

**Submission
No 1**

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: NSW Government

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Inquiry into the *Modern Slavery Act 2018* (NSW) and associated matters

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Overview

The *Modern Slavery Act 2018 (NSW)* (the **NSW Act**) was introduced as a Private Member's Bill by Mr Paul Green MLC (Christian Democratic Party) and was passed by the Parliament on 21 June 2018.

As a Private Member's Bill, the policy development and drafting of the NSW Act did not have the full range of government resources and expertise behind it, and while the intent of the proponent is generally clear, the NSW Act as drafted sometimes does not fulfil that intent.

In working to implement and commence the NSW Act since its assent, the Department of Premier and Cabinet (**DPC**) has consulted extensively with NSW Government agencies on the effect of the NSW Act and its implementation within the justice system.

The amendments proposed to the NSW Act by the Modern Slavery Amendment Bill 2019 (the **Bill**) (**Attachment B**) will ensure that the NSW Act better aligns with the policy intent behind it, and will enhance the legal clarity, constitutionality and operation of the NSW Act.

The table at **Attachment A** provides the reasons for, and effect of, each of the proposed amendments to the NSW Act.

The more significant of these amendments are explained below. Item references in this submission are to the items in **Schedule 1 of the Bill**, unless otherwise specified.

The supply chain reporting requirements on commercial organisations in section 24 of the NSW Act cannot be commenced without detailed provision in regulations on how organisations are to prepare and publish their statements. A draft *Modern Slavery Regulation 2019* (the **Regulation**) (**Attachment C**) has been prepared for this purpose. DPC has prepared a paper (**Attachment D**) which explains each of the reporting requirements in the Regulation, to guide public consultation.

Background

What is Modern Slavery?

Modern slavery is a serious violation of an individual's dignity and human rights. Exploitative practices, including human trafficking, slavery, servitude, forced labour, debt bondage and forced marriage, are all considered modern slavery and are serious crimes under Australian law.

The [International Labour Organisation](#) estimates there are more than 40 million people in modern slavery conditions worldwide.

Modern slavery takes many forms. It could be:

- a worker on a farm who is unable to leave or stop working because of threats of violence from his employer
- a teenager who is overseas on a family holiday and forced or coerced into marriage, or
- a migrant worker in a factory who has not received any wages while he works to repay an exorbitant debt owed for his recruitment.

Modern slavery is not confined to far-off places. Sadly, it occurs in Australia, with up to 1900 people estimated to be living in conditions of modern slavery ([Australian Institute of Criminology](#)).

Legislative Council Select Committee on Human Trafficking in NSW

On 9 November 2016, the NSW Legislative Council Select Committee Inquiry into Human Trafficking in New South Wales was established to inquire into and report on human trafficking in NSW. The Committee inquired into the effectiveness of law enforcement agencies in responding to human trafficking, the prevalence of human trafficking in NSW and the effectiveness of legislation

and policies (the **NSW Inquiry**). The final report of the NSW Inquiry was released on 19 October 2017 and made 34 recommendations, many of which are implemented in the NSW Act.

The Committee's recommendations included:

- That the NSW Government urge the Australian Government, through the Council of Australian Governments, to establish a modern slavery act for Australia (Rec 1)
- That the NSW Government advocate through the Council of Australian Governments, for the Australian Government to establish:
 - legislation that requires large companies based in Australia to publicly report annually on steps taken to ensure there is no modern slavery within the organisation and supply chain
 - a publicly available, independently managed register to measure the success of companies and the effectiveness of this legislation. (Rec 8)

Other recommendations related to a non-legislative framework based on the NSW Government's Code of Practice for Procurement, to ensure that government agencies are not procuring goods and services that are the product of human trafficking, slavery or slave-like practices (Recs 10-12).

The NSW Government's response to these recommendations was the support given by the Government to the *Modern Slavery Bill 2018* in the Parliament.

Modern Slavery Act 2018 (NSW)

The NSW Act implements a mix of recommendations from both NSW and Federal Parliamentary inquiries, and also contains other provisions in relation to modern slavery advocated by civil society organisations. The NSW Act:

- establishes an independent NSW anti-slavery commissioner;
- introduces requirements for large organisations to publish annual modern slavery statements about the steps they have taken to eliminate modern slavery from their supply chains. Under the Act's supply chain reporting requirement (section 24 of the NSW Act, and the Regulation) commercial organisations with an annual turnover between \$50 million and \$100 million are to lodge annual Modern Slavery Statements with the NSW Anti-Slavery Commissioner (the **Commissioner**);
- requires Modern Slavery Statements to describe action the organisation has undertaken to assess and address modern slavery risks in their operations and supply chains, both in Australia and overseas, if applicable. These statements will be made available on an online public register;
- enables the NSW Procurement Board to issue directions about modern slavery, and requires annual reporting by government agencies about action taken to ensure that goods and services procured are not the product of modern slavery;
- introduces a 'modern slavery risk order' which would prohibit a person convicted of certain modern slavery offences from engaging in conduct where the person poses a risk of engaging in further conduct constituting modern slavery;
- introduces new NSW offences of slavery, servitude and child forced labour, and child forced marriage;
- introduces a new aggravated offence in relation to using a child to produce child abuse material, and a new offence of providing information to assist a person to avoid detection for a child abuse material offence;
- amends the apprehended domestic violence order framework to ensure these orders are available in cases of forced marriage;
- amends the *Criminal Assets Recovery Act 1990 (NSW)* to permit the recovery of assets gained through the commission of offences of slavery, servitude and child forced labour;
- extends support under the NSW scheme in the *Victims Rights and Support Act 2013 (NSW)* to victims of modern slavery;

- requires the establishment of a modern slavery hotline to provide advice and support to victims of modern slavery;
- establishes a joint parliamentary committee on modern slavery; and
- provides the Auditor-General with authority to conduct risk based modern slavery audits.

Items 2 and 3 in the above list have a significant overlap with the supply chain reporting provisions of the Commonwealth legislation discussed below, with the result that only businesses with a turnover between \$50 million and \$100 million are required to report under the NSW Act.

Modern Slavery Act 2018 (Cth)

Since the NSW Act was passed, the Commonwealth Parliament has passed its own *Modern Slavery Act 2018* (the **Commonwealth Act**). The Commonwealth Act was subject to extensive consultation from August 2017 to when it was first introduced in Parliament in June 2018. The Commonwealth Act commenced on 1 January 2019.

Two related inquiries into human trafficking and modern slavery were undertaken at the Federal level which made recommendations which intersect significantly with those made by the NSW Inquiry.

The Commonwealth Act deals with supply chain reporting and requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than \$100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. Other entities based, or operating, in Australia may report voluntarily. Unlike the NSW Act, the Commonwealth Act does not include penalties for entities that fail to comply with reporting requirements. Instead, the Act provides that the Commonwealth Government has the power to publicly name and shame entities that fail to comply with the reporting requirements.

The Commonwealth is required to report on behalf of non-corporate Commonwealth entities, and the reporting requirements also apply to Commonwealth corporate entities and companies with an annual consolidated revenue of more than \$100 million.

Reports will be published by the Minister on the Modern Slavery Statements Register. Statements on the register may be accessed by the public, free of charge, on the internet.

In light of the recommendations from the Legislative Council Select Committee on Human Trafficking's 2017 Report, which strongly supported action on modern slavery being taken at the Federal level, including the introduction of a modern slavery act for Australia, the question arises as to whether the NSW Act is, in whole or in part, still necessary.

Operability – ToR 1(a)

In working to implement and commence the NSW Act since its assent, the Department of Premier and Cabinet (**DPC**) has consulted extensively with NSW Government agencies on the effect of the NSW Act and its implementation within the justice system.

The amendments proposed to the NSW Act by the Modern Slavery Amendment Bill 2019 (the **Bill**) (**Attachment B**) will ensure that the NSW Act better aligns with the policy intent behind it, and will enhance the legal clarity, constitutionality and operation of the NSW Act.

The table at **Attachment A** provides the reasons for, and effect of, each of the proposed amendments to the NSW Act.

The more significant of these amendments are explained below. Item references in this submission are to the items in **Schedule 1 of the Bill**, unless otherwise specified.

Effect of the scheme on business – ToR 1(b)

As the *Modern Slavery Act 2018* was brought forward as a Private Member’s Bill, the usual policy development processes of government, including in relation to assessing the regulatory impact of a new proposal, were not able to be followed.

No regulatory impact statement (RIS) has been prepared in relation to the Regulation because the instrument is of a machinery nature, and is therefore exempt under Schedule 3 of the *Subordinate Legislation Act 1989*. “Machinery nature” means that the regulation sets out the necessary procedural details to give effect to a substantive provision set out in the relevant Act.

The substantive regulatory impact in relation to supply chain reporting is imposed by the *Modern Slavery Act 2018*, not by the proposed Modern Slavery Regulation 2019.

The Commonwealth Department of Home Affairs prepared a Regulatory Impact Statement prior to the introduction of the Commonwealth Modern Slavery Act. A copy of the Commonwealth Statement is included in the Explanatory Memorandum for the Commonwealth Bill (<https://www.legislation.gov.au/Details/C2018B00136/Explanatory%20Memorandum/Text>).

The Commonwealth estimated an annual regulatory impact on the business community of the modern slavery reporting requirement of \$21,950 per reporting entity.

The expectations of businesses reporting under the NSW Modern Slavery Act are equivalent to the expectations of businesses reporting under the Commonwealth Act. Accordingly, the NSW Government expects that the regulatory impact for each individual reporting entity would be very similar.

The Department is still working to refine the number of commercial organisations that will be required to report under the NSW Act. We currently estimate that there are approximately 1650 businesses in Australia with a turnover between \$50 million and \$100 million who either have headquarters in NSW or branches in NSW that may be required to report each year. This figure is likely to be smaller, if it takes into account the NSW employee requirement and the proposed exemptions for charities and not-for-profit organisations and small businesses.

Draft Modern Slavery Amendment Bill 2019 – Key amendments

Clarifying supply chain reporting obligations – State Owned Corporations - Items [1] and [14] – ToR 1(c)

The text of the NSW Act indicates an intention to include charities and not-for-profit organisations, State owned corporations and local councils within the scope of the supply chain reporting obligations in the Act.

The NSW Act provides for two separate supply chain reporting regimes - ‘commercial organisations’ are required to report on the risks of modern slavery in their supply chains (section 24) and ‘government agencies’ are obliged to take reasonable steps to ensure that goods and services procured by and for the agency are not the product of modern slavery, and report on their actions in their Annual Reports (new section 176(1A) of the *Public Works and Procurement Act 1912* (NSW) (the **Public Works Act**)).

There is a clear intention in the text of the NSW Act to treat State owned corporations established under the *State Owned Corporations Act 1989* (NSW) (**SOCs**), and companies incorporated under the *Corporations NSW Act 2001* (Cth) which have a Minister as a shareholder, as ‘government agencies’ under the NSW Act (see paras (c) and (d) of the definition of ‘government agency’ in section 5). As the NSW Act is currently drafted, including these entities in this definition ensures that the supply chain reporting requirement placed on commercial organisations under section 24 will not apply to them.

However, there is significant uncertainty about the extent to which the provisions governing the reporting requirements of government agencies have effectively captured SOCs, given that SOCs are not covered by the Public Works Act.

The Government understands that the intention was to treat SOCs and local councils in the same way as government agencies. However, Government policy in relation to SOCs is that they should operate on a level playing field with equivalent commercial organisations, to the greatest extent possible. Accordingly, the Bill proposes amendments to bring SOCs within the reporting regime applying to commercial organisations.

In fact, as all of the current SOCs have turnover above \$100 million they are most likely covered by the Commonwealth Act, but this is a matter on which they should obtain their own legal advice.

Clarifying supply chain reporting obligations – Local councils - Items [1] and [14] – ToR 1(c)

As with SOCs, while there is evidence of an intention to treat local councils as government agencies under the Act, there is doubt about the extent to which that intention has been fulfilled. NSW Government policy generally is to treat local councils as distinct from NSW Government agencies. At this stage, no amendments to bring local councils within the scope of the NSW Act are proposed.

Non-legislative approaches for local councils are being explored. There are concerns that smaller and regional councils will not have the resources to meet an additional burden to report on how their procurement activities are being managed to ensure that the goods and services they procure are not the product of modern slavery.

The Office of Local Government is proposing an administrative process, working with the sector and the Commissioner. Part of this work will involve assessing the degree to which councils would be willing to provide information to the Commissioner on a voluntary basis, and designing an appropriate regulatory instrument (e.g. a code of practice).

If non-legislative approaches prove ineffective, an amendment could be introduced at a later stage, by amending either the *Local Government Act 1993* (NSW) or the NSW Act to provide obligations equivalent to those imposed on NSW Government agencies, for example:

- A council, county council or joint organisation must take reasonable steps to ensure that goods and services procured by and for the agency are not the product of modern slavery within the meaning of the NSW Act.
- The annual report for a council, county council or joint organisation is to include the following matters:
 - a statement of the action taken by the council, county council or joint organisation in relation to any issue raised by the Anti-Slavery Commissioner during the financial year then ended concerning the operations of the council, county council or joint organisation and identified by the Anti-Slavery Commissioner as being a significant issue,
 - a statement of steps taken to ensure that goods and services procured by and for the council, county council or joint organisation during the financial year then ended were not the product of modern slavery.

To address the concerns about the burden on smaller and regional councils, a regulation making power could be included, so that the Minister for Local Government and the Anti-Slavery Commissioner could agree on regulations to exempt, unconditionally or subject to conditions, any council, county council or joint organisation, or class of council, county council or joint organisation, from the modern slavery procurement and reporting requirements.

Clarifying supply chain reporting obligations – Charities and not-for-profits - Items [1] and [14] – ToR 1(c)

It is the Government's view that charities and not-for-profit organisations that supply goods or services for profit (such as through the sale of second hand clothes) are caught by the current requirement to provide a Modern Slavery Risk Statement, if they meet the other criteria in section 24 of the Act.

It is understood that this was the intended effect of the provisions. However, this reading has been contested by some stakeholders and requires clarification.

These amendments make clear that section 24 applies to charities and not-for-profit organisations, if they supply goods or services for profit, have employees in NSW and meet the turnover threshold (Item [12]). The relevant turnover is, however, only that derived from the supply of goods and services for profit or gain (not for example, income derived from charitable donations) (Item [13]). This outcome is consistent with the position of charities and not-for-profits under the Commonwealth Act.

The question of whether some or all charities and not-for-profit organisations should be exempt from this requirement is a separate matter. The explanatory paper released with the Regulation raises this as a matter on which submissions are sought. If the exemption set out in the Regulation is supported by stakeholders during the consultation process, an exemption can be provided in the final Regulation.

The appropriateness and enforceability of Modern Slavery Risk Orders – Items [3] and [18] – ToR 1(d)

The most problematic provision of the NSW Act is section 29 (Part 4 of the NSW Act) which provides for the making of Modern Slavery Risk Orders (**Risk Orders**), to constrain the liberties of a person convicted of a modern slavery offence, on top of any sentence served, in order to reduce or manage the risk of that person committing a further modern slavery offence.

The section presents significant legal, policy and practical challenges.

Risk-based and prevention-oriented orders are complex and challenge fundamental principles of justice, including the presumption of innocence. They should not be introduced lightly. Broadening the use of such orders has the potential to cast doubt on the efficacy of the deterrent and rehabilitation functions of the current prison/parole/supervision regime.

The Risk Order provisions fit poorly into the current criminal justice and criminal courts frameworks. In particular:

- the provision for the courts to make Risk Orders on their own motion, and the absence of an unfettered right of appeal, may raise a potential risk of constitutional challenge.
- as currently drafted, section 29 is ambiguous as to whether it provides for civil or criminal proceedings, and the proposed proceedings are extremely difficult to accommodate within existing court rules, processes and technology
- the provisions fail to identify how risk assessments of modern slavery offenders will be conducted and by whom, who will make the applications to the court, how the court will make its decision, and who will monitor and enforce compliance with the orders.

An alternative approach to the NSW Act's Risk Orders

NSW's existing suite of risk-based schemes could, with a minor amendment proposed in the Bill, present a much more developed and effective option for addressing the potential risk posed by modern slavery offenders, and do not have the legal, funding and implementation challenges that section 29 presents.

NSW has several existing schemes that can be used to address the future risk posed by modern slavery offenders, such as those under the *Crimes (Serious Crime Prevention Orders) Act* (NSW),

the *Crimes (High Risk Offenders) Act* (NSW), and the *Child Protection (Offenders Registration) Act* (NSW). Other amendments in the NSW Act ensure that AVOs can be deployed in forced marriage situations.

Accordingly at Item [18] the Bill proposes the repeal of Part 4 (section 29), and at Schedule 2.1 the Bill proposes an amendment to include certain modern slavery offences within the definition of “offence of a sexual nature” in the *Crimes (High Risk) Offenders Act 2006* (NSW). Item [3] is a consequential amendment that omits the definition of ‘modern slavery risk order’ from section 5 (Definitions) of the NSW Act.

Replacing a reference to the Human Tissue Act with a reference to organ trafficking Items [22] and [23] – ToR 1(e)

Section 32 of the *Human Tissue Act 1983* (NSW) (the **Human Tissue Act**) makes it an offence for a person to enter into a contract or arrangement, for valuable consideration, relating to the sale or supply of human tissue. It is currently listed as a ‘modern slavery offence’ in Schedule 2 of the Act.

The definition of modern slavery offence in the NSW Act includes any activity that occurs in another country that would be a breach of section 32 of the Human Tissue Act, had the activity occurred in NSW, even if the activity is legal in the other country. The offence in section 32 relating to the prohibition of trading in human tissue precludes blood and plasma donors being paid. However, some comparable overseas jurisdictions may pay donors in a way that could breach section 32 of the Human Tissue Act.

It is noted that the offence in section 32 does not apply to all tissue or in all cases. For example, section 32 does not apply to tissue that has been subjected to processing or treatment, and it is not an offence under section 32 if only reasonable expenses are paid. Further, the Minister has the power to exempt certain agreements from section 32 if there are special circumstances and this does occur to allow for paired kidney exchanges.

Capturing any activity within the meaning of modern slavery that occurs in another country that would be a breach of section 32 of the Human Tissue Act had the activity occurred in NSW has the potential to reduce the supply of blood and other products into NSW. NSW Health can and does rely on imports of blood-related products, particularly plasma derived products, from parts of America, or other countries, that allow a donor to be paid for their donation in a manner that may breach section 32 had the activity occurred in NSW. Continuing to rely on such imports has the potential to put NSW Health at risk of breaching the obligation created by the NSW Act that it take reasonable steps to ensure it does not have modern slavery in its supply chain (new section 176(1A) of the Public Works Act).

It is understood that the purpose of including section 32 of the Human Tissue Act within the definition of ‘modern slavery offence’ was to prevent organ trafficking, not the payment of donors for supplying blood and other tissue products. Accordingly, to ensure the continuing supply of blood and blood products from comparable overseas countries, it is proposed to amend the NSW Act to make clear that a modern slavery offence includes organ trafficking, but does not include activity, when occurring overseas, in relation to the sale and supply of blood and tissue that is not an organ, by replacing the reference to section 32 of the Human Tissue Act in Schedule 2 of the NSW Act with references to the relevant Commonwealth organ trafficking offences.

Risk of constitutional challenge - Amendments to new Crimes Act offences – Items [21] and [26] - [37] – ToR 1(f)

Where Commonwealth and NSW offence provisions overlap, certain types of inconsistency can give rise to a risk that the NSW provision (and any prosecution based on it) will be found invalid.

Amendments are proposed in the Bill to remove the risks arising from these sorts of inconsistencies with equivalent Commonwealth offences. Those equivalent Commonwealth offences remain available to NSW law enforcement agencies to use in relation to offences they may be investigating or prosecuting.

The Bill proposes to delete section 91HAA due to a conflict with the equivalent Commonwealth provision, which cannot be fixed by redrafting the provision (Item [26] if the Bill). The Commonwealth provision (s473.5 of the *Criminal Code*) specifically exempts Internet service providers and Internet content hosts from the reach of their offence provisions, whereas the new NSW offence specifically targets them (in section 91HAA(3)(b)).

Two other amendments will align sections 93AB and 93AC with the equivalent Commonwealth offence provision, removing relatively minor, but nonetheless problematic, inconsistencies:

- The amendment to section 93AB (Item [31] in the Bill) will limit the territorial operation of the offence provision to within NSW, to avoid a conflict with the requirement in the equivalent Commonwealth offence, under which the Attorney General must consent to any prosecution in relation to matters where all of the physical elements of the offence occurred outside Australia.
- The amendment to section 93AC (Item [32] in the Bill) will ensure that where both partners to a forced marriage are victims (for example both are children who have been coerced into the marriage), neither is guilty of the offence of procuring a forced marriage, in line with the equivalent Commonwealth provision.

Clarifying the extraterritorial scope of ‘modern slavery’ – Item [2]

A minor amendment to the definition of ‘modern slavery offence’ will clarify slightly ambiguous drafting. The amendment will make clear that the definition of ‘modern slavery offence’ includes conduct occurring outside of NSW and Australia, which, if it occurred in NSW, would be an offence (even though it might not be an offence in the place in which it occurred). This is consistent with the effect of the current provision, but warrants clarification.

A common misunderstanding about the extraterritorial provisions in the Act, and this definition of ‘modern slavery offence’, is that the NSW Act attempts to criminalise conduct occurring outside of NSW and Australia under NSW law that may not be an offence in the place in which it occurs. This is not the case. The NSW Act does not impose any prohibition or penalty in relation to that offshore conduct, but does impose reporting requirements in relation to it.

The way in which the term ‘modern slavery offence’ is used in the NSW Act ensures that this broader concept of ‘modern slavery’ expands the general operation of the NSW Act – including by defining the scope of the Anti-Slavery Commissioner’s functions, the functions of the Modern Slavery Committee, and the scope of supply chain reporting obligations for commercial organisations and government agencies.

The extraterritorial reach of relevant NSW criminal offences (being those listed in Schedule 2 to the Act) is governed by Part 1A of the Crimes Act.

Clarifying and standardising the information sharing and immunity provisions Items [7], [8], [10] and [20], and Schedule 2.2

The provisions in the NSW Act relating to co-operation, information sharing and protections from liability contain various inconsistencies and ambiguities (sections 14-16).

The amendments proposed by the Bill are intended to ensure that the Anti-Slavery Commissioner and government and non-government agencies will co-operate and exchange information to the extent necessary to assist the Commissioner in the exercise of his or her functions under the NSW Act, but not to impose obligations of an uncertain extent that might operate more broadly than that (Item [7]).

An inconsistency between sections 14(2) and 16 of the NSW Act has been resolved by the deletion of the words “subject to any duty of confidentiality imposed by law” from section 14(2) (Item [8]).

Clearer and more standardised protections from liability for people required or authorised to provide information to the Commissioner under the NSW Act have been introduced by a new section 16 (Item [10]). A new section 16A provides standard personal immunities for the Commissioner and Commission staff when they are acting in good faith for the purpose of

exercising a function under the NSW Act or any other law, but does not exempt the State from any liability (Item [10]). The provisions of section 16A are mirrored in the proposed standard amendment to the *Defamation Act 2005* (NSW) for oversight bodies (see Schedule 2.2).

A new section 35 (Item [20]) ensures that confidential police information is protected.

Greater flexibility and control over what is published on the Register – Items [16] and [17]

During consultations undertaken by DPC over the last six months, many stakeholders (including both commercial organisations and civil society organisations) have expressed concern that the current focus of section 26(a) is on naming and shaming companies that discover modern slavery in their supply chains, which would act as a disincentive to effective due diligence.

An amendment allowing the Commissioner to publish such other information as he or she thinks appropriate will give the Commissioner greater flexibility to use the register to publish all Modern Slavery Risk Statements (to improve transparency and facilitate comparisons, in line with the proposed Commonwealth register), and to highlight certain matters, as the Commissioner sees fit, for example to reward best practice.

Similarly, while section 26(1)(b) recognises that information may be voluntarily disclosed to the Commissioner, there is no guidance in relation to how to provide such information. (In contrast, section 24 and the Regulation set out in detail the requirements for making a mandatory Modern Slavery Risk Statement). This amendment inserts a new regulation-making power into section 26, so that the Regulations will be able to address the manner and form in which voluntary disclosures can best be made to the Commissioner (without limiting the current flexibility to volunteer any information to the Commissioner that a person or organisation sees fit to provide).

NSW Act – supply chain reporting – ToR 1(g)

An alternative approach for supply chain reporting – commercial organisations

The supply chain reporting regime under the Commonwealth Act could be relied upon to address the issue of modern slavery in commercial and corporate organisations operating in NSW, including charities and SOCs.

If section 24 of the NSW Act were repealed, smaller commercial organisations (including the commercial arms of charities and not-for-profit organisations) with at least one employee in NSW and with annual turnover of between \$50 million and \$100 million would no longer be required to provide an annual modern slavery statement.

Larger organisations, captured by the Commonwealth Act, would continue to be required to report under the Commonwealth Act.

If this approach were to be taken, consequential amendments to other provisions of the NSW Act would be required, particularly in Part 3 (Supply chains) of the NSW Act, but also, for example, in section 3 (Objects of the Act) and section 9 (Functions of the Commissioner).

An alternative approach to supply chain reporting – NSW Government agencies

As is proposed for local councils (see above), a non-legislative framework based on introducing new provisions into the NSW Government's Procurement Framework, Procurement Directions, and/or Code of Practice for Procurement, to ensure that government agencies are not procuring goods and services that are the product of human trafficking, slavery or slave-like practices could be developed, as recommended by the 2017 Report of the NSW Legislative Council Select Committee Inquiry into Human Trafficking in New South Wales (see Recommendations 10-12).

NSW Draft Modern Slavery Regulation 2019 – supply chain reporting

Section 24 of the NSW Act requires commercial organisations with an annual turnover of \$50 million or more, and with employees in NSW, to prepare and publish annual modern slavery statements. The Regulation (**Attachment C**), developed for public consultation, sets out how commercial organisations are to meet the requirements of preparing and publishing their modern slavery statements.

The Regulation covers the mandatory minimum content of statements and the timing and method of publication, enables the preparation of joint statements by groups of organisations, and provides certain exemptions from reporting. These include:

- Proposed exemptions for voluntary reporters under the Commonwealth Act, and for subsidiaries of reporting entities under the Commonwealth Act (with the retention of the NSW penalty in relation to the provision of false or misleading information);
- Proposed exemptions for small businesses with fewer than 20 employees; and
- Proposed exemptions for charities and not-for-profit organisations.

In preparing the Regulation, DPC has sought to clarify the reporting process and minimise regulatory burdens on affected organisations by aligning reporting requirements under the Act with the Commonwealth Act's supply chain provisions. The mandatory minimum content of statements, as well as timing and method of publication, reflect the Commonwealth Act's requirements.

The accompanying explanatory paper (**Attachment D**) sets out the policy position and rationale for each of the proposed reporting requirements in the Regulation. Feedback on the Regulation and responses to the explanatory paper questions will help DPC determine the appropriateness and practical effect of the Regulation provisions.

NSW Act – raising community awareness, victim assistance – ToR 1(g)

In addition to supply chain reporting, the NSW Act introduces a range of measures intended to combat modern slavery.

Anti-slavery Commissioner

The NSW Act makes NSW the second jurisdiction in the world to provide for an Anti-Slavery Commissioner. The NSW Anti-Slavery Commissioner's role is to advocate for action to combat modern slavery and to provide support to victims in NSW. Raising public awareness and educating businesses are key to uncovering modern slavery. The Commissioner will work with all government agencies to raise awareness about the indicators of these serious crimes and thereby increase the likelihood that victims will be identified and offenders prosecuted.

Part 2 of the NSW Act confers a wide range of functions on the Commissioner, including:

- Preparation of a strategic plan to combat human trafficking, raise public awareness and provide education and training;
- Monitoring the effectiveness of legislation and government policies in combating modern slavery; and
- Providing guidance on preventing, detecting, investigating and prosecuting modern slavery

Victim support

The NSW Act confers specific functions on the Commissioner in relation to providing assistance and support for victims of modern slavery.

The Act also requires the Commissioner 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. Experience from the United Kingdom indicates that a dedicated modern slavery hotline and increasing community awareness can have a significant impact on the identification of victims of modern slavery. The UK's National Crime Agency reported a 36% increase in the number of modern slavery victims identified from 2017 to 2018, which correlates to an increase in government and civil society initiatives to raise awareness about the issue.

In addition, amendments to the *Victims Rights and Support Act 2013* (NSW) (contained in Schedule 5.7 of the NSW Act) extend the operation of the Victims Support legislation to victims of “acts of modern slavery”, ensuring access to some forms of financial support and counselling for these victims.

Amendments to the apprehended domestic violence order framework ensure these orders are available in cases of forced marriage (Schedule 5.3 of the NSW Act).

Attachment A – Summary of proposed amendments to the Modern Slavery Act 2018 (NSW)

Item No in Sch to Bill	Current NSW Act section	Reason for amendment	Effect of amendment
Schedule 1 [1]	Section 5 Definitions <i>government agency</i>	NSW Government policy generally is to treat State owned corporations the same as commercial organisations, to put them on as level a playing field as possible with their private sector equivalents.	This amendment removes State owned corporations and other corporations of which a Minister is a shareholder from the definition of government agency for the purposes of the NSW Act. At Item [14] below, these corporations are included in the definition of commercial organisation for the purposes of supply chain reporting under section 24 of the NSW Act.
[2]	Section 5 Definitions <i>modern slavery offence</i>	The unusually broad provision for the extraterritorial effect of the NSW Act (section 4 of the NSW Act) has led to uncertainty about the scope of the NSW Act in a number of respects.	A minor amendment to the subparagraph (c) of the definition of “modern slavery offence” will clarify slightly ambiguous drafting. The amendment makes clear that the definition of “modern slavery offence” includes conduct occurring outside of NSW and Australia, which, if it occurred in NSW, would be an offence (even though it might not be an offence in the place in which it occurred). The defined term “modern slavery offence” is used to define the scope of “modern slavery”. These terms set the range of conduct that comes within the reporting obligations under the NSW Act and the educational, advocacy and other functions of the Anti-slavery Commissioner. They do not create offences or affect the scope of existing offences.
[3]	Section 5 Definitions <i>modern slavery risk order</i>	Consequential amendment – see Item 18 below	This amendment removes a definition from the NSW Act that is no longer required if Part 4 (Section 29) is removed, as proposed – see Item 18 below.

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[4]	Section 5 Definitions New subclause (3)	Consequential/drafting amendment	This is a drafting device to simplify the drafting of amendments proposed to clarify when a reference to government agencies in the NSW Act only applies to government agencies of NSW (the rest of the time “government agencies” also includes public and local authorities constituted by an Act of another jurisdiction”). The definition of government agencies in the NSW Act is wider than (and displaces) its usual meaning in section 13A of the <i>Interpretation Act 1987</i> .
[5]	Sections 13(2) and 19(3)(c)	Consequential / drafting amendment	This amendment updates references to the Department of Family and Community Services following the post-election machinery of government changes.
[6] and [9]	Sections 13(4) and 14(5)	These amendments correct a drafting error. The relevant functions of the Commissioner are conferred under section 9 of the Act, not under “this” section (section 14).	This amendment will ensure that the reference to the functions of the Commissioner is a reference to all of the functions of the Commissioner in relation to which referrals to police and other agencies and co-operation will be necessary and appropriate.
[7]	Section 14(1)	The requirement for NGOs to co-operate with <i>each other</i> is proposed to be removed (as it is overreach to regulate the relationships between NGOs), and to be limited to an obligation to co-operate with <i>the Commissioner</i> . The amendment will also more clearly identify the range of government agencies and NGOs affected, as the words “provide or deal with services or issues affecting victims of modern slavery” is capable of catching a very wide class of organisations.	As amended, the obligations to co-operate will apply to: <ul style="list-style-type: none"> • government and non-government agencies • that provide services to, or advocate for, victims of modern slavery. These agencies will be required to co-operate with the Commissioner in the exercise of the Commissioner’s functions under the NSW Act.
[8]	Section 14(2)	An inconsistency between sections 14 and 16 is removed.	Sections 14, 16 and 16A will now work together to require agencies to disclose information to the Commissioner that is likely to be of assistance to the Commissioner, and ensure that neither the agency nor

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			the Commissioner is liable for complying with that requirement.
[10]	New sections 16 and 16A	The immunity provisions will be amended to encompass the disclosure of information by the Commissioner (as well as to the Commissioner) in the exercise of the Commissioner's functions; and to clarify the breadth of the immunity.	New section 16 expands and clarifies the extent of the immunity provided to a person who is providing information to the Commissioner, whether as a requirement under the NSW Act (such as a Modern Slavery Risk Statement) or voluntarily (such as in the course of an Anti-slavery NGO cooperating with the Commissioner). New section 16A inserts a standard legislative provision to protect the Commissioner and officers of the Commission from personal liability for acts or omissions done or omitted in good faith in the exercise of their functions (including the provision of information).
[11]	Section 20	This section needs to be updated to reflect the recent insertion of new section 316A of the Crimes Act.	The amendment ensures that the Commissioner's powers to use information under the NSW Act align with the Commissioner's obligations to provide information under the new Crimes Act provision.
[12]	Section 24(1) Charities	The Government considers that charities and not-for profits that supply goods or services for profit are caught by the current requirement to provide a Modern Slavery Risk Statement, and this is understood to be the intended effect. However, as this reading is contested by some stakeholders, it warrants clarification.	This amendment clarifies that an organisation that is a charity or not-for-profit body may be a commercial organisation required to provide a Modern Slavery Risk Statement under the NSW Act if it "supplies goods or services for profit" (and meets the other criteria – related to turnover and employees in NSW).
[13]	Section 24(1) Turnover	This is a consequential amendment to the above.	This amendment clarifies that the turnover counted towards the \$50 million threshold of an organisation only includes turnover derived from the supply of goods and services for profit or gain. For example, it does not include charitable donations.
[14]	Section 24(1) <i>organisation</i>	NSW Government policy generally is to treat state owned corporations the same as	This amendment inserts State owned corporations and other corporations of which a Minister is a shareholder

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		commercial organisations, to put them on as level a playing field as possible with their private sector equivalents.	into the definition of ‘organisation’ for the purposes of supply chain reporting under section 24 of the NSW Act.
[15]	Section 25	Correction of a drafting error. The current draft refers to “procurement” being the product of modern slavery, whereas it is the goods and services procured that may be the product of modern slavery.	The amended clause will require the Commissioner to consult regularly with the Auditor General and the NSW Procurement Board in order to monitor the effectiveness of due diligence procedures in place within government agencies to ensure that “goods and services procured by government agencies” are not the product of modern slavery.
[16]	Section 26 – new (d) – Other information	Many stakeholders have expressed concern that the current focus of section 26(a) is on naming and shaming companies that discover modern slavery in their supply chains, which would act as a disincentive to effective due diligence. This amendment, requested by the Interim Anti-Slavery Commissioner, will give the Commissioner greater flexibility to use the register to publish all Modern Slavery Risk Statements (to improve transparency and facilitate comparisons); and to highlight certain matters, as the Commissioner sees fit, for example to reward best practice or list organisations that have failed to make a report.	A new subsection is inserted allowing the Commissioner to publish on the public register any other information that the Commissioner thinks appropriate.
[17]	Section 26 – new (3) – voluntary disclosures	While Section 26(1)(b) recognises that information may be voluntarily disclosed to the Commissioner, there is no guidance in relation to how to provide such information. (Section 24 and the Regulation set out in detail the requirements for making a mandatory Modern Slavery Risk Statement).	This amendment inserts a new regulation making power into section 26, so that the regulations will be able to address the manner and form in which voluntary risk statements can be made to the Commissioner.
[18]	Part 4, Section 29	In response to the cumulative concerns of many government agencies, the Acts	Instead of attempting to create a unique new regime for managing the potential risk of future offending by

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		provisions for Modern Slavery Risk Orders are proposed to be repealed.	modern slavery offenders, a minor amendment will be made to ensure that existing risk management regimes can be used to manage this risk.
[19]	Section 33	Amends the jurisdictions that can deal with offences summarily by deleting the District Court (which has a strictly limited summary jurisdiction) and including the Supreme Court in its summary jurisdiction, in line with current practice.	This machinery provision allows offences under the NSW Act to be dealt with summarily.
[20]	New Section 35	This provision is inserted to protect information the disclosure of which may prejudice the investigation of a crime or prejudice criminal proceedings, etc.	Arrangements for information sharing can be made between the Commissioner of Police and the Anti-Slavery Commissioner. The Commissioner of Police is not required to provide information to the Anti-Slavery Commissioner if he or she believes it would prejudice an investigation or proceedings, or endanger a person's life or physical safety, etc.
[21]	Schedule 2 Offences	Consequential amendment – removes the reference to s91HAA which is proposed to be repealed (see [26] below)	
[22] and [23]	Schedule 2 Offences	To avoid unintended consequences arising from the scope of s32, which applies to blood and blood products as well as organs.	Removes reference to section 32 of the <i>Human Tissue Act 1983 (NSW)</i> and replaces it with references to Commonwealth organ trafficking offences.
[24]	Schedule 3 Savings and Transitional regulations	This amendment inserts new standard drafting relating to savings and transitional regulations.	
[25]	Schedule 4 Section 91G(3A) <i>Crimes Act 1900 (NSW)</i>	This amendment brings the wording of the new offence provision into line with existing similar offences in the <i>Crimes Act 1900 (NSW)</i>	For consistency, this amendment inserts the words “by means of an offensive weapon or instrument” at the end of the offence provision.

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[26] – [30]	Schedule 4 Section 91HAA	This offence provision is being deleted as there is an inconsistency with the equivalent Commonwealth provision, which cannot be remediated by redrafting the provision. In consequence, other provisions are being renumbered and cross-references to the deleted section are also being removed from other sections.	The Commonwealth provision specifically exempts Internet Service providers from the reach of the offence provisions, whereas this offence specifically targets them. The Commonwealth offences will still be available for use by NSW Police in appropriate circumstances.
[31]	Schedule 4[7] Section 93AB	This amendment will align the offence provision with the equivalent Commonwealth offence provision, removing a potential constitutionally problematic inconsistency.	The amendment limits the territorial operation of the offence provision to within NSW, to avoid a conflict with the requirement in the equivalent Commonwealth offence, under which the Attorney General must consent to any prosecution in relation to matters where all of the physical elements of the offence occurred outside Australia.
[32]	Schedule 4 [7] Section 93AC(4)	This amendment will align the offence provision with the equivalent Commonwealth offence provision, removing a potential constitutionally problematic inconsistency.	The amendment will ensure that where both partners to a forced marriage are victims (for example both are children who have been coerced into the marriage), neither is guilty of the offence of procuring a forced marriage, in line with the equivalent Commonwealth provision.
[33]-[37]	Schedule 5.3	The NSW Act amends the <i>Crimes (Domestic and Personal Violence) Act</i> to ensure that child victims of forced marriage can access Domestic Violence Orders or Personal Violence orders if they experience coercion or threats to enter a forced marriage. These amendments expand the reach of those changes to include adult victims of forced marriage.	The expansion is achieved by incorporating references to the Commonwealth offence of forced marriage in appropriate places. The Commonwealth offence extends to adult victims of forced marriage, whereas the NSW offence is limited to child victims.
[38] - [39]	Schedule 5.5	Consequential / drafting amendments	These amendment are designed to clarify that the Auditor General's new powers to audit agencies in relation to procurement and modern slavery apply to

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	Sections 38F and 38G <i>Public Audit and Finance Act 1983</i> <i>government agency</i>		those agencies that are otherwise subject to an obligation, however imposed, to take reasonable steps to ensure that the goods and services procured by and for the agency are not the product of modern slavery
[40]-[42]	Schedule 5.7	Consequential amendments to the Victims legislation are required to give effect to the changes that will expand the operation of the Victims Support legislation to “acts of modern slavery”.	By inserting the words “acts of modern slavery” into the appropriate sections of the Act, the relevant provisions of the NSW Act are extended to victims of acts of modern slavery.
Schedule 2.1	New amendment to <i>Crimes (High Risk Offender Orders) Act 2006 (NSW)</i>	This amendment will ensure that High Risk Offender Orders can be made where a High Risk Offender is in custody in relation to an offence of a sexual nature, relating to the modern slavery offences of sexual servitude.	This amendment will complement existing provisions, including in the <i>Crimes (Serious Crime Prevention Orders) Act</i> , the <i>Child Protection (Offenders Registration) Act</i> , and the <i>Restricted Premises Act</i> , to manage the potential risk of further offending by modern slavery offenders.
Schedule 2.2	New amendment to <i>Defamation Act 2005 (NSW)</i>	Consequential amendment.	In keeping with the new protections from liability inserted in sections 16 and 16A (see above), this consequential amendment to the <i>Defamation Act 2005 (NSW)</i> will extend to the Commissioner the standard provision that absolute privilege applies to any matter that is published to or by the Commissioner or the Commissioner’s staff in the exercise of their functions, including requirements to publish material under the Act.