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## Submission on the Modern Slavery Act 2018 Draft Guidance for Reporting Entities

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the *Modern Slavery Act 2018 Draft Guidance for Reporting Entities (Draft Guidance)*.

ALHR welcomes the Draft Guidance as an essential document in supporting reporting entities to comply with the *Modern Slavery Act 2018 (Cth) (Act)*, and as a means to ensuring the overall effectiveness of the Act.

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## 1. Recommendations

1.1 ALHR makes the following recommendations:

- 1.1.1 **ALHR recommends that the final Guidance refers specifically to the modern slavery offences pursuant to s 4 of the Act, in particular the offences under the *Criminal Code Act 1975* (Cth) (Criminal Code), and the word “serious” be removed in defining modern slavery. Further explanation of the terms “coercion”, “threat”, “deception” and “exploitation” as defined in the Criminal Code, and how the specific offences under the Criminal Code relate to these terms, is required to assist reporting entities in their understanding of what risks to report in their modern slavery statements.**
- 1.1.2 **ALHR recommends that reporting entities are encouraged to adopt a broad approach to reporting human rights risks, and further guidance is required regarding the term “human rights”. The final Guidance should provide reporting entities with the relevant international human rights laws and standards; examples of conduct which constitutes breaches of relevant human rights; and the role the UN Guiding Principles on Business and Human Rights (UNGPs) has in assisting reporting entities to prevent, address and remedy human rights violations in the business sector.**
- 1.1.3 **ALHR recommends that the final Guidance should contain a separate chapter on the consequences of not complying with the reporting requirement, especially given that the Act does not provide for a penalty for failure to comply.**
- 1.1.4 **ALHR recommends that the Australian Government takes active steps in supporting civil society and other relevant stakeholders in promoting compliance with the Act.**
- 1.1.5 **ALHR recommends further guidance is provided regarding the terms “cause”, “contribute to”, or “be directly linked”. Additionally, specific reference should be made to the UNGPs where these terms are set out to enable the reader to easily access the information.**
- 1.1.6 **ALHR recommends further guidance as to the terms “owns” or “controls”.**
- 1.1.7 **ALHR recommends further guidance on the extra-territorial application of the Act.**

- 1.1.8 **ALHR recommends that examples of modern slavery statements which refer to anti-modern slavery clauses, and/or contractual agreements which include such clauses, be included in the final Guidance, either as links in the document or as additional resources.**
- 1.1.9 **ALHR recommends that a public list of reporting entities required to report is made available to ensure compliance with the reporting requirements under the Act.**

## **2. Chapters 1 and 2 of the Draft Guidance**

- 2.1 ALHR's primary concern with Chapter 1 of the Draft Guidance is that it does not expressly mention the conduct which constitutes modern slavery pursuant to s 4 of the Act, in particular the offences under Divisions 270 and 271 of the Criminal Code.
- 2.2 ALHR supports the practical and comprehensive examples of "types of modern slavery" outlined in the Draft Guidance, particularly in Appendix 1, Table Three, commencing on page 59 of the Draft Guidance. However, given the significance and importance of the Act in defining modern slavery, ALHR welcomes further explanation in the final Guidance as to the modern slavery offences as defined in s 4 of the Act so that reporting entities can accurately, and more confidently, identify risks of modern slavery within their supply chains pursuant to ss 16(1)(c) - (d) of the Act. For example, organ trafficking is an offence pursuant to ss 271.7A - 271.7E of the Criminal Code, yet there is no mention in the Draft Guidance of this offence, despite it being a modern slavery offence.
- 2.3 ALHR notes that paragraph 3.1 on page 7 of the Draft Guidance states that modern slavery "is only used to describe serious exploitation", and on page 59, it states "The Act defines modern slavery as including eight types of serious exploitation". Notwithstanding that ALHR accepts that the Draft Guidance aims to simplify the legal definitions of modern slavery offences for reporting entities, these particular statements may be confusing for reporting entities in understanding modern slavery offences (an understanding which is required in order for reporting entities to identify risks of modern slavery practices in their operations and supply chains). The statements may also be somewhat misleading given that modern slavery is conduct pursuant to s 4 of the Act. Further, ALHR notes that the legal definition of "exploitation" pursuant to s 271.1A in the Criminal Code does not contain the word "serious".
- 2.4 Further, the "Learn More box" on page 8 of the Draft Guidance has the potential to confuse reporting entities in their understanding of the risks of modern slavery offences in their operations and supply chains. Reporting entities may assume, wrongly, that modern slavery is "only used to describe serious exploitation", when in fact some of the

conditions listed as “Dangerous or Substandard Working Conditions” in the “Learn More box” may amount to conduct constituting a modern slavery offence or human rights violation.

- 2.5 For the reasons stated in paragraphs 2.2 to 2.4 above, **ALHR recommends that the final Guidance refers specifically to the modern slavery offences pursuant to s 4 of the Act, in particular the offences under the *Criminal Code Act 1975 (Cth)* (Criminal Code), and the word “serious” be removed in defining modern slavery. Further explanation of the terms “coercion”, “threat”, “deception” and “exploitation” as defined in the Criminal Code, and how the specific offences under the Criminal Code relate to these terms, is required to assist reporting entities in their understanding of what risks to report in their modern slavery statements.** This can be achieved by using an infographic or table.
- 2.6 ALHR welcomes the individual and entity risk indicators identified in Appendix 1, Table Four, based on industry, product, geographic location and entity type. These examples provide critical signals and guidance to companies to effectively identify risks of modern slavery practices within their operations and supply chains.
- 2.7 ALHR supports, at page 8 of the Draft Guidance, the emphasis on the negative consequences of modern slavery for reporting entities, including grave abuses of human rights, in addition to the reputational and legal risks, and damage to commercial relationships. This aligns with the aims provided for in the Explanatory Memorandum to:
- drive a ‘race to the top’, as reporting entities compete for market funding and investor and consumer support<sup>1</sup>.
- 2.8 ALHR notes, however, that further explanation of “grave abuses of human rights” is required in the final Guidance, especially given reporting entities may not be familiar with the conduct which amounts to “grave abuses of human rights”, or indeed a breach of human rights generally. The final Guidance, in providing further explanation about human rights, should state the relevant international human rights laws and standards, and relevant links to documents and publications relating to these laws and standards, to assist reporting entities in understanding, and working from, a human rights framework, which, ultimately, underpins the Act.
- 2.9 Further, given there is currently no international treaty on business and human rights, in particular, on reporting requirements, ALHR respectfully submits that the Draft Guidance does not go far enough in explaining the UNGPs, including the important role

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<sup>1</sup> Explanatory Memorandum to the *Modern Slavery Bill 2018*, circulated by authority of the Assistant Minister for Home Affairs, the Honourable Alexander Hawke, MP, p2 at [7].

these principles have for businesses to prevent, address and remedy human rights violations in the business sector.

- 2.10 **ALHR recommends that reporting entities are encouraged to adopt a broad approach to reporting human rights risks, and further guidance is required regarding the term “human rights”. The final Guidance should provide reporting entities with the relevant international human rights laws and standards; examples of conduct which constitutes breaches of relevant human rights; and the role the UN Guiding Principles on Business and Human Rights (UNGPs) has in assisting reporting entities to prevent, address and remedy human rights violations in the business sector.**
- 2.11 The flowchart on page 13 of the Draft Guidance explaining the main steps required for compliance with the reporting requirements is simple and easy to understand. The guidance regarding compliance on page 12 includes not only information on how to comply with the reporting requirements, but also information about the consequences of not complying. **ALHR recommends that the final Guidance should contain a separate chapter on the consequences of not complying with the reporting requirements, especially given that the Act does not provide for a penalty for failure to comply.** A chapter on the consequences of non-compliance is essential in ensuring the effectiveness of this Act, and can include examples of how reporting entities around the world are reporting and benefitting from reporting on the risks of modern slavery practices in their operations and supply chains, both financially and in terms of business reputation. ALHR submits that including information about the benefits of complying will positively encourage reporting entities to comply.
- 2.12 Chapter 2 in the Draft Guidance provides useful information for reporting entities on how to calculate their consolidated revenue, and how to identify whether a company is an Australian entity for the purposes of the Act.
- 2.13 The Act defines “accounting standards” as having the same meaning as in the *Corporations Act 2011* (Cth) (**Corporations Act**), however the Act does not state the relevant provision, namely s 9 and s 334 of the Corporations Act. ALHR submits that further guidance should be provided on the meaning of “accounting standards” as provided for in the Corporations Act.
- 2.14 ALHR notes that the reporting threshold under the Act is \$100 million consolidated revenue, and that the Draft Guidance at page 16 states that the reason for this is so that the Act covers “large entities that have the capacity to meaningfully comply with the reporting requirements and the leverage to influence change in their supply chains”. ALHR echoes our previous submission that high standards of reporting must be embedded over the first three years of the Act’s regime to ensure that the regime

does not become a mere corporate compliance exercise.<sup>2</sup> ALHR submits again that at the three-year review of the Act, if not before if appropriate, this threshold be lowered in order for the Act to achieve its aims.

- 2.15 Further, although the Draft Guidance provides helpful guidance in determining a reporting entity for the purposes of the Act, ALHR reiterates our previous submission that the Government, at the three-year review of the Act, if not before if appropriate, takes steps to create a public list of reporting entities that are required to report.<sup>3</sup> A public list of reporting entities will enable Government agencies, civil society and other relevant stakeholders, to effectively monitor whether reporting entities are complying with the Act. A public list of reporting entities required to report will remove any ambiguity in identifying whether a reporting entity is required to report. Finally, such a list will enable civil society and relevant stakeholders to focus on their role of monitoring statements, and educating and assisting business to improve their supply chains.<sup>4</sup>
- 2.16 In addition to the creation of a public list of reporting entities, **ALHR recommends that the Australian Government takes active steps to support civil society and other relevant stakeholders in promoting compliance with the Act.** This can be done through the provision of guidance for civil society and other relevant stakeholders; funding to assist with monitoring compliance; and ensuring that any public list of reporting entities is easily accessible and searchable, including through the use of filters including, but not limited to, industry, turnover, and business name. Some, or all of these steps, could be avoided by the introduction of penalties for non-compliance and a publicly available list of reporting entities.

### 3. Chapters 3 and 4 of the Draft Guidance

- 3.1 ALHR supports the encouragement and wider participation of reporting entities to voluntarily provide a modern slavery statement. In our view, Chapter 3 provides a clear explanation of the benefits to, and option of, reporting voluntarily.
- 3.2 The flowchart on page 19 of the Draft Guidance is likely to be a useful reference for reporting entities as it seems easy to follow and understand. It could be enhanced by using different colours for each box.

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<sup>2</sup> Australian Lawyers for Human Rights, Submission to the Senate Legal and Constitutional Affairs Committee on the Commonwealth, Modern Slavery Bill 2018, 20 July 2018, p7 at [31] - [32], <https://alhr.org.au/alhr-submission-modern-slavery-bill-2018/>

<sup>3</sup> Ibid, p5 at [20] - [21]

<sup>4</sup> Ibid, p5 at [17]

- 3.3 In our view, Chapter 4 provides a clear explanation of the reporting period and the timeline for submitting a modern slavery statement. The timeline for reporting provides a useful visual aid in understanding when the reporting period commences and ends, and when the first modern slavery statement is due.
- 3.4 ALHR is of the view that the Draft Guidance can more actively encourage reporting entities to submit their modern slavery statements as soon as possible after the end of their annual reporting period. A clear message of this kind may minimise any potential delays in reporting entities publishing their modern slavery statements, particularly if a reporting entity fails to comply with the reporting requirements. Similar wording is included in the UK's *Transparency in Supply Chains: a practical guide*<sup>5</sup> document, with a strong expectation that reporting entities should publish their statements sooner rather than later at the same time they publish their annual accounts.

#### 4. Chapters 5 and 6 of the Draft Guidance

- 4.1 Chapter 5 provides guidance on how to prepare a modern slavery statement with reference to the seven mandatory criteria pursuant to s 16(1) of the Act.

##### *Mandatory Criteria One and Two*

- 4.2 Mandatory criteria one and two requires reporting entities to identify the reporting entity and describe the entity's structure, operations and supply chains.
- 4.3 Given the importance of mandatory criteria one and two, further guidance is required regarding the information provided by the reporting entity. For example, under "Structure", a reporting entity should be encouraged to report on its workforce, including the gender and age of its employees (without breaching the privacy of its employees). Under "Supply Chains" a reporting entity should be encouraged to provide more detailed information about their supply chains including its workforce, geographical location, and sources of its products and services.
- 4.4 ALHR submits that mandatory criteria one and two requires detailed information from reporting entities as a means of assessing risks of modern slavery practices, offences pursuant to s 4 of the Act and human rights violations, in its operations and supply chains.

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<sup>5</sup> UK Home Office. 2015. *Transparency in supply chains: a practical guide*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649906/Transparency in Supply Chains A Practical Guide 2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf), p14.

### *Mandatory Criteria Three*

- 4.5 Mandatory criteria three requires a reporting entity to describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and any entities the reporting entity owns or controls.
- 4.6 The Draft Guidance at page 30 defines “risks of modern slavery practices” as “the potential for your entity to cause, contribute to, or be directly linked to modern slavery through its operations and supply chains”. The terms “cause”, “contribute to”, or “be directly linked” are not explained in the Draft Guidance, but rather a general reference is made to the UNGPs. **ALHR recommends further guidance is provided regarding the terms “cause”, “contribute to”, or “be directly linked”. Additionally, specific reference should be made to the UNGPs where these terms are set out to enable the reader to easily access the information.**
- 4.7 Further, the final Guidance should provide further explanation as to what is meant by the terms “owns” or “controls”. This will assist reporting entities to better understand the extent of their reporting requirements with regard to their operations and supply chains. **ALHR recommends further guidance as to the terms “owns” or “controls”.**
- 4.8 ALHR notes that s 10 of the Act provides that the “Act extends to acts, omissions, matters and things outside Australia”. **ALHR recommends further guidance on the extra-territorial application of the Act.**

### *Mandatory Criteria Four and Five*

- 4.9 Mandatory criteria four and five requires reporting entities to describe the actions taken to address risks of modern slavery practices and assessing the effectiveness of these actions.
- 4.10 The Draft Guidance at page 44 provides that entities can conduct ‘internal audits and monitoring’ as part of assessing. Appendix 2 at page 65 provides an example of ‘mutual recognition of audits’ by the entity and its suppliers, to reduce the compliance burden.
- 4.11 ALHR is of the view that further guidance is required regarding the use of auditing systems in identifying and assessing actions taken to minimise or prevent risks.



- 4.12 Audits need to meet minimum standards, including being sufficient, qualified, systematic, independent and/or unannounced.<sup>6</sup> For audits to be effective in identifying and assessing the effectiveness of actions taken, it requires for certain standardisation as to how such audits are conducted. For example, consideration needs to be given to whether the audits are planned and/or unannounced, or a combination of both; by whom, that is, whether by a competent and independent expert or an internal staff member; and how frequently done within the reporting period, for example in certain situations the reporting entity may require more than one audit and/or a follow-up audit.
- 4.13 Such audits, when feasible, should also ensure that they include the voices of workers and those who have been subjected to modern slavery. In practice, it may mean that third party professional audits are more suitable in some contexts, as these are generally considered to provide a more reliable and comprehensive view.<sup>7</sup> Generally, self-assessment, even though potentially lowering the costs for reporting entities, may not be suitable in identifying and assessing risks, and in ensuring the effectiveness of actions to prevent those risks in operations and supply chains, in a systematic manner.
- 4.14 ALHR also submits that further guidance is required regarding modern slavery training for staff and suppliers, and awareness-raising programs. The final Guidance should emphasise the need for implementing such training for *all* relevant staff and suppliers, and that *all* staff and suppliers need to be aware of the responsibilities of the reporting entity. Based on the UK experience, in relation to monitoring practices within the higher education sector, it was identified that, in the first and second year of reporting, training was targeted primarily at the 'procurement staff', which is often not sufficient.<sup>8</sup>
- 4.15 Artificial Intelligence and future technologies can increase some of the difficulties for reporting entities in monitoring and ensuring due diligence, including issues around the source of the raw data and how it is obtained. Given this, ALHR is of the view that reporting entities should be encouraged to train those dealing directly with the data, including data engineers and data scientists.
- 4.16 ALHR is of the view that further guidance should be provided to reporting entities about incorporating, where appropriate, anti-modern slavery clauses into standard terms and conditions of contractual agreements.<sup>9</sup> Introducing anti-modern slavery contractual

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<sup>6</sup> As is required under the *California Transparency in Supply Chains Act of 2010*.

<sup>7</sup> See, for example, Kamala D. Harris, *The California Transparency in Supply Chains Act, A Resource Guide* (California Department of Justice, 2015), p15.

<sup>8</sup> Based on 156 Slavery and Human Trafficking statements from 115 Higher Education Institutions (from the enactment of the *Modern Slavery Act* (UK) 2015 to 31 May 2018). Olga Martin-Ortega and Patrycja Krupinska, *UK Modern Slavery Act Transparency in Supply Chains: The Second Year of Reporting by Universities*, Research Series Report no. 3 (BHRE, 2018), p6.

<sup>9</sup> Similar to the one introduced by the University Bolton (UK), *Anti-Modern Slavery and Human Trafficking Statement* (Financial Year ending 31 July 2018), <https://www.bolton.ac.uk/wp-content/uploads/2018/11/Anti-Modern-Slavery-and-Human-Trafficking-Statement--20-Nov-2018.pdf>

clauses by the reporting entities can provide them with contractual rights over their suppliers to demand disclosure of information, collaboration, and/or any other form of process, to support reporting entities in their efforts to meet their responsibilities under the Act, and to send a clear message to their suppliers about refraining from engaging in modern slavery practices.

- 4.17 **ALHR recommends that examples of modern slavery statements which refer to anti-modern slavery clauses, and/or contractual agreements which include such clauses, be included in the final Guidance, either as links in the document or as additional resources.**

## 5. Chapters 7 and 8 of the Draft Guidance

- 5.1 Chapter 7 of the Draft Guidance explains how reporting entities can provide joint modern slavery statements, and Chapter 8 explains the role of the Modern Slavery Business Engagement Unit (MSBEU).
- 5.2 Given the risk that joint modern slavery statements may be used to avoid reporting obligations, further guidance should be provided as to when a reporting entity would elect to provide a joint statement rather than a single statement.
- 5.3 ALHR notes a submission made by Adidas regarding the Modern Slavery Bill in 2017:

whilst Adidas Group is a strong advocate for disclosure, from a business perspective we are concerned that parallel legislative requirements in different parts of the world (including Australia) could create duplication in effort or multiple, varied approaches. This should be avoided.<sup>10</sup>

- 5.4 Reporting entities may benefit from further guidance on how joint modern slavery statements operate when a reporting entity is required to report in multiple jurisdictions. This will ensure that reporting entities who are required to report in multiple jurisdictions fully understand their reporting requirements under the Act, in light of the option to elect to provide a joint statement.

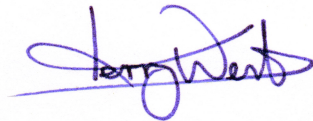
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<sup>10</sup> Adidas Group Submission, 6 March 2017, Inquiry into establishing a Modern Slavery Act in Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, p7, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions).

- 5.5 ALHR observes that two of the functions of the MSBEU are to promote best practice and monitor overall compliance, including by reporting annually to Parliament about implementation of the Act, and administering the online central register for statements.
- 5.5 ALHR has previously made submissions about the importance of a public list of reporting entities as an effective means of monitoring compliance with the reporting requirements.<sup>11</sup> **ALHR recommends that a public list of reporting entities required to report is made available to ensure compliance with the reporting requirements under the Act.**

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If you would like to discuss any aspect of this submission, please email me at:  
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Yours faithfully



Kerry Weste  
President  
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## ALHR

ALHR was established in 1993 and is a national association 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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*Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.*

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<sup>11</sup> Australian Lawyers for Human Rights, Submission to the Senate Legal and Constitutional Affairs Committee on the Commonwealth, Modern Slavery Bill 2018, 20 July 2018, p5 at [18], <https://alhr.org.au/alhr-submission-modern-slavery-bill-2018/>.