

F I O N A M C L E O D S C
B A R R I S T E R

11 July 2018

Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Inquiry into Modern Slavery Bill
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

Submission on Modern Slavery Bill 2018

Please find my Submission on Modern Slavery Bill 2018 attached.

Yours faithfully,

Fiona ~~Mc~~Leod

525 LONSDALE STREET • MELBOURNE VIC 3000

PHONE: 9225 8708 •

MOBILE

ABN: 40 364 084 200

email fmcleod@vicbar.com.au

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SUBMISSION ON MODERN SLAVERY BILL 2018
Fiona McLeod SC

Introduction

1. I welcome the opportunity to make this submission on the proposed *Modern Slavery Bill* 2018 to the Senate Legal and Constitutional Affairs Legislation Committee. I congratulate the government and all parties involved in progressing this important legislation.
2. Addressing modern slavery is an issue of paramount importance. The important role of business in addressing egregious human rights abuses in their operations and supply chains is well known.

The Modern Slavery Bill

3. The Modern Slavery Bill intends to set standards and guidelines for companies to encourage them to ensure that they are not violating human rights in their operations and supply chains consistent with the *United Nations Guiding Principles on Business and Human Rights* and the *Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development*.
4. I support the Government's stated intention to introduce this Bill and believe it can be improved in a number of respects.

Major Concerns

A. Penalty for Breach

5. The Bill does not provide for any civil or criminal consequence for the failure to comply with mandatory reporting requirements. This failure has the potential to undermine the intention and efficacy of the Bill and create confusion for those advising on legal and compliance requirements.

6. If the concern is that the Bill should encourage compliance 'gently', at least initially, to allow organisations time to react with compliant behaviour, the Bill can still be improved.
7. To improve the Bill the Committee might consider the following options:
 - a. Include a criminal or civil penalty provision for non-compliance with a delayed start date to give businesses time to adjust to the new regime. This would be far easier than requiring government to amend the Bill at a later date;
 - b. Include a criminal or civil penalty provision for non-compliance with immediate effect but adopt a facilitative approach, consistent with the approach taken to the introduction of the *Future of Financial Advice Reforms* introduced in 2017 by ASIC, such that there was in effect a 12 month amnesty on enforcement of the requirements of the new laws; and/or
 - c. Include a criminal or civil penalty for failure to report, initially focused on the fact of reporting rather than the content of the report to build compliance behaviours and familiarity with the new requirements.

B. Need for an Anti-Slavery Commissioner

8. Second, the legislation does not create the Office of an Anti-Slavery Commissioner. It is critical that somebody independent of Government with the capacity to speak to government, NGOs, unions and business holds the office of Anti-Slavery Commissioner. In-house public servants providing information to the public with no compulsory powers will be inherently weaker and less effective than the creation of an independent office.
9. The introduction of the new legislation is itself an exciting opportunity for a major education campaign. A Commissioner should in place from the outset to take advantage of this opportunity.

10. The NSW legislation Division 2 provides a good model, in particular

9 General functions of Commissioner

(1) The functions of the Commissioner are as follows:

- (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,
- (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,
- (h) to exercise such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.

(2) In exercising the Commissioner's functions, the Commissioner must encourage good practice in:

- (a) the prevention, detection, investigation and prosecution of modern slavery, and
- (b) the identification of victims of modern slavery.

(3) Unless the contrary intention appears, the Commissioner's functions may be exercised with respect to any government or non-government agency, person, matter or thing (whether or not they are in or of, or for, the State), so long as the function is exercised in relation to a matter to which this section relates.

10 Restriction on exercise of functions

(1) The Commissioner does not generally have the function of investigating or dealing directly with the complaints or concerns of individual cases but may take them into account and draw conclusions about them solely for the purpose of, or in the context of, considering a general issue.

(2) The Commissioner may, despite subsection (1), provide individuals and their families, friends and advocates with information about and referral to government and non-government programs and services.

C. Consistency with NSW Modern Slavery Act

11. Consideration should be given to the interaction between the Commonwealth Act and State Legislation. For example, New South Wales has recently introduced modern slavery reporting requirements under the Modern Slavery Act 2018 NSW.
12. There should be harmonisation of the requirements otherwise this will lead to confusion within the business community as to the fulfilment of their obligations under different regimes with different requirements.

13. A fragmented scheme across States, Territories and the Commonwealth legislation will ultimately impact upon compliance and productivity as has been observed in so many areas of regulation.
14. The NSW Act, for example,
 - a. applies to organisations with a total turnover in a financial year of a commercial organisation of not less than '\$50 million or such other amount as may be prescribed by the regulations'.
 - b. Provides a criminal penalty for non compliance with a maximum penalty of 10,000 penalty units [or \$1,100,000] s.24(2).
 - c. There is a capacity to make modern slavery risk orders.
15. There is an opportunity for harmonisation at the outset that may otherwise take years of COAG negotiations to achieve.

D. Redress

16. Finally, the Bill does not contemplate a redress compensation scheme, contrary to international obligations and the commitments of the *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*.
17. The UN Special Rapporteur Joy Ngozi Ezeilo, the 2018 Trafficking in Persons Report and the Joint Standing Committee of Foreign Affairs Defence and Trade Report *Hidden in Plain Sight* each recommended the establishment of a National Compensation Scheme in Australia to compensate victims of modern slavery.
18. A National Compensation Scheme for offences under Division 270 and 271 of the Commonwealth Criminal Code is necessary to ensure that Australia effectively fulfils its obligations under international law by providing a unified framework that avoids the inconsistencies and unfairness associated with the current varied State and Territory specific crime compensation schemes.

19. Each State and Territory in Australia presently provides their own statutory victims' compensation schemes under their respective Victims of Crimes Act, however the lack of consistency among the schemes with regard to the threshold requirements of harm, time limits for claims and compensation caps has led to varied outcomes for victims depending upon the relevant jurisdiction for what is essentially the same harm or the same Commonwealth offence. These schemes are not designed to address Commonwealth offences like human trafficking, slavery and labour exploitation.
20. I have consistently, for more than a decade, pressed for a Commonwealth scheme to provide timely, fair and effective access to justice and compensation because I have seen the transformation of people's lives when they are provided with just and fair compensation for the wrongs they have suffered.
21. Professor Jennifer Burn and I proposed a model for a National Compensation Scheme modelled on two current schemes, the defence abuse reparation scheme and the Australian victims of overseas terrorist payment schemes, the structure of which could be used as a template upon which to model the proposed compensation scheme. I am happy to provide further details of the model scheme.
22. A law enforcement response and a business education plan go significant ways to preventing and addressing these crimes when they occur but they can take no significant step to rehabilitating the lives of those effected by these crimes.
23. It is time that Australia took up its obligation to provide redress for those caught by the most serious offences of trafficking and slavery under our Commonwealth Criminal Code. The failure to do so is no longer explicable given the shocking circumstances of abuse that survivors face and the deprivation of basic human rights.
24. We must remind ourselves whom it is we are working for with this Bill. It is not government or business interests and reputation, or even law enforcement agencies in the good work they undertake. It is the victims of trafficking and slavery offences.

25. It is timely that a scheme was introduced into the Australian network of compensation schemes for Commonwealth offences.

Other Matters

26. In order to be effective, the Modern Slavery Bill will require companies to comprehend the scope of their obligations. As currently defined under section 4, modern slavery refers to criminal conduct within Division 270 and 271 of the Criminal Code and Trafficking in Persons by reference to international instruments. It is noted that it will not immediately be clear to corporations caught by the reporting requirements as to what is captured by each of the Divisions and the definition of trafficking in persons and it will be necessary to provide guidance within or accompanying the legislation in this respect.
27. The \$100M consolidated revenue threshold has been selected based on global revenue. The Law Council and Anti-Slavery Australia and a number of other organisations pressed for a lower threshold of \$50M, adopted in NSW, to ensure that significant business operations were captured by the new reporting regime. While it is recognised there may be pragmatic considerations for increasing the threshold to \$100M regarding the identification of those to whom the legislation applies, this is contrary to the need to have a widespread take up of the reporting requirements and does not reflect the recommendations and experience of the United Kingdom as noted by the former Anti-Slavery Commissioner Kevin Hyland OBE.
28. Sections 16 and 22 concern the register of modern slavery statements. It is noted that it is desirable that compliance with the obligations under the new law should be transparent – much of the incentive to adopt rigorous internal processes is driven by consumer demand for products and services free of modern slavery practices.
29. The public should be able scrutinise entities in breach of their reporting obligations and reward those businesses that comply with customer support and favourable reviews. Without the ability to assess performance, the real incentive for compliance

is lost. This is particularly the case where there is no civil or criminal penalty provision provided.

30. I welcome the opportunity to address these matters in detail if the Committee would be assisted by hearing from me directly.

Fiona McLeod SC

10 July 2018

Relevant Expertise

1. I am senior counsel in Victoria with a practice in commercial and public law and have worked closely in my practice as a barrister on a pro bono basis with victims of trafficking and slavery, and with NGOs representing victims and with the Commonwealth DPP for more than fifteen years.
2. I am a member of the Australian Institute of Company Directors and do and have served on a number of boards and committees.
3. I am the Chair of the National Roundtable on Human Trafficking and Slavery's Labour Exploitation Working Group. The report of the Working Party *Strengthening Australia's Approach to Serious Forms of Labour Exploitation* is comprehensive and is due to be presented to Government shortly. I will speak to it at the next Roundtable on 16 August. That report will recommend the adoption of a Modern Slavery Bill to assist with addressing the most serious forms of exploitation of workers in Australia and a range of measures to improve prevention and deterrence, detection, access to justice and victim support services.
4. I was a member of the Multi Stakeholder Advisory Group on Implementation of UN Guiding Principles on Business and Human Rights convened by the Minister for Foreign Affairs and reporting last year.
5. I am the immediate past president of the Law Council of Australia and gave evidence to various Committee hearings in that capacity and privately on this and related topics including submissions and evidence to the Joint Committee on Law Enforcement Inquiry into Human Trafficking, the Committee's Inquiry into Slavery, Slavery-Like Conditions and People-Trafficking, and the Joint Standing Committee on Foreign Affairs, Defence and Trade.
6. I am the Co-Chair of the Open Government Forum representing civil society interests in the Open Government Partnership and Chair of the Accountability Round Table.