Law Council
OF AUSTRALIA

Review of Australia's Modern Slavery Act 2018

Attorney-General's Department

13 December 2022

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council thanks its Business and Human Rights Committee, whose views have been particularly instrumental in putting this submission together.

It also thanks its Business Law Section, its National Human Rights Committee, members of its International Section, and the following constituent bodies for their substantive contributions to this submission:

- the New South Wales Bar Association (**NSW Bar**);
- the Law Institute of Victoria;
- The Law Society of New South Wales;
- The Law Society of Western Australia; and
- the Victorian Bar.

Executive Summary

1. The Law Council thanks the Attorney-General's Department (**Department**) for the opportunity to make a submission to the statutory review of the *Modern Slavery Act 2018* (Cth) (**Modern Slavery Act**), which is being led by Professor John McMillan AO.

2. Eliminating slavery and slavery-like conditions is a global priority, and is reflected in Australia's commitments in a number of international instruments.

3. The Modern Slavery Act was conceived as a scheme which, by requiring large corporate entities operating in Australia to publicly report on the measures to address the risk of modern slavery arising in their operations and supply chains, would generate a shared culture of transparency and accountability and inspire those entities to develop best practice.

4. The Law Council has been a strong supporter of the passage of the Modern Slavery Act, and has been pleased to assist in its subsequent establishment.[1]

5. The Law Council recognises that the Act has had a positive impact by increasing Australian entities' understanding of modern slavery and the need to improve their risk management practices. It acknowledges that the pandemic period has been a very challenging time for business, and that the vast majority of entities have engaged in good faith with the new scheme.

6. However, anecdotal evidence alongside various academic, investor and civil society reports, suggests some entities are having difficulty understanding how to assess the risks and how to respond to them, and not all entities are producing high-quality reports. Further, it is not clear that all relevant consumers, investors, and business partners are aware of the scheme at all, let alone in a position to appraise the reports and adapt their engagement with the reporting entities accordingly.

7. Notwithstanding the positive ground achieved, the Law Council suggests that reform is required to the Modern Slavery Act to address these shortcomings and mitigate, effectively, the risks of modern slavery consistent with Australia's international obligations. In short, the Law Council suggests amendments to buttress the transparency ethos with greater regulatory controls and incentives.

8. The Law Council's key recommendations are:

    - The Modern Slavery Act should be amended to establish an Anti-Slavery Commissioner responsible for the performance of key regulatory measures—education, assessment and advice. An entity, resourced, equipped and accountable under the Modern Slavery Act, is needed to perform these additional

[1] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 'Modern Slavery Bill 2018' (**2018 submission on the Bill**) [3] < https://www.lawcouncil.asn.au/publicassets/412edee3-8693-e811-93fc-005056be13b5/3475%20-%20Modern%20Slavery%20Bill%202018.pdf>; Law Council of Australia, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade in relation to its Inquiry into establishing a Modern Slavery Act in Australia, 28 April 2017 (**2017 submission to the Joint Standing Committee**) [9] < https://www.lawcouncil.asn.au/publicassets/826ada38-234b-e711-93fb-005056be13b5/3279%20-%20Establishing%20a%20Modern%20Slavery%20Act%20in%20Australia.pdf>; Law Council of Australia, Submission to Australian Border Force – *National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper*, 21 February 2020 (**Law Council submission to the National Action Plan Consultation**) [120]-[136] < https://www.lawcouncil.asn.au/publicassets/46cffbb3-1d59-ea11-9403-005056be13b5/3757%20-%20Public%20Consultation%20Paper%20on%20the%20National%20Action%20Plan%20to%20Combat%20Modern%20Slavery%202020-2024.pdf>.

functions. This will ameliorate the risks of reporting entities, operating in Australia, benefitting from modern slavery in their operations or supply chains.

- The entity reporting requirements imposed by the Modern Slavery Act should be amended to better align with the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*[2] (**UNGPs**). These amendments should require reporting entities to provide greater detail about modern slavery risks identified and specific measures taken to address these risks.

- More guidance should be given to support reporting entities to understand modern slavery and how to identify and respond to risks of modern slavery under the Modern Slavery Act. The Law Council supports a new Anti-Slavery Commissioner being empowered to make reporting standards to assist reporting entities perform their reporting obligations.

- The Modern Slavery Act should be amended to introduce civil penalties for non-compliance with reporting requirements in certain circumstances, as well as additional regulatory tools to aid compliance.

- Consideration should be given to amending the Modern Slavery Act to lower the annual turnover threshold that determines which entities are subject to the scheme, albeit subject to a tiered approach which gives smaller entities a regulatory amnesty on entering the scheme.

- Improvements should be made to the public register of reports made under the Modern Slavery Act to make the information clearer and easier to peruse.

- Consideration should be given to making changes either in the Modern Slavery Act or the Commonwealth Procurement Rules to ensure Commonwealth entities properly consider the risks of modern slavery in their procurement decisions.

9. Following a brief contextual section, this submission adopts the question structure set out in the 'Review of Australia's Modern Slavery Act 2018—Issues Paper' (**Issues Paper**),[3] published by the Department.

[2] The Guiding Principles were developed by the Special Representative of the Secretary-General, on the issue of human rights and transnational corporations and other business enterprises. They were annexed to his final report to the Human Rights Council (UN Doc A/HRC/17/31) and endorsed by the Human Rights Council in its resolution 17//4 of 16 June 2011 (**UNGPs**).
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
[3] Issues Paper, https://consultations.ag.gov.au/crime/modern-slavery-act-review/user_uploads/review-modern-slavery-act-issues-paper.pdf.

Context

The incidence of modern slavery

10. Australia is part of the Asia–Pacific region, which has the highest number of people in forced labour in the world (15.1 million).[4]

11. The incidence of modern slavery within Australia appears to be relatively low. The Issues Paper suggests Australia identified over 350 suspected victims of modern slavery between 2004–18.[5] A report from the Australian Institute of Criminology (**AIC**) suggests that that figure represents the number of people referred to the Support for Trafficked People Program over that period.[6] The AIC estimates the number of victims of modern slavery in the two-year period from 2015–16 to 2016–17 is between 1,342 and 1,897.[7] According to the AIC, only one in five victims of modern slavery is ever identified.[8]

Relevant international instruments

12. Eliminating slavery and slavery-like conditions is a global priority, and is reflected in Australia's commitments set out in international instruments, including the following:

- the *Convention against Transnational Organized Crime* (**Transnational Organized Crime Convention**), including the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (**Trafficking Protocol**);[9]
- the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**);[10]
- the *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* (Declaration);[11]
- the *International Covenant on Civil and Political Rights*;[12]
- the *International Convention on the Elimination of All Forms of Racial Discrimination*;[13]
- the *Convention on the Elimination of All Forms of Discrimination Against Women*;[14] and

[4] International Labour Organization, Walk Free, and International Organization for Migration, 'Global Estimates of Modern Slavery Forced Labour and Forced Marriage' (September 2022) 3, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf.
[5] Issues Paper 4.
[6] Lyneham S, Dowling C & Bricknell S 2019. *Estimating the dark figure of human trafficking and slavery victimisation in Australia*. Statistical Bulletin no. 16. Canberra: Australian Institute of Criminology 6, https://www.aic.gov.au/publications/sb/sb16 2.
[7] Ibid 6.
[8] Ibid.
[9] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/RES/55/25, annex II art 2(a).
[10] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
[11] UN GA UN Doc A/RES/40/34 (adopted 29 November 1985).
[12] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[13] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)
[14] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

- the *Convention on the Rights of the Child*[15] (**CRC**) and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.[16]

13. These international standards should guide and inform a human rights approach to addressing modern slavery, both in and outside Australia.

14. Further, a number of relevant obligations are contained within the International Labour Organization Protocol of 2014 to the Forced Labour Convention, 1930[17] (**Protocol to the Forced Labour Convention**) which Australia ratified on 31 March 2022, but which will not enter into force for Australia until 31 March 2023.[18] These obligations are discussed within this submission.

15. In addition, both the UNGPs and Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (**OECD Guidelines**)[19] set out standards for companies to prevent and address their involvement in human rights harms, including freedom from modern slavery, in their operations and supply chains.

The objectives of the Modern Slavery Act

16. The Issues Paper states that the 'dual aim of the Act is to increase business and government awareness of these modern slavery risks and support entities to identify, report and address the risks'.[20] It goes on to state that:

> *Equipping and enabling large businesses to be responsible and transparent in responding to modern slavery risks is expected to have flow-on market effects, for example, in consumer support and business reputation and competition for investor funding. Two phrases commonly used to describe the Act is that it creates a 'transparency framework' that will instigate a 'race to the top'.*[21]

17. The Explanatory Memorandum for the Modern Slavery Bill 2018 (Cth) (**Modern Slavery Bill**), consistent with that passage, expresses the objective of the Modern Slavery Act in these terms:

> *The Bill will support large businesses to identify and address modern slavery risks and to develop and maintain responsible and transparent supply chains. It will drive a 'race to the top' as reporting entities compete for market funding and investor and consumer support. The Bill also aims to increase awareness of modern slavery risks among the Australian business community, and assist investors and consumers to make more informed decisions when using, buying and selling goods and services.*[22]

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[15] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[16] Opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).
[17] International Labour Organization (**ILO**), Protocol of 2014 to the Forced Labour Convention, 1930 (Entry into force: 09 Nov 2016) < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029>.
[18] ILO, Ratifications of P029 - Protocol of 2014 to the Forced Labour Convention, 1930 (webpage, accessed on 22 November 2022), < https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672>.
[19] OECD, *OECD Guidelines for Multinational Enterprises* (2011 edition), OECD Publishing.
[20] Issues Paper 6.
[21] Ibid 6-7.
[22] Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) 2.

18. These dual objectives are pursued by the Act's two key features:

    (a) by obliging 'reporting entities' to give modern slavery statements to the Minister for a 'reporting period'[23] (**reporting obligation**); and

    (b) by the Minister maintaining a register of modern slavery statements, which is available for public inspection, without charge, on the internet[24] (**the Register**).

19. The reporting entities are:

    - an Australian entity or entity carrying on business in Australia with a consolidated revenue of at least $100 million for the reporting period (**$100 million reporting threshold**);
    - corporate Commonwealth entities and Commonwealth companies, also subject to a $100 million reporting threshold;
    - the Commonwealth, itself; and
    - any other entity which has volunteered to comply.[25]

20. The modern slavery statements must address mandatory criteria set out in section 16 of the Modern Slavery Act (**reporting requirements**) which include—in relation to the risks of modern slavery practices in the operations and supply chains of the reporting entities, and any entities it owns or controls—describing the risks,[26] describing actions taken to assess address the risks,[27] and describing how the effectiveness of those actions is assessed.[28]

21. The reporting obligation supports large entities to identify and address modern slavery risks, and the Register supports increasing awareness of these risks in the community.

22. During Parliamentary debate, amendments were made to the Modern Slavery Bill to insert a third feature, which gives it some regulatory teeth. Specifically, the Minister is empowered to:

    - if reasonably satisfied that an entity has failed to comply with a reporting requirement, request the entity to provide an explanation and/or undertake specified remedial action;[29] and
    - if reasonably satisfied that an entity has failed to comply with such a request, publish information on the Register or otherwise in relation to the entity's failure to meet the reporting requirement and details of the request with which it has failed to comply.[30]

23. Those amendments also inserted the requirement for the present review.[31]

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[23] Sections 12-15 of the Modern Slavery Act.
[24] Ibid Part 3.
[25] Ibid section 5.
[26] Ibid paragraph 16(1)(c).
[27] Ibid paragraph 16(1)(d).
[28] Ibid paragraph 16(1)(e).
[29] Ibid subsections 16A(1)-(3).
[30] Ibid subsections 16A(4)-(5).
[31] Ibid section 24.

The UNGPs

Relevance to the Modern Slavery Act

24. The Modern Slavery Act is not expressly designed to give effect to the UNGPs. However, the Explanatory Memorandum for the Bill explains that the mandatory reporting requirements in the Act draw on terminology and concepts used in the business and human rights context, particularly in the UNGPs.[32]

25. Further, the Guidance for Reporting Entities, prepared to support reporting entities perform their obligations under the Modern Slavery Act, emphasises an expectation that reporting entities understand and apply the UNGPs in their response to modern slavery,[33] and draws on principles from the UNGPs in explaining the reporting obligations under the Act.[34]

Status of the UNGPs

26. The UNGPs are not an international instrument that can be ratified by States, nor do they create new legal obligations.[35] They are annexed to a Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. The **Ruggie Report** was approved by the Human Rights Council of the United Nations General Assembly on 21 March 2011.[36]

27. Importantly though, the UNGPs, in part, refer to and result from States' existing obligations under international law.[37]

28. The UNGPs are made up of three foundational pillars which reflect State duties, corporate responsibility, and access to remedies for victims of modern slavery. The following passage from the Ruggie Report helpfully sets out the foundational pillars on which the UNGPs are derived:

> *The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and*

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[32] Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [127].
[33] Commonwealth Modern Slavery Act 2018 - Guidance for Reporting Entities 9 < https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.
[34] Ibid 29.
[35] United Nations Office of the High Commissioner on Human Rights, Frequently Asked Questions about the Guiding Principles on Business and Human Rights (2014) 8 (**UNGPs FAQs**); Law Council of Australia, *Business and Human Rights and the Australian Legal Profession* (January 2016) 5. <https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf>.
[36] General Assembly, Human Rights Council, '*Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*', UN Doc A/HRC/17/31 (**Ruggie Report**).
[37] UNGPs FAQs 8.

access to remedy because even the most concerted efforts cannot prevent all abuse.[38]

29. That first pillar, the State duty, is enshrined in the first foundational principle of the UNGPs being that:

> *States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.*[39]

30. The supporting commentary in the UNGPs expands on the content and nature of the State duty to protect against the human rights abuses by third parties such as corporate entities:

> *The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication*.[40]

Australia's response to the UNGPs

31. Australia co-sponsored the resolution which resulted in the UNGPs,[41] and Australia has expressed its commitment to the UNGPs.[42]

32. In 2016, the Human Rights Council's Report of the Working Group on the Universal Periodic Review included a recommendation that a consultative process towards adoption of a National Action Plan on business and human rights.[43] In its response, Australia indicated that the Australian Government would undertake a national consultation on the implementation of the UNGPs during 2016.[44]

33. In August 2017, a multi-stakeholder advisory group convened by the Minister for Foreign Affairs advised how the Australian Government could best implement the Guiding Principles, including through the development of a National Action Plan on Business and Human Rights. However, as far as the Law Council is aware, federal action to implement such a plan has not been further considered.[45]

34. The Law Council has previously recommended[46] that the Australian Government consider adopting a National Action Plan on Business and Human Rights to support

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[38] Ruggie Report [6].
[39] UNGPs, Principle 1.
[40] UNGPs 3.
[41] General Assembly, Human Rights Council, *Report of the Human Rights Council on its seventeenth session*, UN Doc A/HRC/17/2 (**HRC Report**) [140].
[42] Australian Permanent Mission and Consulate-General, Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, sixth session, 26-30 October (undated), <https://geneva.mission.gov.au/gene/Statement834.html>.
[43] General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, UN Doc A/HRC/31/14 [136.212] and [136.213].
[44] General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review* Australia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc A/HRC/31/14Add.1 [63].
[45] Law Council submission to the National Action Plan Consultation [92].
[46] Ibid [94]-[95].

a shift to sustainable, ethical, and human rights compliant business practices, consistent with the UNGPs. It maintains this position.

35. The United Nations Working Group on Business and Human Rights (**Working Group**) established to, amongst other things, promote the effective and comprehensive dissemination and implementation of the UNGPs,[47] has long supported and encouraged States to develop, enact and update periodically a National Action Plan on Business and Human rights as part of their responsibility to disseminate and implement the UNGPs.[48] It has published guidance on the establishment of such plans.

36. A National Action Plan on Business and Human Rights would provide a coordinated and concrete plan to help business enterprises respect all relevant human rights meaningfully in conformity with the UNGPs.[49] It would ensure that entities understand their human rights responsibilities as expansive. It would also put these responsibilities in the language of business, and on a level playing field between entities, rather than leaving it to individual entities to interpret how international human rights instruments should apply in their day-to-day business practices, which risks playing to the lowest common denominator.

37. In adopting such a plan, Australia can draw on international best practice: according to Working Group website, as at the date of writing, 28 countries around the world already had a National Action Plan on Business and Human Rights.

Impact of the Modern Slavery Act

Question 1—Has the Modern Slavery Act had a positive impact in the first three years?

38. With reference to the 'dual aim' of the Modern Slavery Act articulated in [15], the broad view of practitioners is that the Act has achieved its objective of *raising awareness of modern slavery risks* in the business and wider community.

39. The Law Council considers that reporting entities are largely making a good faith effort to report and that reporting entities from a wider range of sectors now are more aware of their modern slavery risks and stakeholders' expectations around addressing them.

40. In general, it is important to acknowledge upfront that the pandemic period has generated some very significant disruption for business during the Act's period of operation and this will have affected its ability to accommodate the additional reporting requirements of a new legislative scheme.

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[47] https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement 6(a).

[48] United Nations General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' A/69/263 (5 August 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/495/68/PDF/N1449568.pdf?OpenElement and Office of the High Commissioner for Human Rights 'National action plans on business and human rights' (webpage, accessed on 9 December 2022) https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights#:~:text=The%20UN%20Working%20Group%20strongly,on%20Business%20and%20Human%20Rights.

[49] UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights (November 2016) < https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf>.

41. The Law Council has received feedback from within the profession that there is considerable room for improvement in achieving the other objective of the Act of reporting entities *identifying and reporting on modern slavery risks*. That feedback suggests that the impact of the Modern Slavery Act has not yet matured into a meaningful discussion on how identified risks can and should be addressed, including through an approach that recognises and responds to the experiences of victim-survivors.

42. Research data collated as part of review of the performance of companies of their reporting obligations under the Modern Slavery Act supports that latter view, as is detailed in the Law Council's response to the following question.

Question 2—Is the 'transparency framework' approach of the Modern Slavery Act an effective strategy for confronting and addressing modern slavery risks, including the drivers of modern slavery?

43. Conceptually, a transparency framework requires the following conditions to achieve its dual aims of increasing business and government awareness of these modern slavery risks and supporting entities to identify, report and address the risks:

- the reporting entities understand how to assess those risks, determine practices best suited to combatting them and to report diligently on them; and
- clear and intelligible information about those reports be made available which enables an appraisal of an entity's efforts to reduce the risk of modern slavery.

44. The availability of clear and digestible reports is critical to enabling:

- consumers, investors and business partners to make informed decisions about whether to purchase their products or make investment decisions;
- other reporting entities to learn about risks to which they too may be exposed and measures that could be taken; and
- the Australian Government to know whether the reporting process is having the desired effect of reducing modern slavery, which is also in the public interest.

45. As discussed throughout this submission, the Law Council considers reforms could be made to the Act to better realise the objectives of a transparency framework, including by educating reporting entities of their obligations, introducing compliance tools to induce more compliant conduct, and improving the quality and digestibility of the information provided to the general public.

46. In gaining a sense of the standard of reporting against the scheme, it may be helpful to set out the findings of the *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (**Broken Promises report**). This report, prepared as part of a collaborative research project of academics and civil society organisations, assessed the second round of reporting statements made under the Modern Slavery Act by 92 companies sourced from four high-risk sectors: garments from China, gloves from Malaysia, horticulture from Australia and seafood from Thailand.[50] This

[50] Freya Dinshaw et al, *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (1 November 2022), 2 (**Broken Promises report**) https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6375ce29c0dad25a4841722f/1668664881220/HRLC_Broken_Promises_2022_11_17.pdf.

was a follow-up to *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (**Paper Promises report**) which considered the first round of reporting statements produced by those 92 companies and ten others.[51]

47. Both reports assessed a score for the companies based around the following themes (with (iv) an addition for the purposes of the Broken Promises report):[52]

    (i) Are companies complying with the mandatory reporting requirements under the Modern Slavery Act?

    (ii) How well are companies identifying and disclosing salient modern slavery risks?

    (iii) Do modern slavery statements indicate that companies are initiating effective actions to respond to modern slavery risks, such as implementing policies and procedures, engaging with suppliers, improving working conditions and providing remedy?

    (iv) Do modern slavery statements indicate that companies are meeting promises and commitments made in first round statements? Are companies substantially improving their statements?

48. The assessment is thus a useful measurement of the achievement of the Act's aim of supporting report entities to identify, report and address modern slavery risks.

49. Relevantly to the achievement of that aim, the Broken Promises report found, in its assessment of the second-round reports produced by the 92 companies, that:

Identifying modern slavery risks

- 43 per cent of companies reviewed failed to identify obvious modern slavery risks in their supply chain, 'despite these being clearly identified in [the Paper Promises report], extensive public reporting, exposés and inquiries'[53]—an improvement from 52 per cent in the Paper Promises report;[54]

Reporting modern slavery risks

- 66 per cent of companies did not address all the mandatory reporting requirements[55]—an improvement from 77 per cent identified in the Paper Promises report;[56]

- it is likely that seven of the original 102 companies failed to submit modern slavery statements within legislative timeframes;[57]

Addressing modern slavery risks

[51] Ibid; Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (February 2022)) 2 (**Paper Promises report**) https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises_Australia+Modern+_Slavery+Act_7_FEB.pdf.
[52] Broken Promises report 14; Paper Promises report 14.
[53] Broken Promises report 2.
[54] Paper Promises report 2.
[55] Broken Promises report 2.
[56] Paper Promises report 4.
[57] Broken Promises report 2.

- 56 per cent of commitments made by companies in their first-round statements to improve their modern slavery responses remained unfulfilled in the second round of reporting;[58]

- 33 per cent of companies could demonstrate some form of effective action to address modern slavery risks, improve working conditions in their supply chains, or tackle root causes[59]—a slight improvement on 27 per cent identified in the Paper Promises report;[60] and

Overall performance

- the average company improved its score by just seven per cent between first and second rounds of reporting, with some companies substantially recycling or 'rolling over' first round statements without any qualitative improvement.[61]

50. In recording these findings, and drawing on them below, the Law Council notes that it is well aware that these are relatively early days for the scheme and that the Broken Promises Report does demonstrate incremental improvement in the reporting by entities across the first two years of the scheme.

Question 3—Should the Modern Slavery Act be extended to require additional modern slavery reporting by entities on exposure to specified issues of concern? If so, what form should that reporting obligation take?

51. The Law Council received very limited feedback from the profession on this question. A general observation was made that any 'specified issues of concern' may go out of date very quickly.

52. In any event, given that the Modern Slavery Act already requires reporting entities to describe risks of modern slavery practices in their operations and supply chains and those of the entities they own or control on an annual basis, it is unclear what such a provision would add.

53. On balance, the Law Council does not support this measure. However, an Anti-Slavery Commissioner, if instituted through amendments to the Act, may be able to discuss these types of issues with companies so that guidance and best practice can be shared relating to specified issues of concerns, as discussed in response to question 16 below.

[58] Ibid.
[59] Ibid 3.
[60] Paper Promises report 2.
[61] Broken Promises report 2.

Question 4—Should the Modern Slavery Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?

What 'due diligence' is required under the UNGPs?

54. It is useful to begin this discussion by briefly unpacking the manner in which the UNGPs address human rights due diligence, as that provides a framework for the expectations of Australia and business enterprises more generally.

55. To start, the UNGPs address human rights due diligence in both pillar 1 (State duties to protect human rights) and pillar 2 (the corporate responsibility to protect human rights).

56. Under pillar 1 (State duties) the UNGPs provide that, where appropriate, States should require human rights due diligence be conducted by entities which are owned or controlled by the State (principle 4). In supporting commentary to this principle, it is suggested that 'where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations'.[62]

57. Due diligence arises more centrally, however, under the second pillar of the UNGPs—the corporate responsibility of business entities to protect human rights.

58. Specifically, under the UNGPs (principle 15), a foundational principle of the corporate responsibility to respect human rights is that business enterprises should have in place, as part of their policies and processes appropriate to their size and circumstances, 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[63]

59. The content of the human rights due diligence processes to be carried out by business is summarised in principle 17 and then detailed in principles 18–21 of the UNGPs. Principle 17 provides:

> *17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:*
>
> *(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;*
>
> *(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;*
>
> *(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.*

[62] UNGPs 7.
[63] Ibid Principle 15(c).

60. As noted, the UNGPs do not themselves create binding legal obligations on Australia. Further, while the UNGPs include principles which encompass duties imposed on States under international law (in the first pillar), the due diligence obligations imposed on corporate entities arise in the second pillar, which is not expressed as reflecting State duties.

61. It is worth noting as an aside, however, that the Protocol to the Forced Labour Convention, which will come into force for Australia on 31 March 2023, requires State Parties to prevent forced and compulsory labour, include supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.[64] The Law Council has not examined the content of this obligation for the purposes of this submission; however, suggests the Australian Government give consideration to it, moving forward.

What the Act presently requires

62. The reporting requirements imposed by the Modern Slavery Act require reporting entities to address due diligence measures in their modern slavery statements.

63. Specifically, paragraph 16(1)(d) of the Modern Slavery Act requires reporting entities to (emphasis added) 'describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, **including due diligence and remediation processes**'.

64. The reference in that paragraph to 'risks' is to the 'risks of modern slavery practices in the operations and supply chains' which reporting entities are required to describe under paragraph 16(1)(c) of the Act.

65. As noted in the Issues Paper,[65] the term 'due diligence' is not defined in the Act.

66. The Guidance for Reporting Entities explains what 'due diligence' means with reference to principles 15 and 17 of the UNGPs. The following extract captured the key details (emphasis in original):

> ***DUE DILIGENCE**: Under the UN Guiding Principles (Principles 15 and 17), your entity is expected to undertake human rights due diligence. The term 'due diligence' refers to an ongoing management process to identify, prevent, mitigate and account for how an entity addresses actual and potential adverse human rights impacts in their operations and supply chains, including modern slavery.*
>
> *There are four key parts to due diligence:*
>
> - ***Identifying and assessing** actual and potential human rights impacts (for example, screening new suppliers for modern slavery risks).*
> - ***Integrating your findings** across your entity and taking appropriate action to address impacts (for example, introducing internal training on modern slavery and processes for incident reporting).*
> - ***Tracking your entity's performance** to check whether impacts are being addressed (for example, doing an internal audit of your supplier screening).*
> - ***Publicly communicating** what you are doing (for example, by publishing a Modern Slavery Statement or publicly responding to allegations against a supplier).*

[64] Protocol to the Forced Labour Convention article 2(e).
[65] Issues Paper 31.

67. The Law Council considers this to be an accurate high-level summary of what it means to undertake human rights due diligence under the UNGPs, noting that modern slavery due diligence represents a small component of human rights due diligence.

68. Importantly, paragraph 16(1)(d) does not expressly oblige reporting entities to conduct due diligence, nor require reporting entities to demonstrate whether they conducted due diligence in a manner consistent with the UNGPs.

69. That is because paragraph 16(1)(d) requires only that the reporting entity *describe the actions* to address the risks of modern slavery, 'including due diligence'. If the actions a reporting entity takes to address the risk of modern slavery did not include due diligence, and those actions were accurately described in the modern slavery statement, it is not clear that the reporting entity would have failed to report in line with paragraph 16(1)(d), and thus be subject to the Minister's power to require an explanation for the non-compliance or that remedial action be undertaken. The better view would appear to be that the reporting entity would not have breached paragraph 16(1)(d).

70. Further, if the reporting entity does describe some due diligence activities, the standard and efficacy of those actions would not be matters which are relevant to compliance with the reporting requirement. The reporting entity only needs to describe the actions and then describe *how* they assess the effectiveness of the activities. If they do those things, even if the due diligence actions and the assessment of their effectiveness falls short of the standards set by the UNGPs, those will not be matters regarding which the entity may be assessed as non-compliant under the Modern Slavery Act.

Is reform required?

A duty of due diligence?

71. The Law Council is aware of recommendations that the Modern Slavery Act be amended to impose a greater obligation on reporting entities to conduct due diligence in relation to modern slavery risks, by replacing an *obligation to report* on due diligence measures undertaken to imposing a specific *duty to conduct* due diligence into such risks.

72. The Paper Promises report, for example, recommends that there be 'a specific duty to prevent modern slavery, which requires companies to undertake mandatory due diligence to identify and assess salient risks in their operations and supply chains that give rise to modern slavery and to take steps to mitigate and address them'.[66] Under this approach 'companies would have to show reasonable and appropriate due diligence as a defence to legal liability'.[67]

73. This recommendation is made again in the same terms in the recent Broken Promises report.[68] There is a usefully detailed discussion of the rationale for this recommendation on page 11 of that report. It notes that entities with which Australia has a lucrative trading partnership are considering establishing schemes which impose due diligence requirements, including New Zealand and the European Union,

[66] Paper Promises report 8.
[67] Ibid.
[68] Broken Promises report 10.

and notes that Australia suppliers would need to comply with the scheme currently proposed by the European Commission.[69]

74. Further, both the Law Institute of Victoria and Victorian Bar expressed to the Law Council support for the imposition of positive due diligence requirements. The Victorian Bar suggests these should be imposed as a quality compliance measure, while the LIV suggests the Modern Slavery Act be amended to require businesses to engage in proactive due diligence to address modern slavery risks, in addition to reporting on and disclosing incidents of modern slavery. Both the Victorian Bar and the Law Institute of Victoria consider it is in the interests of a business to take meaningful due diligence actions to avoid the occurrence of modern slavery in its supply chains.

75. The Law Society of New South Wales noted the establishment of regulatory models in Europe[70] which require reporting entities to conduct due diligence, and indicated it would welcome further consultation on the way in which any positive duty would be embedded and operate in the Modern Slavery Act.

76. The Law Council has not adopted a position on the introduction of a duty of due diligence in relation to modern slavery risks into the Modern Slavery Act, but noting the strong interest above, would be prepared to consult further on this issue.

77. A regulated duty of due diligence in relation to risks of modern slavery would fundamentally change the nature of the Modern Slavery Act. Thought would need to be given to the nature of the duties imposed on reporting entities in practice, the supporting measures to ensure proper performance of an obligation to undertake due diligence, the regulatory measures to assess compliance and the penalties for non-performance. Consideration would also need to be given to how any duty of due diligence would be expressed. For example, any duty of due diligence may need to be expressed in suitably general terms rather than as a set of prescriptive obligations, noting that businesses would need flexibility in regard to how any such obligations may be met within their existing operational, compliance and risk management frameworks, and without the cost burden exceeding the benefit.

78. The Law Council further notes, in any event, that while the UNGPs envisage business conducting 'human rights due diligence', the Modern Slavery Act is focused on a relatively narrow subset of entities and issues.

79. The Law Council considers it would be beneficial for the Australian Government to take a holistic approach to addressing issues of human rights due diligence by corporate entities more generally. As a next step, the Law Council suggests the Australian Government instead focus its efforts on establishing a National Action Plan on Business and Human Rights, as discussed above. It adds that a federal charter of human rights would play a critical role in national 'norm-setting' regarding the nature and scope of human rights, given that most Australian jurisdictions lack such a

[69] European Commission, Proposal for a Directive on corporate sustainability due diligence 2022/0051, 23 February 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.
[70] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022/0051 (COD), https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf. Business for Social Responsibility (BSR), 'The Norwegian Transparency Act: Key Insights for Business' (30 June 2022), https://www.bsr.org/en/our-insights/blog-view/the-norwegian-transparency-act-key-insights-for-business; see also Ropes & Gray, 'New Norwegian Mandatory Human Rights Due Diligence Law Creates Obligations for US-based Multinationals Doing Business in Norway' (15 December 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/December/New-Norwegian-Mandatory-Human-Rights-Due-Diligence-Law-Creates-Obligations-for-US.

charter, and for many in the community and business alike, these remain unfamiliar concepts.

Other potential actions relevant to improving due diligence measures

80. The Broken Promises report found that 67 per cent of businesses that it assessed complied with paragraph 16(1)(d) of the Modern Slavery Act,[71] up from 60 per cent in the Paper Promises Report.[72] The report found that just 26 per cent of companies reported they undertook human rights due diligence on new suppliers, up from 25 per cent.[73] It further assessed that 43 per cent of companies reviewed failed to identify obvious modern slavery risks in their supply chain,[74] suggesting measures presently taken by business to identify those risks are not sufficient and that more rigor in those assessments is required.

81. The Law Society of New South Wales suggests that the early research which shows that companies are not fully complying with reporting under section 16 of the Act, including the due diligence reporting requirement,[75] shows that there needs to be more specific guidance to business on what is required in this respect.

82. The Law Council considers that the reporting requirements generally could be amended to better resemble the UNGPs and improve the likelihood of modern slavery risks being identified in operations and supply chains—this is discussed below, in response to question 10.

83. Further, the guidance provided to reporting entities on how to identify and address risks of modern slavery in their operations and supply chains which is prescribed in the Guidance for Reporting Entities is critical.

84. To add to the findings in the Broken Promises report about the failure of many companies to identify obvious modern slavery risks, the anecdotal observations of practitioners is that companies have difficulty with identifying risks of modern slavery within their supply chains. Practitioners observe that smaller entities nearer the reporting threshold require more practical assistance to identify risk.

85. To address this, Guidance for Reporting Entities should be updated both following this review and on a regular periodic basis to provide more specific and updated information on how to identify and address modern slavery risks, potentially, tailored to particular industries and reporting entities nearer the reporting threshold.

[71] Broken Promises 16.
[72] Paper Promises 54.
[73] Broken Promises 5.
[74] Ibid 2.
[75] The Law Society identifies the following sources, by way of example: comments in Appendix B of the Issues Paper, including those summarising findings of the Australian Council of Superannuation Investors, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act* (July 2021); Monash University Business School, Centre for Financial Studies, *Measuring Disclosure Quality of Modern Slavery Statements* (Dec 2021); Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (Feb 2022); and the Paper Promises report.

Recommendation

- **The Australian Government should establish a National Action Plan on Business and Human Rights to provide a coordinated means to give effect to its commitment to the UNGPs, which would (inter alia) address human rights due diligence by corporate entities.**
- **In the short-term, the Guidance for Reporting Entities should be reviewed and amended to provide more specific and updated information on how to identify and address modern slavery risks, potentially tailored to particular industries and different-sized entities.**

Question 5—Has the Modern Slavery Act been adequately supported and promoted by government, business and civil society?

86. The role of civil society in monitoring the conduct of reporting entities performing their obligations under the Modern Slavery Act is an intended design feature in a 'transparency' focused legislative framework. The motivation to 'race to the top' is, in part, based on an expectation that consumers, investors and business partners will be aware of compliance and non-compliance under the scheme. In the absence of a regulatory body with this function, civil society groups were expected to and, indeed, have, performed this role.

87. The Regulation Impact Statement (**RIS**) annexed to the Explanatory Memorandum for the Bill makes clear this intended design feature:

> *Another potential cost of the reporting requirement is that its effectiveness may be undermined by low rates of compliance and poor reporting practices from business. This could be due to low business awareness of their obligations or wilful non-compliance. The Government has committed to developing clear mandatory criteria and comprehensive guidance for business to ensure reporting entities are able to understand their obligations. The Government will also work with peak bodies, industry groups and civil society to raise business awareness of the reporting requirement.*[76]

Also:

> *The Government aims to implement the reporting requirement in a way that ensures:*
>
> *…*
>
> - *reporting entities, investors, consumers, civil society and business peers collaborate together to drive a 'race to the top' and share best practice*
>
> *..*
>
> *The Department of Home Affairs is responsible for implementing the reporting requirement and will work closely with government, business and civil society stakeholders to achieve these implementation objectives.*[77]

[76] Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) 46.
[77] Ibid 53.

88. The RIS also indicated that the 'the Australian Government will also establish a business and civil society reference group to provide feedback to government about the implementation and operation of the reporting requirement'.[78] To that end, the Law Council has been pleased to be represented on the Modern Slavery Expert Advisory Group and the National Roundtable on Human Trafficking and Slavery.

89. However, the Law Council has received feedback from the profession, including members participating in those civil society organisations that are examining reporting under the Modern Slavery Act, that the operation of the statutory framework should not depend on civil society resourcing and 'support'. Several civil society organisations performing this accountability function have stretched resources which can affect their ability to perform this function.

90. A suggestion was also made that Government could do more to raise consumer awareness of the Act, as, despite the efforts of civil society groups, anecdotal evidence suggests consumers largely do not know about the Act.

Question 6—Is AU$100 m consolidated annual revenue an appropriate threshold to determine which entities are required to submit an annual statement under the Modern Slavery Act? Does the Act impose an appropriate revenue test for ascertaining the $100 m threshold?

Headline view

91. The Law Council ultimately maintains its existing position that the Modern Slavery Act be amended to reduce the reporting threshold to companies with an annual turnover of $60 million or more. However, it also suggests consideration be given to reducing the threshold as part of a tiered reform where, at least initially, new reporting entities are not subject to the compliance powers under the Act, including any new powers introduced.

Law Council's existing position

92. In the 2018 submission on the Modern Slavery Bill, the Law Council submitted that the $100 million reporting threshold is too low and that it preferred a threshold closer to $60 million, being approximately equivalent to the threshold in the *Modern Slavery Act 2015* (UK) (**UK MSA**).[79]

93. The Law Council then suggested[80] that the (footnotes retained from original) 'threshold should be set at a figure that corresponds with the purpose of the legislation, being to address modern slavery risks in the supply chains of goods and services,[81] by requiring companies which are large enough to influence suppliers to report'.[82]

94. The threshold in the UK MSA was suggested as a reference point given the likelihood that some Australian multinationals will be required to report under both the Modern Slavery Act and the UK MSA and that consistency is preferable.[83] (It is worth noting

[78] Ibid 58.
[79] Law Council, 2018 submission on the Bill [8].
[80] Ibid 9
[81] Commonwealth, Parliamentary Debates, House of Representatives, 28 June 2018, 15 (Alex Hawke, Assistant Minister for Home Affairs).
[82] Ibid 16.
[83] Law Council, 2018 submission on the Bill [9](a).

that the reporting threshold in the UK is still £36 million[84] which is approximately AUD $64 million on current exchange rates.)[85]

95. The 2019 independent review of the UK MSA found that the reporting threshold should not be changed and, if anything, in the future, should be lowered:[86]

> *On the issue of the turnover threshold for determining which companies are in scope of section 54, we did not hear many calls for it to be changed at present. Government should primarily focus on improving compliance, quality and enforcement of obligations at the current threshold. However, Government should keep the threshold of £36 million turnover under review, with the possibility of reducing the threshold over time. Specific guidance could also be addressed to companies with an annual turnover under £36 million, following the example of the Scottish Government.*

96. In its 2018 submission on the Modern Slavery Bill, the Law Council also noted that the threshold in the *Modern Slavery Act 2018* (NSW) (**NSW MSA**) was then $50 million[87] and, again, that confusion and compliance costs may result from the same entity being classed differently under different legislation.[88]

97. However, the reporting requirement in the NSW MSA was repealed in November 2021.[89] This repeal followed a 2020 report by the NSW Parliament Standing Committee on Social Issues, *Modern Slavery Act 2018 and associated matters* (**NSW Parliamentary Committee report**), which recommended that:

> *the NSW Government work with the Australian Government to seek harmonisation of the reporting threshold, ideally at $50 million consolidated revenue, as a key reform for a standard national approach to modern slavery.* [90]

98. The amendment to the NSW MSA achieved harmonisation, ensuring only one reporting requirement—the Commonwealth's.

99. In its 2018 submission on the Modern Slavery Bill, the Law Council also referred to existing reporting requirements in the *Corporations Act 2001* (Cth)—the threshold of $50 million is consistent with the definition of a large proprietary company[91] which is obliged to lodge annual audited financial reports and directors' reports under that Act.[92]

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[84] The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 (UK) regulation 2.
[85] Reserve Bank of Australia, Latest Exchange Rates (webpage, accessed on 23 November 2022) <https://www.rba.gov.au/statistics/frequency/exchange-rates.html>.
[86] Rt Hon Frank Field MP et al, 'Independent report, Independent review of the Modern Slavery Act: final report' (May 2019) (**2019 independent review of the UK MSA**) [2.7.2] https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report/independent-review-of-the-modern-slavery-act-final-report-accessible-version#acknowledgements.
[87] *Modern Slavery Act 2018* (NSW) s 24(1)(b)
[88] Ibid 16.
[88] Law Council, 2018 submission on the Bill [9](b).
[89] *Modern Slavery Amendment Act 2021* (NSW) item 30 of Schedule 1.
[90] Standing Committee on Social Issues, Parliament of New South Wales, '*Modern Slavery Act 2018* and associated matters' (Report 56, March 2020) Recommendation 5 < https://www.parliament.nsw.gov.au/lcdocs/inquiries/2546/Final%20Report%20No.56%20-%20Modern%20Slavery%20Act%202018%20and%20associated%20matters%20-%2025%20March%202020.pdf> (**NSW Parliamentary Report**).
[91] *Corporations Act 2001* (Cth) 45A and Corporations Regulations 2001 (cth) reg 1.02.02B.
[92] *Corporations Act 2001* (Cth) paragraph 292(1)(c).

100. The Law Council has, as recently as May 2022, called for an amendment to the Modern Slavery Act to reduce the threshold to $60 million.[93]

The different views from within the profession

101. The Law Council understands the review is interested in considering a wide range of views on this question. With that in mind, the various positions expressed by the Law Council's constituent bodies are set out below.

102. It is noted that several justifications for lowering the threshold which are set out below were contained in the discussion of the reporting threshold in the NSW MSA in the NSW Parliamentary Committee report.[94]

Victorian Bar

103. The Victorian Bar recommends removal of the threshold altogether.

104. In summary, its view is that:

- costs of compliance are likely to be less impactive than the costs of remediation:
  - the RIS estimated that the average cost per reporting entity would be $21,950—a relatively modest sum in the context of a business turnover equal to or exceeding $100 million; and
  - reporting costs would likely be lower for smaller entities that have fewer or less active supply chains and can be expected to decrease over time; and
- there should be no threshold under which the exploitation of people should be effectively deemed acceptable.

The Law Institute of Victoria

105. The Law Institute of Victoria recommends lowering the threshold to $25 million.

106. It suggests that many Australian entities with annual revenue of AUD $25–99 million engage in commercial trading in the Asia–Pacific region (which as noted has a high rate of modern slavery) and thus have supply chains that may be susceptible to modern slavery practices. It notes that the Department of Foreign Affairs and Trade notes that China, Singapore, Malaysia, Thailand and Korea are among Australia's top 15 trading partners.[95]

The Law Society of New South Wales

107. The Law Society of New South Wales recommends lowering the threshold to $50 million.

108. Its view is that compliance costs may not be as large for smaller entities and the significant number of additional companies in Australia which would be captured by

[93] Law Council of Australia, Call to Parties, April 2022 https://www.lawcouncil.asn.au/publicassets/919cc01e-23b9-ec11-944c-005056be13b5/Call%20To%20Parties%20Final-Web.pdf 29.
[94] NSW Parliamentary Report [2.21].
[95] Department of Foreign Affairs and Trade, 'Australia's trade in goods and services 2016', *Australia's trade in goods and services* (Article, 2016) <https://www.dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2016>.

this threshold (around 2,400 entities on estimates in the Issues Paper)[96] should have the capacity to identify and report on modern slavery risks in their operations and supply chains.

The NSW Bar

109. The NSW Bar recommends lowering the threshold to $60 million.

110. It nominated this figure to create consistency with the UK MSA to:

- lessen the burden on reporting entities which operate in both Australia and the United Kingdom; and
- provide greater opportunity for comparisons to be drawn between reporting entities of different sizes across data from different jurisdictions, noting that comparative analysis of this type is already being undertaken.[97]

111. The NSW Bar also sees virtue in increasing the number of reporting entities, noting the Paper Promises report found entities at the lower end of the current threshold score highly in an assessment of their management of modern slavery risks.[98]

112. Finally, the NSW Bar addressed the point raised in the Issues Paper in relation to compliance costs and whether lowering the reporting threshold will result in any materially greater capture of different elements of the economy and supply chains.[99]

113. In response, it noted that the significant human costs arising from modern slavery far outweigh any additional costs involved in administering the Act and the Australian Government should invest in ensuring that the Act captures as many entities as possible as a means of preventing and reducing modern slavery.

The Law Society of Western Australia

114. The Law Society of Western Australia, on the other hand, considers that reducing the reporting threshold, prematurely, may reduce overall compliance.

115. It suggests that it is preferable to retain the current threshold at this stage to allow larger entities to consolidate good practice and strengthen compliance with the Act, with consideration of lowering the threshold in the future.

Consolidated Law Council position

116. A range of views were also expressed in the Law Council's Business and Human Rights Committee.

117. There is a reasonably strong view from some that, in light of the assessments of poor performance of larger entities presently subject to the Act, there is a benefit to bedding down good practice and seeing more progressive actions from companies currently required to report before expanding the scope of the Modern Slavery Act by further lowering the threshold. A view was expressed that lowering the threshold could result in high levels of non-reporting and regulatory and educative efforts should be focussed on high-risk reporting entities. As noted, the experience of practitioners

[96] Issues Paper 28.
[97] Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors,* February 2022 (**Beyond Compliance**), pp. 17-22.
[98] Paper Promises report 72.
[99] Issues Paper 28-29.

advising entities near to the present reporting threshold is that there is a lack of understanding and maturity as to how to identify modern slavery risks.

118. Having said this, the Law Council maintains its settled position that the reporting threshold should be reduced to $60 million. The Law Council shares the view of several constituent bodies that lowering the threshold will capture more entities with modern slavery risks in their supply chains and thus ultimately lead to companies with conceivable risks of modern slavery in their supply chains developing better practices to identify and address such risks.

119. However, the Law Council is aware that a different approach may be needed in relation to smaller entities under the $100 million that are reporting for the first time. Such a tailored approach would be consistent with the UNGPs. Article 14 of the UNGPs provides:

> *The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.*

120. As a result, the Law Council suggests consideration be given to lowering the threshold through a tiered approach, with the new reporting entities which have a consolidated turnover under $100 million initially not being subject to the regulatory remedial functions under the Modern Slavery Act—both those existing and the other additional regulatory functions recommended in this submission.

121. This effective amnesty could extend to the new statutory review or be a matter upon which a new Anti-Slavery Commissioner may advise. This will have the benefit of having those companies begin to consider modern slavery risks in a structured way but subject, initially, to a lower regulatory burden. In this way, the reporting by these entities is essentially an educative process designed to mature the ability of these companies to identify modern slavery risks and develop meaningful actions to address those risks.

122. This approach is responsive to the issues that practitioners observe that even the larger companies are presently having under the Modern Slavery Act—statutory obligations subject to compliance functions should be imposed on entities with capacity to meet those obligations.

123. With this in mind, it is imperative that any reduction in the reporting threshold is allied with refreshed, specific guidance directed towards the experience of those smaller entities to ensure they understand their obligations and resourcing to support advice to these entities.

Recommendation

- **The Modern Slavery Act should be amended to reduce the reporting threshold so as to apply to companies with an annual turnover of $60 million or more.**
- **Consideration should be given to reducing the threshold as part of a tiered reform where, at least initially, new reporting entities with a consolidated turnover under $100 million are not subject to current or future compliance powers under the Act.**
- **The Guidance for Reporting Entities should be updated to specifically address the circumstances of smaller entities entering the purview of the Modern Slavery Act for the first time.**

Question 7—Should the Modern Slavery Act require annual submission of a modern slavery statement? Does the Act contain appropriate rules for ascertaining the annual reporting timeline for entities?

124. The Law Council supports annual submission of modern slavery statements and does not propose any change to the present definition of 'reporting period' in section 4 of the Modern Slavery Act.

Question 8—Does the Modern Slavery Act appropriately define 'modern slavery' for the purpose of the annual reporting obligation?

Headline view

125. While the Law Council does not propose an amendment to the definition of 'modern slavery' in the Modern Slavery Act, it suggests consideration of whether the definition should be expanded to include other international obligations, and a review to ensure supporting guidance in the Guidance for Reporting Entities remains accurate.

The definition

126. Section 4 of the Modern Slavery Act defines 'modern slavery' as:

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

Consideration be given to explanatory clauses or additions

127. It may be helpful to note the explanation provided in the Explanatory Memorandum for the inclusion of (c) and (d):

> *The trafficking offences under Division 271 of the Criminal Code are limited to movement across Australian borders or within Australia. The purpose of item (c) is to ensure the definition of 'modern slavery' is not limited only to domestic trafficking in Australia, or trafficking into or out of Australia, but also encompasses trafficking in persons anywhere in the world.*[100]
>
> *…*
>
> *Item (d) expands the definition of 'modern slavery' to encompass each of the forms of conduct specified in Article 3, occurring anywhere in the world. In some cases, the worst forms of child labour may already be covered by the trafficking in persons, slavery and slavery-like offences under items (a) and (b) above. However, specifically including the worst forms of child labour in the definition of 'modern slavery' sends a clear normative signal that this conduct is unacceptable. It also makes it clear that entities need to report on hazardous child work as defined in Article 3(d) of the Worst Forms of Child Labour Convention.*[101]

128. The present definition of modern slavery has the benefit of legal precision and, with respect to the *Criminal Code* offences, ensures consistency in way in the Commonwealth law deals with the elements of modern slavery. However, it can be difficult for laypersons to grasp its precise meaning and for entities to understand how it can be best adapted for inclusion in contractual terms.

129. The Law Council received input from its constituent bodies that consideration be given to inserting definitional provisions into the legislation to enable entities to become more informed about what amounts to modern slavery when reporting. It was suggested that the necessary step to cross-check the content of other laws may deter entities from accessing and engaging with the relevant laws. However, the Guidance does play an important role in this regard.

130. The UK MSA was raised with the Law Council in this context. However, the UK MSA includes offences within it (as well as a reporting scheme), and those definitions are contained in the offence provisions.[102]

Law Council view

131. The Law Council acknowledges the purpose of the present approach—to ensure uniformity across the legislative framework—may be undermined by replicating or paraphrasing the terms as defined in the *Criminal Code* into the Modern Slavery Act. Such an approach would risk the two becoming inconsistent and could cause confusion.

132. On balance, the Law Council does not propose an amendment to the definition to explain or describe the content of the offences and Convention provisions referred to in the definition. The Law Council does, however, suggest consideration be given to:

[100] Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [54].
[101] Ibid [57].
[102] UK MSA Part 1.

- extracting the relevant articles of the international instruments cited in paragraphs (c) and (d) of the definition of 'modern slavery' into an Appendix to the Modern Slavery Act, given these are static; and

- whether there are other international obligations which Australia has acquired or will shortly acquire (for example, in the 2014 Forced Labour Protocol) since the commencement of the Modern Slavery Act, which are not picked up in the definition, and should be included within it.

Importance of the accuracy of the Guidance for Reporting Entities

133. It is thus important that the Guidance for Reporting Entities, which describes the substantive content of the definition,[103] is accurate.

134. In this regard, the Law Council notes that the definition of modern slavery in the Guidance may not be consistent with the definition in the Act or, at least, may cause some confusion for entities. For example, paragraph 3 of the Guidance states, '[m]odern slavery is only used to describe serious exploitation. It does not include practices like substandard working conditions or underpayment of workers'. The term 'serious' is not defined in the Guidance.

135. Additionally, paragraph 6 of the Guidance defines 'modern slavery' as including eight types of serious exploitation. However, it makes no express mention of 'organ trafficking' which, as an offence under Subdivision BA of Division 271 of the Criminal Code, comes within the definition of 'modern slavery'. There is no mention of 'Table 5 of Appendix 1—which defines the types of exploitation which make up modern slavery—nor in fact in the Guidance at all.

Recommendation

- **Consideration should be given to**
  - **extracting the relevant articles of the international instruments cited in paragraphs (c) and (d) of the definition of 'modern slavery' into an Appendix to the Modern Slavery Act; and**
  - **whether there are other international obligations which Australia has acquired or will shortly acquire (since the commencement of the Modern Slavery Act), which are not reflected in the definition of 'modern slavery', and should be included within it.**
- **As part of the review of the Guidance for Reporting Entities, consideration should be given to the accuracy of the description of the meaning of 'modern slavery', including the use and meaning of 'serious' in paragraph 3.**

Question 9—Is further clarification required of the phrase 'operations and supply chains', either in the Modern Slavery Act or in administrative guidelines?

136. The Law Council considers these terms are quite well described in the Guidance[104] and generally well understood but it suggests it may be worth considering the description of these terms in its recommended review of the Guidance.

[103] Guidance for Reporting Entities, 8 and Appendix 1.
[104] Guidance for Reporting Entities 33-34.

Question 10—Are the mandatory reporting criteria in the Modern Slavery Act appropriate—both substantively and in how they are framed?

Headline view

137. The Law Council suggests the mandatory reporting criteria in section 16 of the Act should be amended to require a reporting entity to: 'identify' modern slavery risks, more fully explain its processes in relation to identifying such risks, and detail how it has responded to risks and actual incidents, in general terms.

Specific proposals in relation to the current reporting requirements

A requirement to identify modern slavery risks

138. The Law Council considers that a modest, but important amendment to make the reporting requirements more consistent with the UNGPs, would be to oblige entities to expressly 'identify' modern slavery risks.

139. This would sharpen the task presently imposed by paragraph 16(1)(c) to (emphasis added) '*describe* the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls'.

140. Professor Paul Redmond suggests that the best reading of paragraph 16(1)(c) is that it requires this identification and mapping exercise (since identification of risk is a pre-condition to its accurate description), which he considers is a beneficial outcome:[105]

> *Clear benefits flow from reading s 16(1)(c) as importing a conduct obligation. It militates against the ever-present temptation not to search for modern slavery lest it be found, with consequent reputational risk and need for remedial response. Second, mapping of risk provides a foundation of information integrity for the reporting measure—of what value is disclosure unless it is built upon knowledge derived from investigation? Third, it integrates the reporting requirement, in this aspect at least, with the global standard of human rights due diligence expressed in the Guiding Principles and elaborated by the Organisation for Economic Co-operation and Development*.[106]

141. In his view, this is consistent with the UNGPs:

> *This language of mapping, assessing and addressing risk, and of due diligence and remediation, is taken from that of the human rights due diligence process under the Guiding Principles. To 'know and show' that they are respecting human rights, all business enterprises should carry out due diligence to 'identify, prevent, mitigate and account for' adverse human rights impacts of their operations and business relationships.*[107]

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[105] Paul Redmond (2020), Regulating through reporting: an anticipatory assessment of the Australian Modern Slavery Acts, Australian Journal of Human Rights, 26:1, 14.
[106] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.
[107] Redmond, n 90 14.

142. The Broken Promises makes clear that risk identification under the current scheme is poor, with:[108]

- 43 per cent of companies still failing to identify obvious risks;
- 40 per cent failing describe sector specific risks in any detail; and
- an average score of just 31 per cent for awareness of modern slavery risks.

143. The Paper Promises report identified a 'noticeable ad hoc approach to how due diligence has been conducted by companies and widely differing levels of effort between companies'.[109]

144. The Law Council suggests that amending paragraph 16(1)(c) to make explicit an obligation to 'identify' modern slavery risks. This would be performed through an exercise of mapping risks by sector, geography and part of the supply chains/operations, in a process supported by detailed and specific instruction in the Guidance for Reporting Entities. This would both assist reporting entities improve the identification of actual risks (and thus address them), and also make it easier for the Government or an Anti-Slavery Commissioner to assess if risks have not been adequately described.

Requiring an explanation of why a reporting entity has reasonable satisfaction that modern slavery is not occurring

145. The Law Council does not support the suggestion on page 31 of the Issues Paper that reporting entities explain in their modern slavery statement the process that they have followed in order to be reasonably satisfied that modern slavery was not occurring in a specified region, industry or product, or in relation to a specified issue of pressing concern. This is not a realistic burden to place on entities.

146. The Law Council does note however that strictly speaking paragraph 16(1)(e) of the Modern Slavery Act is expressed in the abstract, as it requires a description of 'how the reporting entity assesses the effectiveness' of such risks, and this could beget description of a procedure rather than actions.

147. Principle 20 of the UNGPs provides that business enterprises 'should track the effectiveness of their response', in a process which 'based on appropriate qualitative and quantitative indicators' and draws 'on feedback from both internal and external sources, including affected stakeholders'. It may be worth amending paragraph 16(1)(e) to require reporting entities to explain the specific processes they undertook to track the effectiveness of their response to modern slavery risks across the reporting period.

[108] Broken Promises report 18.
[109] Paper Promises report 56.

Responding to risks of modern slavery

148. It appears that, in many cases, reporting entities do not disclose or otherwise report on specific allegations of modern slavery in which they are or have been involved—the Broken Promises report records an increase from 8 per cent to 14 per cent in its analyses of the first and second rounds of modern slavery statement reports.[110] There may be good reasons for such non-disclosure, as emphasised in the Guidance for Reporting Entities.[111]

149. This is a matter upon which an Anti-Slavery Commissioner might advise.

Recommendation

- **Paragraph 16(1)(c) of the Modern Slavery Act should be amended to expressly require reporting entities to 'identify' modern slavery risks and update Guidance for Reporting Entities accordingly.**
- **Consideration should be given to amending paragraph 16(1)(d) and (e) of the Modern Slavery Act such that an entity is required to explain in its modern slavery statement how it tracked the effectiveness of its response to modern slavery risks.**

Question 11—Should more be done to harmonise reporting requirements under the Australian Modern Slavery Act with reporting requirements in other jurisdictions, such as the United Kingdom? How should harmonisation be progressed?

150. The Law Council acknowledges the virtue of globally aligned reporting requirements for multinational companies with reporting requirements in, for example, the UK and Australia. However, this should not be at the expense of consistency with the UNGPs. The Law Council suggests the first principle is consistency with the UNGPs and, as discussed in the submission, there are amendments necessary to better pursue that objective.

Question 12—Does the Modern Slavery Act contain appropriate requirements for approval of a statement by the principal governing body of an entity?

151. The Law Council has not identified any need to change this measure.

[110] Australian Council of Superannuation Investors (**ACSI**), *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021 6 and 16; Paper Promises report 66; Broken Promises report 18.
[111] Guidance for Reporting Entities 41 and Appendix 3.

Question 13—Should other reporting features of the Modern Slavery Act be revised—such as the provisions relating to joint statements, or voluntary reporting?

152. The Law Council reiterates the recommendation it made in its 2018 submission on the Modern Slavery Bill[112] that the Modern Slavery Act should require companies to publish their Modern Slavery Statements on their websites, as required by the UK MSA.[113] While compilation of statements in a central registry is crucial, statements published to the websites of companies are likely to increase their visibility with their consumers, investors, business partners including customers and other stakeholders.

Recommendation

- **The Modern Slavery Act should be amended to require reporting entities to publish their Modern Slavery Statements on their websites.**

Question 14—Has there been an adequate—or inadequate—business compliance ethic as regards the Modern Slavery Act reporting requirements?

153. The Law Council refers to its response to question 2, which addresses data about the extent of non-compliance with reporting requirements under the Modern Slavery Act.

Question 15—Has government administrative action been effective in fostering a positive compliance ethic? What other administrative steps could be taken to improve compliance?

154. The Law Council has received feedback from practitioners that the Modern Slavery Business Engagement Unit in the Australian Border Force has played an important role in helping to answer reporting entity queries and the letters they sent to non-compliant entities did have an impact.

155. However, the Law Council understands from other feedback it has received that government administrative action has not greatly influenced a 'positive compliance ethic'. As noted, the Modern Slavery Act relies on market forces and public scrutiny, with investors, consumers, civil society and the media required to identify circumstances of non-compliance and exert pressure on businesses to reform their reporting and practices.

156. The Department of Home Affairs has released supplementary guidance which has focused on specific mandatory reporting criteria to provide better guidance to reporting entities with the use of hypothetical examples showing good practice, compliant and non-compliant responses but this material is somewhat limited in detail.[114]

[112] 2018 submission on the Modern Slavery Bill [25].
[113] UK MSA subsection 54(7).
[114] Australian Border Force, Resources (webpage, accessed on 24 November 2022) < https://modernslaveryregister.gov.au/resources/>. See for example, Modern Slavery Act Supplementary Guidance: Good Practice Examples of Mandatory Reporting Criteria Three, August 2021, accessed on that page.

157. It may be helpful for a new Anti-Slavery Commissioner to highlight model examples of compliant statements or provide hypothetical examples drawn from real statements.

158. The Law Council suggests a number of measures may improve the transparency of information on the Register, thus providing a greater incentive to improve compliance. These measures are described in the response to question 22.

Recommendation

- **An appropriate responsible entity, such as an Anti-Slavery Commissioner, should have the function of producing supplementary guides, with a focus on highlighting examples of compliant statements and best practice.**

Question 16—Should the Modern Slavery Act contain additional enforcement measures—such as the publication of regulatory standards for modern slavery reporting?

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

160. As already noted, both anecdotal and empirical research have suggested that entities are finding it difficult to understand with precision some of the elements of the reporting tasks. Presently, there is an effective expectation in the way in which the Guidance has been constructed as a companion to the Act, that reporting entities refer to the Guidance to understand the content of the complex definition of 'modern slavery' and the reporting requirements. If entities do not refer to, or apply this Guidance, there would appear to be a greater likelihood of non-compliance.

161. The Law Council suggests that the publication of regulatory standards that entities are expected to observe in preparing modern slavery statements may assist in filling in the gap between the Modern Slavery Act and specific requirements of the UNGPs which are presently detailed in the Guidelines.

162. It is not clear the kinds of standards envisaged by the Issues Paper. The Issues Paper suggests the Minister or an Anti-Slavery Commissioner could 'publish standards or guidelines that entities are expected to observe in preparing modern slavery statements'. Two examples are given—the Information Commissioner's power under section 26V of the *Privacy Act 1988* (Cth) to make written guidelines to assist private entities to develop privacy codes to be registered under that Act and the National Archives of Australia's Information Management Standard to assist Australian Government agencies to create and manage government information.[115] It does not appear that these standards are made as legislative instruments imposing mandatory obligations or lawful requirements—they appear more in the nature of guidelines.

163. Section 27 of the NSW Act permits the Anti-Slavery Commissioner to 'develop, and make publicly available, codes of practice for the purpose of providing guidance in identifying modern slavery taking place within the supply chains of organisations and steps that can be taken to remediate or monitor identified risks'. These appear similarly to be in the nature of guidelines.

[115] Issues Paper 43.

164. The Law Council is aware of other Commonwealth schemes which authorise the making of guidelines as legislative instruments imposed as lawful requirements[116] or in relation to which sanctions may be imposed for non-compliance.[117]

165. The Law Council does not have a firm view at this stage on the extent to which consideration of these regulatory standards may be linked to the reporting obligations and enforced. This may be a matter to develop over time.

166. The Law Council suggests a starting point may be to empower a new Anti-Slavery Commissioner with to power to determine regulatory standards as a guidance tool to support entities perform their reporting requirements. There would be benefit in bringing the kind of guidance provided in the Guidelines for Reporting Entities within the new Anti-Slavery Commissioner's powers. Then, over time, once these have been established and a Commissioner has worked with reporting entities on ensuring compliance with them in their report, consideration could be given in a future statutory review to ramping up the extent of a reporting entity's compliance with these standards.

167. It also does not appear that the NSW Anti-Slavery Commissioner has made any codes to date. However, the review may wish to raise with the NSW Anti-Slavery Commissioner any work done to date in developing those codes.

Recommendation

- **A new Anti-Slavery Commissioner should be empowered to make regulatory standards or guidelines to provide specific instruction to reporting entities as to how to conduct their modern slavery reporting.**

Question 17—Should the Modern Slavery Act impose civil penalties or sanctions for failure to comply with the reporting requirements? If so, when should a penalty or sanction apply?

Headline view

168. The Law Council considers that the Modern Slavery Act should be amended to include civil penalty provisions which may apply when a reporting entity has not complied with its reporting requirements and:

    (a) when its modern slavery statements found to contain false and misleading information; and/or

    (b) at a minimum, the entity continues to breach its obligations under the Modern Slavery Act despite advice and warnings directed at ensuring a compliant response.

169. Further, the Law Council also suggests that a regulator, be given associated powers to investigate and enforce compliance with reporting requirements, potentially in consultation with the Anti-Slavery Commissioner if they are appointed.

[116] Division 2A of Part 2 of the *Disability Discrimination Act 1992* (Cth).
[117] For example, the Aged Care Quality Standards made under the *Aged Care Act 1997* (Cth). See Law Council of Australia, submission to the Department of Health 'Aged Care Quality Principles' (27 October 2021) [11]-[15] < https://www.lawcouncil.asn.au/publicassets/a263f065-a945-ec11-9444-005056be13b5/4115%20-%20Aged%20Care%20Quality%20Standards.pdf>.

Civil penalties

170. The Law Council's established position is that the Modern Slavery Act should provide for civil penalties for non-compliance with the reporting requirement, and it maintains that view. To be clear, the Law Council is not proposing, and does not recommend:

- sanctions for entities, that, in the process of their due diligence, uncover modern slavery in their supply chains;[118] nor
- criminal offences for non-compliance with reporting requirements.

171. In 2017, before draft legislation was introduced, the Law Council stated that, without penalties, a mandatory reporting requirement is rendered merely aspirational, as there is no enforcement mechanism, nor any consequence for non-compliance.[119] It has noted that, while 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, can be overstated. In addition, reputational risk does not apply equally to all entities but, mostly, to consumer-facing entities.[120]

172. In relation to the Modern Slavery Bill ultimately introduced to Parliament, the Law Council stated that, given the unreliability of leaving compliance incentives to the market and consumers, penalties or compliance drivers are preferable to incentivise reporting.[121]

173. That submission was made on 24 July 2018, prior to an amendment sheet moved by the Government on 11 October 2018[122] (which was eventually passed)[123] which empowered the Minister to:

- if reasonably satisfied that an entity has failed to comply with a reporting requirement, request the entity to provide an explanation and/or undertake specified remedial action; and
- if an entity fails to comply with such a request, publish information on the Register or otherwise in relation to the entity's failure to meet the reporting requirement and details of the request with which it has failed to comply.

174. This was an improvement, but the Law Council considers that penalties remain the more effective way to compel compliance by all reporting entities.

175. It is also reinforced by analysis showing a high proportion of reports which fail to address mandatory reporting criteria. As noted, the Broken Promises report found that 66 per cent of companies did not address all of the mandatory reporting requirements in their second-round reports.[124] Research conducted by the Monash Centre for Financial Studies also found a large disparity in the quality of disclosure

[118] Cf 2017 submission to the Joint Standing Committee [77] https://www.lawcouncil.asn.au/publicassets/826ada38-234b-e711-93fb-005056be13b5/3279%20-%20Establishing%20a%20Modern%20Slavery%20Act%20in%20Australia.pdf.
[119] See 2017 submission to AGD on the reporting requirement [5]>.
[120] Ibid [53].
[121] 2018 submission on the Modern Slavery Bill [16].
[122] Modern Slavery Bill 2018, Amendment Sheet (Government), B18ET100.DOCX 11/10/2018 12:02:54 PM < https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6148_amend_778310fc-ec5c-46ac-a7d4-7f684c20e249/upload_pdf/B18ET100.pdf;fileType=application%2Fpdf>.
[123] The Senate, Modern Slavery Bill 2018, Schedule of the amendments made by the Senate (28 November 2018) < https://parlinfo.aph.gov.au/parlInfo/download/legislation/sched/r6148_sched_3400899c-2869-4c92-9787-34675ab9c82b/upload_pdf/Modern%20Slavery%20Bill%202018.pdf;fileType=application%2Fpdf>.
[124] Broken Promises report 2.

statements submitted by S&P/ASX100 companies, with many submitters failing to address basic 'mandatory' criteria.[125]

176. There are some design questions for such a scheme—for example whether:

(i) non-compliance with any reporting requirement in section 16 will give rise to a civil penalty or just some requirements or only significant or flagrant breaches;

(ii) the civil penalty only applies in relation to failures to comply with the Minister's remedial actions in section 16A or may apply as an alternative to those actions; and

(iii) whether any other new non-pecuniary sanctions should apply.

177. The Law Council would be happy to further consider the specific design of a proposed civil penalty regime and the potential inclusion of any associated compliance powers, such as enforceable undertakings or other options found in the *Regulatory Powers (Standard Provisions) Act) 2014* (Cth).

178. As a general principle, the Law Council supports the application of the concept of 'responsive regulation' model of enforcement, which is discussed at some length in the Australian Human Rights Commission's 'Free & Equal: A reform agenda for federal discrimination laws' report.[126] It is worth extracting a part of the description here (footnotes retained from the original):[127]

> *[Responsive regulation] is a theory which involves 'a dynamic model of enforcement that is premised on an ongoing relationship between the regulator and regulatee'.*[128]
>
> > *The model is founded on the assumption that regulators can assume and nurture virtue, corporate responsibility and ethical standards on the part of regulatee but it also requires them to be realistic enough to know when these elements are absent or inadequate.*[129]

179. The model employs an enforcement pyramid (footnotes retained from the original):[130]

> *Under the 'enforcement pyramid' model, breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate typically held in reserve.*
>
> *…*
>
> *Voluntary measures are used first but, if necessary, more intense measures are used, with measures escalating in severity to achieve compliance. Persuasive measures are not enough on their own.*

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[125] Bei Chui, Nga Pham and Ummul Ruthbah, *Modern Slavery Statement Disclosure Quality; ASX100 Companies* (Research Brief, 5 August 2021) Monash Centre for Financial Studies, 10.
[126] Australian Human Rights Commission, 'Free & Equal: A reform agenda for federal discrimination laws' (December 2021) < https://humanrights.gov.au/sites/default/files/document/publication/ahrc_free_equal_dec_2021.docx> (**Free and Equal Report**).
[127] Ibid 66.
[128] Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.
[129] Ibid.
[130] Free and Equal Report 66.

180. The Law Council acknowledges that it is possible that some technical non-compliance with the reporting requirements can result from a failure to grasp the nature of the task required by the legislation, despite good faith efforts.

181. In this light, penalties should not be enforced in the first instance of non-compliance with reporting in line with a mandatory criterion but must at least be capable of being enforced as last resort for entities that continue to flout their obligations after guidance and warning.[131] That is, consideration should be given to whether actions or omissions were beyond the power of reasonable knowledge of the entity.

182. The Law Council is open minded to the appropriate entity, potentially including an Anti-Slavery Commissioner, which may possess any compliance powers, although there can be difficulties with the same person having both advisory and enforcement functions. It notes the Information Commissioner is an example of a statutory holder with the guidance, monitoring and advice functions, as well as regulatory powers.[132]

Recommendation

- **The Modern Slavery Act should be amended to introduce civil penalty provisions that apply to non-compliance with reporting requirements. The Law Council suggests a proposed scheme be based around the following key principles—the scheme:**
  - **should apply to modern slavery statements found to contain false and misleading information; and**
  - **should at least be capable of being imposed as a last resort for entities that continue to flout their obligations after guidance and warning.**

Question 18—Should any alteration be made to the Modern Slavery Act as regards its application to Australian Government agencies?

183. Currently, the Commonwealth, corporate Commonwealth entities and Commonwealth companies must make modern slavery statements but non-corporate Commonwealth entities (such as Government departments) do not—the latter are covered by the Minister's statement made on behalf of the Commonwealth.[133]

184. The Law Council supports the application of the reporting requirements to Commonwealth Government entities, noting that the Commonwealth Government should show leadership in combatting modern slavery given the extent of its procurement.[134]

185. It is noted that the Paper Promises report recommended the use of public procurement processes to reward companies that not only report in a compliant

[131] 2018 submission on the Modern Slavery Bill [16].
[133] Modern Slavery Act subsection 15(1).
[133] Modern Slavery Act subsection 15(1).
[134] According to the Department of Finance, in 2021-22 there were 92,303 contracts published on AusTender with a combined value of $80.8 billion – Department of Finance, 'Procurement' (webpage, accessed on 7 December 2022) <https://www.finance.gov.au/government/procurement#:~:text=In%202021%2D22%20there%20were,taxpayers%20get%20value%20for%20money>.

manner but that have also developed meaningful measures to address modern slavery risks.[135]

186. Some constituent bodies suggested that non-compliant companies could be prohibited from partaking in Commonwealth procurement.

187. In this context, Western Australia's procurement regime, administered under the *Procurement Act 2020* (WA), is sometimes cited as a possible model. The WA regime allows for the termination of contracts with debarred suppliers. As noted by McGaughey et al., the WA regime 'reflects a common approach both in national policies, and international rules and guidance', for example, the use of debarment in United Nations Commission on International Trade Law's Model Law on Public Procurement as well as the European Union's public procurement measures.[136]

188. The Law Council does not consider that reporting entities which have not complied with reporting requirements should be precluded from procurement. However, there is a question as to whether entities subject to the Commonwealth procurement rules should be made accountable for their procurement practices on the Register.

189. In NSW, there is an accountability framework attached to procurement decisions (**NSW procurement accountability framework**), which connects the performance of obligations which apply to public agencies, ultimately, through to the Anti-Slavery Commissioner's powers in relation to the management of the Register:

- government agencies must take reasonable steps to ensure that goods and services procured by and for the agency are not the product of modern slavery;[137]
- the NSW Procurement Board may issue directions or policies regarding those reasonable steps;[138]
- the Auditor-General may, when the Auditor-General considers it appropriate to do so, conduct a risk-based audit of all or any particular activities of a government agency to determine whether the government agency is ensuring that goods and services procured by and for the agency are not the product of modern slavery;[139]
- the Auditor-General may give the Anti-Slavery Commissioner advice as to the result of any modern slavery audit, including to recommend the agency be identified on the public register kept under the NSW MSA;[140]
- the NSW MSA provides a specific function for the Anti-Slavery Commissioner to identify on that register any government agency failing to comply with directions of the NSW Procurement Board concerning procurement (within the meaning of Part 11 of that Act) of goods and services that are the product of modern slavery and whether the government agency has taken steps to ensure compliance in the future;[141] and

[135] Paper Promises report 9.
[136] Fiona McGaughey, Rebecca Faugno, Elise Bant, Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143, 148.
[137] *Public Works and Procurement Act 1912* (NSW) subsection 176(1A).
[138] Ibid paragraphs 175(3)(a1).
[139] *Government Sector Audit Act 1983* (NSW) section 38G.
[140] Ibid paragraph 38H(4)(a).
[141] NSW MSA paragraph 26(1)(a).

- generally, regularly consult with the Auditor-General and the NSW Procurement Board to monitor the effectiveness of due diligence procedures in place to ensure that the procurement of goods and services by government agencies are not the product of modern slavery.[142]

190. The Commonwealth Modern Slavery Statement 2020–21 detailed a number of measures to address the risk of modern slavery arising from Commonwealth Government activities, pursuant to paragraph 16(1)(d) of the Modern Slavery Act.

191. Modern slavery is indirectly addressed in the Commonwealth Procurement Rules[143] - the Rules mention the Act and the reporting requirement.[144] Clause 10.19 of those Rules provides:

> *Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers' practices regarding:*
>
> *a. labour regulations, including ethical employment practices;*
>
> *b. workplace health and safety; and*
>
> *c. environmental impacts.*

192. Guidance published by the Department of Finance on that requirement refers to modern slavery:[145]

> *14. Paragraph 10.19 of the CPRs does not require comprehensive compliance auditing that would add materially to the cost for taxpayers. The purpose is to ensure that there is reasonable evidence to give officials sufficient confidence in the veracity of any representations made.*
>
> *15. There are a number of resources across Government that may be useful for considering relevant regulations. Some examples are provided below:*
>
> *a. Labour and ethical employment practices.*
>
> - *The Attorney-General's Department website provides information outlining relevant laws and treaties on protection from exploitation and the right to freedom from slavery.*
> - *The national Modern Slavery Reporting Requirement, established under the Commonwealth Modern Slavery Act 2018, provides procuring officials with an accessible way to investigate some potential suppliers' modern slavery supply chain risks, and business efforts to mitigate these risks. The reporting requirement applies to Australian and foreign entities operating in Australia with annual consolidated revenue of at least $100 million. These statements are publicly available, with the first statements due by 31 December 2020.*

193. On its face, the reference in the Rules to the Register as a resource which 'may be useful' seems too slight. However, Law Council does not have sufficient insights as to the effectiveness of this measure to inform a recommendation to strengthen this requirement. It suggests the review may wish to make an enquiry of the Department of Finance. For example, it may be of interest to understand whether Commonwealth agencies are reflecting on modern slavery risks in a contracting with an entity, whether

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[142] Ibid 25.
[143] Department of Finance, Commonwealth Procurement Rules (1 July 2022) https://www.finance.gov.au/sites/default/files/2022-06/CPRs%20-%201%20July%202022.pdf.
[144] Ibid 8 and 20.
[145] Department of Finance, Consideration of relevant regulations and/or frameworks

they are in practice reviewing the Register, and how doing so affects their procurement processes.

194. The review may wish to also consider more broadly the work of the Interdepartmental Committee on Human Trafficking and Slavery and the Interdepartmental Committee on Modern Slavery in Public Procurement—detailed at pages 12 and 13 of the Issues Paper. Further, it may wish to make inquiries of the NSW Government agencies responsible for the NSW procurement accountability framework for insights as to the operation of that scheme.

195. Subject to that advice, the Law Council suggests consideration be given to giving effect to the elements of the NSW procurement accountability framework through amendments to Commonwealth legislation. Specifically, consideration could be given to making amendments to either the Modern Slavery Act or to the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) to require Commonwealth entities to consider guidance regarding identifying modern slavery risks in procurement, thus clarifying the expectations for Commonwealth entities and providing a means to hold them publicly to account for their actions in relation to that guidance.

196. Alternatively, consideration could be given to amending the Commonwealth Procurement Rules—a legislative instrument made under subsection 105B(1) of the PGPA Act to oblige consideration of the Register and any compliance action taken which is recorded on it (e.g. as part of a risk or value for money assessment).

197. Consideration should also be given to whether other Commonwealth processes, such as in relation to lease arrangements, oblige sufficient consideration of modern slavery risks.

Recommendation

- **The review should take advice on:**
  - **the effectiveness of the present settings within:**
    - **the Commonwealth Procurement Rules; and**
    - **other contracting processes, such as lease arrangements; and**
  - **the efficacy of the NSW procurement accountability framework;**

  and determine whether to amend:
  - **the Modern Slavery Act or PGPA Act to require Commonwealth entities to consider guidance as to identifying modern slavery risks in procurement; or**
  - **the Commonwealth Procurement Rules to require Commonwealth entities oblige consideration of the Register and any compliance action taken which is recorded on it.**

Question 19—Does the annual Commonwealth Modern Slavery Statement set an appropriately high reporting standard?

198. The Law Council understands the value of a consolidated annual statement, the Commonwealth Modern Slavery Statement, being prepared for all non-corporate entities, including the way in which this allows an overview of the Commonwealth's operations and global supply chains.

199. However, the Law Council considers that there could be additional value in requiring separate reporting by some agencies that undertake high-volume procurement. The Commonwealth Modern Slavery Statement 2020–21 provides 'snapshots' of some of the work of individual non-corporate Commonwealth entities, for example, reference to a framework developed by the Department of Defence for managing the risks of offshore infrastructure projects.[146] It may be helpful for larger government portfolios, such as Defence, to publish more granular and transparent reporting on specific risks and targeted interventions to address such risks.

Recommendation

- **Consideration should be given to amending the Modern Slavery Act to require non-corporate Commonwealth entities to address the particular risks identified and actions in response by their entities.**

Question 20—What action, if any, should be taken to ensure a common standard of modern slavery reporting among Commonwealth, State and Territory government agencies in Australia?

200. The review provides a useful opportunity to explore opportunities for harmonisation of reporting and other obligations among Commonwealth, State and Territory governments.

201. The Issues Paper refers to the *Intergovernmental Network on Modern Slavery in Public Procurement* which 'coordinate[s] the work of Commonwealth, state and territory governments to address modern slavery risks'[147]—it would be worth inquiring as to the outputs from this group.

202. Opportunities for harmonisation may include, for example, producing common guidance on the reporting and other obligations of governments. Reporting on modern slavery by governments (at all levels) is an important way in which to raise awareness of the incidence of modern slavery, generally.

203. It is noted the Victorian Bar suggests a goal be set for harmonised legislation across all jurisdictions within three years, in light of the high desirability of an integrated legislative approach.

204. It may be worth raising this issue for discussion at the Standing Committee of Attorneys-General, subject to a presentation by NSW as to the application of its model.

[146] Australian Government, Commonwealth Modern Slavery Statement 2020–21 (October 2021) 32.
[147] Issues Paper 14.

Question 21—Does the Register provide a valuable service?

205. The Law Council considers that Register provides a valuable service, in functioning as a 'one stop shop' for members of the public and other interested parties to compare modern slavery statements across different business and industry sectors and thus demonstrate the key modern slavery risks in Australian business' operations and supply chains and how they are being managed.

Question 22—Could improvements be made to the Register to facilitate accessibility, searchability and transparency?

Accessibility and searchability

206. The Law Council suggests the Register provide a full directory of all reporting entities and grouping together statements from the same entity. This may not need be given effect by an amendment to the Modern Slavery Act.

Transparency

207. The Law Council received feedback which suggested that the Register would have greater utility as a transparency measure if it, for example:

    (a) included a summary of an assessment of the entity's compliance with the reporting requirements in section 16 of the Modern Slavery Act—for example, by use of a traffic light system;

    (b) published a list of names of entities which were supposed to report in that period but failed to do so; and

    (c) indicated any regulatory action taken against the entity, including any measures included as a result of this review.

208. It was suggested that these measures would much improve the capacity of a consumer to appraise compliance with the requirements, thus better achieving the transparency objective. It would also better take the pressure off civil society.

209. However, it also received feedback that these proposals could raise difficulties, particularly the assessment task in subparagraph (a) of paragraph 207. These difficulties may include, for instance: ensuring there is sufficient resourcing to make an assessment of every report; conveying a perceived endorsement of a statement or reporting entity practices themselves (rather than mere compliance with the reporting requirements); and the potential for making assessments that are incorrect or not explained with sufficient context, which may impact on a reporting entity's reputation with financial consequences and result in the reporting entity taking administrative action against the entity making the assessment.

210. On balance, rather than recommend any particular approach, the Law Council suggests that the Australian Government may wish to consider ways to better highlight on the Register any findings on non-compliance with reporting requirements in the context of developing the functions and powers of the Anti-Slavery Commissioner.

Recommendation

- **The utility of the Register should be improved by:**
  - **grouping statements from the same entity together; and**
  - **providing an overview on the engagement with the entity and a summary of the matters addressed in their statement.**
- **Consideration should be given to options to provide greater transparency on the Register in relation to compliance issues identified with an entity's reports.**

Question 23—What role should an Anti-Slavery Commissioner play in administering and enforcing the reporting requirements in the Modern Slavery Act? What functions and powers should the Commissioner have for that role?

211. The Law Council has previously expressed strong support for the establishment of an Anti-Slavery Commissioner consistent with the recommendations of the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, in its Hidden in Plain Sight report.[148] It maintains that view and strongly recommends the Modern Slavery Act be amended to require the establishment of an Anti-Slavery Commissioner.

212. It is necessary to provide for an entity, resourced, equipped and accountable under a statutory scheme, to perform the additional regulatory functions recommended in this submission to strengthen the Commonwealth scheme to ameliorate the risks of reporting entities operating in Australia being subject to modern slavery in their supply chains.

213. The Law Council supports the establishment of an Anti-Slavery Commissioner with functions similar to those of the office-holder of that title under the NSW MSA. However, unlike the Anti-Slavery Commissioner under the NSW MSA,[149] the Anti-Slavery Commissioner under the Commonwealth scheme should be an entirely independent statutory officeholder, given its proposed role in accounting for the conduct of non-corporate Commonwealth entities.

214. It is worth, for the record, setting those functions out here in full.

215. Subsections 9(1) and (2) of the NSW MSA set out the general functions of the Commissioner:

> *(1) The functions of the Commissioner are as follows:*
>
> *(a) to advocate for and promote action to combat modern slavery,*
>
> *(b) to identify and provide assistance and support for victims of modern slavery,*
>
> *(c) to make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery,*

[148] 2018 submission on the Modern Slavery Bill [6], [19]-[20]; 2017 submission to the Joint Standing Committee [85]-[94].
[149] NSW MSA section 7.

(d) to co-operate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery,

(e) to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations,

(f) to monitor the effectiveness of legislation and governmental policies and action in combating modern slavery,

(g) to raise community awareness of modern slavery,

(h) to exercise such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.

(2) In exercising the Commissioner's functions, the Commissioner must encourage good practice in:

(a) the prevention, detection, investigation and prosecution of modern slavery, and

(b) the identification of victims of modern slavery

216. Section 12 of the NSW MSA provides for its public awareness and advice functions:

The Commissioner is:

(a) to promote public awareness of modern slavery and its effects on its victims, and

(b) to provide advice, education and training on ways to prevent modern slavery taking place and assist the victims of modern slavery, and

(c) to encourage reporting of instances of suspected modern slavery to appropriate authorities (including without limitation reporting by sex workers and bodies or organisations representing sex workers), and

(d) to establish and maintain a hotline (or utilise a hotline maintained by a government or non-government agency or other body or organisation) for provision of advice and assistance to children and other persons who are, or may be, victims of modern slavery.

217. Other specific functions under the NSW MSA include:

- prepare a strategic plan[150] and annual report in relation to the performance of its functions;[151]
- the maintenance of a register of modern slavery statements, which records whether the entity in question 'has taken steps to address the concern';[152] and
- the procurement functions and codes of practice functions referred to above.

218. All of these functions appear suitable for a Commonwealth Anti-Slavery Commissioner. The Commissioner's role could also include oversight of the implementation of the National Action Plan to Combat Human Trafficking and Slavery, as well as well as advocating for and promoting action to combat modern slavery through wider-ranging policy initiatives.[153]

[150] NSW MSA section 12.
[151] Ibid section 19
[152] Ibid section 26.
[153] 2018 submission on the Modern Slavery Bill [20].

219. The Law Council has, in this submission, noted further discrete functions which it recommends be included in the Modern Slavery Act which could be performed by an Anti-Slavery Commissioner, including:

- producing, reviewing and updating the Guidance for Reporting Entities and creating regulatory standards relating to an entity's reporting requirements, potentially, assisted by a specialist committee;
- highlight models of compliant or best practice reporting statements;
- advising the Minister on compliance with the Act and the opportunities for further reform; and
- assessing modern slavery statements lodged by reporting entities and recording assessment outcomes on the Register.

Recommendation

- **The Modern Slavery Act should be amended to provide for an Anti-Slavery Commissioner, as an independent Commonwealth office-holder, responsible for the performance of key regulatory measures—education, assessment and advice, with similar functions and powers to those of the Commissioner under the NSW MSA.**

Question 24—Responsibility within government for administering the Modern Slavery Act?

220. This is a matter for Government and not a matter which engages the Law Council's expertise or functions.

Question 25—Is a further statutory review (or reviews) of the Modern Slavery Act desirable? If so, when? And by whom?

221. The Law Council recommends the Modern Slavery Act be amended to require periodic independent reviews, with the first taking place three years after the amendments made in respect to the findings of this review.

Recommendation

- **The Modern Slavery Act should be amended to require periodic independent reviews, with the first taking place three years after the amendments made in respect to the findings of this review.**

Question 26—Should a periodic review process (other than a statutory review) be conducted of the Modern Slavery Act and its implementation? What form should that review process take?

222. See answer to previous question.

Question 27—Is there any other issue falling within the Terms of Reference for this review that you would like to raise?

223. This question seeks submissions on any other issues falling within the terms of reference for the review. Term 1(e) of those terms of reference provides the review is to consider and report on whether it is necessary or desirable to do anything else to improve the operation of the Act or rules.

224. The Law Council has received input for the purposes of a response to this question which goes to matters relevant to address modern slavery per se, but which are not matters which the Law Council considers should be addressed in the Modern Slavery Act itself. These include a civil cause of action, the non-punishment principle and import bans. The Law Council would be happy to address these matters in this forum or any other, if it would assist.

225. Another such issue is a federal compensation scheme for victims of modern slavery. The Law Council has long supported, and maintains firm support for, the establishment of a federal compensation scheme. However, the Law Council suggests that the scheme may best sit in a standalone Act, similar to *the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth)

226. The Modern Slavery Act is directed at requiring large business reporting on the risks of modern slavery in their supply chains, whereas a federal victims compensation scheme is for victims of modern slavery and human trafficking. Combining the two may blur public understanding regarding the responsibilities and objects of the Act. However, a federal compensation scheme has been raised in consultation related to the review, and thus the Law Council has taken the opportunity to set out its position, in case it is of assistance to the review or the Australian Government.

Federal compensation scheme for victims of modern slavery

The Law Council's existing position

227. In 2016, the Law Council co-authored a *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (**2016 Report on a National Compensation Scheme**)[154] which set out a proposal for establishing a federal compensation scheme. It acknowledges and values the significant expertise and leadership of its co-author, Anti-Slavery Australia, in this context.

228. The Law Council maintained this position in its 2018 submission on the Modern Slavery Bill, in its recent Call to Parties document published ahead of the 2022 Federal Election and it maintains the position for the purposes of this submission.

[154] Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime (2016) (**2016 Report on a National Compensation Scheme**), <https://www.lawcouncil.asn.au/files/web-pdf/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>.

229. It is noted that, at least, four Federal Parliamentary inquiry reports have recommended the introduction of a federal compensation scheme for victims of modern slavery,[155] most recently, the Hidden in Plain Sight report.[156]

230. The case for a federal compensation scheme instituted under Commonwealth law is conceptually simple:

- Australia's international obligations require it; and
- while statutory victims' compensation schemes are provided by each of the eight States and Territories, to which trafficked people may, in limited circumstances, have access, these schemes are not designed to provide a remedy to victims of Federal offences against the person.[157]

International obligations

231. The international instruments through which Australia has committed to eliminate slavery and slavery-like conditions, referred to above, oblige Australia to ensure the availability of compensation for survivors of trafficking and other human rights abuses.

232. While these are described in the 2016 Report on a National Compensation Scheme,[158] it is helpful to detail them here, in part, given the development of the international law materials and the evolution in Australia's international obligations since that time.

233. These include:

- the Organized Crime Convention, which requires State parties to 'establish appropriate procedures to provide access to compensation and reparation for victims';[159]
- the CAT, which requires State parties to ensure victims of torture are able 'to obtain redress and [have] an enforceable right to fair and adequate compensation';[160]
- the Trafficking Protocol, which requires States to ensure that victims of trafficking have the 'possibility of obtaining compensation for damage suffered';[161]
- the Declaration, which urges Member States to ensure that 'when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation'.[162] The Declaration extends obligations of

[155] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 [Provisions] (2012) [3.88] (recommendation 2); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Trading Lives: Modern Day Human Trafficking (2013) xviii (recommendation 6); Joint Standing Committee on Law Enforcement, Parliament of Australia, An inquiry into human trafficking, slavery and slavery-like practices (2017) xii, 35-37; Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Establishing a Modern Slavery Act in Australia (2017) [6.133] – [6.136].
[156] Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Establishing a Modern Slavery Act in Australia (2017) (**Hidden in Plain Sight Report**) [6.133] – [6.136]; see also, Law Council of Australia, National Compensation Scheme for victims of modern slavery a watershed recommendation (7 December 2017), https://www.lawcouncil.asn.au/media/media-releases/national-compensation-scheme-for-victims-of-modern-slavery-a-watershed-recommendation.
[157] 2016 Report on a National Compensation Scheme 4.
[158] Ibid 4-5.
[159] Organized Crime Convention article 25(2).
[160] CAT article 14(1).
[161] Trafficking Protocol article 6(6).
[162] The Declaration article 12.

compensation toward family members of persons who have died or become incapacitated due to victimisation. It further encourages States to pursue the 'establishment, strengthening and expansion of national funds for compensation';[163]

- the ICCPR, which outlines that where the violation of an individual's rights occurs, the victim has a human right to an 'effective remedy';[164] and

- the CEDAW which requires that States take all measures to suppress all forms of trafficking in women[165] and obligates States parties to provide appropriate and effective remedies, including restitution, recovery, compensation, satisfaction and guarantees of non-repetition, to women whose rights under the Convention have been violated.[166]

234. The importance of Australia taking measures suppress all forms of trafficking in women has been further emphasised by recent investigatory media reports of syndicates which trafficked women to Australia for the purpose of sex work in exploited circumstances.[167]

235. The Committee on the Elimination of Discrimination against Women (CEDAW Committee), in *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration* stated the following in relation to a federal compensation scheme:[168]

> *Victims of trafficking often encounter significant difficulties in claiming compensation and other forms of reparation, including damages, for the harm suffered, including in cases in which: it is made conditional upon cooperation with law enforcement authorities; victims do not have access to high-quality, gender-sensitive, trauma-informed legal aid and representation; residency permits are tied to criminal justice processes and repatriation occurs prior to seeking or obtaining civil remedies; the victim bears the burden of proof in civil claims; survivors of trafficking are not identified as victims of a crime for the purpose of reparations owed under law; and monetary compensation is unavailable or the proceeds of crimes are not redistributed to victims.*

236. As a brief aside in relation to several issues raised in that paragraph, the Law Council has raised concerns that, in Australia, the availability of visa and humanitarian support for victims of human trafficking under the Human Trafficking Visa Framework and Support for Trafficked People Program, respectively, is, despite recent changes, still too contingent on the person's co-operation for a criminal investigation and law

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[163] Ibid article 13.
[164] ICCPR article 2.
[165] CEDAW article 6.
[166] Ibid article 2(b).
[167] Nick McKenzie, Amelia Ballinger and Joel Tozer, 'Trafficked: Women shunted 'like cattle' around Australia for sex work' (The Age online, 30 October 2022) < https://www.theage.com.au/politics/federal/trafficked-women-shunted-like-cattle-around-australia-for-sex-work-20221018-p5bqnd.html>.
[168] United Nations Committee on the Elimination of Discrimination against Women, *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration* (**CEDAW Committee General Recommendation 38),** UN Doc CEDAW/C/GC/38, 20 November 2020 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/324/45/PDF/N2032445.pdf?OpenElement> [43].

enforcement process.[169] It has recommended the modern slavery visa and victim support framework be de-linked from the criminal justice process.[170]

237. On a compensation scheme, the CEDAW Committee recommended that State parties:[171]

> *Ensure that that trafficked women and girls have a legally enforceable right to affordable, accessible and timely remedies through the criminal, civil and labour courts and administrative proceedings, including a right to compensation, back pay and other tailored reparations, and ensure that such remedies are not made conditional on confiscation of assets from the traffickers and are guaranteed under the conditions provided for in domestic law for victims. Compensation as a victim of a crime should have no impact on social assistance received by victims or as provided by another State programme.*

238. The 2014 Forced Labour Protocol, which will come into force for Australia on 31 March 2023, requires that each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.[172]

239. Finally, in her 2020 report, the Special Rapporteur on trafficking in persons, especially women and children, made this categorical statement in relation to the obligations of States to compensate victims of trafficking:[173]

> *… In accordance with the principle of due diligence, States must ensure that trafficked persons are entitled to claim the full spectrum of remedies for human rights violations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to claim remedies, including compensation, should be ensured to all exploited persons through criminal, civil, administrative or labour law proceedings, irrespective of their presence or legal status in the country, including by providing for free legal counselling and representation, speeding up related procedures and establishing public funds for compensation. An individual independent guardian must be promptly appointed in the best interests of the child, when that child is unaccompanied or separated from family members. Victims must be protected from secondary victimization; their rights, such as to privacy, must be respected at all times during judicial proceedings.*

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[169] Law Council's submission to the National Action Plan consultation [120]-[136] < https://www.lawcouncil.asn.au/publicassets/46cffbb3-1d59-ea11-9403-005056be13b5/3757%20-%20Public%20Consultation%20Paper%20on%20the%20National%20Action%20Plan%20to%20Combat%20Modern%20Slavery%202020-2024.pdf>.
[170] Ibid.
[171] CEDAW Committee General Recommendation 38 [100].
[172] 2014 Forced Labour Protocol article 4(1).
[173] United Nations General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, UN doc A/75/169, 17 July 2020 [71].

Model for a scheme

240. The 2016 Report on a National Compensation Scheme concluded that a targeted Federal compensation scheme is the best method of providing an effective remedy for trafficked people.[174]

241. This report favoured a model with the following features:

- The scheme would be limited to Federal offences under the *Criminal Code*.[175]
- Any person who has experienced human trafficking or slavery in Australia should be eligible to make a claim for compensation under a federal compensation scheme. A trafficked person would need to show, to the appropriate standard of proof—such as 'reasonable likelihood'—that they have been a victim of one of the Federal human trafficking offences, such as forced labour, forced marriage or servitude.[176]
- There would not be a need for an admission of liability by the Commonwealth—the right to compensation for harm or injury would arise from the basis that human trafficking is inherently wrong. This would make it easier for survivors to access the payment. This characterisation also allows victims to receive payment even if they do not know the identity of their trafficker or associated persons.[177]
- The payment could be subject to a reasonable cap (considered at that time to be around $100,000).[178] The proposed scheme should provide flexibility for payment amounts to be varied, taking into account other factors of the trafficked person's experience. The scheme should balance the virtue of clearly defined boundaries for different payment amounts which reduces administrative costs and makes the system simpler, and providing a remedy that is sufficiently tailored to individual circumstances.[179]
- The scheme would operate concurrently with State and Territory compensation schemes—trafficked people would have the option of pursuing a compensation claim under either scheme.[180]
- To address issues of constitutionality, any legislation must be drafted so that:[181]
    - the payments being authorised by the legislation bear some relationship to the Constitutional head of power supporting the legislation;
    - the manner in which survivors' claims are processed is set out in detail (e.g. whether an agency is to be established to administer claims or whether that is to be undertaken by the courts, and the terms on which payments should be made); and
    - the Parliament has a method of reviewing the payments being authorised.

[174] 2016 Report on a National Compensation Scheme 7.
[175] Ibid 9.
[176] Ibid 11.
[177] Ibid 7.
[178] Ibid 7.
[179] Ibid 12.
[180] Ibid 8.
[181] Ibid 10.

242. The Law Council continues to support a model based on these features. The Law Society of New South Wales submitted the following additional features:

- the relevant nexus to Australia should be specified to include conduct carried out by an Australian resident or corporation regardless of where the conduct occurred, and include conduct which has caused loss or damage to any person in Australia, regardless of where the conduct occurred;

- eligibility should be determined on the basis that particular conduct has occurred, and there should be no requirement to prove 'harm' as part of eligibility criteria. The harm suffered should be considered in the quantification of the redress payment, as occurs under the National Redress Scheme for Child Sexual Abuse; and

- a generous approach should be taken to statutory limitation periods.

Summary view

243. The Law Council considers that the above remain the basic principles of a model federal compensation scheme. It acknowledges that this is a relatively high-level position, and further, separate, close consideration of the specifics of such a scheme would be required.

244. The Law Council suggests the review give consideration to amending the Modern Slavery Act to insert such a scheme within it. A compensation scheme would stand apart from the other elements of the Act, which are directed towards the conduct of reporting entities—the conduct of reporting entities with respect to their reporting obligations would not be relevant to the operation of the federal compensation scheme.

245. Inclusion of a federal compensation scheme within the Modern Slavery Act may ensure the Act provides the definitive Commonwealth statutory expression of regulatory and remedial actions taken to address its international obligations in relation to modern slavery. However, the Law Council is not wedded to the inclusion of the scheme within the present Act.