

Submission
No 58

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: New South Wales Bar Association

Date Received: 4 October 2019



NEW SOUTH WALES
BAR ASSOCIATION®

NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES INQUIRY INTO THE *MODERN SLAVERY ACT 2018* (NSW) AND ASSOCIATED MATTERS

1. The New South Wales Bar Association welcomes the opportunity to provide a submission to the Legislative Council Standing Committee on Social Issues Inquiry into the *Modern Slavery Act 2018* (NSW) (**NSW Act**) and associated matters.
2. In June 2018, NSW passed and assented to the NSW Act. It was anticipated that the NSW Act would commence by 1 July 2019. However, no commencement date has to date been proclaimed, and as a result, the NSW Act has yet to commence operation.
3. The Bar Association, through its Human Rights Committee, has been active in engaging with the proscription of modern slavery and related issues at both Commonwealth and State levels. This important legislation in New South Wales plays a key role in promoting human rights and freedoms, including economic and social human rights.
4. In order to provide some context to the issue of modern slavery, it has been estimated that some 4,300 workers in Australia are the victims of slavery.¹ While, statistically at least, the incidence of modern slavery within Australia appears to be relatively low, there is concern that the statistics reflect a low level of awareness of the issues, and the actual incidence may be much higher, both domestically and overseas.
5. The Bar Association commends New South Wales for being the first Australian jurisdiction to introduce specific modern slavery legislation. The NSW Act predates the *Modern Slavery Act 2018* (Cth) (Commonwealth Act), which was enacted in December 2018 and which commenced on 1 January 2019. Both the NSW Act and the Commonwealth Act are based on the *Modern Slavery Act 2015* (UK) (UK Act).²
6. Section 3 of the NSW Act defines its objectives as being:

¹ 2016 Global Slavery Index, pp 4 and 29, accessed at <https://www.globalslaveryindex.org/download>. An estimated 46 million people worldwide are the victims are slavery.

² <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

- (a) *to combat modern slavery,*
- (b) *to provide assistance and support for victims of modern slavery,*
- (c) *to provide for an Anti-Slavery Commissioner (the Commissioner),*
- (d) *to provide for detection and exposure of modern slavery that may have occurred or be occurring or that is likely to occur,*
- (e) *to raise community awareness of, and provide for education and training about, modern slavery,*
- (f) *to encourage collaborative action to combat modern slavery,*
- (g) *to provide for the assessment of the effectiveness and appropriateness of laws prohibiting modern slavery and to improve the implementation and enforcement of such laws,*
- (h) *to provide for mandatory reporting of risks of modern slavery occurring in the supply chains of certain corporate bodies,*
- (i) *to make forced marriage of a child and certain slavery and slavery-like conduct offences in New South Wales,*
- (j) *to further penalise involvement in cybersex trafficking by making it an offence to administer a digital platform for the purpose of child abuse material.*

7. The Bar Association suggests that these objectives be kept in mind when the Inquiry addresses its terms of reference.

Inquiry's terms of reference and focus of the Bar Association's submission

8. The Standing Committee is tasked with inquiring and reporting into the consultation draft of the Modern Slavery Bill 2019 (**Amendment Bill**), and the consultation draft of the Modern Slavery Regulation 2019 (NSW) (**Regulation**), 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) 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
- (i) any other related matter.

9. The Bar Association’s submission addresses terms of reference (1)(d), (e), (f), and (g). Term of reference (1)(h) is considered in addressing terms of reference (d)-(f). The Bar Association also raises a further matter for consideration under term of reference 1(i).

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

10. Item 18 of Schedule 1 of the Amendment Bill proposes to repeal Part 4 of the NSW Act.

11. Part 4 of the NSW Act enables a court that convicts a person of certain modern slavery offences to make orders (**modern slavery risk orders**) prohibiting the person from engaging in conduct described in the order if it is satisfied as to certain matters. A modern slavery risk order may be made by the court:

(a) on the conviction for a relevant offence or at any time afterwards;³
or

(b) on its own initiative or on application by the Attorney General or the Director of Public Prosecutions.⁴

12. A modern slavery risk order has effect for such period after it is made (of at least 2 years) as is specified by the court.⁵

13. A person who is the subject of a modern slavery risk order may apply to the Supreme Court to vary or revoke the order.⁶

14. There is no equivalent mechanism in the Commonwealth Act.

15. The UK Act contains similar mechanisms in Part 2, by providing for the making of “slavery and trafficking prevention orders”.⁷ The UK Act permits the making of prospective “slavery and trafficking risk orders”,⁸ which apply in circumstances where there is a “risk” a person will commit a slavery or human trafficking offence and it is necessary to make the order for the purpose of protecting persons generally, or particular persons, from physical or psychological harm.⁹

³ NSW Act, s 29(1).

⁴ NSW Act, s 29(4).

⁵ NSW Act, s 29(5).

⁶ NSW Act, s 29(6).

⁷ UK Act, ss 14-22.

⁸ UK Act, ss 23-29.

⁹ For information about the operation of such orders see the Home Office’s “Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015”, April 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/610015/110417_-_statutory_guidance_part_2_-_GLAA_updates-_Final.pdf.

16. The Bar Association considers there is much force in a having a mechanism that is aimed to prevent repeated instances of the commission, or risk of commission, of modern slavery offences, such as is intended by Part 4 of the NSW Act.

17. New South Wales already has a mechanism by which crime prevention orders can be made – the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (Crime Prevention Orders Act). The Crime Prevention Orders Act applies to persons convicted of a serious criminal offence,¹⁰ and persons involved in “serious crime related activity”¹¹ for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence).¹² In order to make an order, the Court must be “satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities”.¹³

18. The Bar Association considers the object of Part 4 of the NSW Act could be met by having the modern slavery offences listed in Schedule 2 of the NSW Act being included in the definition of “serious criminal offence” for the purpose of the Crime Prevention Orders Act. This amendment would also supplement the consequential amendment proposed at Schedule 2.1 of the Amendment Bill to include certain modern slavery offences within the definition of “offence of a sexual nature” in the *Crimes (High Risk Offenders) Act 2006* (NSW).

19. There is also a strong case for the modern slavery offences listed in Schedule 2 of the NSW Act being subject to the operation of the *Criminal Assets Recovery Act 1990* (NSW).

20. Amendments in such terms would operate to ensure the furtherance of the NSW Act’s objectives; particularly, “to combat modern slavery”.¹⁴

Term of reference (1)(e) – 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

21. Items 21 and 22 of Schedule 1 of the Amendment Bill propose to omit the offence contained in s 32 of the *Human Tissue Act 1983* (NSW) from the list of modern slavery offences in Schedule 2 to the NSW Act and insert instead references to offences in the Commonwealth Criminal Code relating to organ trafficking.

¹⁰ Crime Prevention Orders Act, s 3 (defined to have the same meaning as in the *Criminal Assets Recovery Act 1990* (NSW)).

¹¹ Crime Prevention Orders Act, s 4.

¹² Crime Prevention Orders Act, 5(1)(b).

¹³ Crime Prevention Orders Act, s 5(1)(c).

¹⁴ NSW Act, s 3(a).

22. Section 32 of 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. The purpose of including s 32 in the list of modern slavery offences is to prevent organ trafficking.

23. The NSW Government submission notes that the inclusion of s 32 in the list of modern slavery offences has the effect of capturing, inadvertently, activities that are lawful in other countries (such as those that permit payment for donations of blood and other tissues), with the result that NSW Health will be 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 s 176(1A) of the *Public Works and Procurement Act 1912*).¹⁵ Accordingly, the Amendment Bill proposes to replace the reference to s 32 with the equivalent Commonwealth organ trafficking offences.

24. The Bar Association opposes the removal of s 32 from the list of modern slavery offences because it considers that it is important that entities, including government entities, in New South Wales take steps to *prevent* (notably not eliminate) trafficking in human organs. The obligation imposed on entities is to take *reasonable* steps to ensure they do not have modern slavery in their supply chains. For those reasons, the Bar Association submits there are strong reasons for retaining s 32 in the list.

25. If there is an issue with the scope of s 32 (including any unintended consequences from its operation), which the NSW Government appears to contend, that is a matter better addressed by consideration of s 32 itself, rather than by removing s 32 from the list of modern slavery offences. For example, an exception to s32, which captures NSW Health's imports of blood-related products, can overcome any possible breaches of s 32 by NSW Health.

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)

26. The Bar Association notes certain offences in the NSW Act and the *Criminal Code Act 1995* (Cth) potentially overlap. To this end, the Amendment Bill proposes to make consequential amendments to offence provisions to ensure that offences contained in the NSW Act are not inconsistent with Commonwealth laws. The Bar Association supports these amendments, which clarify the operation of the provisions, while ensuring the objects of the NSW Act are achieved.

27. In particular, the Bar Association supports the clarification provided to the extraterritorial scope of modern slavery, as proposed by item 2 of Schedule 1 of the Amendment Bill. It makes clear that the definition of “modern slavery offence” includes conduct occurring outside of NSW and Australia, which, if it occurred in New South Wales, would be an offence (even though it might not be an offence in the place in which

¹⁵ NSW Government Submission, p 9.

it occurred). However, it is important to note that the effect of the NSW Act is not to criminalise that conduct as such, but to impose reporting obligations in relation to it.¹⁶

Term of reference (1)(g) – whether the passage of the Commonwealth Act renders parts or all of the NSW Act unnecessary, or requires amendment to address inconsistencies or gaps

28. As mentioned above, the NSW Act predated the Commonwealth Act. In simple terms, the NSW Act applies to a broader class of entities (turnover of \$50 million compared to \$100 million under the Commonwealth Act). As the NSW Government submission notes, it is estimated 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.

29. There are compelling reasons, informed by the objects of the NSW Act, to retain the NSW Act’s current scope and provisions.¹⁷ Indeed, the NSW Act already contains “anti-overlap” provisions to ensure that entities the subject of both the Commonwealth and NSW Acts are not burdened by reporting obligations under both regimes.¹⁸

30. There are key differences between the NSW Act and the Commonwealth Act. One significant difference is that the NSW Act provides for penalties of up to \$1.1 million for non-compliance with certain requirements relating to the preparation of modern slavery statements.¹⁹ The Commonwealth Act does not include a similar penalty regime, instead relying on public breach reporting (and associated reputational damage) as the primary deterrent to non-compliance.

31. Another significant feature of the NSW Act, notably absent from the Commonwealth Act, is the creation of the statutory office of the Anti-Slavery Commissioner.²⁰ New South Wales is only the second jurisdiction, after the United Kingdom,²¹ to create such an office. The office of the Anti-Slavery Commissioner performs important functions, including:²²

- (a) to advocate for and promote action to combat modern slavery,
- (b) to identify and provide assistance and support for victims of modern slavery,
- (c) to make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery,

¹⁶ NSW Act, Pt 3.

¹⁷ See also NSW Government Submission, pp 11-13.

¹⁸ NSW Act, s 24(9).

¹⁹ NSW Act, s 24.

²⁰ NSW Part, Pt 2.

²¹ UK Act, Pt 4.

²² NSW Act s 9.

- (d) to co-operate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery,
- (e) to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations,
- (f) to monitor the effectiveness of legislation and governmental policies and action in combating modern slavery,
- (g) to raise community awareness of modern slavery.

32. The Anti-Slavery Commissioner is not subject to the control or direction of the Premier and any other Minister in respect of the functions at paragraphs (a) and (c) above.

33. The Bar Association submits retention of the office of the Anti-Slavery Commissioner will assist to ensure the achievement of the important objects of the NSW Act's objects.

Term of reference (1)(i) – any related matter

34. As noted above, s 24 of the NSW Act creates certain offences in relation to the preparation of modern slavery statements. Section 33 of the NSW Act confers jurisdiction on Courts to entertain prosecutions of these offences. However, the NSW Act does not confer responsibility on any person for prosecuting these offences, which leaves a gap in the enforcement regime. Section 9, which confers functions on the Anti-Slavery Commissioner, does not confer a prosecution function upon him or her. Section 10 expressly restricts the functions of the Anti-Slavery Commissioner such that he or she “does not generally have the function of investigating or dealing directly with the complaints or concerns of individual cases”.

35. Therefore, the present position is that the only way of enforcing the offence provisions would be through a private prosecution under s 14 of the *Criminal Procedure Act 1986* (NSW), which provides:

“A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of person.”

36. The Bar Association recommends that consideration be given to making specific provision in the Bill for a relevant authority to conduct prosecutions involving breaches of the NSW Act.

4 October 2019