



Australian Government
Department of Home Affairs

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Modern Slavery Bill 2018

Australian Government Submission

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INTRODUCTION

The Department of Home Affairs (the Department) is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Modern Slavery Bill 2018 (the Bill). The Department has developed this submission on behalf of the Australian Government to provide the Committee with additional context about key aspects of the Bill. This submission supplements the information provided in the extrinsic materials for the Bill.

Purpose and development of the Modern Slavery Bill 2018

The Bill will establish a national Modern Slavery Reporting Requirement (reporting requirement). This will require certain entities in Australia to issue annual Modern Slavery Statements (statements) detailing their actions to assess and address modern slavery risks in their operations and supply chains. Further information about the structure and operation of the Bill is set out in the Explanatory Memorandum.

The reporting requirement will support the Australian business community to respond to modern slavery by providing a practical, risk-based framework for transparency. This will increase business awareness of modern slavery, reduce modern slavery risks in Australian goods and services, and drive a business 'race to the top' to improve workplace standards and practices. The reporting requirement will also increase information available to consumers and investors.

The Government has worked closely with business and civil society to develop the Bill through extensive national consultations. These consultations commenced with the release of a detailed public consultation paper in August 2017 and included twelve stakeholder roundtables with over 130 attendees and 99 written submissions. The Government also held targeted consultations with over 40 expert stakeholders on an exposure draft of the Bill in May 2018. A summary of the consultation roundtables and copies of relevant submissions are available online.¹ In addition to these consultations, the Government carefully considered similar legislation in other jurisdictions, including the United Kingdom (UK) Modern Slavery Act 2015.

Stakeholder feedback from the Government's consultations played a key role in shaping the scope and content of the Bill, including the definition of 'modern slavery'; the structure and wording of the mandatory reporting criteria; and the requirements for joint statements. The Government also carefully considered relevant recommendations made by the 2017 Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) Inquiry into establishing a Modern Slavery Act in Australia. The Government is currently coordinating a formal response to the full report and recommendations of the JSCFADT inquiry.

¹ See: <https://www.homeaffairs.gov.au/about/consultations/modern-slavery-supply-chains-reporting-requirement>

KEY ISSUES

The Government has carefully designed the reporting requirement to ensure it is effective, clear and practical for business to implement. The scope and content of the reporting requirement has been tested through extensive consultations and the key features of the scheme are appropriate for the Australian context. In the 2018/19 budget, the Government committed to ensuring the reporting requirement is implemented effectively and will establish a \$3.6 million Modern Slavery Business Engagement Unit to provide advice and support to business. Extensive guidance materials will be developed in consultation with business and civil society. To ensure the reporting requirement remains effective, the Government has committed to review the operation of the scheme after three years.

Definition of modern slavery

For the purpose of the reporting requirement, the Bill defines modern slavery broadly to include all forms of trafficking in persons, slavery and slavery-like practices, and the worst forms of child labour. This definition ensures that the scope of entities' reporting will be consistent with community expectations.

The definition of modern slavery applies to conduct that occurs within Australia as well as overseas. Importantly, this definition also applies to modern slavery conduct irrespective of the industry or context in which it occurs. For example, the definition of modern slavery could encompass exploitation in mining or agricultural contexts, as well as the trafficking or exploitation of children in orphanages.

Detailed explanatory information about the definition of 'modern slavery', including case studies, will be provided in guidance material. This guidance material will also include information about high risk industries and contexts and specific information for particular sectors, such as the travel and tourism industry.

Consistency with regulation in other jurisdictions

The reporting requirement will form part of a growing international regulatory regime and builds on lessons learned in other jurisdictions. The reporting requirement significantly improves on similar legislation overseas, including by: setting mandatory reporting criteria; covering the Australian Government; establishing a dedicated register for statements; providing a clear framework for entities to give joint statements; including the worst forms of child labour; and setting a legislated six month deadline for reporting.

Consultations demonstrated strong business and civil society support for a single, national reporting requirement. Consultations also highlighted that it is impractical to require entities to report on their supply chains in multiple forms across multiple jurisdictions. The reporting requirement has been carefully designed to ensure that entities operating in both Australia and the UK have the option of providing the same statement in each jurisdiction. This will be possible as long as the statement meets the criteria and requirements set out in each jurisdiction.

Scope of the Modern Slavery Reporting Requirement

The reporting requirement will apply to entities with over \$100 million annual consolidated revenue. The Government has set the initial revenue threshold at \$100 million to ensure the reporting requirement covers those entities that have the resources to meaningfully comply and the leverage and market influence to effect change in their supply chains. The Bill also specifically provides that entities below the revenue threshold are able to voluntarily 'opt in' to the reporting requirement. The appropriateness of the \$100 million revenue threshold will be assessed as part of the three year review of the reporting requirement, as required and outlined in the Bill.

Alternate revenue thresholds were considered in developing the Bill. Lowering the revenue threshold would significantly increase the number of reporting entities. This would limit Government and civil society's ability to advise and support reporting entities, ensure reporting entities are aware of their obligations and monitor the quality of statements. Importantly, feedback from the consultations indicates that a substantial number of entities that meet the \$100 million revenue threshold will require intensive support to manage their reporting obligations. A lower reporting threshold would impose a significant burden on entities that have limited capacity to comply with their reporting obligations. For example, smaller entities may not have dedicated sustainability teams or access to internal legal counsel. These smaller entities are also less likely to be able to influence supplier practices.

It is not considered necessary to align the revenue threshold for the Australian reporting requirement with the £36 million (approximately AUD\$65 million) revenue threshold set by the UK Modern Slavery Act. The threshold set by the UK legislation reflects the UK context and aligns with existing definitions of large companies in UK law. There is not a direct parallel to this threshold in Australian law or practice. It is not anticipated that this difference in thresholds will mean that significant numbers of Australian entities will be required to report in the UK but not in Australia. To date, at least 26 Australian entities have published statements in compliance with the UK Modern Slavery Act. Each of these entities would meet the \$100 million revenue threshold for the Australian reporting requirement. The Department also notes that transparency legislation in California sets a higher threshold of USD\$100 million.

Requiring reporting from entities in high risk sectors or focusing on high risk goods being imported into Australia are also not feasible alternatives to a revenue threshold. All large businesses have modern slavery risks, irrespective of their sector. Focusing reporting on certain sectors would create a confusing and complex reporting scheme. This is because large businesses may operate across multiple different sectors and available information about high risk goods and services is not sufficiently detailed to target reporting to specific sectors and countries. It would also be difficult in practice to determine and monitor the level of business an entity needs to conduct in a certain sector or country before it is required to report. A sector-based reporting requirement would also be inconsistent with existing legislation in the UK and California.

Targeting and inspecting goods imported into Australia that may be tainted by modern slavery is not a viable alternative to a reporting requirement. This approach would not address modern slavery risks related to goods within Australia or risks associated with entities' operations and supply chains outside Australia. This approach would also impose a significant compliance burden on importers rather than the entities responsible for producing, consuming or retailing goods that may be tainted by modern slavery. This approach would also have a significant resource impact on the Australian Border Force and could impede trade flows.

Publishing a list of entities required to report under the Modern Slavery Reporting Requirement

Consultations have carefully considered whether it is feasible to publish an accurate list of entities required to report. The reporting requirement is clearly outlined in the legislation, which sets the parameters of the reporting requirement. This provides businesses with clear and unambiguous guidance. The reporting requirement covers a wide range of entity types and structures, including public and private companies, partnerships, trusts, and other registered organisations, as well as foreign entities carrying on business in Australia.

Given the nature of the Australian economy, business revenues fluctuate and change. Careful consideration has been put into the extent to which existing Government lists, such as the Corporate Tax Transparency Report (CTTR), could be used to identify reporting entities. Importantly, the CTTR does not cover all reporting entities or align with the way reporting entities are likely to comply with the reporting requirement. For example, the CTTR identifies 'corporate tax entities' with \$100 million or more total Australian income. However, these corporate tax entities are not necessarily standalone entities and are sometimes part of larger corporate groups. This means that these entities may not need to provide statements under the reporting requirement. Additionally, the CTTR does not necessarily account for entities' foreign revenue or identify corporate groups with consolidated Australian revenue of \$100 million where these groups are not consolidated for tax purposes.

Further, a company erroneously included on a list and consequently identified as having failed to report may incur financial losses and reputational damage. The utility and accuracy of a list may also be limited in practice where reporting entities provide joint statements. For example, a corporate group may include multiple reporting entities that are covered through a single group statement.

Significant resources would also be required to maintain any complete and timely list and crosscheck the list with entities' statements. The establishment of a new Modern Slavery Business Engagement Unit (Unit) within the Department of Home Affairs will support the effective implementation of the proposed Modern Slavery Reporting Requirement (reporting requirement) and strengthen the Australian Government's engagement with business on modern slavery issues more broadly. Public reporting of the modern slavery reports by business is a more useful way to understand how business is responding to the legislated requirements.

Compliance with the Modern Slavery Reporting Requirement

The Bill does not include penalties for non-compliance with the reporting requirement. This is because compliance with the reporting requirement will primarily be driven by reputational risk and reward and market scrutiny. Under the reporting requirement, entities must make information available to the market about their actions to address modern slavery risks. This information will be scrutinised and considered by shareholders, business peers, consumers, civil society and potential investors.

Consultations have indicated that this market scrutiny will incentivise compliance and help drive a 'race to the top'. If entities do not comply with the reporting requirement or provide inadequate information they face tangible reputational risks and consequences. For example, consultations suggest that investors and lenders may consider the availability and quality of an entity's statements when considering whether to invest in that entity. Large entities may also require suppliers that meet the revenue threshold to provide a statement before contracts are awarded. In circumstances of egregious non-compliance, it would also be open to the Government to name non-compliant entities.

Conversely, the market will reward entities that adopt a best-practice approach to compliance. For example, industry bodies and civil society may highlight positive examples of compliance and consumers may use statements to inform their purchasing decisions. Entities will also be able to use their statements as evidence that they are addressing modern slavery risks. This may assist entities when tendering for contracts or

seeking capital investments. As in the UK and California, it is also likely that reporting entities in certain sectors will be ranked and evaluated through civil society benchmarking reports. Options are also being considered to identify and promote entities that demonstrate best-practice.

In addition, the feasibility of non-punitive measures to encourage compliance with the reporting requirement is being considered. For example, in the future consideration could be given to requiring entities (with over \$100 million revenue) to certify they have complied with the reporting requirement in order to tender with the Commonwealth. The benefits of this approach would have to be considered against the additional compliance burden that it would create. This could be achieved through amendments to Government procurement policies and would not require legislative change.

More broadly, the quantum of any proportionate penalties may not affect business compliance rates and would be difficult and resource intensive to enforce. The reputational impact of receiving a penalty for non-compliance can also be achieved through other means, including by publicly identifying non-compliant entities.

There is also a risk that penalties may limit Government's ability to foster a collaborative, multi-stakeholder approach to combating modern slavery and lead to a compliance-focused response from business. This collaborative approach is important to provide a supportive and safe environment for businesses to disclose and address potential modern slavery risks. It is anticipated that most cases of non-compliance over the initial three years of the reporting requirement will be due to a lack of awareness about the reporting requirement or misinterpretation of the entity's reporting obligations. These compliance issues can be best addressed by providing advice and support to business rather than through a penalty regime.

Providing support and advice to business, managing the Modern Slavery Register and undertaking awareness-raising and training are best undertaken by the dedicated Modern Slavery Business Engagement Unit rather than an Independent Anti-Slavery Commissioner. These functions require significant resources and time and it is unlikely any Commissioner could undertake this work while also carrying out a range of other statutory functions. Consultations also indicated that requiring entities to contact Government rather than an independent body for advice is unlikely to impact whether entities seek assistance. This approach is also consistent with the role of the UK Independent Anti-Slavery Commissioner, which does not include a formal, statutory responsibility to work with business. Australia already has a well-coordinated national response to modern slavery which is subject to robust oversight from Parliament, Government Ministers and civil society.

Recommendations made by the JSCFADT inquiry about compensation for modern slavery victims are also being considered. Each Australian state and territory jurisdiction has a victims' compensation scheme, which may be available to people who have been subject to modern slavery offences. It is also important to consider the extent to which it is appropriate to establish dedicated federal compensation schemes for specific crime types. Any new compensation scheme would also need to be developed through extensive consultations with civil society, potential applicants and the states and territories.