



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

3 October 2019

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

www.alhr.org.au

Legislative Council Standing Committee on Social Issues
Parliament of New South Wales
Email: socialissues@parliament.nsw.gov.au

Submission to the Legislative Council Standing Committee on Social Issues inquiry into the Modern Slavery Act 2018 and associated matters

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Legislative Council's Standing Committee on Social Issues inquiry into the *Modern Slavery Act 2018* (NSW) (**NSW Act**) and associated matters, with particular regard to the inquiry's Terms of Reference (**ToR**).

Table of Contents

1	Summary	2
2	Recommendations	2
3	ToR 1(a) the operability of the proposed anti-slavery scheme	4
4	ToR 1(b) the effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act	4
5	ToR 1(c) the intended application of the anti-slavery scheme with respect to charities and not for profit organisations, State Owned Corporations and local councils	5
6	ToR 1(d) the unintended consequences of drafting issues with the NSW Act, including with respect to the Human Tissue Act 1983 (NSW) and the sale and supply of human tissue	5
7	ToR 1(f) the risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the Criminal Code Act 1995 (Cth)	6
8	ToR 1(g) whether the passage of the Cth Act renders part or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps	7
9	ToR 1(h) the preferred course of action to address the matters identified	8
10	ToR 1(i) any other related matter	9

1 Summary

- 1.1 Australian Lawyers for Human Rights (**ALHR**) supports the modern slavery reporting scheme introduced by the NSW Act. It is commendable that NSW seeks to be a leading jurisdiction in combatting modern slavery, both in Australia and internationally.
- 1.2 ALHR notes that, by having a lower reporting threshold than the *Modern Slavery Act 2018* (Cth) (**the Cth Act**), the NSW Act extends the scope of legislative modern slavery reporting to cover some 1650 additional reporting entities.¹
- 1.3 ALHR is of the view that the inclusion of penalties for non-compliance and the provision for an Anti-Slavery Commissioner in the NSW Act represents key improvements, not only in comparison to the Cth Act, but also on comparable modern slavery reporting laws worldwide. In this regard, voluntary schemes, or mandatory schemes without attached penalties, tend to be less effective, as exemplified by the *Modern Slavery Act 2015* (UK) where compliance with the minimum reporting requirements is at a low twenty-three percent (23%).² In this respect, the NSW Act is leading the way globally in terms of legislative action to address the scourge of modern slavery in corporate supply chains.
- 1.4 ALHR has previously made submissions on the NSW Act, with reference to how the NSW scheme is complementary to the Cth Act, however, the NSW Act needs to be further harmonised, as far as possible, with the reporting requirements provided for in the Cth Act.³
- 1.5 ALHR's key recommendation is that the forthcoming guidance material⁴ should clarify the requirements and penalties for all entities with employees in NSW with an annual turnover of more than \$50 million, as well as amending the draft Modern Slavery Regulation 2019 (NSW) (**the draft Regulation**) as set forth in our recent submission.⁵

2 Recommendations

- 2.1 The forthcoming guidance material should clarify the requirements and penalties for all entities with employees in NSW with an annual turnover of more than \$50 million. In particular, the guidance material should highlight that entities with employees in NSW with an annual turnover of between \$50 million and \$100 million who voluntarily opt into the Commonwealth reporting regime are not relieved of their NSW business reporting requirements and associated penalties.

¹ NSW Government, Submission 1 to the Legislative Council Standing Committee on Social Issues on the *Modern Slavery Act 2018 (NSW) and associated matters*, 6 August 2019, p6.

² See the most recent analysis of the modern slavery statements provided by the Modern Slavery Registry, n.d., available at: <https://www.modernslaveryregistry.org/>. Accessed 30 September 2019.

³ Australian Lawyers for Human Rights, Submission to the NSW Department of Premier and Cabinet on the draft Modern Slavery Regulation 2019 (NSW) and Section 24 of the *Modern Slavery Act 2018* (NSW), 13 September 2019, p3 at [2.14]; Australian Lawyers for Human Rights, Feedback Letter to the Attorney General for New South Wales, *Modern Slavery Bill 2018*, 20 June 2018, p2 at [3].

⁴ NSW Premier & Cabinet, Explanatory Paper: Supply Chain Reporting Requirement for Business on the draft Modern Slavery Regulation 2019, June 2019, p3.

⁵ Australian Lawyers for Human Rights, Submission to the NSW Department of Premier and Cabinet on the draft Modern Slavery Regulation 2019 (NSW) and Section 24 of the *Modern Slavery Act 2018* (NSW), 13 September 2019.

2.2 Reiterating ALHR's recent submission on the draft Regulation:

- 2.2.1 A public list of entities required to report under the NSW Act should be created;
 - 2.2.2 There should be sanctioning for three years in relation to the publishing of the public register pursuant to s 26(1) of the NSW Act;
 - 2.2.3 Amend clause 8(6) of the draft Regulation to provide that the statement register is kept separately to the public register; and
 - 2.2.4 In the event that the combined public register is implemented as proposed, the register must focus on highlighting best practice in identifying, disclosing and responding to risks of modern slavery in supply chains.⁶
- 2.3 The NSW Act and the draft Regulation should apply to charities and not-for-profits that meet the stated criteria. But we support reconsidering the exemption for these entities after the first reporting period should it be found that it is impractical or counterproductive for such entities to engage meaningfully in identifying the risk of modern slavery in their supply chain.
- 2.4 Until the Commonwealth organ trafficking laws are amended, s 32 of the *Human Tissue Act 1983* (NSW) should not be repealed as there are currently inadequate legal protections regarding trafficking in human organs, both domestically and internationally.
- 2.5 Provisions on 'slavery', 'servitude' and 'child forced labour' should be dealt with separately in the NSW Act.
- 2.6 The current s 91HAB of the NSW Act should be amended to include 'postal or similar services' to capture non-digital vehicles that may be misused for this conduct.
- 2.7 Section 93AB(2)(a) of the NSW Act should be amended to include a statutory definition of forced labour applicable to all persons. Further, the NSW Act should retain the separate offence of child forced labour.
- 2.8 Should any inconsistency exist between s 24 of the NSW Act, clause 7 of the draft Regulation, and s 16(1) of the Cth Act, it is not to be dealt with by diluting NSW provisions but rather by using the NSW anti-slavery scheme as an exemplar to lift the Cth Act at its three-yearly statutory review.
- 2.9 The draft Regulation and the draft *Modern Slavery Amendment Bill 2019* (NSW) (**the Bill**) are brought into effect as soon as possible.
- 2.10 In order to minimise additional burden on NSW entities that are required or choose to report under the Cth Act, the public repositories under the NSW and Commonwealth schemes should be unified, or allow, as a minimum, for cross-referencing.

⁶ Australian Lawyers for Human Rights, Submission to the NSW Department of Premier and Cabinet on the draft Modern Slavery Regulation 2019 (NSW) and Section 24 of the *Modern Slavery Act 2018* (NSW), 13 September 2019, p2 at [1.1.1-1.1.4].

3 ToR 1(a) the operability of the proposed anti-slavery scheme

- 3.1 The modern slavery reporting requirements in the NSW Act are, in substance, complementary to the Cth Act. The NSW Act applies to commercial organisations with employees in NSW with an annual turnover between \$50 million and \$100 million. Reporting entities that have a consolidated revenue of \$100 million or more are regulated by the Cth Act. Entities over the \$100 million threshold are exempt from the reporting requirements pursuant to s 24 of the NSW Act.⁷
- 3.2 Pursuant to s 24(8) of the NSW Act voluntary reporters and subsidiaries of reporting entities under the Cth Act are exempt from ss 24(2)-(6) of the NSW Act.⁸
- 3.3 ALHR has previously made submissions calling for the harmonisation of the NSW and Cth modern slavery reporting requirements, and therefore welcomes the removal of unnecessary duplication. We also support the alignment of the NSW Act, via its draft Regulation, with the Cth Act in the following areas: mandatory criteria for modern slavery statements (reg 7); director sign-off and board approval of statements (reg 5); reporting timeframes (reg 8(2)); and publication of statements on a statement register (reg 8(1)(3)(4) and (5)).
- 3.4 However, we are concerned that the NSW Act and draft Regulation do not clearly state the obligations and penalties for entities that are required to report under the NSW Act but who voluntarily opt into the Cth reporting regime.
- 3.5 The explanatory paper to the draft Regulation references practical guidance material that is being developed to help businesses comply with the requirements of the NSW Act and the Regulation.⁹ This material would be necessary to clarify to businesses, civil society and other interested parties the requirements under the NSW anti-slavery scheme.
- 3.6 For the avoidance of doubt, ALHR recommends that the forthcoming guidance material should clarify the requirements and penalties for all entities with employees in NSW with an annual turnover of more than \$50 million. In particular, the guidance material should highlight that entities with employees in NSW with an annual turnover of between \$50 million and \$100 million who voluntarily opt into the Commonwealth reporting regime are not relieved of their NSW business reporting requirements and associated penalties.

4 ToR 1(b) the effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act

- 4.1 ALHR welcomes the supply chain reporting obligations pursuant to s 24 of the NSW Act and the accompanying draft Regulation to outline how businesses are to comply with this section.

⁷ NSW Premier & Cabinet, Explanatory Paper: Supply Chain Reporting Requirement for Business on the draft Modern Slavery Regulation 2019, June 2019, p16.

⁸ Ibid, p17-18.

⁹ Ibid, p3.

- 4.2 ALHR reiterates its recent submission with recommendations to amend the draft Regulation, which would give greater effect to the supply chain reporting obligations. See also para 2.3 above.

5 ToR 1(c) the intended application of the anti-slavery scheme with respect to charities and not for profit organisations, State Owned Corporations and local councils

- 5.1 ALHR welcomes the clarification of the effect of s 24(1) of the NSW Act which applies to charities and not-for-profit organisations that supply goods or services for profit; have employees in NSW; and meet the turnover threshold. ALHR notes that the relevant turnover is only that derived from the supply of goods and services for profit or gain.¹⁰ ALHR has previously called for the harmonisation of the NSW and Cth Acts and this outcome is consistent with the position of charities and not-for-profits under the Cth Act.¹¹
- 5.2 The exemption for charities and not-for-profit organisations pursuant to s 24(8) of the NSW Act and the regulation 10(4) of the draft Regulation aim to address the proportionally greater administrative burden and increased compliance costs presented by the NSW Act for these organisations compared with larger organisations.¹² ALHR notes that this exemption will be reconsidered following the first reporting period.¹³
- 5.3 ALHR supports the reconsideration of this exemption after the first reporting period, in light of recent developments in the charity sector which have made it even more challenging for charities to know their supply chain.¹⁴
- 5.4 ALHR recommends that the NSW Act and the draft Regulation should apply to charities and not-for-profits that meet the stated criteria. However, ALHR supports reconsidering the exemption for these entities after the first reporting period should it be found that it is impractical or counterproductive for such entities to engage meaningfully in identifying the risk of modern slavery in their supply chain.

6 ToR 1(d) the unintended consequences of drafting issues with the NSW Act, including with respect to the Human Tissue Act 1983 (NSW) and the sale and supply of human tissue

- 6.1 ALHR is concerned that the current Commonwealth organ trafficking offences do not capture conduct of trafficking in human organs which occurs overseas, in particular the illicit removal of organs from living or deceased persons and the solicitation of commercial organ transplants.

¹⁰ NSW Government, Submission 1 to the Legislative Council Standing Committee on Social Issues on the *Modern Slavery Act 2018(NSW) and associated matters*, 6 August 2019, p8.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ NSW Premier & Cabinet, Explanatory Paper: Supply Chain Reporting Requirement for Business on the draft Modern Slavery Regulation 2019, June 2019, p19.

¹⁴ Paul Tavatgis, The Changing Face of F2F, *Fundraising and Philanthropy Magazine*, 28 March 2018, available at: <https://www.fpmagazine.com.au/changing-face-f2f-355220/>. Accessed 1 October 2019.

- 6.2 We note that in November 2018 the Federal Government published its report, *Compassion, not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism (the Report)*.¹⁵
- 6.3 Relevantly, Recommendation 7 of the Report calls for amendments to the *Criminal Code 1995 (Cth)* in relation to the solicitation of commercial organ transplants with the effect that such laws have extraterritorial application.
- 6.4 Further, the Report recommends that the Australian Government work with the medical profession and transplant registries to consider “the appropriate parameters, protections, and other considerations, to support a mandatory reporting scheme whereby medical professionals have an obligation to report, to an appropriate registry or authority, any knowledge or reasonable suspicion that a person under their care has received a commercial transplant or one sourced from a non-consenting donor, be that in Australia or overseas.”¹⁶
- 6.5 The recent findings by the China Tribunal¹⁷ highlight Australia’s need to have adequate legal protections regarding trafficking in human organs. The Tribunal found, unanimously and beyond reasonable doubt, that “in China forced organ harvesting against prisoners of conscience has been practiced for a substantial period of time involving a very substantial number of victims.”¹⁸
- 6.6 Given the Report and the recent findings by the China Tribunal, ALHR recommends that, until the Commonwealth organ trafficking laws are amended, s 32 should not be repealed as there are currently inadequate legal protections regarding trafficking in human organs, both domestically and internationally.

7 ToR 1(f) the risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the Criminal Code Act 1995 (Cth)

- 7.1 ALHR welcomes Item 1 of the Bill, as the new wording of s 5 of the NSW Act clarifies the initial drafting ambiguity in that the definition of ‘modern slavery’ by itself does not create an offence or affect the scope of the existing offences.
- 7.2 ALHR welcomes Item 26 of the Bill, as s 91HAA of the NSW Act could raise a constitutional challenge as inconsistent with s 473.5 of the *Criminal Code 1995 (Cth)*, which clearly states a person is not using a carriage service by engaging in particular conduct if acting in the capacity of a carrier, carriage service provider, internet service provider or internet content host.
- 7.3 ALHR welcomes Item 31 of the Bill, which amends the territorial scope of section 93AB of the NSW Act (to be inserted into the NSW Crimes Act) to clearly be within the jurisdiction of NSW. This amendment avoids a potential inconsistency with the Commonwealth offence of slavery (s 270.3) which requires the Attorney-General’s

¹⁵ The Parliament of the Commonwealth Australia, November 2018, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Tabled_Reports. Accessed 1 October 2019.

¹⁶ Ibid, pxxiv.

¹⁷ Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, 7 June 2019, available at: <https://chinatribunal.com/final-judgement-report/>. Accessed 1 October 2019.

¹⁸ Ibid, n.p.

- consent to proceed to prosecute where the offence occurred outside Australia, and the Commonwealth offences of servitude (s 270.5) and forced labour (s 270.6A), when committed wholly outside Australia, require that the perpetrator is an Australian citizen, resident or body corporate (s 15.2).
- 7.4 ALHR welcomes Item 32 of the Bill, which clarifies that in a situation where two children are forcibly married, neither is to be guilty of the offence set out in 93AC of the NSW Act (to be inserted into the NSW Crimes Act). Prosecuting these offences is challenging as the perpetrators will invariably always be close family relatives of the victims.
- 7.5 The current s 91HAB of the NSW Act (to be inserted into the Crimes Act 1900 (NSW)), on 'Encouraging use of a digital platform to deal with child abuse material', refers to a 'digital platform' only. However, s 91G of the NSW Act (to be inserted into the Crimes Act 1900 (NSW)), on 'Children not to be used for production of child abuse material', is silent on such a distinction. Amending current s 91HAB to apply to other channels, including postal or other services, would make it also consistent with relevant provisions under Div. 474 of the Criminal Code 1995 (Cth) addressing misuse of a carriage service provider as well as provisions under Div. 15A of the Crimes Act 1900 (NSW) relating to 'child abuse material'.
- 7.6 Section 93AB of the NSW Act groups the offences of 'slavery, servitude and child forced labour' into the one provision, despite this relating to quite different conduct. This is not consistent with the *Criminal Code 1995* (Cth), which defines these offences separately.
- 7.7 Further, s 93AB(6) of the NSW Act expressly incorporates the Commonwealth definition of 'slavery' (Div. 270.1) and 'servitude' (Div. 270.4), but it does not expressly incorporate the Commonwealth definition of 'forced labour' (Div. 270.6). The definition of 'forced labour', as defined under the *Criminal Code 1995* (Cth), is incorporated in s 5 of the NSW Act but the Commonwealth definition applies to all persons, rather than being limited to 'children' only.
- 7.8 ALHR recommends that provisions on 'slavery', 'servitude' and 'child forced labour' are dealt with separately in the NSW Act.
- 7.9 ALHR recommends that current s 91HAB of the NSW Act be amended to include 'postal or similar services' to capture non-digital vehicles that may be misused for this conduct.
- 7.10 ALHR recommends that section 93AB(2)(a) be amended to include a statutory definition of forced labour applicable to all persons. Further, the NSW Act should retain the separate offence of child forced labour.
- 8 ToR 1(g) whether the passage of the Cth Act renders part or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps**
- 8.1 As noted above, the passage of the NSW Act complements the Cth Act by targeting an additional group of businesses, those with employees in NSW with an annual turnover not less than \$50 million and up to \$100 million.

- 8.2 ALHR notes that entities with employees in NSW with an annual turnover between \$50 million and \$100 million who voluntarily opt into the Commonwealth reporting regime are still required to provide the NSW Anti-Slavery Commissioner with a copy of the modern slavery statement pursuant to the proposed regulation 10(1)(d) and 10(2)(d) of the draft Regulation.
- 8.3 ALHR also notes that those entities in NSW who are either required to report under, or voluntarily opt into, the Commonwealth reporting regime will have their modern slavery statements made public through the statement register pursuant to s 18 of the Cth Act. Thus, in practical terms, the requirement of public reporting under the NSW Act will still be met when entities choose to report under the Commonwealth scheme.
- 8.4 ALHR further notes that, under the draft Regulation, entities that opt into the Cth Act's voluntary reporting regime are exempt from s 24(1)(2) and s 24(1)(6) penalties under the NSW Act. However, this disapplication, in practice, is nullified by regulations 10(1)(d) and 10(2)(d) of the draft Regulation and the statement register pursuant to s 18 of the Cth Act.
- 8.5 There is, however, a pragmatic need for consistency and harmonisation between the NSW and Commonwealth anti-slavery schemes to avoid forum shopping by NSW reporting entities with an annual turnover between \$50 million and 100 million who may voluntarily elect to report under the Cth Act, if the Cth scheme appears less onerous.
- 8.6 Further, businesses within the scope of the NSW Act may fluctuate between an annual turnover between \$50 million to \$100 million, and annual consolidated revenue of more than \$100 million. In such cases, inconsistencies in reporting under the NSW and Cth Acts will invite unnecessary regulatory confusion. It is likely such a business would elect to voluntarily report under the Cth Act to avoid confusion.
- 8.7 ALHR recommends that should any inconsistency exist between s 24 of the NSW Act, clause 7 of the draft Regulation and s 16(1) of the Cth Act, that this is not to be dealt with by diluting the NSW provisions, but rather by using the NSW anti-slavery scheme as an exemplar to lift the Cth Act at its three-yearly statutory review.

9 ToR 1(h) the preferred course of action to address the matters identified

- 9.1 ALHR is of the view that the NSW Act is not to be repealed as the NSW anti-slavery scheme is not only necessary but critical to ensuring that NSW leads the global legislative action to address the scourge of modern slavery in corporate supply chains.
- 9.2 The forthcoming guidance materials will be necessary to clarify some of the potential discrepancies and inconsistencies between the NSW and Commonwealth anti-slavery schemes.
- 9.3 ALHR recommends that the forthcoming guidance materials clarify the requirements and penalties for all entities with employees in NSW whose annual turnover is over \$50 million, as well as in relation to all other matters arising following this consultation period.

9.4 ALHR recommends that the draft Regulation and Bill are brought into effect as soon as possible.

10 ToR 1(i) any other related matter

10.1 ALHR recommends that, in order to minimise additional burden on NSW entities that are required or choose to report under the Cth Act, the public repositories under the NSW and Commonwealth schemes should be unified, or allow, as a minimum, for cross-referencing. This will also facilitate more accessible and easier identification by civil society, and other interested parties, as to the entity's modern slavery statement and the scheme to which it applies.

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

president@alhr.org.au

Yours faithfully

Kerry Weste
President
Australian Lawyers for Human Rights
president@alhr.org.au

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.

Contributors

Jessica Hatherall, Natalia Szablewska, Madeleine Bridgett, Olivia Dean, Charles Wilson, Tamara Dawood.

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.