British Institute of International and Comparative Law

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

SUBMISSION BY THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO A MODERN SLAVERY BILL

We make these submissions to the Senate Standing Committee on Legal and Constitutional Affairs on behalf of the British Institute of International and Comparative Law ("**BIICL**") on the terms of the proposed *Modern Slavery Bill 2018* (the "**Bill**").

BIICL welcomes the action taken by the Australian Government to introduce legislation aimed at addressing modern slavery and its recognition of the scale and importance of the issue.

While BIICL is generally supportive of the Bill, there are a number of matters that should be addressed in order to improve its effectiveness.

1. Penalties

The Bill in its current form does not provide any civil or criminal penalties for non-compliance with the mandatory reporting requirement set out in Part 2 of the Bill. BIICL has previously made submissions to the Australian Attorney-General's Department on the importance of penalties for non-compliance with the requirements of any proposed mandatory reporting requirements,[1] we summarise those submissions below.

BIICL research has found that companies are often calling for more regulation rather than less, and that legal and regulatory exposures are significant drivers for companies to undertake human rights due diligence ("**HRDD**") in relation to their operations and business relationships.[2]

There is mounting evidence that voluntary codes of conduct and auditing programs have failed to eliminate or substantially reduce incidence of labour violations in global supply chains. This finding is consistent with the 2017 Corporate Human Rights Benchmark results, which have shown that while there are some industry leaders addressing human rights impacts in their businesses, including in their supply chains, significant improvements can and should be made.[3] It is becoming apparent that industry-led programs alone cannot address human rights impacts in the supply chain.

---

1 See Gabrielle Holly, Lise Smit and Robert McCorquodale, submission by the British Institute of International and Comparative Law dated 19 October 2017 in response to certain of the consultation questions set out in the Attorney-General's Department's *Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement* dated 16 August 2017.

2 Robert McCorquodale, Lise Smit et al "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Law Journal* 195 at 201; Gabrielle Holly, Lise Smit and Robert McCorquodale *Making Sense of managing Human Rights in Supply Chains: 2018 Report and Analysis* available at https://www.biicl.org/duediligence.

3 Among other findings, the results showed that the bulk of companies benchmarked scored within the 40-49% range. See *Corporate Human Rights Benchmark: Key Findings 2017*, March 2017.

In order to shift the economic calculus required to transform self-regulation into actual improvement, external incentives should be applied. The possibility of penalties for non-compliance would be a powerful external incentive for companies to ensure that their supply chains are compliant. BIICL's research has shown that companies place considerable significance on legal risks. The three top incentives identified by survey respondents for undertaking HRDD were avoidance of legal risk, reputation (each selected by 66 per cent of the 150 companies surveyed) and compliance with local laws and regulatory requirements (selected by 60 per cent of respondents).[4]

Such an approach would be consistent with calls from industry for more rather than less regulation to provide much needed clarity and a level playing field. Companies are statutory constructs and accustomed to their daily operations being subject to a wide range of regulatory requirements. In an area where voluntary initiatives and industry guidelines are increasingly leading to a mosaic of legal and operational risks through case law and reputational damage, our research has shown that companies welcome the certainty that clear regulation provides. Binding regulatory requirements also enable more constructive external and internal discussions around human rights. As a representative of one company surveyed as part of BIICL's research stated "sometimes you just need the forceful push".[5]

For example, our recent research for which we interviewed various multinational companies across various sectors found that:

> There is often a misperception on the part of states that companies welcome the absence of regulation. Instead, companies that "seek to honour" IHR standards, as expected by UNGP 23(b), view the absence of state involvement in improving and enforcing human rights-compliant domestic laws in a negative light. High risk operating environments require companies to invest considerable resources in steps to undertake heightened ongoing HRDD, engage in collective initiatives, and exercise various forms of leverage, to compensate for the shortcomings of the domestic legal system in protecting human rights. In describing their HRDD process and collective engagement efforts, one company representative stated that "all of these things are substitutes for Pillar I [of the UNGPs, which deals with state responsibilities]."

For the above and further discussion on the topic see our report *"When national law conflicts with international human rights standards: Recommendations for Business"*, (May 2018), available at: https://www.biicl.org/conflicts-between-human-rights-law-and-nat-practice

The imposition of penalties for non-compliance with reporting or due diligence requirements would be in line with global legal and regulatory trends, including existing and proposed regulatory regimes such as the French Duty of Vigilance law, the Swiss Responsible Business Initiative proposal and the Dutch Child Labour Bill.

2. Anti-Slavery Commissioner

The Bill does not provide for the establishment of an Office of an Anti-Slavery Commissioner, independent of the government, to advocate for the eradication of modern slavery.

[4] Robert McCorquodale, Lise Smit et al "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Law Journal* 195 at p201.
[5] Robert McCorquodale, Lise Smit et al "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Law Journal* 195 at p223.

The UK Anti-Slavery Commissioner has performed an invaluable role in raising community awareness of the issue of modern slavery in the UK and mobilising action. It would demonstrate the Australian government's seriousness in addressing the issue of modern slavery if it were to make legislative provision for the appointment of an Anti-Slavery Commissioner to act as champion for the eradication of modern slavery. The independence of the UK Anti-Slavery Commissioner has enabled the Commissioner to liaise with a variety of stakeholders such as NGOs, trade unions, business and government with the purpose of encouraging cooperation and inciting action around the eradication of slavery.

BIICL considers that the functions of a Commissioner set out in Division 2 of the *Modern Slavery Act 2018* (NSW) provide a good model of terms of reference for a Commissioner and we encourage the Australian Government to include equivalent provisions in the Bill.

3. **Extending the application of the Bill**

The present threshold for compliance with the mandatory reporting provisions in the Bill is companies with a consolidated revenue of AUD100million and above. BIICL is of the view that the threshold should be lowered so that the Act would apply to more and smaller companies. In this respect it is noted that the threshold adopted by NSW in the *Modern Slavery Act 2018* (NSW) is AUD50million.

In our recent research on human rights due diligence in supply chains, companies have indicated with reference specifically to the Australian Modern Slavery Act that they would welcome its application to smaller companies as well. In this way, the legislation would apply to their second, third and further tier suppliers, with whom they have no contractual relationships and where they have determined many of their main supply chain human rights risks to be located.

Our study found the following (our emphasis):

> The general approach of interviewees is that clear regulation would be welcomed, as it would provide legal certainty. With reference to the example of labour brokers, one interviewee stated that "states are not regulating as much as they should." Another interviewee stated: We would like to see more regulation. It would force our tier two, three and four suppliers to improve their processes – and our competitors. We rely on the whole industry.
>
> They added that for this purpose, *regulation should not just be directed at large organisations.* In their supply chains, one of the main challenges relates to labour recruitment brokers, which are not covered by legislation which only applies to large multinationals. They emphasised that "*there is no reason why it has to be limited to large companies; there are risks in all companies.*"

The above and further can be found at in our report "*Making sense of managing human rights issues in supply chains"*, available at: https://www.biicl.org/duediligence

4. **A Human Rights Due Diligence approach**

Recent BIICL research surveying over 150 companies worldwide has shown that companies which only focus on labour issues are failing to identify other human rights impacts in their supply chains.[6] The focus of the Bill on modern slavery in isolation from other human rights impacts does not conform

6 Robert McCorquodale, Lise Smit et al "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Law Journal* 195 at pp206-207 and 221.

with Australia's Pillar I responsibilities set out in the UNGPs. Moreover, such an approach will not assist Australian companies with supply chains either within Australia or abroad to understand their responsibility to respect human rights wherever they operate as required under Pillar II of the UNGPs, nor the standards that the Australian Government expects them to meet.

Accordingly, addressing the issue of modern slavery would benefit from a broader HRDD approach consistent with that set out in the UNGPs. Such an approach would require a company to consider human rights impacts on an ongoing basis both within its own operations and the operations of third parties with whom it has a business relationship. A HRDD approach would raise awareness of broader human rights impacts and avoid the patchwork effect of inconsistent regulations targeted at specific or selective human rights impacts.

We note that the UK Joint Committee undertook a review of the UK Modern Slavery Act 2015 in its report *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*[7] and made a number recommendations for improvement. One such recommendation was that "the Government bring forward legislative proposals to make reporting on due diligence for all other human rights, not just the prohibition of modern slavery, compulsory for large businesses, with a monitoring and enforcement mechanism."[8]

BIICL encourages the Australian Government to actively consider a proposal in line with that recommended by the UK Joint Committee for a reporting requirement based on broader human rights impacts.

Gabrielle Holly
Researcher in Business and Human Rights

Lise Smit
Associate Senior Research Fellow in Business and Human Rights

18 July 2018

[7] House of Lords and House of Commons Joint Committee on Human Rights *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, 5 April 2017.
[8] House of Lords and House of Commons Joint Committee on Human Rights *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, 5 April 2017 at p42.