour' also be included in the definition of practices constituting 'modern slavery' for the purposes of the reporting requirements, as it is not otherwise covered in divisions 270 and 271. In the UK, failure to include the worst forms of child labour in the definition of modern slavery means reporting entities are not required to report on child labour in their supply chains unless it amounts to slavery or forced labour.<sup>15</sup>

17. The Law Council considers that entities should be required to report on 'the worst forms of child labour' pursuant to any Australian reporting requirements, given:

- the hazardous working conditions children are known to be exposed to as part of global supply chains,<sup>16</sup> likely to harm their health, safety or morals;<sup>17</sup>
- Australia's obligations under the International Labour Organisation's *Convention on the Worst Forms of Child Labour (Convention)*;

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<sup>13</sup> Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>> and (1 September 2017) <<https://www.lawcouncil.asn.au/resources/submissions/responses-to-questions-on-notice-arising-from-the-law-council-s-appearance-at-the-hearing-for-the-inquiry-into-establishing-a-modern-slavery-act-in-australia->>>.

<sup>14</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 14.

<sup>15</sup> UNICEF Australia, Submission No 129 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (11 May 2017) 45 [87].

<sup>16</sup> *Ibid* 45-6. See also Appendix J ('List of goods produced with high risk of forced labour or child labour by country') to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (June 2013).

<sup>17</sup> 'Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children' falls within the definition of 'the worst forms of child labour' for the purposes of the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, C182 (entered into force 19 November 2000) article 3(d).

- the lead role Australia is playing in supporting the Global Alliance to Eradicate Forced Labour, Modern Slavery, Human Trafficking and Child Labour, known as Alliance 8.7;<sup>18</sup> and
- that the Committee has provided ‘in principle’ support for supply chain reporting requirements to include child labour.<sup>19</sup>

18. The Law Council recommends that ‘worst forms of child labour’ be defined consistently with Article 3 of the Convention.<sup>20</sup>

19. Further, although ‘human trafficking’ is defined in the Criminal Code, the Law Council also recommends that the Government consider updating the definition of ‘human trafficking’ for the purposes of the reporting requirement. ‘Human trafficking’ was criminalised in Australia consistent with Australia’s international obligations, but the definition of human trafficking from the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)* has developed since the offence was introduced in 2005. As Dr Anne Gallagher AO, regarded as the leading global expert on the international law of human trafficking,<sup>21</sup> has identified:

*[i]t was previously assumed that ‘movement’ was an essential aspect of the definition of trafficking in persons – that trafficking was essentially the process by which individuals were moved into situations of exploitation. However, international law and the overwhelming majority of national laws support a broader understanding of the term whereby any ‘action’ (including receiving and harbouring a person) for ‘purposes’ of exploitation, made possible through the use of ‘means’ such as coercion and deception, constitutes trafficking.<sup>22</sup>*

20. This development remains unaddressed in Division 271 of the Criminal Code. Providing an updated definition for the purposes of the reporting requirement would

<sup>18</sup> Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Modern Slavery and Global Supply Chains* (17 August 2017) 8, citing Evidence to Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 22 June 2017, 3 (Ambassador Andrew Golezdzinowski AM).

<sup>19</sup> *Ibid* 52 [4.31].

<sup>20</sup> Article 3 defines ‘the worst forms of child labour’ as comprising:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

<sup>21</sup> See for example, US Department of State, *Trafficking in Persons Report Heroes: Dr Anne Gallagher* (2012) <<http://www.tipheroes.org/anne-gallagher/>>.

<sup>22</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (June 2013) 11 [2.35].

address the practical reality of contemporary trafficking and the ways in which it interacts with global supply chains.<sup>23</sup>

#### Recommendation

- **The proposed definition of modern slavery is appropriate and simple to understand. However, reporting entities should also be required to report on the ‘worst forms of child labour’. Consideration should also be given to updating the definition of ‘human trafficking’ within the definition of ‘modern slavery’ to bring it into line with international law developments.**

### **How should the Australian Government define a reporting ‘entity’ for the purposes of the reporting requirement? Should this definition include ‘groups of entities’ which may have aggregate revenue that exceeds the threshold?**

21. For the reasons outlined in the Law Council’s submission to the Committee’s Modern Slavery Act Inquiry, the Law Council considers that reporting ‘entity’ should be defined broadly enough to apply to all Australian businesses and foreign businesses operating in Australia that meet the turnover threshold, regardless of corporate structure.<sup>24</sup> This may include, for example, partnerships, companies limited by guarantee, franchisors, and not-for-profit organisations and superannuation funds.

22. In addition, the definition of ‘entity’ should include all ASX-listed entities, regardless of whether they meet the turnover threshold. Publicly listed entities are already required to comply with the ASX Corporate Governance Guidelines, which require listed entities to act ethically and responsibly and respect human rights.<sup>25</sup> A modern slavery reporting requirement that does not apply equally to all listed companies is likely to lead to confusion and a potentially unequal playing field among listed companies. In any case, the vast majority of reporting requirements that apply to listed entities apply to all listed entities, not just those above certain thresholds.<sup>26</sup>

<sup>23</sup> For further detail on the difficulties that flow from the Criminal Code definition of ‘human trafficking’, and the potential ramifications when formulating an appropriate policy response, see Law Council of Australia, *Persons Who Have Been Trafficked and Exploited* (Justice Project Consultation Paper, August 2017) 6-8 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/People%20Who%20Have%20Been%20Trafficked%20and%20Exploited.pdf>>.

<sup>24</sup> Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) 20-21 [48]-[50] <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

<sup>25</sup> ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2014) 19 <<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>. This position was originally expressed in Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) 20-21 [48] <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

<sup>26</sup> Sections 793C and 1101B of the *Corporations Act 2001* (Cth) provide that the ASX Listing Rules are enforceable against listed entities and their associates. See also Chapter 4 of the ASX Listing Rules and Part 2M.3 of the *Corporations Act* (ss 292, 299, 300A and 319).

23. The Law Council also considers that Government should also be subject to the reporting requirement, for which it notes the Committee have also given ‘in principle’ support.<sup>27</sup> The Law Council considers that this is an opportunity for the Australian Government to lead by example, sending a clear message that the Australian Government will not tolerate slavery in supply chains.
24. The Law Council considers that the definition of ‘entity’ should include ‘groups of entities’ which may have aggregate revenue that exceeds the threshold. Many large companies operate through a series of subsidiary companies that handle different parts of their business.<sup>28</sup> In addition, some corporate groups have subsidiaries for tax purposes or to ensure they attract Government assistance for different aspects of their business. The Law Council considers that if the group’s aggregate revenue otherwise meets the threshold it does not seem equitable that these businesses should avoid the reporting requirement simply because of the way they are structured.

#### Recommendations

- **Reporting ‘entity’ should be defined in a manner that it is broad enough encompass:**
  - **all Australian businesses, including public sector entities, and foreign businesses operating in Australia that meet the turnover threshold, regardless of corporate structure; and**
  - **all ASX-listed entities, regardless of whether they meet the turnover threshold.**
- **The definition of reporting entity should include groups of entities that have aggregate revenue that exceeds the threshold.**

### How should the Australian Government define an entity’s revenue for the reporting requirement?

25. The Law Council considers that ‘revenue’ should be defined by reference to the Australian accounting standards in force at the relevant time. This definition is likely to be familiar and easy to understand for business as it is consistent with the approach taken in the *Corporations Act 2001* (Cth) (**Corporations Act**)<sup>29</sup> and in the *Income Tax Assessment Act 1997* (Cth). For the purposes of a reporting requirement introduced in the first half of next year, ‘revenue’ would have the following definition:

*Income [increases in economic benefits during the accounting period in the form of inflows or enhancements of assets or decreases of liabilities that result in an*

<sup>27</sup> Attorney-General’s Department, ‘Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement’ (16 August 2017) *Australian Government* 47 [4.2].

<sup>28</sup> For example, for liability and practical reasons, a mining company may have a mining exploration subsidiary, a mining operation subsidiary, as well as further subsidiary companies that supply different markets.

<sup>29</sup> See for example, *Corporations Act 2001* (Cth) s 45A(6).

*increase in equity, other than those relating to contributions from equity participants] arising in the course of an entity's ordinary activities.<sup>30</sup>*

#### Recommendation

- **Revenue should be defined consistent with the definition provided in the Australian accounting standards in force at the relevant time.**

### Is \$100 million total annual revenue an appropriate threshold for the reporting requirement?

26. The Law Council does not consider the \$100 million total annual revenue threshold to be appropriate. The Law Council considers that a principled approach to setting a threshold should be adopted, and that the threshold should be consistent with other relevant thresholds. In the view of the Law Council, this would mean a threshold that either has qualitative consistency with the UK MSA threshold (i.e.: the revenue threshold that defines a 'large company' under Australian legislation) or quantitative consistency (i.e.: £36 million in Australian dollars).
27. The Law Council strongly supports evidence-based policy making and is therefore concerned that there appears to be no evidence in the Consultation Paper to support the proposition that a threshold of \$100 million will have an impact in reducing the prevalence of modern slavery in supply chains. Instead, it appears that a threshold has been set to create a manageable cohort of entities subject to the reporting requirements, without sufficient regard as to whether capturing a cohort of that size can achieve the objectives of the legislation.
28. The entities most likely to be able to change the practices of their suppliers that may amount to modern slavery are those with influence and purchasing power, likely large companies. In the UK, the threshold that was ultimately selected reflects the definition of what qualifies as a large company under the *Companies Act 2006* (UK).<sup>31</sup> In Australia, the annual revenue threshold that defines a 'large proprietary company' under the *Corporations Act 2001* (Cth) (**Corporations Act**) is \$25 million.<sup>32</sup> The Corporations Act sets out reporting requirements for entities that qualify as a 'large proprietary company', including the obligation to prepare annual financial reports and directors' reports. The Law Council considers that it would seem more appropriate and relevant for the threshold that triggers the application of modern slavery reporting requirements to be consistent with the threshold that triggers financial reporting requirements.

<sup>30</sup> See Australian Accounting Standards Board, *AASB 15: Revenue from Contracts with Customers* (December 2014) 47 <[http://www.aasb.gov.au/admin/file/content105/c9/AASB15\\_12-14.pdf](http://www.aasb.gov.au/admin/file/content105/c9/AASB15_12-14.pdf)>, due to come into effect on 1 January 2018.

<sup>31</sup> See UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 8 <[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/448201/2015-02-12\\_TISC\\_Consultation\\_FINAL.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf)>; see also *Companies Act 2006* (UK) s 465(3) item 1, which defines 'companies qualifying as medium-sized' as a company with, among other features, turnover of not more than £36 million.

<sup>32</sup> See *Corporations Act 2001* (Cth) s 45A(3)(a).

29. If the Government does not consider the threshold that defines 'large company' under the Corporations Act to be appropriate, then the Law Council considers that the Australian threshold should be set no higher than \$60 million, being the approximate conversion in Australian dollars of the UK's £36 million threshold. The Consultation Paper recognises that the reporting requirements have been formulated similarly to the UK so that 'the business community does not need to comply with inconsistent regulation across jurisdictions'. Given the Consultation Paper's emphasis on the need for consistency with the UK, there is relatively little explanation as to why the proposed Australian threshold is more than \$40 million higher than, and in fact almost double, the UK threshold. This gives rise to inconsistency between jurisdictions and could lead to an undesirable situation, for example, where an entity had reporting obligations in the UK but not in Australia.
30. The Law Council does not consider it relevant that the \$100 million threshold is equal to 'the threshold used for public companies in the Australian Taxation Office's (ATO) corporate tax transparency report'.<sup>33</sup> How much tax an entity pays, and whether it qualifies for inclusion in the ATO's tax transparency report, does not appear to have a clear connection with whether an entity is likely to have modern slavery risks in its supply chain and capacity to address those risks.
31. The Law Council also supports the periodic review and adjustment of the threshold to ensure that it remains appropriate. In addition, entities that fall below the threshold should be able 'opt in' to the reporting requirement.

#### **Recommendations**

- **The proposed revenue threshold for reporting requirements should be lowered, set no higher than \$60 million.**
- **There should be a periodic review and adjustment of the revenue threshold to ensure it remains appropriate.**
- **Entities that fall below the threshold should be able to 'opt in' to the reporting requirement.**

### **How should the Australian Government define an entity's 'operations' and 'supply chains' for the purposes of the reporting requirement?**

32. The Law Council proposes that the Government adopt a broad definition of 'operations' to provide entities with the flexibility to address the requirement in an individual manner that is targeted to their business. This would be consistent with the purpose of the modern slavery reporting requirement to encourage business entities to undertake measures to identify and prevent instances of modern slavery in supply chains, across sectors and types of business entities. Given the operating model of each business can be complex and will vary among entities, to provide a too

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<sup>33</sup> See Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 15.

prescriptive of a definition of operations may restrict business from reporting adequately.

33. An appropriate definition of 'operations' may be 'any operations or activities carried out, or investments held or made by, an entity'.<sup>34</sup> This is similar to the definition of 'business operations' in the *Fringe Benefits Tax Assessment Act 1986* (Cth),<sup>35</sup> but amended to expressly include 'investments', which may not otherwise fall within the ordinary meaning of operations. Government guidance should make clear that where an entity is a fund, trustee or institutional investor, its operations ought to include the investments it makes directly or indirectly.

34. The Law Council also recommends that the term 'supply chains' be defined broadly if the reporting requirements are to be effective. This is because:

*[m]odern business relationships frequently involve engagement with complex international supply chains, often with multiple tiers. These supply chains can involve industries that involve a high risk of exploitation in Australia, or extend to countries overseas with [a] high incidence of human trafficking and slavery'.<sup>36</sup>*

35. A broad definition of 'supply chain' is also in line with the approaches adopted in Australian legislation,<sup>37</sup> the UK MSA,<sup>38</sup> and the French vigilance plan law.<sup>39</sup> The Law Council endorses Anti-Slavery Australia's definition of 'supply chain', being 'vertically

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<sup>34</sup> Adapted from the definition of 'business operations' in *Fringe Benefits Tax Assessment Act 1986* (Cth), section 136.

<sup>35</sup> See *Fringe Benefits Tax Assessment Act 1986* (Cth) s 136. A broad definition of 'operations' is generally consistent with the approach taken in relevant Australian legislation: see also *Casino Control Act 1992* (NSW) s 3, *Mining and Quarrying Safety and Health Act 1999* (Qld) s 10. The Law Council has also reviewed definitions of 'operations' in the *Bankruptcy Act 1966* (Cth) and *Corporations Act 2001* (Cth) ('examinable operations') but considers these definitions to be too prescriptive for the modern slavery in supply chains reporting requirements context.

<sup>36</sup> Parliament of the Commonwealth of Australia, Modern Slavery and global supply chains, *Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (August 2017) 69.

<sup>37</sup> See, for example, *Ports and Maritime Administration Act 1995 No 3* (NSW), section 3, definition of 'port-related supply chain' and 'supply chain facility'. The Law Council notes that Consultation Paper states that targeted regulatory action on modern slavery is 'consistent with the Government's response to other supply chain-related issues, including illegal logging'. However, the Law Council considers the treatment of the concept of 'supply chain' pursuant to the

<sup>38</sup> In the United Kingdom, while the term 'supply chain' is not defined in the UK MSA, the *Transparency in supply chains: a practical guide*, published by the UK Government to provide guidance to reporting companies, states that 'supply chain' has its everyday meaning. For example, 'supply chain' is defined in the Cambridge English Dictionary as 'the system of people and things that are involved in getting a product from the place where it is made to the person who buys it'. The Oxford English Dictionary defines the term to mean: '(a) (collectively) the routes or means by which supplies (esp. those for a military force) are received; (b) Business the chain of processes involved in the production and distribution of a commodity.'

<sup>39</sup> The French vigilance plan law requires companies to establish and maintain a vigilance plan to monitor human rights violations of the company and its subsidiaries, subcontractors and suppliers with whom an established business relationship is maintained. Companies are also required to publish a risk report annually assessing these polices. Under French law, 'established business relationship' is defined as a stable, regular relationship, either contractual or non-contractual, with a certain amount of business, where there is a reasonable expectation that the relationship will last: European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently asked questions* (23 February 2017)

<<http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions>>. Accordingly, the inclusion of both contractual and non-contractual relationships suggests that the French legislature endeavours to capture a wide range of relationships along the supply chain.

integrated systems of production that link raw materials to finished product'.<sup>40</sup> The Law Council considers that this definition fits with the Government's proposal that the definition of 'supply chain' should extend beyond first-tier suppliers.<sup>41</sup> This is consistent with international standards for responsible business conduct, which do not limit corporate responsibility for harm to first-tier suppliers, but extend it to all adverse impacts that the relevant business causes, contributes or to which it is directly linked.<sup>42</sup>

### Recommendations

- **'Operations' should be defined broadly, for example, 'any operations or activities carried out, or investments held or made by an entity'; and**
- **'Supply chain' should also be defined broadly, for example, 'vertically integrated systems of production that link raw materials to finished product'.**

### How will affected entities likely respond to the reporting requirement? As this is how the regulatory impact is calculated, do Government's preliminary cost estimates require adjustment?

36. The Law Council considers that that the inclusion of mandatory criteria will mean that entities seeking to comply with the reporting provisions will be unable to avoid undertaking at least some due diligence. A 2015-16 study by the British Institute of International and Comparative Law and Norton Rose Fulbright (**Study**) found that entities responding to the Modern Slavery Act in the UK were likely to conduct human rights due diligence. The Study found that entities conducted human rights due diligence by employing any number of the following strategies:

- initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;
- risk assessment of human rights risks, including risks to those who may hold rights;
- prioritisation of human rights issues;
- development of action plans;
- strategic direction at the board level;

<sup>40</sup> Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, *Modern Slavery and global supply chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (August 2017) 19-20, citing Anti-Slavery Australia, Submission No 156 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia*, 2017, 69.

<sup>41</sup> See Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 15. There are examples, through the OECD National Contact Point process, of business being found to have 'responsibility' for impacts beyond the first tier of the supply chain. See for example, German National Contact Point, *Joint final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises, the European Center for Constitutional and Human Rights and Otto Stadtlander GmbH* (1 November 2011) 3 <[https://www.oecd.org/daf/inv/mne/17-09-11\\_German\\_NCP\\_final\\_statement\\_Otto%20Stadtlander.pdf](https://www.oecd.org/daf/inv/mne/17-09-11_German_NCP_final_statement_Otto%20Stadtlander.pdf)> and Dutch National Contact Point, *Final Statement Bart Stapert, attorney, vs Mylan* (11 April 2016) p 3 and 5 <<https://www.oecdguidelines.nl/documents/publication/2016/4/11/bart-stapert-attorney-vs-mylan>>.

<sup>42</sup> See United Nations Office of the Higher Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011) 20-21 (principle 19).

- cross-functionality: steering groups, working groups, interaction between relevant functions;
- integration of human rights into internal compliance mechanisms, scoring and tools;
- translation and application of human rights to apply to each function;
- inclusion in contractual provisions;
- having codes of conduct and operational policies;
- providing training; and
- ensuring that there are effective grievance mechanisms in place.<sup>43</sup>

37. Based on the experience of members of the Law Council's Business and Human Rights Committee that advise business on human rights due diligence, it seems likely that an entity will likely adopt the above strategies in response to the modern slavery reporting requirements in a way that reflects, for example:

- the risk that modern slavery exists in its operations and supply chains, its size and financial position;
- its (and especially the board's) appetite for negative public relations; and
- its past reputational impacts both at an industry-wide and individual level (see for example, the agriculture and food industry in Australia which has been found to have a high risk of modern slavery in its supply chains).<sup>44</sup>

38. Given the above variables, predicting how an individual entity will respond to the reporting requirements is difficult. To reflect the diversity of potential responses, a range of different examples are set out at **Appendix A**.<sup>45</sup> However, reporting entities in Australia are likely to confront the common issues faced by entities affected by the UK MSA, which include:

- determining 'how far is far enough' when working through the various levels in an entity's supply chain;
- unavailability of information on third parties or country-specific human rights risks, making it difficult to collate to undertake a risk assessment; and

<sup>43</sup> Norton Rose Fulbright and British Institute of International and Comparative Law, 'Key findings from our empirical research' *Exploring Human Rights Due Diligence* (2016) 6-7 <<http://human-rights-due-diligence.nortonrosefulbright.online/pdf/download/17022/>>.

<sup>44</sup> See Economic Development Committee, Parliament of Victoria, *Inquiry into Labour Hire Employment in Victoria* (Interim Report December 2004 and Final Report June 2005), and Victorian Government Department of Economic Development, Jobs, Transport & Resources, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report* (31 August 2016) <[http://economicdevelopment.vic.gov.au/\\_\\_data/assets/pdf\\_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf](http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf)>; Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016); House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Parliament of Australia, *Making it work: Inquiry into independent contracting and labour hire arrangements* (August 2005); Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales* (June 2015) <<https://www.fairwork.gov.au/ArticleDocuments/763/baiada-report.pdf.aspx>>.

<sup>45</sup> Appendix A identifies several potential ways that different types of entities may respond to reporting requirements, based on the experience of Law Council's Business and Human Rights Committee members that advise business on responding to similar reporting requirements and other international standards on business and human rights. It is not intended to be exhaustive.

- determining the contractual obligations and relationships between suppliers where a centralised contracts or procurement function is non-existent.<sup>46</sup>

39. The Government has estimated that approximately 2,000 entities will be required to report in the first reporting year, and has allocated an annual regulatory burden of \$23 million, or \$11,500 per entity. The Law Council cannot precisely assess the accuracy of this estimate. However, based on the experience of members of its Business and Human Rights Committee that have worked with and advise business on human rights issues, it seems likely some entities may spend much more than \$11,500 on due diligence strategies, particularly those with expansive operations and supply chains.

40. Some Australian entities that fall within the revenue threshold may incur or may have already incurred this expenditure (for example, where there has been a board decision in light of the global movement to address business-related human rights impacts). Other entities may spend less than \$11,500, especially those with less risk of slavery in supply chains, a greater appetite for negative public relations and/or without a history of past adverse reputational impacts.

### **What regulatory impact will this reporting requirement have on entities? Can this regulatory impact be further reduced without limiting the effectiveness of the reporting requirement?**

41. The regulatory impact on entities the basis of the current proposal will vary greatly depending upon the entity involved, and how it decides to respond to the reporting requirement (see above and **Appendix A**). In the experience of members of the Law Council's Business and Human Rights Committee that advise business on reporting requirements and human rights due diligence generally, compliance is likely to involve administrative costs, both initial,<sup>47</sup> and ongoing.<sup>48</sup> It is also likely to include substantive compliance costs. For example, some entities may instruct professional service firms to advise on compliance with the proposed reporting requirement. Therefore, there will be some start-up costs associated with these retainers. Many larger companies will not incur these start-up costs as they may already have these engagements in place. Other ongoing substantive compliance costs are likely to include the costs of providing

<sup>46</sup> Norton Rose Fulbright and British Institute of International and Comparative Law, 'Key findings from our empirical research' *Exploring Human Rights Due Diligence* (2016) 3 <<http://human-rights-due-diligence.nortonrosefulbright.com/online/pdf/download/17022/>>.

<sup>47</sup> Costs associated with, for example: understanding and developing a risk matrix that is relevant to the affected entity's operating systems and industry; mapping a company's supply chain, including identifying supplier/contractors, reviewing archives to locate supply contracts and then contacting those suppliers to determine whether their supply chains pose any red-flag modern slavery risks; reviewing internal policies and procedures to identify and manage any modern slavery risk; and reviewing and drafting appropriate contracts and codes of conduct for suppliers and liaising with suppliers regarding any changes.

<sup>48</sup> Costs associated with, for example, maintaining an up-to-date supply chain map – including setting up a centralised procurement/contracts office; drafting the statement, and tabling it at a board meeting for review/approval by the board. The board may have questions on the statements and therefore there will be costs associated with providing further information and board briefings about the content of the report; publishing the statement online and submitting the statement to a centralised Government database. If the statement is able to be submitted electronically, costs should be relatively low provided that there are sufficient technology capabilities to upload a larger file, if the company has produced a lengthy report; and answering any questions/comments from the public, including consumers/clients, shareholders and the media in relation to any statements made by the reporting entity in the report published online/in the centralised Government repository.

training to employees to meet regulatory requirements,<sup>49</sup> and the costs of providing information to third parties.<sup>50</sup>

42. The Law Council does not consider that this regulatory impact can be reduced any further without impacting the effectiveness of the reporting requirements. Although these mandatory criteria may increase the minimum amount of work that an entity needs to undertake to comply with the reporting requirements, the criteria require entities to engage with their modern slavery risk. This is essential to ensure that businesses operating in Australia take positive steps to tackle modern slavery.

### **Are the proposed four mandatory criteria for entities to report against appropriate? Should other criteria be included, including a requirement to report on the number and nature of any incidences of modern slavery detected during the reporting period?**

43. The Law Council welcomes the Government's proposal to make the reporting criteria mandatory and agrees that this will ensure statements are consistent, easily comparable and will provide certainty to entities on what to include in their statements.<sup>51</sup> However, the Law Council notes a statement in the Consultation Paper that 'entities will also have the flexibility to determine what, *if any*, information they provide against each of the four criteria' (emphasis added).<sup>52</sup> In the view of the Law Council, reporting entities should not be able to report that they took 'no steps' to address modern slavery in supply chains. The Law Council considers that if companies can comply with their reporting requirements while continuing to knowingly sell products produced with slavery, then the reporting requirements are not effective.
44. The Law Council understands the need to develop criteria largely consistent with the UK criteria to avoid business having to comply with inconsistent regulation. However, the Law Council considers that the UK criteria fall short of international standards and best practice in some respects and therefore should be strengthened if they are to be imported into the Australian context. Specifically, the UK requirements do not require entities to explain how the risk of modern slavery in their supply chains will be identified, addressed and mitigated; how the entity will track and monitor the risk of modern slavery and incidents; and how the entity will provide for remedy. As a result, it is difficult to determine whether reporting entities in the UK that produce statements

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<sup>49</sup> For example, procurement officers will no longer be able to consider a price only basis for the purchase of goods and services. Instead, procurement will need to consider whether there are any modern slavery risks associated with the purchase of a particular class of goods or services, and the origin of the proposed goods and services.

<sup>50</sup> In the Study, the authors identified that companies used supplier questionnaires to determine whether or not a particular supply posed a risk of modern slavery. Therefore, the reporting requirement will likely also result in a need for companies to produce information in response to their own customers' requests for assurance that their supply chain does not involve modern slavery.

<sup>51</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 16.

<sup>52</sup> *Ibid.*

responding to these criteria are meaningfully addressing modern slavery risks in their supply chains.<sup>53</sup>

45. To address these issues, the Law Council recommends defining ‘due diligence’ for the purposes of the Australian reporting requirements consistently with the four principles of human rights due diligence set out in the UNGPs.<sup>54</sup> Applying these principles to the modern slavery in supply chains context, reporting entities should be required to assess their actual and potential modern slavery impacts, integrate and act on the findings, track responses, and communicate about how impacts are addressed.
46. In addition, a fifth criterion should be added that addresses remedy, the third pillar of the UN ‘Protect, Respect and Remedy’ Framework upon which the UNGPs are based. For example, a criterion which required the entity to report on *‘the entity’s policies and processes including operational level grievance mechanisms to address complaints or incidents regarding modern slavery risks’*.
47. As part of these requirements, it may be useful for entities to be required to provide information on the number and nature of modern slavery incidents experienced during a reporting year.<sup>55</sup> Entities are in the best position to be able to identify and respond to modern slavery risks in their own supply chains compared with outsiders. How entities have identified and addressed actual risks is important information for benchmarking and contributes to shared learning in the business community. The Law Council considers that the more transparency that is provided regarding entities supply chains, then the more likely the reporting requirements are likely to be effective in addressing modern slavery. ‘Modern slavery incidents’ would have to be carefully defined in government guidance, so that entities were only required to report on adequately substantiated and non-trivial incidents. It may also take time for entities to develop the capacity to identify these incidents, which should be taken into account.
48. The Law Council considers that these proposed changes would strengthen the Australian reporting requirements and contribute to Australia discharging its obligation to address the human rights impacts of Australian-domiciled companies, wherever they occur.<sup>56</sup> In addition, the proposed changes are consistent with the spirit of the Government’s proposal, as the Consultation Paper highlights that ‘Australia supports

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<sup>53</sup> See Patricia Carrier and Joe Bardwell, ‘How the UK Modern Slavery Act can find its bite’ (24 January 2017) *OpenDemocracy* (see concerns noted under heading ‘Widely diverging quality of reports and action’) <<https://www.opendemocracy.net/beyondslavery/patricia-carrier-joseph-bardwell/how-uk-modern-slavery-act-can-find-its-bite>>; see also Business and Human Rights Resource Centre, *FTSE 100 at the starting line: An analysis of company statements under the UK Modern Slavery Act* (2016) 2 and *First Year of FTSE 100 Reports Under the UK Modern Slavery Act: Towards Elimination?* (17 October 2017) 2 <<https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Report%20Public.pdf>>.

<sup>54</sup> United Nations Office of the Higher Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011) 17-18 (principle 17).

<sup>55</sup> The Business and Human Rights Resource Centre has found that the companies producing the better Modern Slavery Statements explained the risks identified in their supply chain, including where the risk was identified (sector or location). See Business and Human Rights Resource Centre, *First Year of FTSE 100 Reports Under the UK Modern Slavery Act: Towards Elimination?* (17 October 2017) 2 <<https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Report%20Public.pdf>>.

<sup>56</sup> See Committee on Economic Social and Cultural Rights, *General Comment No 24 on State obligations in the context of business activities*, E/C.12/GC/24 (10 August 2017) [30] & [33]; see also Committee on the Rights of the Child, *Concluding Observations: Australia*, 60<sup>th</sup> sess, CRC/C/AUS/CO/4 (28 August 2012) [27]-[28].

the UN Guiding Principles and encourages businesses to apply them in their operations'.<sup>57</sup> The Law Council recommends that the Government also advise that Australian reporting requirements should be interpreted consistently with the UNGPs, as the UK Government has in its guidance to business on the UK MSA reporting requirements.<sup>58</sup>

49. In terms of the form that reports on the mandatory criteria take, the Law Council considers that this should not be prescribed. Clear government guidance should be provided on how to meaningfully comply with the reporting requirements to avoid reporting simply becoming a 'tick box' exercise.<sup>59</sup> In addition, there is a need for flexibility in the format for reporting given that reporting entities may have varied business models, some of which may be more complicated than others.<sup>60</sup>

### Recommendations

- **The four reporting criteria are generally appropriate. A additional criterion should be added to the mandatory reporting criteria to address the issue of remedy.**
- **'Due diligence' should be defined consistently with the four principles for human rights due diligence in the UNGPs.**
- **If entities are required to report on the number and nature of modern slavery incidents in a reporting year, government guidance should clearly define 'modern slavery incident' to exclude substantiated or trivial reports. Entities should also be afforded sufficient time to develop their capacity to identify incidents.**
- **Government guidance should be provided which makes clear:**
  - **that the reporting requirements should be interpreted consistently with the UNGPs; and**
  - **how entities can meaningfully comply with reporting requirements, to avoid reporting becoming simply a 'tick box' exercise.**

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<sup>57</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 7. See also Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Modern Slavery and Global Supply Chains* (17 August 2017) xviii [4.13], where the Committee 'provides 'in principle' support for reporting requirements based on international standards

<sup>58</sup> UK Home Office, *Transparency in Supply Chains etc.: A practical guide* (2015) 25, 32 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649906/Transparency\\_in\\_Supply\\_Chains\\_A\\_Practical\\_Guide\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf)>.

<sup>59</sup> The UK Independent Anti-Slavery Commissioner, Kevin Hyland, gave evidence to the Committee's Modern Slavery Act Inquiry that more needs to be done to better engage with the private sector in supply chain reporting in the UK, 'to ensure that companies produce statements that both comply with the Act's obligations and point to decisive action being taken, as opposed to merely being a 'tick box' exercise': see Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, *Modern Slavery and global supply chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (August 2017)14 [2.36].

<sup>60</sup> The Law Council adopts this view directly from the Law Institute of Victoria's submission to the Law Council on the Consultation Paper.

## How should a central repository for Modern Slavery Statements be established and what functions should it include? Should the repository be run by the Government or a third party?

50. The Law Council welcomes the Government's proposal to provide a free, publicly accessible central repository which is searchable and will include all Modern Slavery Statements published in compliance with the reporting requirement. The Law Council supports the repository being run and funded by Government, because:

- compared with a registry or registries being operated by civil society, as in the UK, a Government-operated registry would be authoritative and more likely to enjoy the continuous funding needed to secure its continuous operation;
- reporting entities are ultimately accountable, and therefore would typically be more responsive, to Government, rather than civil society. If there are no penalties for non-compliance, non-legal incentives compelling companies to produce statements, such as seeking to appear responsible in the eyes of Government, are even more important; and
- Government would remain aware of the quality of the statements being produced by eligible entities.

51. The Law Council's submission to the Committee's Modern Slavery Act Inquiry contains suggestions on appropriate government departments in which the registry might be housed.<sup>61</sup> As a practical matter, the Law Council considers that the registry should include the following features:

- A list of all entities required to report: this would make clear which entities have produced and uploaded a statement and which entities have not;<sup>62</sup>
- The entity's financial year and reporting deadline: if the reporting deadline (five months from the end of the financial year) is set based on entities' own financial years, rather than the Australian financial year, then information about the entity's financial year should be included (e.g.: 'ABC Company – financial year: 1 January to 31 December; reporting deadline: 1 June');
- Capability for direct upload of statements and alerts regarding uploaded statements: reporting entities should be able to upload statements directly, to avoid the administrative burden of manual Government upload. Interested third

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<sup>61</sup> Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) 20-31-2 [75] <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

<sup>62</sup> It is likely that the ATO and ASIC already hold information that will enable, as a starting point, the creation of a list of entities required to report. However, as the definition of 'entity' will extend further than just companies, this data may have to be supplemented with information from other sources. In designing any legislation to implement the reporting requirements, careful thought should be given how cross-departmental cooperation can be maximised, as well as to any information sharing regimes and protocols that may require amendment to facilitate the sharing of information relevant to creating a list of reporting entities.

parties should be able to sign up for alerts when a statement is uploaded to the registry, to avoid having to continuously monitor the registry; and

- Capability to filter statements by year produced, company, sector and country: given the thousands of statements that should, in theory, eventually be produced, this will make the registry easier to use and save search time for interested third parties interested only in particular issues or aspects of the registry (e.g. the mining sector; French companies operating in Australia; all statements in the last year).

### Recommendations

- **The central registry should be funded and operated by Government.**
- **In addition to being free, publicly available, searchable and online, the registry should:**
  - **contain a list of all entities required to report;**
  - **list the entity's financial year and reporting deadline;**
  - **have capability for direct upload of statements, and alerts for which anyone can sign up to receive when statements have been uploaded; and**
  - **have capability to filter statements by year produced, company, sector and country.**

### **Noting the Government does not propose to provide for penalties for non-compliance, how can Government and civil society most effectively support entities to comply with the reporting requirement?**

52. The Law Council encourages the Government to adopt a 'compliance-oriented' approach to the reporting requirement, which largely fits with the Government's existing proposal. A compliance-oriented approach is based on securing voluntary compliance with regulatory objectives, undertaking informed monitoring for non-compliance, and engaging in enforcement action where voluntary compliance fails.<sup>63</sup> While punitive penalties are not the focus of a compliance-oriented framework, they are important, as they guide behaviour and compel performance. For example, by not providing penalties for non-compliance with reporting requirements, it may be difficult for entities to justify compliance cost, when non-compliance has zero financial cost.

53. Further, the lack of penalties undermines the 'mandatory' reporting criteria – in practice, the criteria are not mandatory, because there are no consequences for failure to address them. While the Law Council appreciates that there may be reputational costs for non-compliance, the ability and willingness of civil society to identify non-compliant entities, the media to expose them, and consumers to react appropriately, are easily overstated. In addition, reputational risk does not apply equally to all

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<sup>63</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 238 [4.20].

entities, but mostly to consumer-facing entities. The Law Council considers that penalties remain the more effective way to compel compliance by all reporting entities.

54. The first step of compliance-oriented regulatory framework is 'providing incentives and encouragement to voluntary compliance and nurturing the ability for private actors to secure compliance through self-regulation, internal management systems and market mechanism where possible'.<sup>64</sup> Government serves an important role in developing entities' capacity to comply, and from the outset should:

- publish clear and comprehensive guidance on complying with the reporting requirements, with sufficient notice to entities to adjust their internal processes and policies to respond to the guidance;
- engage in outreach with affected entities to ensure they are aware of the requirements, the purpose of the requirements, and how to comply with the requirements, as well as addressing any concerns they may have; and
- provide any other assistance necessary, including responding to queries as they arise and receiving and responding to feedback.

55. Civil society can also support and encourage compliance at this stage by examining statements and publishing information on best practice, including benchmarking.

56. The second step of compliance-oriented regulation is monitoring for non-compliance. The creation of a government-funded central registry of statements will be instrumental in the monitoring process. Civil society can support this step by identifying and exposing the leaders in the field, as well as underperforming entities, as the market may respond to this information accordingly.

57. The third step of compliance-oriented regulation is providing for enforcement in cases of non-compliance. In a compliance-oriented regime, when entities fail to comply in the first instance, Government would attempt to restore or nurture compliance. For example, an independent Anti-Slavery Commissioner or Ombudsman, could have a mandate to engage with business to nurture compliance.

58. It is important that an independent Anti-Slavery Commissioner or Ombudsman not have enforcement powers, in order to promote trust and openness from the private sector. This would also provide a 'safe space' for non-compliant entities to self-report difficulties with compliance, and the Anti-Slavery Commissioner Ombudsman would then work with these entities develop their capacity to comply.

59. Civil society can support this step by providing targeted training for entities and their advisors that require further assistance with compliance. For example, the Law Council, in conjunction with the International Bar Association, will be providing free training to Australian lawyers on human rights in the business context in March 2018, which includes online modules, face-to-face training, and access to a curriculum.<sup>65</sup>

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<sup>64</sup> Ibid [4.21].

<sup>65</sup> See International Bar Association, *Training Lawyers on Business and Human Rights: Importance of Business and Human Rights for Corporate Lawyers* <<https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>>. Suggested timeframes for roll out of the training and delivery of the

60. However, attempts to nurture and restore compliance must operate in the presence of more punitive penalties, as the evidence shows that ‘persuasive and compliance-oriented enforcement methods are more likely to work where they are backed up by the possibility of more severe methods’.<sup>66</sup> Therefore, while an independent Anti-Slavery Commissioner or Ombudsman would be responsible for oversight and nurturing compliance, a separate entity, such as ASIC, would be required to have responsibility for investigation and any enforcement action concerning non-compliance.

61. Preferably, the proposed legislation would include financial penalties for non-compliance. However, even if the Government chooses not to include financial penalties, the Law Council emphasises that there is still a need for appropriate compliance drivers to be enshrined in the proposed legislation. These compliance drivers are required in addition to any independent oversight provided, for example through an independent Anti-Slavery Commissioner. The Law Council supports suggestions by the Law Society of New South Wales that the Government consider, for example:

- making it a condition of Government contracts that any reporting entities that contract with Government must have published all required Modern Slavery Statements; and
- publishing a list of companies that have not submitted Modern Slavery Statements after the relevant deadline for doing so has elapsed.

#### **Recommendations**

- **The Government should introduce financial penalties for non-compliance with reporting requirements.**
- **If not, the Government should nonetheless ensure appropriate compliance drivers are enshrined in the legislation, such as:**
  - **making it a term of Government contracts that any reporting entities with whom Government contracts are required to have published Modern Slavery Statements; and**
  - **publishing a list of entities that have not published Modern Slavery Statements after the relevant deadline has elapsed.**

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curriculum are subject to change. See also, Law Council of Australia, *Everybody's Business: An Introduction to Business and Human Rights for Corporate Advisors* (2017) <<https://www.lawcouncil.asn.au/event/everybodys-business--an-introduction-to-business-and-human-rights-for-corporate-advisors>> held in Sydney on 16 October 2017, and to be held in Melbourne (forthcoming).

<sup>66</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 239 [4.24].

## Is the five-month deadline for entities to publish Modern Slavery Statements appropriate? Should this deadline be linked to the end of the Australian financial year or to the end of entities' financial years?

62. A five-month deadline to publish Modern Slavery Statements is appropriate. In Law Council's view, reporting entities should be tracking and responding to information relevant to the reporting criteria throughout the year. Five months is a generous amount of time for a large business to compile that information into a statement.
63. The Law Council also recommends that the reporting deadline be linked to the end of the entities' financial years. This would likely lead to better reporting, as the statements could draw upon the information produced from other annual reporting the entity is required to do. It would also likely reduce the cost of compliance, as modern slavery reporting systems could be integrated with the entity's existing reporting systems.
64. While there may be some value in entities reporting at the same time, namely five months from the end of Australian financial year, the Law Council considers that high quality statements are more important than all statements being available contemporaneously. The Law Council considers that inclusion of an entity's financial year on the central registry will suffice to address any uncertainty regarding an entity's reporting deadline that might otherwise arise.

### Recommendations

- **The five-month deadline for entities to publish Modern Slavery Statements is appropriate.**
- **The deadline should be linked to the end of the entities' reporting year.**

## Should the reporting requirement be 'phased-in' by allowing entities an initial grace period before they are required to publish Modern Slavery Statements?

65. The Law Council notes that the Minister for Justice proposes to bring forward draft legislation in the first half of 2018,<sup>67</sup> and that entities would have five months from the end of the next full financial year to submit their statement.<sup>68</sup> That is, for example, if the reporting requirements were introduced in March 2018, the obligation for an entity to report would not arise until 1 July 2019,<sup>69</sup> and then the entity would have until 1 January 2020 to submit their Modern Slavery Statement.

<sup>67</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 20.

<sup>68</sup> This understanding is based on representations made by representatives of the Attorney-General Department during the Attorney-General's Department Consultation Session on Modern Slavery in Supply Chains Reporting Requirement (Canberra, 22 September 2017).

<sup>69</sup> The Law Council understands that at this stage the Government has not determined whether the reporting deadline should be aligned with the entity's financial year or the Australian financial year. For the sake of

66. The Law Council considers that this minimum one-year period, which commences from the date the legislation enters into force and which runs to the end of the next full financial year, is sufficient to function as an introductory period for the reporting requirements. Clear and thorough government guidance should be introduced with the legislation, so entities have sufficient time to prepare for submitting a statement that is adequate and compliant with the reporting requirements.
67. Provided that clear government guidance is released when the legislation is introduced, the Law Council considers that an additional 'phase in' period beyond this is not necessary. Given that reporting requirements introduced in the first half of 2018 will not see the first Modern Slavery Statements produced until 2020, any additional 'phase in' period runs the risk that Australian businesses will not address their modern slavery risk for years to come.

### Recommendations

- **There should be an implementation period for the reporting requirement that commences from the date the legislation enters into force and which runs until the end of the next full financial year.**
- **Government guidance for entities on how to comply with the reporting requirements should be released when the legislation is introduced.**

### How can the Australian Government best monitor and evaluate the effectiveness of the reporting requirement?

68. The Law Council considers that one of the most important tools the Government will have for monitoring and evaluating the effectiveness of the reporting requirement is the establishment of a central registry, for the reasons described at [50s].
69. Another tool to assess the effectiveness of the reporting requirements may be to establish or fund a body to conduct benchmarking for the reporting requirements, similar to the Corporate Human Rights Benchmark (**CHRB**).<sup>70</sup> A body established or funded to conduct benchmarking would need to consult widely with civil society, business and investors when conducting benchmarking. Therefore, the Law Council considers that this function would best be performed by a non-Government body, to promote independence and frankness in consultations. However, benchmarking findings would be relevant to the Government assessing and evaluating the reporting requirements, by providing a measure of what effective compliance looks like.

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simplicity, for this example, the Law Council has assumed an entity with a financial year that aligns with the Australian financial year.

<sup>70</sup> The CHRB is a unique collaboration led by investors and civil society organisations dedicated to creating the first open and public benchmark of corporate human rights performance seeks to assess which companies worldwide perform best in terms of human rights: see Corporate Human Rights Benchmark, *Who we are* (2017) <<https://www.corporatebenchmark.org/who-we-are>>. See also, Corporate Human Rights Benchmark, *Key Findings 2017* (May 2017) <<https://www.corporatebenchmark.org/sites/default/files/styles/thumbnail/public/2017-03/Key%20Findings%20Report/CHRB%20Key%20Findings%20report%20-%20May%202017.pdf>>.

70. The Law Council also supports a review of the reporting requirements after three years to assess the effectiveness of the scheme, with further consultation conducted at that time. This consultation should be carried out broadly, with sufficient time for comprehensive responses and feedback to be provided to Government.<sup>71</sup>

### **How should Government allow for the business community and civil society to provide feedback on the effectiveness of the reporting requirement?**

71. The Law Council considers that an independent Anti-Slavery Commissioner, or Anti-Slavery Ombudsman, would be an ideal interface for the business community and civil society to provide feedback on the effectiveness of the reporting requirement, among other functions. In the experience of the Law Council, some of the best feedback may come from having someone, for example an independent Anti-Slavery Commissioner, engaging with civil society and business informally. The benefit of an independent Anti-Slavery Commissioner or Ombudsman is that the independence of the office provides an ability to build relationships among stakeholder groups in a way that may not be possible with Government. This independent Anti-Slavery Commissioner or Ombudsman could also receive feedback from business and civil society on a rolling basis, via an online tool.

72. The Law Council recommends holding an annual roundtable to assess and discuss the implementation of the reporting requirements, like the forum held every year at the UN in Geneva to assess the effectiveness of the implementation of the UNGPs. This annual roundtable could be held at or to coincide with the Australian Dialogue on Business and Human Rights, an existing multi-sector, multi-stakeholder forum aimed at driving the Australian business and human rights agenda forward. The Law Council notes the success of other annual roundtables, such as the National Roundtable on Human Trafficking and Slavery, in enabling multi-disciplinary networks to be developed to inform sophisticated, comprehensive responses to complex problems.<sup>72</sup>

73. The Law Council also recommends convening an annual forum between Government and CEOs of reporting entities, given the Government's proposal that modern slavery statements will be signed-off on by company directors, a proposal the Law Council wholeheartedly endorses. The Law Council considers that convening a forum of CEOs would be a useful step to ensure that the importance of effective reporting requirements reaches the upper echelons of business.

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<sup>71</sup> The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Consultation paper.

<sup>72</sup> See Law Council of Australia, *Persons Who Have Been Trafficked and Exploited* (Justice Project Consultation Paper, August 2017) 51 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/People%20Who%20Have%20Been%20Trafficked%20and%20Exploited.pdf>>.

## Recommendations

- **An independent Anti-Slavery Commissioner or Ombudsman should be established, who has a mandate to engage with relevant stakeholders and receive both formal and informal feedback on the effectiveness of the reporting requirements.**
- **An annual roundtable could be held to assess the effectiveness of the reporting requirements.**
- **An annual forum could be convened with CEOs of reporting entities, to bring the importance of effective reporting requirements to the boardroom and ensure that senior leaders' insights on the approval process as well as broader change management are considered.**

## **Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society? If so, what functions should the oversight mechanism perform?**

74. The Law Council considers that there would be value in creating an independent oversight mechanism, in the form of an independent Anti-Slavery Commissioner or Ombudsman. As outlined in the Law Council's submission to the Modern Slavery Act Inquiry, the Law Council envisaged that a separate entity, such as ASIC, would have responsibility for investigation and enforcement action concerning non-compliance with reporting requirements, while oversight, outreach and education would fall to the Anti-Slavery Commissioner or Ombudsman.<sup>73</sup>
75. The Law Council considers that there is value in creating an independent oversight mechanism, which could take the form of an independent Anti-Slavery Commissioner or Ombudsman. The Law Council notes that many reporting entities may be contracted by Government, or engaged in public-private partnerships. The experience of the Australian National Contact Point, tasked with responding to complaints about Australian businesses under the OECD Guidelines for Multinational Enterprises, has shown Government reluctance to comment on whether companies contracted to carry out Government policy are compliant with business and human rights standards.<sup>74</sup> Therefore, independence from government is crucial if meaningful oversight of the reporting requirements is to occur.
76. The Law Council does not consider that civil society should have primary responsibility for oversight of the reporting requirements. As noted above in relation to the creation of a central registry, the Law Council does not consider it appropriate for the burden of oversight to fall to civil society, especially not-for-profit organisations with limited

<sup>73</sup> Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) [75] <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

<sup>74</sup> See Australian National Contact Point, *Specific Instance – G4S Australia* (10 June 2015) 3 <[http://www.ausncp.gov.au/content/publications/reports/general/G4s\\_au.pdf](http://www.ausncp.gov.au/content/publications/reports/general/G4s_au.pdf)>. See also, Law Council of Australia, *Australian National Contact Point 2017 Review* (25 July 2017) [48] <<https://www.lawcouncil.asn.au/docs/cefecb02-ec77-e711-93fb-005056be13b5/3313%20-%20ANCP%202017%20Review.pdf>>.

funding. While modern slavery statements will no doubt be helpfully scrutinised by civil society, an independent Anti-Slavery Commissioner or Ombudsman funded by Government would ensure there would be a body with official responsibility to review statements for quality, effectiveness, produce annual reports, and provide guidance and training to the business community.

77. The Anti-Slavery Commissioner or Ombudsman could also be responsible for overseeing implementation of the National Action Plan on Human Trafficking and Slavery, as well as any future implementation of the UNGPs in Australia. Both these functions would give the independent Anti-Slavery Commissioner an informed and overarching perspective of Australia's response to slavery and business-related human rights impacts. This perspective could then inform recommendations which the independent Anti-Slavery Commissioner or Ombudsman could make to Government on improving the effectiveness of the reporting requirements, similar to the role of the UK independent Anti-Slavery Commissioner.

### Recommendations

- **The oversight mechanism for the reporting requirements:**
  - **should be independent, for example an independent Anti-Slavery Commissioner or Ombudsman; and**
  - **could perform the following functions:**
    - **review reporting entities' statements for quality and effectiveness;**
    - **produce annual reports that publish findings on general trends of quality and effectiveness;**
    - **provide guidance and training to the business community on the reporting requirements;**
    - **work with any non-compliant entities to strengthen their ability to comply;**
    - **oversee the National Action Plan on Human Trafficking and Slavery, as well as any future implementation of the UNGPs in Australia; and**
    - **make recommendations to Government on how reporting requirements might be improved or strengthened.**

### **Should Government reconsider the other options set out in this consultation paper (Options 1 and 2)? Would Option 2 impose any regulatory costs on the business community?**

78. The Law Council of Australia has previously set out its support for Government action on modern slavery, especially regarding supply chains transparency, in its submission to the Committee's Modern Slavery Act inquiry.<sup>75</sup> The Law Council agrees with the Government's justifications for pursuing option 3 (targeted regulatory action by

<sup>75</sup> See Law Council of Australia, Submission No 60 to the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Establishing a Modern Slavery Act in Australia* (28 April 2017) 5-6 <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

introducing reporting requirements for modern slavery in supply chains) as set out in the Consultation Paper.<sup>76</sup>

79. Therefore, the Law Council considers that options 1 and 2 are inappropriate. As the Consultation Paper notes, option 1 (take no action) would ignore the business community's support for Government to take action in this area.<sup>77</sup> In addition, the Law Council considers that taking no action would not discharge the state duty under international law to protect and promote human rights, through the provision of effective guidance to business enterprises to enable them to avoid infringing upon the human rights of others.

80. The Law Council considers that option 2 (non-regulatory action; voluntary business-led measures) would still impose a regulatory cost on the business community. However, this cost would fall solely upon those businesses that initiate or subscribe to voluntary measures, rather than all those firms sharing in the industry-wide benefit of their adoption. The inhibiting effect of this inequality – and the uneven playing field created – is an obstacle to effectiveness of voluntary requirements. Therefore, option 3 remains the strongest option to address modern slavery in supply chains.

#### **Recommendation**

- **The Government should not reconsider option 1 (take no action) and 2 (encourage voluntary action by the private sector). Option 2 would still impose regulatory costs on the business community, but they would be shared unequally, as opposed to equally under option 3 (introduce reporting requirements in legislation), which remains the strongest option to address modern slavery in supply chains.**

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<sup>76</sup> Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (16 August 2017) *Australian Government* 12-13.

<sup>77</sup> *Ibid* 11.

## Appendix A: Potential responses to reporting requirements, by entity engagement and risk of slavery in supply chain

### **Entity type A: highly engaged, high risk**

81. Type A entities will take the 'gold standard' approach to the reporting requirement. That is, they will likely initiate a 'Supply Chain Project' working group with key organisational stakeholders involved. This will likely include: Communications and Government relations team, Audit, Legal, Procurement, Human Resources and Workplace Health and Safety teams. They may also engage an employee or employees with expertise in human rights to provide day-to-day advice and consider human rights issues as they arise for the entity. In addition to this, the Project team may also instruct professional service firms (such as a consultant, accountant or law firm) that specialise in managing business and human rights risk.
82. Depending on the size of the corporate group and its supply chain, the cost of professional services could be significant and well in excess of \$11 500 per annum. In addition to this, the entity will incur costs associated with the project team. That is, project team members would have to be diverted from their business-as-usual workload to dedicate their time to the project. This could impact the entity's other business activities which may need to be put on hold while the project is completed. The actual workload would involve a mapping and review of the supply chain, a review of supplier contracts and internal/supplier policies including codes of conduct, development of internal and even supplier training, as well as a risk assessment and long-term risk reduction strategy.
83. The most engaged Australian businesses are already doing this work, so the impact of a Modern Slavery Reporting statement in Australia will likely be minimal for most entities in this group and simply involve preparing a statement and having it checked to ensure its accuracy and compliance with any new regulation.

### **Entity type B: medium engagement, medium risk**

84. Type B entities will likely rely on in-house resources rather than instruct professional service firms to undertake any internal risk assessment. Where professional service firms are instructed, this will likely be for specific questions and to set up a structure and assist with policies and procedures. Type B entities will still undertake a risk assessment, but will focus on the more commonly understood areas of risk and some other risk factors could be overlooked. That is, the focus of the exercise is more likely to be on highly regulated human rights issues, such as health and safety and labour related rights.
85. A greater reliance will be placed on the publicly available resources that come out of the development of the UNGPs. These entities will also incur the costs of preparing statements and ensuring that they are accurate, but may do so in-house. The Law Council anticipates that type B entities, on average, will expend more than \$11,500 per annum on responding to an Australian MSA, unless these entities are also bound by other similar legislative regimes.

### **Entity C: high engagement, low risk**

86. Some entities are highly engaged, but are comparatively low risk in terms of having modern slavery in their supply chains. Examples could be mid-sized professional services firms that operate only within Australia. These entities will map their supply chain, adopt appropriate policies and supply terms and prepare statements that are thoroughly checked for accuracy and compliance. They may decide to engage in a deeper review of the arrangements of a very select group of suppliers. The costs of compliance with the reporting requirement may not be significant for this group although there will be some initial set up costs depending upon whether they need to map a substantial supply chain. The Law Council anticipates that type C entities will expend approximately \$11,500 per annum on responding to an Australian MSA, unless these entities are also bound by other similar legislative regimes.

### **Entity type D: low engagement or low risk or both, but still report**

87. Type D entities will likely task an in-house legal or human resources employee with ensuring the statement is prepared as cost effectively as possible. Without an investment of time and effort into a project, it will be difficult for the entity to properly map out its supply chain. Therefore, only highly regulated human rights issues will inform the basis of the report. The report will likely be light on detail, but will still cover each of the compulsory criteria. The Law Council anticipates that type D entities, on average, will expend less than \$11,500 per annum on responding to an Australian MSA.