

**Submission
No 3**

INQUIRY INTO REVIEW OF THE MODERN SLAVERY ACT 2018

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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29 September 2023

Dr Joe McGirr MP
Committee Chair
Modern Slavery Committee
Parliament House, Macquarie Street
SYDNEY NSW 2000

By email: modernslavery@parliament.nsw.gov.au

Dear Dr McGirr,

Review of the *Modern Slavery Act 2018 (NSW)*

The Law Society is grateful for the opportunity to contribute to the Modern Slavery Committee's Review of the *Modern Slavery Act 2018 (NSW) (Act)*. The Law Society's Human Rights, Business and Government Solicitors Committees have contributed to this submission.

It has been almost 20 months since the Act commenced on 1 January 2022, and almost 14 months since the NSW Anti-slavery Commissioner was appointed on 1 August 2022. The Law Society was supportive of the introduction of the Act, and notes its ongoing importance in creating the legislative architecture to combat modern slavery in this jurisdiction. However, we are of the view that more can be achieved under the provisions of the Act to promote its objectives.

We note that the comments below are made without the benefit of the Annual Report of the NSW Anti-slavery Commissioner, which is due at the end of October 2023, as required by s19(1) of the Act.

Objectives of the Act

The objects of the Act are set out in s 3 as follows:

- (a) to combat modern slavery,
- (b) to provide assistance and support for victims of modern slavery,
- (c) to provide for an Anti-slavery 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 government agencies,
- (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 or encourage another person to use a digital platform to deal with child abuse material,
- (k) to provide for education, training and guidance about identifying and addressing modern slavery taking place within supply chains of organisations.

Schedules 4 and 5 of the Act made legislative amendments to other Acts and regulations to implement the objectives in ss 3(i) and 3(j) above. The other objectives, with the exception of s 3(c), fall within the functions of the Anti-slavery Commissioner, as outlined in Part 2 Division 2 of the Act.

With the exception of the legislative amendments noted above, the release of the NSW Anti-slavery Commissioner's Strategic Plan (**Strategic Plan**),¹ and several discussion papers,² it is difficult to ascertain progress on some of the objects. However, we draw the Modern Slavery Committee's attention to the following priority matters set out below.

Support and Referral Hotline

A hotline is yet to be established for the provision of advice and assistance to victims of modern slavery.³ In our view, this is a crucial tool in supporting victims, identifying modern slavery and encouraging collaborative action. The Strategic Plan prioritises establishing an effective support and referral hotline as part of building prevention capacity. We remain concerned, however, that victim survivors are still being directed into the criminal justice system as an initial response. For example, on the NSW Anti-slavery Commissioner's website, the links to help and support are to the email address of the Office of the NSW Anti-slavery Commissioner and the Australian Federal Police only.⁴

Strengthening access to effective remedy

Enabling effective remedies is a key priority in the NSW Anti-slavery Commissioner's Strategic Plan. We consider that an important way to strengthen access to effective remedies is the establishment of a national compensation scheme for modern slavery victim-survivors, and we encourage further advocacy by the NSW Government on this issue. Despite the Act amending the *Victims Rights and Support Act 2013* (NSW) to seemingly include statutory support for victims of modern slavery within NSW, the amendment has limited practical impact for victim-survivors, as detailed in our submission to the Statutory Review of the *Victims Rights and Support Act 2013* (NSW).⁵

¹ Office of the NSW Anti-slavery Commissioner, [Working together for real freedom: NSW Anti-slavery Commissioner's Strategic Plan 2023-2026](#) (June 2023).

² Website of the NSW Anti-slavery Commissioner hosted by the NSW Department of Communities and Justice at <https://dcj.nsw.gov.au/legal-and-justice/our-commissioners/anti-slavery-commissioner/strategic-plan-and-discussion-papers.html>.

³ This is a requirement under section 12(d) of the *Modern Slavery Act 2018* (NSW) (Act).

⁴ See website of the NSW Anti-slavery Commissioner (n 2).

⁵ Law Society of NSW, [Submission to the Statutory Review of the Victims Rights and Support Act 2013](#) (8 July 2022).

Availability of an electronic register under s 26 of the Act

We are not aware that a publicly available electronic register has been established, as required under s 26 of the Act, which was intended to identify non-complying Government agencies and State-owned corporations, as well as make available other “appropriate” information.

Duty to co-operate

A further area that would benefit from revision or clarification, whether through the establishment of regulations or otherwise, relates to the “duty to co-operate” provisions set out under ss 14-16 of the Act.

Currently, there is a requirement under s 14(1) of the Act for NSW Government agencies, and persons and bodies that provide services to, or advocate for, victims of modern slavery, to work in co-operation with the Commissioner in the exercise of the Commissioner’s functions. Under s 14(2), this duty to co-operate includes:

- (a) the duty to disclose information that is likely to be of assistance to the Commissioner or an agency in the exercise of functions imposed on the Commissioner or agency with respect to modern slavery and victims of modern slavery,
- (b) the duty to provide reasonable assistance and support to the Commissioner or an agency in connection with the exercise by the Commissioner or an agency of functions with respect to modern slavery and victims of modern slavery.

It is notable that the duty to co-operate under s 14 contains none of the exceptions or parameters provided to the Commissioner of Police under similar “duty to inform” provisions contained under s 35, including an exception where the provision of such information may contravene legal professional or client legal privilege (s 35(3)(d)). In our view, the current duty to co-operate and its broad ambit (information “*that is likely to be of assistance*” and providing “*reasonable assistance and support*”) has the potential to place an unreasonable burden on many service providers. For example, they may be required to access legal advice on what information or assistance they can reasonably provide without breaching confidentiality or other duties to, and relationships with, their victim-survivor clients.

Readoption of the lower reporting threshold, public register, relevant penalties and due diligence processes

The *Modern Slavery Amendment Act 2021* (NSW) repealed s 24 of the Act, which required commercial organisations with an annual consolidated revenue of more than \$50m to prepare modern slavery statements. Before the repeal of the reporting obligation, the Act provided that a civil penalty of up to 10,000 penalty units could apply if a reporting entity failed to prepare a statement or knowingly included materially false information in it. Section 26(1)(a) and (b) created a public register which identified any business that had disclosed under s 24 that its goods and services are, or may be, a product of supply chains in which modern slavery may be taking place as well as the steps taken by the business to address the concern.

The existence of the lower reporting threshold, a public register, and the sanctions for reporting failures that breach objective standards were important strengths of the modern slavery regime originally contemplated in NSW. We understand that the repeal of s 24 was motivated by a desire to see greater harmonisation with the Commonwealth, where the reporting threshold is set at \$100 million under the *Modern Slavery Act 2018* (Cth) (**MSA (Cth)**). Recently, following the conclusion of the statutory review of the MSA (Cth) conducted by Professor John McMillan AO, it was recommended that the Commonwealth regime be amended to lower the reporting threshold to \$50M as well as the creation of civil penalties for non-compliance with the reporting requirements.⁶

⁶ Australian Government, [Report of the statutory review of the Modern Slavery Act 2018 \(Cth\): The First Three Years](#) (25 May 2023) 9.

While we appreciate that there are valid arguments against a lowered reporting threshold, including concerns about the costs and expertise of undertaking supply chain audits, we note the suggestion by Professor McMillan that there are options for reporting obligation to be 'tailored to the size and activity of an entity (consistently with the spirit of the UNGPs)'.⁷

In the case that the Commonwealth Government does not enact the recommendations of the Statutory Review, we therefore suggest the readoption of the lower reporting threshold and the relevant penalties in NSW, along with the requirement for corporate entities to implement due diligence processes. This would ensure that NSW enterprises are appropriately targeted, thereby enabling a robust response to modern slavery in this jurisdiction.

We consider that our observations above align with the recommendations of the 2023 Global Slavery Index study of Australia, which include ensuring support services and visas do not depend on participation in the criminal justice process, and the establishment of a national compensation scheme, as well as the implementation of financial penalties, compliance measures, and mandatory human rights due diligence.⁸

Thank you for the opportunity to contribute.

Yours sincerely,

Cassandra Banks
President

⁷ Ibid.,55.

⁸ Walk Free, 2023 Global Slavery Index (Website) at <https://www.walkfree.org/global-slavery-index/country-studies/australia/>