

**INQUIRY INTO MODERN SLAVERY ACT 2018 AND
ASSOCIATED MATTERS**

Organisation: Slavery Links Australia Inc

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

Submission to
the Parliament of New South Wales
Legislative Council
Standing Committee on Social Issues

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FROM

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25 September 2019

EVIDENCE IN PERSON

Slavery Links Australia Inc. (Slavery Links) asks to give evidence in person to the Committee.¹

STANDING OF SLAVERY LINKS

Slavery Links is a charity whose members work *pro bono* on slavery as defined in the United Nations *Supplementary Convention 1956*, Division 270 of the *Criminal Code Act 1995* (Cth, the *Criminal Code*) and Section 11 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the *Charter*).

The people who became Slavery Links commenced work in 2005. Slavery Links was incorporated as a community association in Victoria in 2009, registered as a charity in 2011 and in 2017 was registered as a Public Benevolent Institution and Deductible Gift Recipient.

Slavery Links has contributed to ten Inquiries conducted by the Parliament of the Commonwealth.²

HISTORY OF THIS SUBMISSION

On 28 June 2019 there were reports in the press and media that Minister Harwin had referred the *Modern Slavery Act 2018* (NSW) (the NSW Act) to the Standing Committee on Social Issues for consultation, inquiry and report.

On 29 July 2019, before release of the draft Amendment Bill and draft Regulation, Slavery Links wrote to Minister Harwin, Hon Shayne Mallard MLC (Chair of the Social Issues Committee) and Hon Daniel Mookhey MLC (Deputy Chair) and provided a copy for information to the NSW Interim Anti-slavery Commissioner, Associate Professor Jennifer Burn. This Submission derives from that letter.

SIGNIFICANCE OF THE INQUIRY

The Inquiry into the NSW Act is especially important. It will help to 'frame' Australia's national approach to anti-slavery law and policy. Slavery Links encourages an approach which will affirm that:

- In suppressing slavery, *governments* have an essential role which should not be compromised. Slavery is evidence of market failure and 'the market' cannot be left to address its own failure.
- Anti-slavery law and policy must affirm that slavery is a serious international crime, defined in Division 270 of the *Criminal Code Act 1995* and the *Supplementary Convention 1956*.
- The NSW Act, as passed in 2018, had some valuable provisions which should be retained under a revised Act or alternative Act(s). The provisions that should be retained in some form include the Anti-slavery Commissioner and support for survivors of the crime of slavery.
- We anticipate that the Committee will address where the NSW Act is at odds with both the *Criminal Code 1995* (Cth)³ and the *Supplementary Convention 1956*.
- The NSW Act sets some standards that should be applied nationally, such as the reporting threshold, mandatory reporting, penalties for non-compliance, and support for survivors.
- We encourage the Minister and the Committee to initiate and contribute to a national framework for addressing slavery, and if possible via an approach to Uniform Slavery Law.

¹ In October, Slavery Links will be represented by Dr Mark Burton, a member of the Board (as per the cover sheet). From November Slavery Links will be represented by Dr Burton and Roscoe Howell, Founding Director

² Go to: <http://library.slaverylinks.org/submissions/>

³ See the Chart 'Hierarchy of Slavery Offences in the *Commonwealth Criminal Code*', in Attachment 2

TERMS OF REFERENCE

Slavery Links' letter and this Submission set out four options to be considered by the Committee.

The Terms of Reference⁴ invite comment on fundamental aspects that can be addressed through one or more of the four options we propose. These fundamental aspects in the Terms of Reference are:

- Operability of the proposed anti-slavery scheme
- Its appropriateness and enforceability
- Its unintended consequences
- Constitutional issues
- Inconsistencies with the *Criminal Code Act 1995* (Cth), and
- Overlap with the *Modern Slavery Act 2018* (Cth)

FOUR OPTIONS RELEVANT TO TERMS OF REFERENCE FOR THE INQUIRY

Slavery Links believes it will assist the Minister and the Committee to set out four options for action to be taken. These options are (and see the more detailed descriptions in Attachment 1):

1. Repeal the current NSW Act. Replace it with an Act (**the new Act**) that binds public authorities to promote freedom from forced labour, servitude and slavery under the leadership of a NSW Anti-slavery Commissioner with powers as defined in the current Act. The new Act would implement specific reforms for NSW, such as support for survivors of forced labour, servitude and slavery.
2. Establish a basis for operation of a NSW Anti-slavery Commissioner with powers as defined in the current Act. Suspend the commencement of the NSW Act. Argue instead for creation of Uniform Slavery Legislation between the Commonwealth and States and Territories. Implement specific reforms for NSW, such as support for survivors of forced labour, servitude and slavery.
3. Establish a basis for operation of a NSW Anti-slavery Commissioner with powers as defined in the current Act. Implement specific reforms for NSW, such as support for survivors. Offer to suspend commencement of the NSW Act or offer to vary it. Instead encourage the Commonwealth to Strengthen the *Modern Slavery Act 2018* (Cth) with respect to:
 - a. The reporting threshold of the Commonwealth Act.
 - b. The introduction of penalties for not reporting, to be introduced as part of the three-year review of the *Modern Slavery Act 2018* (Cth).
 - c. The appointment of a Commonwealth Anti-slavery Commissioner. Bring this forward in preparation for the three-year review and allocate Commonwealth staff in support.
4. Retain the NSW Act, with the NSW Anti-slavery Commissioner, but make several necessary amendments and especially amendments to remove inconsistencies that put the NSW Act at odds with both the *Criminal Code Act 1995* (Cth) and the *Supplementary Convention 1956*.

⁴ Terms of reference - Inquiry into the Modern Slavery Act 2018 and associated matters.pdf. Go to: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2546/Terms%20of%20reference%20-%20Inquiry%20into%20the%20Modern%20Slavery%20Act%202018%20and%20associated%20matters.pdf>

RECOMMENDATION

In framing Option 1 and the other options, Slavery Links has been mindful that the NSW Parliamentary Inquiry into the *Legislation Review Act 1987* (the Review Inquiry) did not institute a process of Parliamentary Scrutiny against pre-set criteria. New South Wales has taken a different course from Victoria in this regard.

Option 1 provides the Government, the Social Issues Committee and the Legislation Review process with a way forward that would allow the NSW Parliament to embrace a principle of freedom from slavery as part of a process of educating Parliamentarians regarding possible taint of slavery, when new Bills are being considered in the legislation review process.

We commend this approach (Option 1), which could usefully be combined with other options that would encourage the Commonwealth to take up its responsibilities more effectively and with a more realistic commitment of resources.

A NOTE ON COST-SHIFTING BY THE COMMONWEALTH

The four options are described more fully in Attachment 1. Options 1, 2 and 3 will put the onus on the Commonwealth to act. Slavery and human trafficking offences can be tried in State and Territory courts although they are offences in the Commonwealth *Criminal Code*.

In the opinion of Slavery Links:

- It is in the best interests of the country for the Commonwealth to fund a national framework for policy development and action to be taken by governments in areas such as slavery and human trafficking, where the Commonwealth has substantial responsibilities.

The Commonwealth should be encouraged to foreshadow and commit to action it will take in preparation for the three-year review of the *Modern Slavery Act 2018* (Cth).

The Commonwealth should be encouraged to re-establish or re-build the expertise that formerly resided in its Department of Justice. Slavery as defined in Division 270 of the *Criminal Code* is defined in terms of 'ownership'. It is not a border control issue. Commonwealth action on slavery and modern slavery needs sound policy development and staff equipped to interact with the relevant conventions, human rights law, criminal law, trade and business.

- It is in the best interests of the States and Territories to minimise the sort of cost-shifting that can happen when the Commonwealth does not fully implement its responsibilities, does not pull its weight, leaving the States and Territories to pick up part of the burden.

In this way of thinking, perhaps the NSW Act can be used as a standard-setter and a lever to encourage the Commonwealth to do its job.

- It is in the best interests of the national economy for business and other entities in each of the States and Territories to be able to operate under a coherent set of rules that establish a level and predictable playing field where expectations are known, understood and consistent. In the opinion of Slavery Links, it is not desirable for New South Wales to have its own set of rules.

The aspect of cost-shifting was an important element for Slavery Links in framing its four options. There is nothing to stop New South Wales taking action, and we have commended several of the actions that are contemplated in the NSW Act. At the same time, we urge the Minister and the Parliament to sheet home responsibility to act where this is arguably a principal responsibility of the Commonwealth.

THE ASPECT OF 'KNOWLEDGE' IN THE *CRIMES ACT 1900* (NSW)

Australian jurisprudence on slavery was established by the High Court of Australia in Tang's Case, *R v Wei Tang* (2008) 237 CLR 1. Slavery Links urges the Minister and the Committee Chair and Deputy Chair to have regard to the legal context in which a NSW Act would operate; and in particular to take all steps to affirm and uphold existing Australian jurisprudence on slavery. In this regard we refer with concern to the aspect of 'knowledge' in Schedule 4 of the NSW Act (see the Text Box below).

Modern Slavery Act 2018 [NSW]

Schedule 4 Amendment of *Crimes Act 1900* No 40

NOTE:

The Consultation Draft, Schedule 4 [7] inserts into section 93AB (1) "in New South Wales" after "if".

93AB Slavery, servitude and child forced labour

(1) A person is guilty of an offence if in New South Wales:

- (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the person is held in slavery or servitude, or
- (b) the person requires a child to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the child is being required to perform forced or compulsory labour.

Maximum penalty: imprisonment for 25 years.

[underlines added]

Source: <https://www.legislation.nsw.gov.au/#/view/act/2018/30/sch4>

Schedule 4 uses the phrase 'knows or ought to know'. The aspect of 'knowledge' is significant.

- The subsection 1(a) insertion reflects the views of Eames JA of the Court of Criminal Appeal in Victoria; views which were considered by the High Court of Australia in *R v Wei Tang* (2008) 237 CLR 1, paragraphs 36 – 42 and rejected in paragraph 43. In other words, to be found guilty it is not necessary to have 'knowledge' re the offence of slavery (or similar offences).
- On the other hand, Slavery Links has considered the first paragraph of the judgment in *Ostrowski v Palmer* (2004) 218 CLR 493, per Gleeson CJ and Kirby J; and given further consideration to the presumption of knowledge, as is apparent from Brennan J's judgment in *He Kaw Teh v R* (1985) 157 CLR 523.

In the submission of Slavery Links, this formulation of knows or ought to know is an error at a fundamental level which is so serious that it would justify abandoning the NSW Act, save and except for the appointment of a NSW Anti-slavery Commissioner and enabling support for survivors of forced labour-servitude-slavery.

Over the page, this Submission considers another aspect of the complex territory that the NSW Act seeks to occupy. In the opinion of Slavery Links, the public consultation *process* falls short of the mark.

GUIDANCE FOR SUBMITTERS TO AN INQUIRY

These preliminary citations illustrate the level of the depth of research that would be required merely to engage the committee on *one* aspect of any submission that Slavery Links may make. The Committee will need to prepare submitters to be exacting and relevant in this complex territory.

The Minister and the Committee may well conclude that the NSW Act sits on uncertain ground, which needs to be clarified before a new NSW Act commences.

On 29 July, Slavery Links wrote to Minister and the Committee that consideration of an amended NSW Act will require more than the usual Explanatory memorandum, the sort of document which would cover specific provisions and inform a Second Reading speech.

We encouraged the Minister and the Committee Chair and Deputy to commission two papers:

- A policy paper, to explain how actions taken under the NSW Act will relate to actions called forth under the *Modern Slavery Act 2018* (Cth) and the *Criminal Code* (Divisions 270 and 271).
- A jurisprudence paper⁵ informed by Division 270 of the *Criminal Code Act, 1995*, the United Nations *Supplementary Convention 1956*, the High Court in *R v Wei Tang* (2008) 237 CLR 1 and the *indicia* of slavery from the International Criminal Tribunal for Yugoslavia (ICTY).

These are not trivial matters. They require exacting work involving complex issues including:

- the Constitution and Commonwealth-State relations;
- criminal law and the interfaces between Commonwealth and State legislation;
- company law and the effective means of regulating and facilitating business and trade;

all in context of the need to understand how Australia is exposed to the slave-making *systems* that persist in the Indo-Asia-Pacific region, and especially the *systems* of servitude defined in Article 1 of the *Supplementary Convention* and the forms of forced labour that can, in the words of the *Slavery Convention 1926*, develop into conditions analogous to slavery.

Regrettably these papers were not prepared. In the submission of Slavery Links, submitters to the Inquiry are being asked to do the impossible, to form a view on complex matters of law but without a framework for comprehending anti-slavery policy or Australian jurisprudence.

We repeat: The NSW Act sits on uncertain ground, which needs to be clarified before a new NSW Act can be constructed and, in our Submission, before the Committee can usefully call for Submissions.

We look forward to hearing from you regarding an opportunity to give evidence in person.

Yours sincerely,

(Dr) Mark Burton
Board

Roscoe Howell
Founding Director

⁵ We have covered this territory on several occasions, most recently in our submission to the 2017 Inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) regarding a Possible Modern Slavery Act for Australia. Our contribution was valued. Several of our recommendations were adopted by the Committee and the Chart attached to this letter regarding the Hierarchy of Slavery Offences was included in the JSCFADT report 'Hidden in Plain View'.

ATTACHMENT 1. DESCRIPTION OF FOUR OPTIONS

OPTION 1

Repeal the current NSW Act. Replace it with an Act (the new Act) that binds public authorities to promote freedom from forced labour, servitude and slavery under the leadership of a NSW Anti-slavery Commissioner with powers as defined in the current Act. The new Act would implement specific reforms for NSW, such as support for survivors of forced labour, servitude and slavery.

Following Victorian practice, this approach would cover government agencies and local government as well as organisations funded by the State of New South Wales (refer to s 4 of the Victorian Charter⁶).

This would have the advantage of committing the NSW State government to make change within its own purview; while enabling the NSW Anti-slavery Commissioner to educate and lead entities who would be subject to the Commonwealth *Modern Slavery Act, 2018*. It would avert inconsistencies between the NSW and Commonwealth *Modern Slavery Acts*. It would allow other specific changes, such as support for survivors. Importantly it would enable the Legislation Review Committee to determine that freedom from slavery would be one of the rights and liberties against which it will review bills and regulations.⁷ This step, of reviewing all Bills with respect to slavery, is vital because forced labour, servitude and slavery can worm their ways into all sorts of activities. They are often present in obscure ways that can be difficult to recognise.

It is essential to educate and inform Parliamentarians, agencies and the public. As was noted by the Inquiry into the operation of the *Legislation Review Act 1987* (NSW):

‘The Committee seeks to introduce transparency and accountability measures to the Parliament’s law making functions, while educating and informing Members and the broader

⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic)

4 What is a public authority?

s. 4 (1) For the purposes of this Charter a public authority is—

- (a) a public official within the meaning of the Public Administration Act 2004; or
- (b) an entity established by a statutory provision that has functions of a public nature; or
- (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or
- (d) Victoria Police; or
- (e) a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or
- (f) a Minister; or
- (g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or
- (h) an entity declared by the regulations to be a public authority for the purposes of this Charter— but does not include—
- (i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- (j) a court or tribunal except when it is acting in an administrative capacity; or
- (k) an entity declared by the regulations not to be a public authority for the purposes of this Charter.

⁷ This is consistent with the Finding of the Parliament of New South Wales (2018) Inquiry into the operation of the Legislation Review Act 1987. Report 1/56, November 2018, Finding 1, page 16. Go to:

<https://www.parliament.nsw.gov.au/ladocs/inquiries/2456/Final%20report%20-%20operation%20of%20the%20Legislation%20Review%20Act%201987.pdf>

community about the potential impacts on personal rights and liberties ... [and that] to publish these determined rights and liberties ... will assist in informing agencies, the NSW Government and the wider public about the rights and liberties the Committee will be using to assess bills and regulations.⁸ (underline added)

This approach would have the advantage of educating New South Wales Parliamentarians about slavery each time a new Bill is considered. It would have the effect of leaving the Commonwealth to deal with the aspects of trade and corporations law. It would enable the Parliament of New South Wales to assure itself that its own State is slavery-aware and its operations are free of slave-making tendencies.

OPTION 2

Establish a basis for operation of a NSW Anti-slavery Commissioner with powers as defined in the current Act. Suspend the commencement of the existing NSW Act. Argue instead for creation of Uniform Slavery Legislation between the Commonwealth and States and Territories. Implement specific reforms for NSW, such as support for survivors of forced labour, servitude and slavery.

This course of action would encourage the Commonwealth, States and Territories to frame anti-slavery policy and action with regard to the definitions in Division 270 (slavery) and 271 (trafficking) of the *Criminal Code Act 1995*. By harnessing action of all Australian governments to a common purpose, this approach would bring advantage to the national economy by creating a consistent predictable and level playing field for businesses and large entities in different parts of Australia.

OPTION 3

Establish a basis for ongoing operation of a NSW Anti-slavery Commissioner with powers as defined in the current Act. Implement specific reforms for NSW, such as support for survivors. Offer to suspend commencement of the NSW Act. Instead encourage the Commonwealth to strengthen the *Modern Slavery Act 2018* (Cth) with respect to its threshold, penalties for not reporting, the appointment of a Commonwealth Anti-slavery Commissioner and support for survivors of slavery.

In this context, the term 'strengthen' would refer to the appointment by the Commonwealth of a well-resourced anti-slavery Commissioner and the enactment by the Commonwealth of civil penalties (in line with the penalties in the present NSW Act) for non compliance with the Commonwealth reporting provisions. These initiatives would be consistent with recommendations of the Senate Inquiry into the Modern Slavery Bill 2018 (Cth). Finally, Commonwealth support is long overdue for survivors of slavery and human trafficking.

Having brought about a more effective Commonwealth Act, the NSW Social Issues Committee could recommend with honour to suspend or repeal the NSW Act.

⁸ Parliament of New South Wales (2018) Inquiry into the operation of the Legislation Review Act 1987. Report 1/56, November 2018, page iii. Go to: <https://www.parliament.nsw.gov.au/ladocs/inquiries/2456/Final%20report%20-%20operation%20of%20the%20Legislation%20Review%20Act%201987.pdf>

OPTION 4:

Retain the NSW Act, but make several necessary amendments and especially amendments to remove inconsistencies that put the NSW Act at odds with both the *Criminal Code Act 1995* (Cth) and the *Supplementary Convention 1956*.

These inconsistencies may lead to confusion and unintended consequences that could weaken or negate the Act's intended purpose and undermine the relevant sections of the *Criminal Code*. The necessary amendments include:

- a. Align the NSW definitions of slavery and trafficking with the definitions in Division 270 and 271 of the Commonwealth Act;
- b. Align the NSW threshold provisions and the threshold in the Commonwealth Act;
- c. Align the NSW 'extra-territorial' provisions with the Commonwealth Act provisions;
- d. Repeal the amendment to the NSW *Crimes Act 1900* in Section 93AB, re knowledge;⁹
- e. Limit offences in the NSW Act to offences that could be committed by entities in the course of business operations. This would not include, for example, child marriage;
- f. Revise the aspect of compensation for survivors of modern slavery.¹⁰

Refer to the discussion on page 4 above regarding The aspect of 'knowledge' in the *Crimes Act 1900* (NSW). The amendment to section 93AB of the Crimes Act was not consistent with Australian jurisprudence on slavery.

The same error regarding the aspect of 'knowledge' occurs where Schedule 5 refers to the amendment to the *Victims Rights and Support Act 2013*. This error could compromise the aim of the NSW Act, to make victims of modern slavery eligible for support and or compensation.

The Text Box below reproduces the part of Schedule 5 which refers to 'knowledge' and should be reviewed.

Modern Slavery Act 2018 [NSW]

Schedule 5 Amendment of other Acts and regulations

5.7 Victims Rights and Support Act 2013 No 37

19A Meaning of "act of modern slavery"

(1) In this Act, *act of modern slavery* means an act or series of related acts, whether committed by one or more persons:

- (a) that has apparently occurred in the course of commission of an offence or other

⁹ Section 93AB 1 (a) (Slavery, servitude and child forced labour): where 1) A person is guilty of an offence if: (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the person is held in slavery or servitude (underline added)

¹⁰ Burn, Jennifer, Fiona McLeod SC and Nicola Knackstredt (2016) Report on establishing a National Compensation Scheme for Victims of Commonwealth Crime (Anti-Slavery Australia & the Law Council of Australia)

conduct constituting modern slavery within the meaning of the *Modern Slavery Act 2018*, and

(b) that has involved subjecting one or more persons to any form of slavery, servitude or forced labour of a child within the meaning of section 93AB of the *Crimes Act 1900*, and

(c) that has resulted in injury or death to one of those persons....

(underline added)

End of Attachment 1

ATTACHMENT 2

The hierarchy of **slavery offences** in the *Commonwealth Criminal Code*

