

Submission
No 52

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: Holding Redlich

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Ms Jenelle Moore
Director Committee
Legislative Council Standing Committee on Social
Issues
Parliament House
SYDNEY NSW 2000

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Dear Ms Moore

Inquiry into the Modern Slavery Act 2018 (NSW)

1. Thank you for the opportunity to make a submission to the Legislative Council Standing Committee on Social Issues regarding its inquiry into the *Modern Slavery Act 2018* (NSW) (the **NSW Act**), the consultation draft of the *Modern Slavery Bill 2019* (the **amendment Bill**), and the consultation draft of the *Modern Slavery Regulation 2019* (NSW) (the **Regulation**) (together, the **NSW Scheme**) with particular reference to:
 - (a) the operability of the proposed anti-slavery scheme;
 - (b) the effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act;
 - (c) the intended application of the anti-slavery scheme with respect to charities and not-for-profit organisations, State Owned Corporations and local councils;
 - (d) the appropriateness and enforceability of Modern Slavery Risk Orders under section 29 of the NSW Act;
 - (e) the unintended consequences of drafting issues with the NSW Act, including with respect to the *Human Tissue Act 1983* (NSW) and the sale and supply of human tissue;
 - (f) the risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the *Criminal Code Act 1995* (Cth);
 - (g) whether the passage of the *Modern Slavery Act 2018* (Cth) (**Commonwealth Act**) renders parts or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps;
 - (h) the preferred course of action to address the matters identified; and
 - (i) any other related matter.

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2. Set out below are our submissions on the above terms of reference.

Term of Reference 1(a) – The operability of the proposed anti-slavery scheme

3. We support the implementation of the NSW Scheme as an effective anti-slavery scheme.

4. In particular, we support the preservation of the following aspects of the NSW Scheme:

- (a) The alignment of mandatory reporting criteria with the Commonwealth Act.
- (b) The introduction of significant penalties of up to \$1.1million for commercial organisations for:
 - (i) failing to prepare a modern slavery statement;
 - (ii) failing to publish a modern slavery statement; and
 - (iii) providing false or misleading information in relation to a modern slavery statement.

It is important that NSW continues to be a leader for the implementation of meaningful penalties under the NSW Scheme.

In our view, the ‘naming and shaming’ provisions and the threat of reputational damage under the Commonwealth Act are inadequate enforcement mechanisms for non-complying reporting entities. This is supported by the recent findings from the UK that the lack of compliance under the Modern Slavery Act 2015 (UK) (**UK Act**) over the past three years has been in part due to the lack of meaningful penalties and enforcement mechanisms.

The significant financial penalties under the NSW Scheme should be preserved to:

- (i) provide effective enforcement and deterrent mechanisms for reporting entities in NSW;
- (ii) provide leadership ,both domestically and globally, in relation to the implementation of financial penalties under the Commonwealth Act as well as other international regimes; and
- (iii) provide important data regarding compliance rates under the NSW Scheme, compared to others which do not yet have financial penalties.

However, clarity is required under the NSW Scheme regarding whether an entity that is required to report under the NSW Scheme, and opts in to the Commonwealth Act, is still subject to penalties under the NSW Scheme (refer to Term of Reference 1(g) below).

- (c) The independence of the Anti-Slavery Commissioner (compared to the Commonwealth Act which is not independent of government).
- (d) The \$50 million threshold for reporting entities. In our view, the \$50 million threshold is a more appropriate threshold than the \$100 million threshold, noting that it also aligns more closely with the threshold under the UK Act of GBP36 million. However, we believe this should be a consolidated revenue figure using Australian Accounting Standard 10, as per the Commonwealth Act.

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

5. In order to avoid a double reporting requirement, we support the preservation of the following two aspects of the NSW Scheme:
 - (a) the alignment of the mandatory reporting criteria with the Commonwealth Act i.e. the mandatory reporting criteria under the NSW Scheme being identical to the mandatory reporting criteria already in force under the Commonwealth Act; and
 - (b) the exemption under section 24(9) of the NSW Act which provides that a commercial organisation that is subject to obligations under a law of the Commonwealth or another State or a Territory, that is prescribed as a corresponding law for the purposes of this section, does not need to comply with the reporting obligations under section 24 of the NSW Act. However, clarity is required under the NSW Scheme around the situation where a commercial organisation who is caught by the NSW Scheme decides to instead opt in to the Commonwealth Act. In particular, clarity is sought on whether that entity could still be subject to penalties under the NSW Scheme if it has opted in to the Commonwealth Act.
6. In our view (and from the feedback we are currently receiving from clients), the cost of compliance is not prohibitive or unreasonable. As far as we are aware, UK business has not identified cost of compliance as a key issue in relation to this legislation.

Term of Reference 1(c) – The intended application of the anti-slavery scheme with respect to charities and not-for-profit organisations, State Owned Corporations and local councils

Charities and not-for-profits

7. We believe that charities, not-for-profit organisations and small businesses with annual revenues of more than \$50 million should continue to be included in the reporting requirements and accordingly, the proposed exemption under the Regulation to exclude them is not required.

State Owned Corporations

8. We strongly support the proposed amendment per Item 14 of the amendment Bill which proposes to define State Owned Corporations as a ‘commercial organisation’ rather than a ‘government agency’.
9. We believe that this amendment appropriately deals with the current uncertainty about whether State Owned Corporations are effectively captured by the reporting requirements of government agencies, given that SOCs are not covered by the *Public Works and Procurement Act 1912* (NSW), and would uphold the original intention of the NSW Act to include State Owned Corporations in the reporting scheme.

Local councils

10. The clear intention in the NSW Scheme to provide for mandatory reporting of modern slavery risks for local councils should be upheld (“a council, county council or joint organisation within the meaning of the *Local Government Act 1993*” is defined as a government agency under section 5(e) of the NSW Act).
11. This will require amendments to either the NSW Act, or the *Local Government Act 1993* (NSW), as the reporting requirements for government agencies are currently imposed under the *Public Works and Procurement Act 1912* (NSW) (which does not apply to local councils), and there is

currently no mechanism under the NSW Act that requires local councils to comply with the government agency reporting requirements.

12. We understand that there are currently no proposed amendments to bring local councils within the scope of the NSW Scheme.
13. In our view, due to the significant procurement spend of local councils (in 2017–18, local councils reported a combined expenditure of \$11.4 billion in 2017 – 2018 across many sectors that are established as high risk for modern slavery instances¹) the NSW Scheme should be amended so that local councils are captured by the government agency reporting requirements under sections 25 and 26, as was originally intended under the NSW Act.
14. In the alternative, an amendment could be introduced to the *Local Government Act 1993* (NSW) to provide obligations equivalent to those imposed on NSW Government agencies under the NSW Scheme i.e. requiring a local council to take reasonable steps to ensure that goods and services procured by and for the local council are not the product of modern slavery within the meaning of the NSW Act.
15. Finally, it may be that local councils in NSW are caught by the Commonwealth Act in any event, where they have ‘revenue’ in excess of \$100m, in which case this issue is not significant. The key determinant for this will be the definition and quantum of ‘revenue’ for the purposes of councils.

Term of Reference 1(d) – The appropriateness and enforceability of Modern Slavery Risk Orders under section 29 of the NSW Act

16. We note that the amendment Bill proposes to repeal the ‘Modern Slavery Risks Orders’ under section 29 of the NSW Act.
17. The amendment to repeal Modern Slavery Risk Orders should only proceed if victims of modern slavery are sufficiently protected under existing criminal legislation.

Term of Reference 1(e) – The unintended consequences of drafting issues with the NSW Act, including with respect to the *Human Tissue Act 1983* (NSW) and the sale and supply of human tissue

18. We do not have any submissions on this term of reference.

Term of Reference 1(f) – The risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the *Criminal Code Act 1995* (Cth)

19. We do not have any submissions on this term of reference.

Term of Reference 1(g) – Whether the passage of the *Modern Slavery Act 2018* (Cth) renders parts or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps

20. The exemption under section 24(9) of the NSW Act provides that a commercial organisation that is subject to obligations under a law of the Commonwealth, or another State or a Territory, that is prescribed as a corresponding law for the purposes of this section, does not need to comply with the reporting obligations under section 24 of the NSW Act.
21. The Commonwealth Act allows an entity to ‘opt in’ to being a reporting entity under that Act.

¹Audit Office of New South Wales Report of Local Government 2018 dated 28 February 2019 section 1.3 available at https://media.opengov.nsw.gov.au/pairtree_root/b0/6c/67/f2/f3/4e/47/f0/86/2e/d1/b4/95/5d/a4/bc/obj/Report_on_Local_Government_2018_Final_Report.pdf

22. There is no clarity under the NSW Scheme around the situation where a commercial organisation, which is caught by the NSW Scheme, decides to instead opt in to the Commonwealth Act. In particular, clarity is sought on whether that entity could still be subject to penalties under the NSW Scheme, where it has opted in to the Commonwealth Act.

Term of Reference 1(h) – The preferred course of action to address the matters identified

23. We support the commencement of the NSW Scheme, subject to:
- (a) the preservation of the items in paragraph 4(b) above;
 - (b) the required amendments regarding the situation where a commercial organisation which is caught by the NSW Scheme, decides to instead opt in to the Commonwealth Act; and
 - (c) the required amendments regarding the inclusion of Statutory Owned Corporations and local councils in the NSW Scheme, or a commitment that the *Local Government Act 1993* (NSW) will be later amended to introduce reporting requirements for local councils.

Term of Reference 1(i) – Any other related matter.

24. We believe that the NSW Scheme could be improved by including the following matters:
- (a) **Opting in regime commensurate to the Commonwealth Act:** There is currently no ability for entities who do not meet the revenue threshold to opt in to the NSW Scheme. We note that significant financial penalties under the NSW Scheme for non-compliance may be a deterrent for entities who wish to opt in to the NSW Scheme. However, in our view, this could be overcome by an exemption to the penalties or a ‘sliding scale’ of penalties based on revenue for entities who have opted in to the NSW Scheme.
 - (b) **Victim compensation fund:** A victim compensation fund should be established under the NSW Scheme to support victims of modern slavery, which should be funded by any proceeds from a financial penalty given under the NSW Act.
 - (c) **Statutory defence to crimes:** The NSW Scheme should introduce a statutory defence for victims of modern slavery who have committed a crime because the person was under compulsion that is attributable to slavery or other relevant exploitation. The statutory defence should mirror the defence for slavery or trafficking victims under section 45 of the UK Act.
25. We would be pleased to provide any further information to the Committee if required.

Yours sincerely

Holding Redlich