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20 July 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Sir/Madam,

Re: Commonwealth Modern Slavery Bill 2018

Australian Lawyers for Human Rights (**ALHR**) thanks the Senate Legal and Constitutional Affairs Committee (**Committee**) for the opportunity to make this submission in response to the Commonwealth Modern Slavery Bill 2018 (**Bill**).

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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Introduction

1. ALHR welcomes the introduction of the Bill into Parliament. The Bill is an important legislative step in requiring businesses to take responsibility for human rights by engaging in a 'race to the top' to combat modern slavery throughout global supply chains.
2. ALHR strongly supports the need for a comprehensive suite of new national laws to combat the issue of modern slavery, and looks forward to working with the Government and other parties to ensure an effective Australian Modern Slavery Act is passed. Given the extensive work undertaken to bring this Bill to Parliament, along with the strong business and bipartisan support for the introduction of modern slavery legislation, ALHR encourages all Parliamentarians to work collaboratively and in good faith to see modern slavery legislation enacted as a matter of priority.
3. ALHR specifically welcomes many aspects of the Bill, which reflect the recommendations of the year-long Inquiry into a Modern Slavery Act in Australia¹ in 2017 (**Inquiry**) by the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (**Inquiry Committee**). The Inquiry's recommendations are found in the Inquiry's final report, *Hidden in Plain Sight*.² Unfortunately some of the Inquiry's key recommendations, aimed at combating domestic slavery and addressing lessons learnt from the UK's modern slavery supply chain reporting regime, are missing from the Bill. ALHR has made a range of recommendations regarding possible amendments to the Bill below.
4. ALHR is guided in its response to the Bill by the requirements of international human rights law and standards, in particular by the *United Nations Guiding Principles for Business and Human Rights 2011*³ (**UNGPs**). Australia recently committed to the implementation of the UNGPs,⁴ which outline:
 - a. States' duty to protect against business-related human rights abuse, including through enforcing laws aimed at requiring and enabling businesses to respect human rights, and providing victims access to remedy; and
 - b. businesses' responsibility to respect human rights wherever they operate.
5. ALHR notes that the Bill is an important step towards, rather than fulfilment of, the duties and responsibilities outlined in the UNGPs, for Australia and businesses based in Australia. ALHR also acknowledges the significant work behind, and multi-stakeholder support for, the outcomes of the Inquiry's final report and its recommendations. Therefore, ALHR's proposed amendments to the Bill are limited to

¹https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery

² Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into establishing a Modern Slavery Act in Australia* (December 2017) [https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report_\(Hidden_in_Plain_Sight_report\)](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report_(Hidden_in_Plain_Sight_report))

³ UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HR/PUB/11/04 and A/HRC/17/31 (United Nations, 2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> The UN Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011 (**UNGPs**)

⁴ See Australia's statement to the UN Human Rights Council at the adoption of the Report of the UPR Working Group on 17 March 2016 <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UPR-Adoption-Statement.pdf> access at <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>

consideration of those measures recommended by the Inquiry,⁵ which best achieve the aims of effectively combating the human rights abuses associated with modern slavery in Australia and in global supply chains of large entities based in Australia.

Domestic Modern Slavery

6. The year-long Inquiry heard evidence of slavery and slavery risks existing in Australia in the sex work, domestic work, hospitality, agriculture and construction industries, as well as the difficulties in detecting and prosecuting modern slavery crimes.⁶
7. In ALHR's view there is a strong case for the Inquiry's recommendation that the legislation establish an Independent Anti-Slavery Commissioner (**IASC**)⁷ or a modern slavery focused statutory office. The Inquiry's recommendation in favour of establishing an IASC reflects the recommendation of the Parliamentary Joint Committee on Law Enforcement (**PJCLE**), following its 2017 *Inquiry into human trafficking, slavery and slavery-like practices*.⁸ The Inquiry recommended the IASC should have a range of functions which are largely echoed in the PJCLE's recommendation,⁹ including overseeing and monitoring the implementation of *National Action Plan to Combat Human Trafficking and Slavery 2015-19*.
8. As recommended by the Inquiry, an IASC would provide leadership, advocacy, independent oversight, and community education around combating modern slavery issues in Australia. In particular the IASC would play an important role in supporting the 11 agencies involved in preventing and responding to modern slavery offences and ensuring appropriate support for victims. It is ALHR's opinion that the IASC, or other statutory office holder, would make a significant contribution in facilitating the fulfilment of Australia's duty to protect against human rights abuse within Australia's territory or jurisdiction by third parties, including business enterprises (Principle 1, UNGPs).¹⁰
9. The UK's Independent Anti-Slavery Commissioner established in 2015 under the *Modern Slavery Act 2015 (UK) (UK Act)*, has similar functions to those recommended for the IASC by the Inquiry.¹¹ The UK IASC's work has already had a meaningful impact on combating domestic modern slavery in the UK. The 2016 review of the UK Act found there had been a 40% increase in victims identified.¹² There was also a 159 per cent increase in recorded modern slavery offences during 2016 to 2017.¹³
10. In addition, in ALHR's view, the IASC should also play a role in providing support and education for business in complying with the reporting requirement, but not policing their compliance. This support would be separate to the support, and compliance oversight undertaken by the Home Affairs Business Engagement Unit. The IASC should also be able to provide expert advice to business around best practice

⁵ See the *Hidden in Plain Sight* report

⁶ *Hidden in Plain Sight* report, 56 - 63

⁷ Recommendation 6, *Hidden in Plain Sight* report, xxxii at [4.59]

⁸ Parliamentary Joint Committee on Law Enforcement (**PJCLE**), *An inquiry into human trafficking, slavery and slavery-like practices*, 18 July 2017, Canberra, 42 noted in *Hidden in Plain Sight* report, 78 at [4.20]

⁹ PJCLE, *An inquiry into human trafficking, slavery and slavery-like practices*, 42 noted in *Hidden in Plain Sight* report, 82 at [4.31]

¹⁰ Principle 1, UNGPs, 3

¹¹ *Hidden in Plain Sight* report, 88 at [4.54]

¹² Caroline Haughey, *The Modern Slavery Act review*, UK Home Office, 31 July 2016, 3

<https://www.gov.uk/government/publications/modern-slavery-act-2015-review-one-year-on>

¹³ Independent Anti-Slavery Commissioner, *Annual Report 2016-2017*, October 2017, 6

http://www.antislaverycommissioner.co.uk/media/1164/iasc_annual-report-16-17-web.pdf

approaches to responding to modern slavery or modern slavery risks identified in their workplace or supply chains.

Recommendation 1

11. ALHR **recommends** that the Bill be amended to establish a fully independent IASC or other form of modern slavery statutory officer holder with the full range of functions outlined in the Inquiry's Recommendation 6. In particular the IASC or statutory office holder should have a role in encouraging best practice in government responses to the prevention of modern slavery, leading community engagement around the new legislation and providing support to business in complying with supply chain reporting requirements. The IASC or statutory office should be adequately resourced to fulfil those functions.

Supply chain reporting

List of reporting entities

12. As set out in the Explanatory Memorandum, the supply chain reporting regime provided for in the Bill aims to:

*'drive a 'race to the top' as reporting entities compete for market funding and investor and consumer support. The Bill also aims to increase awareness of modern slavery risks among the Australian business community, and assist investors and consumers to make more informed decisions when using, buying and selling goods and services.'*¹⁴

13. Oversight by civil society, media, consumers and business competitors is central to the design and effectiveness of the Bill's supply chain reporting regime, and a key driver of the 'race to the top'.¹⁵
14. ALHR welcomes the Government's proposed introduction of an online, public Modern Slavery Statements Register of businesses' annual modern slavery statements (Clause 18) as recommended by the Inquiry.¹⁶ However, ALHR is concerned that the Bill does not include the Inquiry's related recommendations that the legislation should include publication on the Modern Slavery Statements Register site of a list entities that:
 - a. are required to provide the Minister with a modern slavery statement;¹⁷
 - b. have provided the Minister with a modern slavery statement, including those who reported voluntarily;¹⁸
 - c. failed to provide the Minister with a modern slavery statement after the second year of reporting onwards.¹⁹
15. The Inquiry suggested the purpose of the lists was to, '*clarify obligations ... [and] to improve accountability and transparency, and to reward compliance.*'²⁰ In the context of the current provisions in the Bill, the recommendation would translate to, at least,

¹⁴ Explanatory Memorandum, 2 at [7] in *Hidden in Plain Sight* report, 25 at [2.62]

¹⁵ This was also specifically recognised by the Government in its August 2017 Consultation Paper on the proposals for supply chain reporting, Attorney General's Department, *Modern Slavery in Supply Chains Reporting Requirement*, 17

¹⁶ Recommendation 17, *Hidden in Plain Sight* report, 127

¹⁷ Recommendation 18 and 19, *Hidden in Plain Sight* report, 129 and 135

¹⁸ Recommendation 18, *Hidden in Plain Sight* report, 129

¹⁹ Recommendation 19, *Hidden in Plain Sight* report, 135

²⁰ *Hidden in Plain Sight* report, 129 at [5.141] – [5.143]

the publication of the list of entities required to report pursuant to Clauses 13 and 14 of the Bill, and as well as lists of entities that have and have not complied.

16. Without a public list of the reporting entities, it is unclear how relevant Government agencies and stakeholders will be able to effectively monitor whether relevant businesses are complying with their reporting requirements.²¹ ALHR understands that at least 3,000 entities are expected to be caught by the Bill, and of these, around 2,000 entities may be identifiable from public Australian Taxation Office (ATO) and Australian Charities and Not-For-Profit Commission records. However, ALHR understands there will be a large number of entities (or groups of entities) that will not be easily identifiable, particularly by relevant stakeholders.
17. Oxfam Australia's submission to the Inquiry highlighted the challenges in the UK of trying to assess modern slavery compliance under the *Modern Slavery Act UK (2015)* without a list of reporting entities.²² It is not an efficient use of civil society stakeholders' already limited resources to devote time to identifying or 'proving' that certain entities (or groups of entities) should be reporting. This will detract from civil society's proper role in monitoring the quality of the statements, as well as education and awareness raising and assisting businesses to improve their supply chains. ALHR assumes a list of reporting entities would also be necessary to facilitate the implementation of any consequences or incentives around reporting introduced by Government, now or in the future.
18. The public list of reporting entities, or a way to easily identify reporting entities, is also important for business stakeholders and relevant Government agencies. The list of reporting entities would provide certainty and 'reputational incentives'²³ around reporting. It would also create the 'level playing field' which the Explanatory Memorandum notes is required by business *'to ensure that sections of the business community are not disadvantaged by taking action to disclose and address modern slavery risks.'*²⁴
19. ALHR acknowledges that preparation of such a list of reporting entities (and subsequently a list of entities that have and have not reported) is a significant undertaking. ALHR understands that changes to Government systems or processes may assist with identification of reporting entities, such as updates to ASIC or ATO reporting mechanisms. ALHR stresses that the Modern Slavery Business Engagement Unit, which already has limited resources, should not be diverted away from its core mandate by also being tasked with compiling a list of reporting entities.

Recommendation 2

20. ALHR **recommends** the Bill be amended to provide for a process for working towards achieving the creation of a list of reporting entities, or a way for stakeholders to easily identify reporting entities, by the three-year review of the Act. ALHR strongly recommends any such initiative should not use resources from the Business Engagement Unit.
21. In the alternative, if such an amendment is not made to the Bill, ALHR **recommends** the Government should ensure steps are taken towards achieving the creation of a

²¹ See *Hidden in Plain Sight* report, 128 at [5.138] which references Walk Free Foundation's similar submission to the Inquiry on this point

²² *Hidden in Plain Sight* report, 128 at [5.140]

²³ Explanatory Memorandum, Regulatory Impact Statement, 39

²⁴ Explanatory Memorandum, Regulatory Impact Statement, 39; Attorney General's Department, *Modern Slavery in Supply Chains Reporting Requirement*, 17; *Hidden in Plain Sight* report, 95 at [5.8]

list of reporting entities, or a way for stakeholders to easily identify reporting entities, by the three-year review of the legislation.

Recommendation 3

22. ALHR also **recommends**, that in the interests of facilitating transparency and oversight, and in accordance with the Inquiry's recommendation and the Government's August 2017 Consultation Paper, that the Bill be amended to require reporting entities to publish their modern slavery statements on their website homepages.²⁵

Lack of incentives to comply with reporting requirement

23. In line with the recommendations of the Inquiry, ALHR does not support any form of penalisation or other consequences for businesses that identify modern slavery risks in their supply chain and are taking steps to address them. ALHR also specifically recommends avoiding measures such as the public register provided for in the *Modern Slavery Act 2018* (NSW),²⁶ which lists only the reporting entities that have identified risks of modern slavery. As discussed in the *Hidden in Plain Sight* report, such measures fail to recognise the importance of avoiding the creation of perverse incentives for entities to avoid publicly reporting risks or incidences of modern slavery in their supply chains.²⁷
24. The Bill does not provide for any Government led incentives or consequences for business around compliance with the reporting requirement. In ALHR's view the Government should take steps to ensure there is an 'even playing field,' and businesses that have taken steps to disclose risks and address modern slavery in their supply chain are not disadvantaged by laggards who fail to report. The Inquiry made a number of recommendations for action Government should take, after the second reporting year, if an entity has failed to provide a modern slavery statement. They are:
- i. placing the entity on a public list of entities that failed to report, discussed above;²⁸
 - ii. the entity should be unable to tender to supply goods or services to any Commonwealth Government entity (i.e. procurement consequences);²⁹ and
 - iii. the imposition of a penalty.³⁰
25. The UK Independent Anti-Slavery Commissioner recently called for the same approach to government procurement (i.e. option (ii) above) to be introduced in the UK.³¹ Australian Government procurement activities are valued at over \$56 billion annually; therefore this option has the potential to have significant impact.³² In addition, it would assist with implementing the UNGPs, which ask that Australia promote respect for human rights by business enterprises with which they conduct commercial transactions through procurement activities.³³

²⁵ AGD, *Modern Slavery in Supply Chains Reporting Requirement*, 17; *Hidden in Plain Sight* report, 124 at [5.119]

²⁶ *Modern Slavery Act 2018* (NSW), s 26

²⁷ *Hidden in Plain Sight* report, 133-135

²⁸ Recommendation 19, *Hidden in Plain Sight* report, 135

²⁹ Recommendation 12, *Hidden in Plain Sight* report, 107 at [5.64]

³⁰ Recommendation 19, *Hidden in Plain Sight* report, 135

³¹ Independent Ant-Slavery Commissioner, *Government must use the power of public procurement to tackle slavery*, 18 June 2018, <http://www.antislaverycommissioner.co.uk/news-insights/government-must-use-the-power-of-public-procurement-to-tackle-slavery/>

³² *Hidden in Plain Sight* report, 105 at [5.57]

³³ Principle 6, UNGPs, 8

26. Not only could the non-compliant entity be barred from tendering for government contracts, but the entity could also be placed on a public, online list of 'Non-Compliant entities' or 'Ineligible Suppliers List,' on the Modern Slavery Register site (i.e. option (i) above). As noted above, such a list would provide reputational risk for relevant entities that fail to report (if they are identified) and ensure that businesses that have complied are not disadvantaged. The list would serve as a 'stop-gap' solution if the Bill is unable to provide for the publication of comprehensive lists of reporting entities (discussed above).
27. ALHR's recognises that for entities captured by the reporting threshold of \$100m, monetary penalties are more likely to act as a reputational risk than a monetary deterrent. In addition, experience with other corporate penalty regimes suggest that Government resources would need to be devoted to enforcement of any penalties (through ASIC or another body) to ensure the risk of penalties being enforced is not so remote that the reporting requirement is ignored.

Recommendation 4

28. As noted above, at least in the short term, it appears there may not be a comprehensive list of reporting entities published to raise the reputational risk of legislative non-compliance. In light of this, ALHR **recommends** the Committee should strengthen the legislation with consequences for entities that fail to provide the Government with a compliant modern slavery statement in accordance with Clauses 13 and 14 of the Bill.

\$100m threshold for supply chain reporting

29. ALHR is not opposed to a lower turnover threshold for reporting entities, in principle. However, the experience with the *Modern Slavery Act 2015* (UK) demonstrates that without appropriate funding for education of business and compliance monitoring by government and/or civil society, supply chain reporting becomes ineffective to the point where it is frequently considered voluntary or routinely ignored.
30. Significant Government resources are needed to facilitate effective supply chain reporting, especially during the early years of its establishment, including for education and awareness-raising for business and compliance monitoring of whether statements are produced and whether they meet the requirements of the reporting regime. Resources are also required for benchmarking of the quality of annual statements provided and enforcement of any penalties that may be introduced.
31. Lowering the reporting revenue threshold may substantially increase the number of reporting entities. Smaller entities are likely to require more assistance from Government to understand and comply with the supply chain reporting requirements. ALHR is concerned that unless the Commonwealth provides significant extra resourcing to facilitate the reporting at a lower threshold in the first three years, there is a danger that the reporting requirement will become a superficial corporate compliance exercise, and the transformative potential of an adequately resourced supply chain reporting regime will not be realised.
32. In ALHR's view it is important that high standards of reporting are embedded over the first three years of the regime through a proper resourcing, after which the reporting threshold should be lowered.

Reviews

33. The UNGPs ask states to ensure that laws aimed at requiring business enterprises to respect human rights are periodically reviewed to assess their adequacy.³⁴ ALHR welcomes the review of the legislation after three years provided for in the Bill.

Recommendation 5

34. ALHR **recommends** an amendment to Clause 24 of the Bill to establish a rolling three-year review of the Act, to ensure ongoing improvement in responses to modern slavery in supply chains. Such reviews will allow business, civil society and other feedback regarding the effectiveness of the legislation and hurdles to compliance, and importantly, will allow for adaption to changes in technology as well as business and international human rights best practice.

Thank you for your consideration. If you would like to discuss any aspect of this submission, please do not hesitate to contact Kerry Weste, President of ALHR, by email at president@alhr.org.au.

Yours sincerely,



Kerry Weste
President ALHR
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³⁴ UNGPs, Principle 3(b)