

NSWCCL SUBMISSION

PROFESSOR JOHN MCMILLAN, AO AND THE AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT.

REVIEW OF THE MODERN SLAVERY ACT 2018 (CTH)

22 November 2022

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Introduction

The New South Wales Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to provide this submission to the Modern Slavery Act Review Secretariat in the Attorney-General's Department on the issues raised in the "Review of Australia's Modern Slavery Act 2018 Issues Paper" (**Issues Paper**).

NSWCCL's aims

The NSWCCL's constitutional aim is to assist in the maintenance and protection of the rights and liberties of persons in Australia and its Territories, against any infringement by authority, or against the use or abuse of powers by governments, their agencies, or others in authority to the detriment of the liberties which people within this country should enjoy.

In this submission a reference to 'this country' is to be taken to mean all of Australia and its Territories and includes any place in respect of which the Parliament of Australia has the power to make any laws, and includes an '*excised offshore place*'¹.

Consistent with our constitutional aim, our submission has focussed on addressing this question - "in the context of the aims and objectives of the Modern Slavery Act and the Issues Paper is any government, government agency or other authority using or abusing their powers (or at risk of doing so) to the detriment of the liberties which all people within this country should enjoy."

In framing our question, we note that we consider as a general proposition that the liberties of people within this country include the freedom to not be personally a victim of modern slavery as contemplated under the Act.

Modern Slavery in Australia

The Global Slavery Index 2018 estimated there are 15,000 victims of modern slavery in Australia.² However, this number differs in other estimates. For example another estimate from 2015-16 and 2016-17 suggested there are between 1,300 and 1,900 victims of modern slavery and human trafficking in Australia.³

Even with these numbers being 'low' in comparison to other jurisdictions, it is estimated only 1 in 5 victims are detected in Australia, with around 1670 modern slavery cases referred to the Australian Federal Police.⁴

Recommendation 1- We recommend that the Australian Government:

- commission an independent examination to:
 - assess whether, and if so the extent to which, the use and/or the apprehension of the potential for the use of, the powers of government and of government agencies in relation to immigration and employment may be detrimental to the ability of a victim of modern slavery in this country to:
 - report instances of modern slavery; and
 - enforce employee like rights in this country where their 'modern enslavement' has involved them undertaking employee like activities (even whilst they may not hold a visa permitting such or any employment); and
 - formulate recommended next steps based on the examination's findings;
- report publicly on the examination's findings and recommendations; and
- include the relevant and current findings and recommendations in relation to these above identified matters and concerns in future Commonwealth Modern Slavery Statements.

¹ The term '*excised offshore place*' is defined in the *Migration Act 1958* (Cth).

² Global Slavery Index 2018, <https://downloads.globalslaveryindex.org/ephemeral/GSI-2018-Chapter-5-regional-findings-p-1668495187.pdf>

³ Samantha Lyneham, Christopher Dowling and Samantha Bricknell, "Estimating the dark figure of human trafficking and slavery victimisation in Australia" (Australian Institute of Criminology, Statistical Bulletin 16, February 2019); National Action Plan to Combat Modern Slavery 2020-2025.

⁴ Anti-slavery Australia, source found [here](#).

Notes on Recommendation 1

Recommendation 1 is made with respect to matters 1.a), 1.b), 2.c) and 3 of the terms of reference list of *"Matters to be considered by the review"*, in particular noting the Commonwealth's own obligations to submit a Commonwealth Modern Slavery Statement under the Act.

As part of Recommendation 1 we recommend that a joint position statement of the shared position of the Department of Home Affairs and the Australian Border Force be provided to the Commissioner (once the position of an independent Commissioner is established).

We understand that the Department of Home Affairs has affirmed it has adopted a position that all people working in Australia have the same minimum workplace rights and protections, regardless of their citizenship or visa status. There is we understand an Assurance Protocol that applies to those on temporary visas with permission to work and provides that a visa cannot be cancelled by the Department because of workplace exploitation on the basis that:

- the visa holder has sought advice/support from the Fair Work Ombudsman and is assisting them with their inquiries;
- there is no other reason to cancel the visa (such as national security, character, health or fraud); and
- the visa holder has committed to following their visa conditions in the future.

However, it is noted the Assurance Protocol only applies to temporary visas with permission to work and only for visa cancellation considerations. For temporary visa holders who do not have permission to work, the Department will, we understand, only consider on a case by case basis and this uncertain position we apprehend may result in increased risks of modern slavery in the Commonwealth's supply chains.

Recommendation 2 - Seek to improve compliance standards through administrative action by requiring (through the procurement process) that businesses that have modern slavery reporting obligations and are tendering for a government contract, must affirm they have met those obligations and will continue to do so as a condition of any contract.⁵

Recommendation 3 - Amend the Act to include as an additional enforcement measure the identification of a reporting entity which has failed to submit a statement when required to do so under the Act. It is suggested that a penalty should not be set as a monetary amount in keeping with the original aspirations that the Act can potentially operate more successfully where it is framed to provide an opportunity for there to be a 'race to the top' in terms of performance of those entities required under the Act to submit a Modern Slavery Statement.⁶ It will nevertheless be appropriate to continue to monitor whether the framing as a '*race for the top*' approach is succeeding as intended, or whether further consideration should be given to the introduction of a monetary penalty provision for a failure to submit a statement when required to do so under the Act.

Recommendation 4 - Introduce an independent Anti-Slavery Commissioner (**Commissioner**) with nominated functions to:

- coordinate research work across government and with industry with the aim to eliminate modern slavery in this country and in global supply chains;
- monitor and report publicly on the question whether the use and/or the apprehension of the potential for the use of the powers of government and of government agencies in relation to immigration and employment matters may be detrimental to the ability of a victim of modern slavery in this country to:
- report instances of modern slavery; and
- enforce employee like rights in this country where their 'modern enslavement' has involved them undertaking employee like activities (even whilst they may not hold a visa permitting such employment);
- collaborate with other agencies to increase outreach and information sharing; and

⁵ Pages 41-42 of the Issues Paper.

⁶ Page 42 of the Issues Paper.

- publish an annual list of countries, regions, industries and products with a high risk of modern slavery;⁷ and

specifically report on modern slavery practices in Australia.⁸ **Notes on Recommendation 4 - Independent Commissioner (Questions 23 and 24 of the Issues Paper)**

We support the introduction of an independent Commissioner.

We believe the appointment of a federal Commissioner in Australia can serve to:

- help the focus on improving the identification of victims and the effectiveness of the law enforcement response in this country to encourage investigations that lead to successful convictions of modern slavery offences;⁹
- help provide information, education or training (for instance, training law enforcement on good practice when investigating modern slavery offences);¹⁰
- help encourage co-operative or joint engagements with public authorities, voluntary organisations and other persons, in this country or internationally;¹¹
- help encourage the co-operative or joint engagements with persons and organisations to combat modern slavery and provide assistance and support to victims of modern slavery;¹² and
- help promote advocacy for and action to combat modern slavery.¹³

We support an office of Commissioner that will take an independent role to the Australian Government. In the UK, the Independent Anti-Slavery Commissioner (IASC) signed a memorandum of understanding with the UK home office which:

- acknowledged that the IASC is a public appointee and operates independently of the Home Office;
- clarified some of the key responsibilities of the Home Office and the IASC;
- governance, oversight and reporting of the IASC; and
- data sharing arrangements and process for agreeing a budget for the IASC.¹⁴

We suggest a similar memorandum be considered between the Australian Government and the Commissioner (once established).

There is precedence in this country for an independent Commissioner, for example the Office of the Australian Information Commissioner is an independent national regulator for privacy and freedom of information which promotes and uphold a person's rights to access government-held information.

We trust that this submission assists Professor McMillan in his work and would be pleased to offer further assistance if it would be of use.

⁷ Pages 48-49 of the Issues Paper.

⁸ we suggest a broader role than just monitoring and reporting on the operation of the Act's reporting requirement as is suggested on page 49 of the Issues Paper.

⁹ s 41(1) of the *Modern Slavery Act 2015* (UK).

¹⁰ s 41(3) of the *Modern Slavery Act 2015* (UK).

¹¹ s 41(3) of the *Modern Slavery Act 2015* (UK).

¹² s 9(1)(d) of the *Modern Slavery Act 2018* (NSW).

¹³ s 9(1)(a) of the *Modern Slavery Act 2018* (NSW).

¹⁴ Memorandum of Understanding (MoU) between the Independent AntiSlavery Commissioner (IASC) and the Home Office dated August 2019, <https://www.antislaverycommissioner.co.uk/media/1313/memorandum-of-understanding-2019.pdf>

Yours sincerely,


Secretary
NSW Council for Civil Liberties

Contact in relation to this submission: 
