

Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 [Provisions]

January 2024

About the UK Modern Slavery and Human Rights Policy and Evidence Centre (Modern Slavery PEC)

1. The UK [Modern Slavery and Human Rights Policy and Evidence Centre](#) (Modern Slavery PEC) was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to address it. The Centre is a consortium of six research organisations led by the [Bingham Centre for the Rule of Law](#) and is funded by the [Arts and Humanities Research Council](#) on behalf of [UK Research and Innovation](#) (UKRI).
2. The Modern Slavery PEC funds research to provide independent, innovative and authoritative insight and analysis on modern slavery. The Modern Slavery PEC is an impartial organisation and our focus is on ensuring the best available evidence and analysis is available for policymakers and law-makers. We are led by evidence and our belief that policies are more effective when they are firmly underpinned by evidence grounded in robust research and data. Our approach is rooted in human rights.
3. This submission has been informed by an assessment of the [Modern Slavery Amendment \(Australian Anti-Slavery Commissioner\) Bill 2023](#) (hereafter “the Bill”) and its [Explanatory Memorandum](#); the Modern Slavery PEC’s firsthand experience of working with the UK Independent Anti-Slavery Commissioner (IASC) in relation to research and policy on modern slavery; and scrutiny and assessments of the legal framework for the UK IASC role, in particular by the [UK Parliament’s Joint Committee on Human Rights](#), and of its operation in practice by the [Independent Review of the UK Modern Slavery Act 2015](#). This response has been prepared by the Modern Slavery PEC’s core team and does not necessarily represent the views of all partners making up the Modern Slavery PEC consortium.

Analysis

4. This submission considers how and whether the Bill’s provisions will enable effective operation of the proposed Australia Anti-Slavery Commissioner role, with a particular focus on the role’s independence, and how the role can support modern slavery research.

The Commissioner’s Independence

5. The Commissioner’s independence from Government, and in particular the adequacy of the institutional guarantees of that independence, have been the most frequently debated and discussed aspects of the UK IASC role, from which there may be lessons to learn. The independence of the UK IASC role was considered during Parliamentary scrutiny of the UK Modern Slavery Bill, when the [UK Parliament’s Joint Committee on Human Rights](#) expressed strong reservations about whether the office being created could meaningfully be called

“independent” because of various features of the statutory scheme which, taken together, meant “it is largely controlled by the Home Office.” Those parliamentary concerns were borne out in practice when the first Commissioner, Kevin Hyland, said in his [resignation letter](#) that “at times independence has felt somewhat discretionary from the Home Office, rather than legally bestowed.” The issue of the Commissioner’s independence was taken up by the [Independent Review of the UK Modern Slavery Act 2015](#), which agreed with the submissions it received that the role was too constrained by Government, and made a number of recommendations designed to increase the Commissioner’s independence in practice.

6. The Bill clearly envisages that the Australian Commissioner role is independent, including independent from government. The Bill contains several measures which support the independence of the role, namely:
 - a. Clause 20J states that the Commissioner “has complete discretion in performing or exercising the Commissioner’s functions or powers” and “is not subject to direction from anyone when doing so”.
 - b. Clause 20Y requires the Commissioner to prepare and give to Ministers an annual report, which Ministers must table in the House of Representatives within 15 sitting days of that House. The Bill does not give Ministers the powers to approve or modify the contents of the annual report, though Section 4 defines ‘sensitive information’. Clause 20Y envisages that such ‘sensitive information’ would not be included in the version of the annual report that is tabled in parliament or published on the Commissioner’s website.
 - c. While Clause 20X requires the Commissioner to consult with Ministers in preparing a strategic plan, it does not give Ministers the powers to approve or modify the contents of the strategic plan.
7. However, there are some areas where the Bill could be clarified or strengthened to support the independence of the role. Namely:
 - a. Clause 20C subsection (l) states that one of the Commissioner’s functions is “at the request of the Minister, to provide advice to the Minister on matters relating to modern slavery”. A broad power in the Minister to request advice from the Commissioner could be used in a way which significantly influences the way in which the Commissioner deploys their scarce resources, and is difficult to reconcile with the aspiration to make the Commissioner independent. **Consideration should be given to either removing this provision from the Bill or making clear that the Commissioner has discretion to decide whether or not to provide advice requested by the Minister.**
 - b. Clause 20F states that the staff assisting the Commissioner are to be APS employees in the Department whose services are made available to the Commissioner, and that when performing services for the Commissioner, they are subject to the directions of the Commissioner. The ability of the UK IASC to appoint their own staff was considered a critical element of their independence by [UK Parliament’s Joint Committee on Human Rights](#). While Clauses 20G and 20H do enable the Commissioner to engage contractors and consultants to work for them, **for the Commissioner to be seen as truly independent it will be important for them to have the power to appoint their own staff rather than rely on staff provided by the Government.**
 - c. Clause 20N provides that the Commissioner’s term of office is to be specified in the instrument of appointment, should be no more than 5 years, and is renewable for one more term. The UK Commissioner’s term is 3 years and is also renewable, but the UK Joint Committee on Human Rights has consistently recommended that independent commissioners should be appointed for a single term of 5-7 years in order to be perceived as independent. Consideration should be given to whether the Commissioner’s term should be a single term of five years, rather than at the Government’s discretion and renewable.
8. **We recommend that, in addition to the various ways in which the legal framework could be amended to improve the institutional guarantees of the Commissioner’s independence, the Committee also considers encouraging the inclusion of the word**

“Independent” in the title of the role and of the Bill itself, to further cement the independence of the role as central to its identity.

9. We note that Clause 20C subsection (k) envisages one function of the Commissioner as being “to advocate to the Commonwealth Government on matters relating to modern slavery; including for continuous improvement in policy and practice”. It is encouraging that the Australian Government would welcome advocacy and suggestions for improvement, however, similar to the UK IASC role, there is no requirement for the government to formally respond to any reports or recommendations made by the Commissioner. The legislation underpinning the Children’s Commissioner for England role does give the Children’s Commissioner powers to require responses from public sector agencies to recommendations. [Section 107 of the Children and Families Act 2014](#) states “Where the report contains recommendations about the exercise by a person of functions of a public nature, the Commissioner may require that person to state in writing, within such period as the Commissioner may reasonably require, what action the person has taken or proposes to take in response to the recommendations”. **The Committee should consider amending the Bill to give the Commissioner powers to request written responses to their reports and recommendations.**

[The Appointment Process for the Commissioner](#)

10. In the UK, Section 40 of the [Modern Slavery Act 2015](#) requires the Home Secretary to appoint a person to the IASC role. The UK role recently remained vacant for some 20 months, during a period when some controversial immigration legislation, with [significant implications](#) for people affected by modern slavery and human trafficking, was before Parliament. This led very experienced parliamentarians, including a former modern slavery minister and Co-Chair of the All Party Parliamentary Group on Human Trafficking and Modern Slavery, [Karen Bradley MP](#), to suggest that “legislation which will impact victims of modern slavery should not be created in the absence of an Independent Anti-Slavery Commissioner.” It also led to a [Private Members’ Bill](#) proposing that Parliament should be able to appoint the IASC role, rather than the Home Secretary, if the role was vacant for three months or more.

11. The Bill is clear on the process for appointing a Commissioner (Clause 20L); the period of appointment and the renewability of the appointment (Clause 20N); and the grounds and process for removal of the Commissioner from their role (Clause 20U).

12. Clause 20M would mitigate the risk of an unfilled vacancy arising in Australia as it places an obligation on Ministers to appoint a Commissioner “as soon as practicable after the office of the Commissioner becomes vacant”. To further reduce the risks of the role remaining vacant, **the Committee could consider recommending amending the Bill to specify a time within which a new Commissioner should be appointed, and requiring Ministers to provide written updates to Parliament if the role remains vacant beyond that timescale.**

13. A key issue identified by the [Independent Review of the UK Modern Slavery Act 2015](#) in relation to the UK IASC role was that there was no formal complaints procedure in place to “ensure the Commissioner’s accountability and protect him/her from unjustified allegations”. **The Committee should encourage the Australian Government to clarify a formal procedure should complaints arise about the Commissioner’s work or conduct.**

[The Commissioner’s Functions](#)

14. Clause 20C sets out a broad range of proposed functions for the Commissioner role. The requirement at Clause 20X to prepare and publish a strategic plan and at Clause 20Y to prepare and publish annual reports will enable clarity and accountability for stakeholders about how the Commissioner is exercising these functions. In paragraphs 15-18 we make several recommendations about how the Commissioner’s functions could operate in practice, though we note that these would not require amendments to the text of the Bill itself.

15. We welcome the proposed functions in relation to research and data about modern slavery. Clause 20C subsection (g) proposes that the Commissioner will “support, encourage, conduct and evaluate research about modern slavery”. However, such functions require a dedicated budget and **consideration should be given to ensuring that the Commissioner has a realistic budget to enable them to perform these functions. The Commissioner should also consider publishing a set of research priorities as part of their strategic plan**, developed following consultation with researchers, policymakers, businesses, civil society groups and people affected by modern slavery. Published research priorities would encourage research funders and researchers to fund and undertake research in line with the Commissioner’s priorities. This is particularly important given the proposed budget for the Commissioner (as outlined in the Bill’s [Explanatory Memorandum](#)) suggests the Commissioner will not necessarily be able to fund a significant volume of new research.
16. Clause 20C subsection (h) proposes the Commissioner will “collect, analyse, interpret and disseminate information relating to modern slavery”. The ability to undertake this function is dependent on the availability and quality of data and information about modern slavery. Clause 20W, which provides for the Commissioner to request information from Commonwealth agencies, may assist the Commissioner in obtaining relevant data. We note that, in the UK context, there are challenges regarding data on modern slavery, for example, the quality of [data available to investors](#) about modern slavery. The Commissioner should therefore consider developing strategic partnerships and memoranda of understanding with data and information-owners, including with organisations not in scope of Clause 20W (such as businesses), to underpin the sharing of data on modern slavery to support this function.
17. We also welcome the proposed functions as Clause 20C subsection (e) “to engage with, and promote engagement with, victims of modern slavery to inform measures for addressing modern slavery”. Modern Slavery PEC-funded [research](#), commissioned by the UK Foreign, Commonwealth and Development Office, has found that meaningful survivor involvement can improve the effectiveness of policies and programmes to address modern slavery. **The Commissioner should consider the recommendations from this research around emerging best practice around ethical survivor engagement**, for example the need to ensure that engagement is non-tokenistic, trauma-informed and prevents harm.
18. The Bill’s [Explanatory Memorandum](#) states the role will “help fight modern slavery in Australia and abroad” and the Memorandum is clear that the Commissioner will not represent the Australian Government at international meetings or events. In the UK, the balance of focus of the IASC role between domestic and international priorities was considered by the [Independent Review of the UK Modern Slavery Act 2015](#), which recommended that the IASC should primarily focus on tackling modern slavery domestically. **The Committee should encourage the Australian Government to clarify the expected balance between the Commissioner’s domestic and international functions.**