

Business & Human Rights Resource Centre

**Submission to the Legislative Council Standing Committee on Social Issues,
Parliament of New South Wales
Inquiry into the Modern Slavery Act 2018 and associated matters**

September 2019

We refer to the [Inquiry by the Legislative Council's Standing Committee on Social Issues, Parliament of New South Wales, into the Modern Slavery Act 2018 and associated matters](#). We note that submissions are invited to the [Terms of Reference](#) (ToR) for this inquiry.

We recognise that the subject of the inquiry is, in part, a proposed modern slavery in supply chains reporting requirement. We support this legislative reporting requirement, whilst acknowledging that a mandatory due diligence measure would represent an important future step to address modern slavery in supply chains.

In responding to the issues raised in the ToR, we have provided information and insights on the issues that relate directly to our organisational experience and expertise, namely matters relating to s24 (Transparency of supply chain) of the *Modern Slavery Act 2018* (NSW Act) and accompanying draft Regulation. As such, our submission addresses ToR 1(a), (b), (g), (h) and (i).

Overview

We support the modern slavery reporting scheme introduced by the NSW Act. We consider the scheme will play a significant role in addressing modern slavery in the supply chains of certain companies operating in and from the state of New South Wales. We acknowledge that, by having a lower reporting threshold than the *Modern Slavery Act* (Cth) 2018 (Cth Act), the NSW Act extends the scope of legislative modern slavery reporting to cover approximately 1400 additional reporting entities. As such, we consider the NSW Act to be an important complement to the Cth Act.

We **recommend** that the NSW Act is brought into effect, with application to those companies not within the scope of the Cth Act, namely companies with a total annual turnover of between AUD\$50m-AUD\$100m and not reporting voluntarily under the Cth Act.

The inclusion of penalties for non-compliance with the provisions of s24 of the NSW Act, and provision for an Anti-Slavery Commissioner, represent key improvements, not only on other Australian legislation, but on comparable modern slavery reporting laws worldwide. In this respect, the NSW Act is leading the way globally in terms of legislative action to address the scourge of modern slavery in corporate supply chains.

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Inquiry questions

ToR 1(a) the operability of the proposed anti-slavery scheme:

The modern slavery reporting requirements in the Cth Act apply to certain entities with an annual consolidated revenue of AUD\$100m or above.

The NSW Act applies to entities with a total turnover in a financial year of not less than AUD\$50m.

We understand it is intended that s24 of the NSW Act will be operable with respect to relevant NSW entities with an annual turnover of between AUD\$50m-AUD\$100m, after which the Cth Act provisions would apply.¹

For the avoidance of doubt, we **recommend** that this upper turnover threshold be expressly stipulated in the NSW scheme.

ToR 1(b) the effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act:

We consider the effect of the anti-slavery scheme on business, and supply chain reporting obligations under s24 of the NSW Act in particular, will have a significant impact in terms of encouraging entities to address modern slavery.

We support mandatory modern slavery reporting requirements for companies for several reasons:

- **A reporting requirement on modern slavery helps establish a level playing field** for businesses so that those striving to abide by ethical norms, are not penalised by greater production costs associated with their efforts to act responsibly.
- **Modern Slavery reporting provides companies with tangible examples of leading practice** which facilitates the adoption of better operating practices. We understand that a number of companies use our [Modern Slavery Registry](#) for this purpose.

¹ *Draft Modern Slavery Regulation 2019 Explanatory Paper: Supply Chain Reporting Requirement for Business*, June 2019, NSW Government Premier & Cabinet, p.6.

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- **Modern slavery reporting exposes laggard companies.** This facilitates productive engagement, by civil society and others such as investors, with those companies that are slower to respond to the challenge of modern slavery.
- **It facilitates the assessment of progress, over time, by companies in addressing modern slavery risks in their operations and supply chains.** This is facilitated by having comparable reporting criteria in place. We note the effect of the draft Regulation is to align the NSW Act mandatory reporting criteria with those in the Cth Act which is helpful.
- **Public disclosure of modern slavery statements provides stakeholders with valuable information, leading to better engagement and new conversations on human rights.** It provides a useful barometer as to how seriously a company is taking its human rights responsibilities and how committed it is to addressing the issues. As such, we are seeing growing demand by different stakeholders, including investors, business leaders, consumers, civil society organisations and lawyers, for modern slavery reporting. Benefits derived from modern slavery reporting regimes include:
 - Consumers are empowered to make better informed purchasing decisions.
 - Civil society can use the information to drive advocacy and campaigns.
 - Legal advisors are better placed to advise corporate clients on industry practice and how to limit legal liability or reputation risk.
 - Trade unions and worker representatives can use modern slavery disclosures as a basis for engagement with employers.
 - Investors require information about companies' actions to address modern slavery risks as part of their own due diligence. Modern slavery poses a material business risk to companies and, ultimately, investors. Modern slavery reporting assists investors to understand the extent to which potential and current investee companies both comprehend and manage their modern slavery risks.

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- **Legislation can drive positive change in corporate behaviour.** A report by the Ethical Trading Initiative and Hult International Business School found that the UK Modern Slavery Act (UK Act) has been a game-changer². According to the report, in the year since the UK Act was enacted: twice as many CEOs and other senior executives in the companies surveyed are actively involved in addressing modern slavery; 50% of companies surveyed are collaborating more with peers, NGOs and multi-stakeholder initiatives; and business-to-business companies are under growing pressure to provide assurance on what they are doing to address these issues. [Analysis of modern slavery statements](#) by the Business & Human Resource Centre has found that the UK Act transparency provision is driving positive action. Companies, across sectors, have developed or revised existing policies and have enhanced due diligence processes to better identify and address modern slavery risks.
- **Globally, modern slavery legislation is leading to greater public awareness of the perils of excessive consumption and associated supply chain sourcing.** This growing awareness is, in turn, catalysing growing demand for action by governments. It has highlighted the role business plays in creating and perpetuating the conditions for modern slavery, through business models and practices, as well as its potential to assist in eradicating it. It is up to governments to translate this discussion into legislative action.
- **In the international context, there is increasing human rights regulation of companies.** Mandatory human rights transparency and due diligence legislation is on the rise globally and emerging as a popular legislative tool. Examples being:
 - California Transparency in Supply Chains Act 2010
 - EU Non-Financial Reporting Directive 2014
 - UK Modern Slavery Act 2015
 - French Corporate Duty of Vigilance law 2017
 - Dutch Child Labour Due Diligence Law 2019
 - Proposed Swiss Responsible Business Initiative
 - Modern slavery disclosure laws recently proposed in Canada, Hong Kong and the United States.

² [Corporate Leadership on Modern Slavery](#), Ethical Trading Initiative and Hult Business School (October 2016).

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Enactment of the NSW Act represents an important component of global moves to introduce laws that curb human rights abuses, including the use of slaves, in corporate supply chains. We encourage the Parliament of NSW to support this crucial step by bringing the NSW Act, and associated instruments, into effect.

ToR 1(g) whether the passage of the Modern Slavery Act 2018 (Cth) renders parts or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps:

The passage of the Cth Act introduced a modern slavery reporting requirement applicable to certain entities with an annual consolidated revenue of AUD\$100m and above. As drafted, the NSW Act applies to entities with a total turnover of *'not less than \$50 million or such other amount prescribed by the regulations'*. As noted above, the NSW reporting regime will apply to entities with a turnover of between AUD\$50m-AUD\$100m.

We **recommend** amending the NSW instruments to include an upper reporting threshold so as to avoid confusion about whether an entity should report under the NSW Act or Cth Act. Consideration should also be given to aligning the NSW Act's threshold reference from 'turnover' to 'consolidated annual revenue', as used in the Cth Act.

We note, and support, the alignment of the NSW Act, via its Regulation, with the Cth Act in the following areas:

- Mandatory criteria for modern slavery statements (Reg 7)
- Director sign-off and board approval of statements (Reg 5)
- Reporting timeframes (Reg 8)
- Publication of statements on public register (Reg 8)

Public Registers

We note that s26 of the NSW Act provides for *'a register in electronic form that identifies any commercial organisation that has disclosed in a modern slavery statement...that its goods or services are, or may be, a product of supply chains in which modern slavery may be taking place'*.

This focus on listing only those entities disclosing a link to modern slavery suggests the **s26 register** may operate like a 'dirty list'. In our view, the dirty list approach of the s26 register may be counterproductive because it would likely disincentivise business from acting responsibly and taking

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steps to identify slavery risks. Further, it acts in opposition to the rationale behind a reporting requirement such as that established by s24. Reporting entities may be discouraged from being open and transparent about their actual, or potential, modern slavery risks, and how they are addressing them, for fear of being publicly named and shamed on the s26 register.

We note that Reg 8 establishes a free, publicly available electronic **statement register** on which all statements must be published by the Commissioner. We support the establishment of this statement register.

To be effective, the statement register will require functionality that allows users to search and collate statements according to a user's specifications, such as by company name, country where headquartered and sector/ industry. It could also provide access to additional resources such as guidance, analysis or commentary published by the Government and civil society. To determine the functionality and features most useful to stakeholders, we **recommend** that the Government collaborate and consult with external experts in the design of the statement register. We further **recommend** that there be linkage between the NSW and Commonwealth MSA registers so users are aware of the existence of both.

In addition to being free and publicly-available, we **recommend** that the statement register also meets the following criteria:

- reliably and consistently funded;
- continuously updated;
- historical to facilitate year-on-year progress to be tracked;
- single, central location;
- user-friendly;
- easily searchable to facilitate analysis and comparison; and
- well-publicised.

We support the creation of the statement register, and **recommend** the s26 register be repealed. In our view, the retention of the s26 register will likely create confusion and may disincentivise businesses from identifying slavery risks in their operations and supply chains.

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An important element of the NSW Act is the inclusion of penalties. These apply where a reporting entity fails to *'make its statements public in accordance with the regulations'* (s24(6)) or provides information *'in connection with a matter under this section that the person knows, or ought reasonably to know, is false or misleading in a material particular'* (s24(1)(7)). Under the draft Regulation, entities which opt in to the Cth Act's voluntary reporting regime, are exempt from preparing a statement under the NSW Act and, critically, from s24(1)(6) penalties.

This nullifies an important aspect of the NSW Act. Whilst false and misleading penalties under s24(1)(7) would still apply where a NSW entity opts in and voluntarily reports under the Cth Act, legislative consumer protections already exist to prohibit entities from making false and misleading statements in modern slavery statements. The disapplication of s24(1)(6) penalties to voluntary reporters under the Cth Act, in effect, removes the penalty regime of the NSW Act - a regime for which the NSW ACT has been strongly applauded by advocates.

ToR 1(h) the preferred course of action to address the matters identified:

As noted above, with respect to s24 of the NSW Act, we **recommend** clarifying an upper turnover/revenue threshold for reporting entities. We **recommend** s26 be repealed.

We further **recommend** that the NSW Act, the draft Regulation and Modern Slavery Act Amendment Bill 2019 be brought into effect.

ToR 1(i) any other related matter:***List of reporting entities***

We **recommend** the publication of a **list** of entities subject to the provisions of the NSW Act. A publicly-available list of reporting entities is critical for an effective reporting provision. Stakeholders, including investors, civil society and consumers, must know which entities are required to report under s24 in order to assess and engage with those that fail to report when required to do so.

A list of reporting entities would facilitate scrutiny and monitoring of corporate action against slavery by all stakeholders, encourage entities to take positive steps to meet their human rights responsibilities and enhance the efficacy of the NSW Act.

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Guidance

We further note the need to provide clear, detailed and timely **guidance** and awareness-raising materials for the business community. We **recommend** that Guidance be provided to companies about information to include in statements, as well as, more generally, how companies can better identify, prevent and address modern slavery in their operations and supply chains.

Public awareness campaign

We **recommend** that the NSW Act is also supported by a **public awareness campaign**. An effective campaign would be invaluable for raising awareness amongst both business, and the wider community, about the human rights risks associated with supply chains.

Thank you for the opportunity to provide input on the Standing Committee's Terms of Reference. Should you have further questions, or need to contact us, please email Amy Sinclair at sinclair@business-humanrights.org.

Amy Sinclair

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www.business-humanrights.org