Submission
No 72

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Name: Professor Paul Redmond

Date Received: 4 October 2019

Legislative Council Standing Committee on Social Issues

Inquiry into the *Modern Slavery Act 2018* and associated matters

Submission by Professor Paul Redmond AM, Sir Gerard Brennan Professor
Faculty of Law, University of Technology Sydney

1. The New South Wales Government is to be commended on its initiative to strengthen the Modern Slavery Act which the Parliament enacted in 2018. That statute is of singular importance. The measures proposed to strengthen its operation reflect the powerful statement by the Premier when she moved the Second Reading of the Modern Slavery Bill on 6 June 2018: "Slavery and human trafficking are transnational crimes that prey on society's most vulnerable people. ... There is an undeniable moral imperative to take action in relation to all forms of modern slavery."

2. The Government is also to be commended for the helpful documentation provided including the admirably clear and comprehensive submission outlining and explaining the proposed changes and choices.

3. This submission is concerned principally with ToR (g) and, incidentally for that purpose, (b). ToR (g) asks 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." In contrast to the NSW Act, the Commonwealth Act is solely concerned with the creation of a reporting requirement with respect to the risks of modern slavery in business operations and supply chains. It is exclusively a transparency in supply chains (TISC) measure. ToR (g) therefore asks, more by implication than direct statement, whether the reporting requirement in s 24 of the NSW Act has been rendered unnecessary by the Commonwealth requirement. This submission argues that it has not. It also suggests amendments to the NSW Act.

The case for retaining the reporting requirement of section 24

4. Mandatory reporting requirements such as the TISC measures in the Commonwealth and NSW Acts perform important functions and possess peculiar strengths. The NSW provision also provides a superior model of a reporting requirement relative to the Commonwealth provision and will likely influence the

review of the Commonwealth requirement due by 2021. Further, the reporting regime under s 24 serves to formalise and structure investigations that are already being conducted by businesses that are not required to report under the Commonwealth Act simply beause such investigation is required as a condition of supplying to such entities or to NSW Government departments and agencies under their procurement rules. This, in summary, is the argument made for the retention of the NSW reporting requirement despite the existence of the Commonwealth provision.

5. The reporting requirements in the Commonwealth and NSW Acts serve important functions that complement criminal sanctions and address weaknesses in their enforcement. Both the Commonwealth Criminal Code and NSW legislation criminalise categories of serious exploitation within modern slavery. These offence provisions apply to conduct both within and beyond Australia and may be attributed to Australian corporations as well as to individuals. Breaches of these provisions are inherently difficult to detect since offending conduct is usually well concealed. Offshore enforcement faces special difficulty so that, in practice, the offence provisions have no or very limited application to offshore exploitation in the supply chains of Australian organisations. The reporting requirements address this deficit by encouraging companies to police their supply chains for modern slavery and report their findings. Large companies have leverage over supply chains that home and host states (the states in which those companies are based and in which they operate, respectively) do not have, or are unwilling to exercise, in combatting modern slavery. The reporting requirements potentially play a key role in countering the "transnational crimes that prey on society's most vulnerable people" (Ms Gladys Berejiklian MLA, above para 1).

6. Mandatory reporting requirements possess peculiar and distinctive strengths especially in those areas such as modern slavery where outcomes are not susceptible to quantitative assessment through discoverable metrics. The particular strength of mandated reporting lies in its focus upon internalising norms—in this case, of avoiding modern slavery—into an organisation's ecosystem and culture. Disclosure builds upon internal inquiry and assessment; investigation for the

purpose of disclosure embeds the targeted values within the enterprise's operating culture and insinuates acceptance of their intrinsic worth. Other goals come into play in particular contexts. Thus, mandated disclosure strengthens the ability of external market actors such as consumers and investors to monitor and influence business towards desired conduct. This oversight reinforces business incentives to protect reputation by careful assessment of targeted risks. Even apart from engagement with empowered market actors, disclosure ideally drives social engagement with stakeholders in the process of discovery and assessment of modern slavery risk.[1] Where (as with s 24 and the Commonwealth Act) reporting is regular and ongoing, it also drives reporting entities to improve performance and promotes ongoing scrutiny by external stakeholders and monitors of improvements in performance.

7. The case for retention of the reporting requirement in s 24 despite the later passage of the Commonwealth reporting requirement commences with an account of their relative merits. The Commonwealth and NSW reporting requirements sit comfortably together. They adopt compatible definitions of modern slavery, mandate the same disclosure content, make it accessible on official public online registers, and require approval of the disclosure statement by the highest organ of the entity. But of the four modern slavery reporting requirements—the *California Transparency in Supply Chains Act 2010*, the *Modern Slavery Act 2015* (UK), the Commonwealth Act and s 24—the New South Wales provision provides the superior model. While the statutes differ in the thresholds that trigger annual reporting obligations, the key differences are that the NSW Act alone imposes penalties for failure to lodge and for false or misleading statements, and, unlike the Commonwealth Act, provides for oversight through a dedicated officer with defined areas of independence. It would be a significant loss if the NSW requirement were abandoned in favour of the weaker Commonwealth model, in the result embracing a narrower universe of reporting entities.

[1] D Hess, "The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights" (2019) *American Business Law Journal* 56 (1), 5 at 16-17.

8. The principal argument that might be made against the NSW reporting requirement is that it is anomalous that a higher reporting standard—one with penalties for false or misleading statements—applies to organisations with turnover within the lower NSW threshold, below that which attracts the Commonwealth's reporting requirement. Why should smaller firms be subject to a legal penalty for misstatements in their reports than larger counterparts? Does this apparent anomaly undercut the legitimacy of the NSW reporting requirement? It is likely that advocacy has already been presented to the Government in these terms.

9. Several responses should be made to this argument.

10. The first goes to the role that the reporting requirement in s 24 plays in the Act's integrated regulatory response to modern slavery. The Act's structure provides for oversight by a dedicated and expertised independent Anti-slavery Commissioner with wide educational and public awareness functions (ss 9, 12), systemic cooperation between the Commissioner and NSW agencies providing support for victims (s 14), and monitoring of due diligence procedures to ensure that procurement of goods and services by government agencies is not the product of modern slavery (s 25). The reporting requirement in s 24 is integral to this structure. Commercial organisations, not government, have knowledge of and leverage over the supply chains in which modern slavery exists. This is particularly the case in relation to offshore operations and production (see para 5 above). The reporting requirement engages these organisations in the Act's goal of eliminating the products of modern slavery. The legitimacy of engaging business in this goal is grounded in the benefits that business, their consumers and investors, derive from modern slavery in the generation of products and services.

11. A second response to the argument that s 24 is unnecessary goes to the strength of the NSW reporting requirement relative to the Commonwealth model. The threshold for reporting under the Commonwealth Act is $100 million, a figure far in excess of that applying under the United Kingdom requirement. Many submissions made in the consultation process for the Commonwealth Act argued for a lower

figure such as that adopted in the NSW requirement.[2] The other major difference is in the imposition of penalties for false or misleading statements in reports under the NSW Act.[3] Both reporting requirements rely on market sanctions for their efficacy—on business incentives to protect reputation and assumed active monitoring by consumers, investors, media and civil society. The best guide to the likely efficacy of market sanctions, unsupported by legal penalty, is the experience of reporting since 2015 under the UK Modern Slavery Act. That experience is not encouraging. The UK Home Office reported in 2018 that 40 per cent of the 17,000 entities required to do so had failed to publish a statement.[4] A survey of statements published by FTSE 100 leading companies found that '[t]hree years on, most companies still publish generic statements committing to fight modern slavery, without explaining how. Sadly, only a handful of leading companies have demonstrated a genuine effort in their reporting to identify and mitigate risks.'[5] An independent review of the UK Act concluded that 'lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor-quality statements.'[6] Australia has stronger and clearer reporting obligations but less depth of investor, media and civil society monitoring experience and resources. In both respects, s 24 addresses more effectively the 'moral imperative' that the Premier has identified and serves as a model for the review of the Commonwealth reporting requirement in 2021.

---

[2] See, for example, the submission by the Law Council of Australia to the Senate Legal and Constitutional Affairs Legislation Committee on the Modern Slavery Bill 2018 (24 July 2018) preferring 'a threshold closer to $60 million, being approximately equivalent to the UK Modern Slavery Act threshold' <https://www.lawcouncil.asn.au/docs/452edee3-8693-e811-93fc-005056be13b5/3475%20-%20Modern%20Slavery%20Bill%202018.pdf>. Like submissions are discussed in the committee's report at [3.35]-[3.50].

[3] It is significant that the exemption to be provided for under proposed Reg 10(1) for voluntary reporting under the Commonwealth Act does not extend to exemption from liability under s 24(7) for false or misleading statements.

[4] The UK reporting requirement is enforceable only through an injunction sought by the Secretary of State to compel an organisation to publish a statement. No such action has ever been taken: Independent Review of the Modern Slavery Act, *Independent Review of the Modern Slavery Act 2015: Final Report* (2019), 43 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803554/Independent_review_of_the_Modern_Slavery_Act_-_final_report__print_.pdf>.

[5] Business and Human Rights Resource Centre, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action* (2018), 3 <https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf>.

[6] Independent Review of the Modern Slavery Act, note 3, 39.

12. A third response is that both the Commonwealth reporting requirement and the NSW provisions that government agencies take reasonable steps to ensure that their procurement is not tainted by modern slavery are already driving firms whose consolidated revenue is below the Commonwealth reporting threshold to identify, assess and address modern slavery risk as a condition of supplying to reporting entities or responding to requests for tender with NSW agencies. (These pressures will only continue with time as reporting entities increasingly engage with the Commonwealth reporting requirement.) For these suppliers whose turnover is within the NSW reporting threshold, reporting under s 24 provides an enabling structure, process and support in this investigation. It imposes no burden beyond that effectively imposed by these independent requirements.

Amendments to the NSW Act

13. Under this heading the submission offers some observations on technical provisions principally concerning the reporting requirement.

14. The Commonwealth Act uses the term 'consolidated revenue', a central and well-elaborated concept under Australian corporate law and accounting standards, to define the reporting threshold. In contrast, the NSW Act uses the term 'turnover' in s 24(1) to define the reporting threshold; the term 'turnover' is not defined in the Act. The term is taken from the UK Act; in that country, the term appears to have a more settled legal and business usage. Greater clarity is needed with respect to the meaning of this key concept in this statutory context. How, and by what agency, is compliance with the threshold requirement and the lodgment obligation under s 24(2) to be monitored and enforced? Does 'turnover' of a commercial organisation include that of entities that it controls and, if so, under what standards of control? What relation, if any, is the concept of 'turnover' in s 24(1) intended or interpreted to bear to 'aggregated turnover' in s 328.115 of the Income Tax Assessment Act 1997 (Cth) (and on what basis)? There is a cloud of uncertaintly hanging over this central concept and its application that the otherwise helpful Government documents do not address.

15. In an ideal structure, users would have access to a single register for reports under the Commonwealth and NSW Acts. In default, it would be advantageous if the Commonwealth and NSW registers might be linked to each another to reduce barriers to access.

16. The Government's submission refers to concerns expressed during consultations from both commercial organisations and civil society about the register to be maintained under s 26(1)(a) & (b), in particular, its propensity to expose organisations who discover modern slavery in their supply chains to naming and shaming. It is submitted that these concerns are serious and well-founded, and that this register (a 'dirty list'?) is likely to be counter-productive to the aims of the legislation. It is important to provide incentives to identify the modern slavery that inevitably accompanies international production systems that draw for their inputs upon low-cost countries with correspondingly low levels of social protection. The discovery of modern slavery and appropriate action to address it should be the occasion of celebration and reward, not of opprobrium. It is important to get incentives right and discourage easy resort to naming and shaming without substance; concern should be with the quality of compliance. The proposed solution of permitting the Commissioner to publish other information, such as that promoting or rewarding best practice, does not address the substance of this concern. Commending a commercial organisation whose name sits on the register of those who have found modern slavery in their supply chain is unlikely to repair the damage sustained to reputation and to incentives for reporting organisations to search. The greater threat is from those that do not search for fear of finding.

17. The NSW Act provides for the appointment of an Anti-slavery Commissioner with a wide range of functions including promotion of public awareness of modern slavery, providing advice, education and training, monitoring reporting of modern slavery risks, and referring suspected instances to the police and other agencies (ss 9-13). The Commissioner's role does not include investigating or dealing directly with individual complaints or cases (s 10). Presumably, the failure of a reporting organisation to lodge a complying statement with the Commissioner under

proposed Reg 8(1) or lodgment of a statement that is false or misleading in a material particular would fall to the criminal agencies for consideration of action.

18. The Commissioner is not an independent statutory officer but an executive officer subject to Ministerial direction except in relation to advisory, advocacy and educational functions (s 7). The bill as originally introduced would have vested the office of Anti-slavery Commissioner with the independence of a statutory officer. Amendments introduced by the Government provided instead for the appointment of the Commissioner under the Government Sector Employment Act 2013 with curtailed independence and freedom of decision and action outside the sphere of advisory and educational functions. Even so circumscribed, the office of Commissioner is an advance upon the Commonwealth position but would be strengthened further by the independence of a statutory officer and clearer oversight functions and responsibilities with respect to compliance with reporting under s 24.