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29 November 2023

Dr Joseph McGirr MP  
Chair, Modern Slavery Committee

*By email: [modernslavery@parliament.nsw.gov.au](mailto:modernslavery@parliament.nsw.gov.au)*

Dear Chair

**Review of the *Modern Slavery Act 2018* (NSW) – Supplementary Submission**

1. The New South Wales Bar Association (the **Association**) thanks the Modern Slavery Committee (**Committee**) for the opportunity to appear before the Committee at the public hearing on 30 October 2023 regarding the review of the *Modern Slavery Act 2018* (NSW) (the **Act**).
2. We also thank the Committee for the opportunity to provide a supplementary submission which responds to questions taken on notice and elaborates on the evidence given by the Association's representatives at the public hearing.

***Duty to co-operate with the NSW Anti-slavery Commissioner***

3. The Association respectfully suggests that the Committee consider the scope and appropriateness of the duty to co-operate provisions that apply to NSW Government agencies, and persons and organisations that provide services to, or advocate for, victims of modern slavery. The Association has concerns about the breadth of these provisions, particularly where information disclosed or sought includes confidential information, personal information, sensitive information and/or communications protected by client legal privilege.
4. We note that the Law Society of NSW and Anti-Slavery Australia have also identified concerns with the duty to co-operate provisions in their written submissions to the Committee.<sup>1</sup> In his written submission to the Committee, the NSW Anti-slavery Commissioner notes that the Commissioner lacks power to compel the production of information or documents and the Commissioner has limited recourse where an agency ignores or contests its obligations under section 14.<sup>2</sup> The Anti-slavery Commissioner reports that most agencies have been co-operative to date, however the requests take time *'as there are often complex questions of privilege, privacy, confidentiality and safety to be worked through'*.<sup>3</sup>

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<sup>1</sup> See Law Society of NSW submission to the Modern Slavery Committee dated 29 September 2023, p 3. See Anti-Slavery Australia submission to the Modern Slavery Committee dated 12 October 2023, p 5-6.

<sup>2</sup> See NSW Anti-slavery Commissioner submission to the Modern Slavery Committee dated October 2023, para 80.

<sup>3</sup> Ibid.

## Duty to co-operate provisions in the Act

5. Section 14(1) of the Act states: *Government agencies of the State and persons and bodies that provide services to, or advocate for, victims of modern slavery in the State must work in co-operation with the [Anti-slavery] Commissioner in the exercise of the Commissioner's functions.*
6. Pursuant to section 14(2) of the Act, the duty to co-operate includes duties to:
  - a. *disclose information that is likely to be of assistance to the Commissioner or an agency in the exercise of functions imposed on the Commissioner or agency with respect to modern slavery and victims of modern slavery; and*
  - b. *provide reasonable assistance and support to the Commissioner or an agency in connection with the exercise by the Commissioner or an agency of functions with respect to modern slavery and victims of modern slavery.*
7. The Act provides no further guidance to NSW Government agencies, service providers or advocacy organisations as to what the duty to co-operate with the Anti-slavery Commissioner requires, including guidance as to what '*information that is likely to be of assistance to the Commissioner*' entails. However, section 14(5) of the Act requires information be provided in accordance with section 14 despite the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW).
8. Section 15 of the Act permits the Anti-slavery Commissioner to work co-operatively with others, as well as consult with, and disseminate information to, persons and organisations that the Commissioner thinks appropriate.
9. Section 16 of the Act provides that no criminal or civil liability, apart from under the Act, attaches to a person for compliance, or purported compliance in good faith, with the Act's provisions, or for providing information to the Anti-slavery Commissioner.
10. Privileges such as legal professional privilege and the privilege against self-incrimination are protected by the principle of legality which effectively requires the legislature to indicate that such rights and privileges are abrogated expressly or by necessary intendment. There is however a risk that section 14 might be used to obtain confidential counselling notes provided, for example, by a modern slavery survivor to a service employing counsellors or psychologists. The same concern may arise in respect of other privileges recognised in Part 3.10 of the *Evidence Act 1995* (NSW) including professional confidential relationship privilege and sexual assault communications privilege.
11. Notably, the duty to co-operate provisions at section 14 of the Act do not include any of the exceptions afforded to the Commissioner of Police under similar duty to provide information provisions at section 35 of the Act.

12. Section 35(1) of the Act states: *The Commissioner of Police is, on request or in accordance with arrangements with the Commissioner, to provide the Commissioner with information regarding modern slavery and victims of modern slavery.* However, section 35(3) notes that the Commissioner is not required to provide information *if the Commissioner of Police reasonably believes that to do so would:*

- a. *prejudice the investigation of a contravention, or possible contravention, of a law in a particular case, or*
- b. *prejudice a coronial inquest or inquiry, or*
- c. *prejudice care proceedings, or*
- d. *contravene legal professional or client legal privilege, or*
- e. *enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained, or*
- f. *endanger a person's life or physical safety, or*
- g. *prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention, or possible contravention, of a law, or*
- h. *not be in the public interest.*

13. The *Modern Slavery Act 2018* (Cth) does not contain duty to co-operate provisions. We note that the federal legislation does not currently provide for a federal Anti-slavery Commissioner. However, the Australian Government has indicated that it intends to establish a federal Anti-Slavery Commissioner role and has allocated funding over the next four years to do so.<sup>4</sup>

#### Duty to co-operate provisions in the UK modern slavery legislation

14. The duty to co-operate provisions at section 43 of the *Modern Slavery Act 2015* (UK) (the **UK Act**) are narrower in scope and have greater safeguards than those contained in the NSW legislation. Section 43(1) of the UK Act enables the United Kingdom's Independent Anti-slavery Commissioner to request a *'specified public authority co-operate with the Commissioner in any way that the Commissioner considers necessary for the purposes of the Commissioner's functions'*. Section 43(2) of the UK Act requires a specified public authority to comply with a request made to it *'so far as reasonably practicable'*.

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<sup>4</sup> See the Attorney-General's speech to the National Modern Slavery Conference 2023, dated 29 June 2023, available here: <https://ministers.ag.gov.au/media-centre/speeches/national-modern-slavery-conference-2023-29-06-2023>.

15. ‘Specified public authorities’ are prescribed in Schedule 3 of the UK Act.<sup>5</sup> Non-government organisations providing services to, or advocating for, victim-survivors of modern slavery, *are not designated* as specified public authorities.
16. Section 43(3) of the UK Act states that: *A public authority which discloses information to the Commissioner...does not breach any obligation of confidence owed by the public authority in relation to that information; but this does not apply in relation to patient information.* ‘Patient information’ means information which:
- a. *relates to the physical or mental health or condition of an individual, to the diagnosis of an individual’s condition or to an individual’s care or treatment, or is to any extent derived directly or indirectly from such information, and*
  - b. *identifies the individual or enables the individual to be identified (either by itself or in combination with other information).*<sup>6</sup>
17. Section 43(5) states that: *Except as provided by subsection (3), subsection (2) does not require or authorise any disclosure of information which contravenes a restriction on the disclosure of information (however imposed).*

#### Duty to co-operate provisions in the Act lack important privacy protections

18. The Association has concerns about the scope of section 14(2) of the Act, especially as there are currently no specific legislative exceptions for NSW Government agencies and persons or bodies that provide services to, or advocate for, victims of modern slavery in the State. This is especially problematic in a modern slavery context, particularly for advocacy and service provider organisations as they are likely to hold confidential material, communications protected by client legal privilege, and/or personal and health information about victims-survivors of modern slavery.
19. Victim-survivors are often faced with issues of trust because of their lived experience of modern slavery, and trust underpins working relationships between agencies and their clients. Legislation that has the unintended consequence of breaching this trust could have a detrimental impact on the victim-survivor and the support they receive from agencies.
20. Further, not all anti-slavery advocacy and service provider organisations will have ready access to, or funding to obtain, legal advice regarding their obligations pursuant to the Act and how those obligations interact with other statutory and common law duties that may apply.

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<sup>5</sup> At present, Schedule 3 public authorities include a chief office of police for a police area in England and Wales, the chief constable of the British Transport Police Force, the National Crime Agency, an immigration officer, a designated customs official, local government bodies, a National Health Service Trust, an NHS foundation trust, a Local Health Board and the Gangmasters and Labour Abuse Authority.

<sup>6</sup> See section 43(4) of the UK Act.

21. As the Committee is aware, modern slavery can be difficult to detect, and many victim-survivors are fearful of seeking assistance because they fear retaliation from the perpetrator, are fearful of authorities, or are concerned that seeking assistance may have negative consequences for them (e.g. on their migration status). The Association stresses the importance of ensuring that the Act's provisions do not become another factor that may dissuade or deter victim-survivors from seeking assistance from NSW government agencies, anti-slavery advocacy organisations, and other service providers. It is vital that victim-survivors feel confident that they can contact such organisations without fear that the information they disclose may be further disseminated, used for a different purpose, and/or identify them, especially without their consent.

#### The Anti-slavery Commissioner does not have investigative or regulatory functions

22. The NSW Anti-slavery Commissioner's general functions are, inter alia, to advocate for and promote action to combat modern slavery, identify and provide assistance and support for victims of modern slavery, and raise community awareness of modern slavery.<sup>7</sup> The Commissioner's functions are not investigative or regulatory. Section 10(1) of the Act explicitly states that the Anti-slavery Commissioner '*does not generally have the function of investigating or dealing directly with the complaints or concerns of individual cases*'. Section 13 of the Act permits the Anti-slavery Commissioner to refer information relating to modern slavery, or suspected instances of modern slavery, to other investigative and government agencies.

23. Accordingly, the Anti-slavery Commissioner's role differs from other statutory officers in NSW, such as the Children's Guardian and the NSW Building Commissioner, who have greater detection and exposure powers to assist their investigative and regulatory functions.<sup>8</sup> The Association would have concerns if any additional inspection or information-gathering powers granted to the Anti-slavery Commissioner did not address the confidentiality and privacy rights and concerns we have raised above.

24. The Anti-slavery Commissioner has a role in providing victim-survivors of modern slavery with information about, and referrals to, government and non-government programs and services,<sup>9</sup> assisting victims generally,<sup>10</sup> and encouraging reporting of instances of suspected modern slavery.<sup>11</sup> As mentioned above, developing and maintaining trust with victim-survivors is an important aspect of any modern slavery work. If the Anti-slavery Commissioner's role were to be expanded through

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<sup>7</sup> See section 9(1) of the Act.

<sup>8</sup> For example, section 128(f4) of the *Children's Guardian Act 2019* (NSW) states that a principal function of the Children's Guardian is to investigate compliance with the children's care legislation. Section 12(a) and (b) of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* confer investigatory and enforcement functions on authorised officers. Section 11(a) defines the Building Commissioner as an 'authorised officer'.

<sup>9</sup> See section 10(2) of the Act.

<sup>10</sup> See section 12(b) of the Act.

<sup>11</sup> See section 12 (c) of the Act.

investigative or detection powers, consideration needs to be given to how the Commissioner and his office would maintain the trust and relationship with the victim-survivor.

25. There is also the issue of resources. As noted in the Commissioner's written submission to the Committee, the Office of the Anti-slavery Commissioner currently has around 1.0 FTE personnel time available for the function of providing assistance and support for victims of modern slavery.<sup>12</sup> The Association anticipates that the number of victim-survivors who contact the Anti-slavery Commissioner will continue to rise in the coming years, particularly once the hotline required under section 12(d) of the Act is established.
26. Further, it is important to recognise that the Anti-slavery Commissioner's role in providing support to victims-survivors is a joint role, in co-operation with government agencies and non-government organisations, with the Office of the Anti-slavery Commission focussing on referrals to appropriate support services. Working collaboratively and jointly with agencies and organisations is vital to the Commissioner's work to ensure appropriate referrals for victim-survivors.
27. Similar to section 14(5) of the Act, the information sharing provisions in Part 13A of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the **Domestic and Personal Violence Act**) permit agencies, in some cases,<sup>13</sup> to use and disclose information about a person, to a designated referral or co-ordination point, without the consent of the person and despite the privacy legislation.<sup>14</sup> However, an agency must have obtained the consent of the person they reasonably believe is subject to a domestic violence threat,<sup>15</sup> unless the agency reasonably believes that the disclosure is necessary to prevent or lessen a serious domestic violence threat, and the person has refused to give consent or it is unreasonable or impractical to obtain the person's consent.<sup>16</sup>
28. The coordinated service provider referral network is far more established under the Domestic and Personal Violence Act, with support agencies and non-government support services nominated as local co-ordination points. Such a framework does not exist under the Act and the Office of the Anti-slavery Commissioner is not adequately resourced.
29. Therefore, the Association considers that it is particularly important that victim-survivors' confidential and personal information not be disclosed without the individual's consent, especially where there is limited personal benefit to an individual in having such information disclosed to the Anti-slavery Commissioner.

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<sup>12</sup> See paragraph 78 of the NSW Anti-Slavery Commissioner's submission dated October 2023.

<sup>13</sup> Where the agency believes on reasonable grounds that the particular collection, use or disclosure of the information is necessary to prevent or lessen a domestic violence threat to the person or any other person, and the threat is serious, and the person has refused to give consent or it is unreasonable or impractical to obtain the person's consent. See section 98M of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

<sup>14</sup> Section 98A of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) defines privacy legislation as the *Privacy and Personal Information Protection Act 1998* (NSW) or the *Health Records and Information Privacy Act 2002* (NSW) and any regulation or code of practice made under either of those Acts.

<sup>15</sup> See section 98D of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

<sup>16</sup> See section 98M of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

## Recommendations

30. In light of the above concerns, the Association respectfully suggests that the Committee consider whether:

- a. the duties currently imposed on persons and bodies that provide services to, or advocate for, victims of modern slavery, at sections 14(2)(a)-(b) of the Act, should be limited to a function enabling the Anti-slavery Commissioner to seek and receive information in a co-operative manner only, and subject to the informed consent of the victim-survivor, and subject to the disclosure of information not contravening the victim-survivor's rights to confidentiality, client legal privilege and other privileges in Part 3.10 of the *Evidence Act 1995*, privacy, and/or endangering a person's life or physical safety;
- b. the exceptions at subsections 35(a)-(f), and section 35(4), of the Act should be replicated for NSW Government agencies. Further, if a duty to disclose is retained in ss 14(2)(a)-(b) for persons and bodies that provide services to, or advocate for, victims of modern slavery, the exceptions subsections 35(a)-(f), and section 35(4) should apply to such persons and bodies;
- c. section 14(5) of the Act should be repealed, insofar as those provisions protect disclosure of an individual's personal information and/or health information without the individual's informed consent; and
- d. consequential amendments are needed to section 16 of the Act in relation to personal liability for co-operation with the Anti-slavery Commissioner.

31. The Association supports NSW Government agencies and non-government organisations having a duty to provide reasonable assistance and support to the NSW Anti-slavery Commissioner in connection with the exercise of the Commissioner's functions, however such duties should be limited to a seek and receive information in a co-operative manner only for *persons and bodies that provide services to, or advocate for, victims of modern slavery*, and should not involve the disclosure of information that infringes victim-survivors' rights to confidentiality, client legal privilege their privacy, or endanger their life or physical safety. Further, any assistance or support should be provided with the informed consent of the victim-survivor.

### *Attrition of cases through the criminal justice system*

32. At paragraph 35 of the Bar Association's submission dated 17 October 2023, there is reference to an article regarding a study into the attrition of human trafficking and slavery cases through the Australian criminal justice system.<sup>17</sup> The purpose of the study was two-fold, firstly to identify the points of attrition in the criminal justice process, and secondly to identify the challenges that police

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<sup>17</sup> Lyneham, Samantha, *Attrition of human trafficking and slavery cases through the Australian criminal justice system*, Australian Institute of Criminology, (November 2021). Available [here](#).

and prosecutors face when investigating, prosecuting and, ultimately, attempting to secure a conviction.

33. The study showed

an overall attrition rate of 73 percent between the number of defendants referred for prosecution (n=93) and the number of defendants who were convicted (n=25; see Figure 3). Attrition was similarly high from charge to conviction, with half of defendants (52%) being dismissed between these stages. Comparable levels of defendant attrition were observed between referral for prosecution and charge (44%), and between plea/trial and conviction (40%). A lower rate of attrition was observed between charge and plea/trial (19%), indicating that most defendants who were charged either pleaded guilty or were found guilty at trial.

34. The study also found that at

the offence level, the more serious charges of human trafficking and slavery had a lower conviction rate than alternative charges. Whereas human trafficking and slavery offences comprised the largest proportion of charges (n=101, 60% vs n=68, 40% for alternative offences), they comprised the smallest proportion of convictions (n=20, 39% vs n=31, 61% for alternative offences; see Figure 4). Therefore, the prosecution attrition rate for human trafficking and slavery offences was 80 percent, compared to 54 percent for alternative offences.

35. The article refers to the barriers and challenges of investigating and prosecuting human trafficking and slavery cases and states that research has indicated that the reasons why human trafficking and slavery investigations and prosecutions have faltered include ‘victim identification and cooperation, victim credibility and evidentiary difficulties, the complexity of legislation, and training and experience of investigators and prosecutors’.<sup>18</sup> The article provides a detailed analysis of these reasons as they relate to the Australian context.

36. The article raises an important point worth noting with respect to investigating and prosecuting such cases, stating that investigation and prosecution processes ‘are not necessarily linear, and key decisions made by investigators, prosecutors, defence lawyers and the judiciary influence how a case progresses’.<sup>19</sup> Further, in ‘taking a victim-centric approach to human trafficking and slavery cases, the AFP considers disruption and intervention activities, which remove victims from harm, as important as successful prosecution outcomes’.<sup>20</sup>

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<sup>18</sup> Ibid, p 11.

<sup>19</sup> Ibid, p 3.

<sup>20</sup> Ibid, p 4.



### *Service provision for victim-survivors of modern slavery*

37. Addressing modern slavery will not solely be achieved through legislation, investigation, or prosecution.
38. Support services that educate and support victim-survivors to better recognise modern slavery are vital, as are services that assist victim-survivors financially, emotionally, and practically.
39. Building the capacity of existing agencies and organisations that may encounter victim-survivors of modern slavery will better equip them to respond to the needs of victim-survivors and possibly prevent modern slavery. Those with lived experience are well placed to develop and implement, or co-design, the education and training to build the capacity of agencies and organisations.
40. Further, identifying and filling any gaps in current service delivery will ensure that victim-survivors receive appropriate care and support. The Office of the Anti-slavery Commissioner is well placed to undertake the task of identifying gaps and advocating for funding to fill any gaps. The Office of the Anti-slavery Commissioner is also well placed to sign post and promote existing services providing support to victim-survivors.

### *Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022*

41. There have been three federal, private members' Bills in recent years to amend the *Customs Act 1901* (Cth) in relation to banning goods produced by forced labour:
  - a. the *Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020* (Cth)<sup>21</sup> introduced by former Senator Rex Patrick on 8 December 2020. The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee which reported on 17 June 2021.<sup>22</sup> The Bill was discharged from Notice Paper on 24 June 2021;
  - b. the *Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021* (Cth)<sup>23</sup> was introduced by former Senator Rex Patrick and read for a first time on 24 June 2021. The Bill lapsed at dissolution on 11 April 2022; and

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<sup>21</sup> Available here:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=s1284](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1284)

<sup>22</sup> The report is available here:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Uyghur\\_ForcedLabourBill](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Uyghur_ForcedLabourBill)

<sup>23</sup> Available here:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=s1307#:~:text=A+mends%20the%20Customs%20Act%201901,in%20part%20by%20forced%20labour.](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1307#:~:text=A+mends%20the%20Customs%20Act%201901,in%20part%20by%20forced%20labour.)

- c. the *Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022* (Cth)<sup>24</sup> was introduced by Senator Jordan Steele-John on 22 November 2022 as a Private Member's Bill. The second reading debate took place on 1 December 2022.

### *Conclusion*

42. Thank you again for the opportunity to provide submissions to the Committee regarding the review of the Act. The Association welcomes the opportunity to continue to contribute to the development and improvement of modern slavery legislation in NSW.

43. Should you have any questions in relation to this letter, please contact Alanna Condon, Senior Policy Lawyer, at [redacted] in the first instance.

Yours faithfully

Ruth Higgins SC  
President

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<sup>24</sup> Available here:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs1356%22>