

**Senate Standing Committee on Legal and Constitutional Affairs
Modern Slavery Act (Australian Anti-Slavery Commissioner) Bill 2023**

**Submission by Emeritus Professor Paul Redmond AM,
Faculty of Law, University of Technology Sydney**

1. The focus of **this** submission is solely upon the proposed functions for the Australian Anti-Slavery Commissioner (ASC). As contained in the Amendment Bill, these seem to be decidedly wanting in ambition, scope and clarity.

What is the ASC to do? Functions of ASC: s20C

2. The McMillan Report on the *Modern Slavery Act 2018* (Cth) [Report of the review of the *Modern Slavery Act 2018* (Cth)] indicated that the specialist functions (ie, specific, non-generic **functions** conferred on most statutory regulators) was not his concern but that of a separate scoping project within the AGD (p106). The functions assigned under proposed s20C are presumably the product of this project.
3. The Attorney's Second Reading Speech on the Bill indicates that the ASC's core function is education and awareness raising with respect to modern slavery. Then follows other related functions: supporting victims by providing information about resources, programs and services, and engaging with them so that victims' voices inform the design of these measures; supporting business to address modern slavery risks; promoting research; advocating for continuous improvement in policy and practice, specifically in relation to systemic issues rather than individual cases. Indeed, the Attorney forecloses ASC investigation or direct dealing with individual matters of modern slavery; presumably, this is the preserve of the Australian Federal Police (AFP). Generally, the Bill preserves intact the existing domains of other organs within the Attorney-General's Department (AGD) such as the AFP and the Modern Slavery Business Engagement Unit (MSBEU). There is little elaboration of their nexus with the ASC beyond preserving existing roles of those agencies. Beyond education and community awareness, there is no clear role for the ASC within the modern slavery regulatory ecosystem.
4. The Attorney's speech seems to me to fairly describe the functions of the ASC as contained in proposed section 20C(1). It is a narrowly constrained role, incoherently emerging from the disordered jumble of functions listed in the paragraphs of s20(1). Indeed, the education function first listed by the Attorney appears belatedly as para (f); the Attorney's ordering of the

functions is a better guide to the underlying role conception than the statutory ordering which obscures role clarity.

5. The McMillan Report distinguished between two kinds of functions usually given to a statutory regulator or commissioner: 'there is a standard set of functions to pursue the objects of the statutory scheme, and specialist powers for the unique role of the office' (p106). Most of the powers contained in s20C(1) fall within the first category of generic functions, as exemplified by McMillan at p106. It is difficult to identify any *specialist* functions given to the ASC beyond education and community awareness raising. While McMillan noted that the specialist functions were to be determined by the separate AGD scoping project, none of the 11 possible functions that he identified from submissions made to him, with the sole exception of commissioning research, is contained in the Amendment Bill. Specific ASC functions appear to be a category of illusory reference beyond education, left to future political negotiation rather than legal specification, an undesirable *tabula rasa* which stacks the pack *ex ante* against the ASC in those negotiations. Unhelpfully, such functions beyond education as appear are expressed in s20C(1) through soft verbs such as *support, engage with, consult and liaise, advocate for* etc.
6. Before looking more closely at s20C(1), it is useful to note the evidence of the NSW Anti-slavery Commissioner (NSWASC), Dr James Cockayne, to the NSW Modern Slavery Committee, a joint committee of the Parliament, noted in its December 2023 report on the NSW *Modern Slavery Act 2018* (NSW). He stated that modern slavery remains dangerously undetected and unexposed in NSW, with only around 120 to 230 cases out of a possible 16,400 cases being reported each year, and that there is reason to believe that 80-98 percent of victim-survivors in the State remain unidentified, unassisted and unsupported (*Review of the Modern Slavery Act 2018*, 2.1). It is cautionary to recall that the McMillan Report found that there was no significant evidence that the MSA had caused meaningful change for victim-survivors of modern slavery; further, the report noted there was a competing view that reporting was not being taken seriously enough (p8).
7. Comments on individual functions appear below. While it is not desirable to set in stone specific functions for the ASC, nonetheless, some specificity is required to empower the Commissioner to play a distinctive, legitimate role with requisite authority. Query whether an appropriate balance between generality and specificity has been captured in s20C(1). I suggest it hasn't.

Proposed s20C: Functions of Commissioner

'Promote compliance with the Act' (s20(1)(a))

8. What specifically is intended by s20(1)(a)? This is a classic generic function of regulatory agencies. The EM at [20] contemplates that the ASC could undertake a range of activities that promote compliance with the Act. These would be 'distinct from the functions of the Modern Slavery Business Engagement Unit in AGD responsible for administering the Act, providing guidance and awareness raising to reporting entities on compliance with the Act, assessing modern slavery statements, and maintaining the modern slavery statements register.' What activities might feasibly be undertaken by the ASC under this function given the area marked out exclusively for the MSBEU and in light of the criminal enforcement functions reserved for the AFP (see below re s20C(1)(e))? It is not obvious that there is much space and scope to promote compliance with the reporting obligation; see also discussion below re s20C(1)(b).

'Support reporting entities to address modern slavery risks in operations and supply chains' (s20(1)(b))

9. The Act in its present form (pending the Government's response to the McMillan Review recommendation with respect to a due diligence provision) only imposes a reporting requirement. That requirement is administered by the AGD through the MSBEU. The EM at [20] contemplates that the ASC 'would not, as a general practice, provide tailored advice or financial support to entities to complete their modern slavery statements but may support businesses by developing targeted resources which promote best practice in addressing modern slavery risks'.
10. What specific role does this function give ASC in relation to the reporting requirement under MSA s16(1)? What is the relationship between the ASC and the MSBEU? Is there a clear division of labour and function? It seems from EM [20] that the *Guidance for Reporting Entities* document will continue under the control of the MSBEU. There is an unfortunate silence with respect to McMillan's Recommendation 27 for a declaration of high-risk matters to be made either by the Minister or the ASC. I suggest that the ASC is well placed to perform this specialist task, to accumulate information and expertise, and thereby enhanced authority for the office.
11. Professor McMillan considered positively suggestions received that government should embark on an active statement review program on the quality of modern slavery statements, to provide feedback and improve

reporting. These suggestions took several forms, ranging from a close analysis of every statement, conducting an audit program on selected batches of statements, or convening multi-stakeholder panels to do a batch analysis and prepare reports that would be taken up in other consultation forums. Professor McMillan thought that this was a matter that might appropriately be taken up by the ASC but made no recommendations in these terms given that a separate process was underway to establish the office (at p100-101). I respectfully agree that this is a task for which the ASC is well-suited, and might, in appropriately general terms, be explicitly stated as a means of shaping a distinct role for the ASC, wanting in the proposed s20C(1).

12. Under the NSW MSA s27 the NSWASC is given explicit power to develop codes of practice to provide guidance in identifying modern slavery within supply chains and the steps that can be taken to remediate or monitor identified risks. This would be a valuable addition to the Amendment Act. The NSWASC is currently developing a code of practice to address risks in renewable energy value chains (Report, 2.47). The NSW Bar Association submitted to the Committee the codes of practice should be developed for other industries including 'agriculture, manufacturing, hospitality, healthcare, mining and construction' (Report, 2.48). Again, it would help mark out a clear role for the ASC.
13. More specifically, I urge the substitution of the words 'to identify, assess and address' in lieu of 'to address risks' in s20C(1)(b). The current reference to 'address' alone obfuscates since s16(1) is concerned with more than the assessment of modern slavery risk, but extends also, inter alia, to its description and addressing. The proposed words also make clear that the obligation to describe modern slavery risk in MSA s16(1)(c) means to *identify risk through mapping* under the Guiding Principle 17 of the United Nations *Guiding Principles on Business and Human Rights* (UNGPs). This change would confirm alignment of s16 with the UNGPs, alignment made clear in the foundational documents for the MSA, confirmed in the *Guidance for Reporting Entities* but obscured by the language of 'describing' risk in s16(1)(c).

'Support collaboration and engagement within and across sectors in relation to addressing modern slavery (s20(1)(c))

'Consult and liaise' with governments and other persons and organisations on matters relating to modern slavery (s20(1)(i)), s20(1)(j))

14. The EM talks of 'an independent, high-profile specialist commissioner' with functions enabling them 'to work collaboratively with government, business, civil society, and other key stakeholders to support compliance with the Act, increased transparency in supply chains and fight modern slavery in Australia

and abroad' (EM, 16). Without specific functions to this end conferred by the Bill, the ASC receives neither guidance, authority nor legitimacy to ground these functions.

15. The suggestions for ASC functions made in submissions to the McMillan review included coordination of a whole-of-government response to modern slavery, both at national and federal level, including overseeing implementation of the *National Action Plan to Combat Modern Slavery 2020-25*, chairing the National Roundtable on Human Trafficking and Slavery, and liaising with the Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking (at p106).
16. A like suggestion was for the ASC to improve coordination between criminal justice agencies in identifying and prosecuting modern slavery cases, receiving incident reports from business, referring matters for investigation, and assisting in the prosecution of offenders. There seems value in such a function but does the soft *support* language ground a leadership role in this and other forms of engagement and coordination?
17. The report of the NSW Modern Slavery Committee referred to the evidence of the NSWASC that cooperation with the Australian ASC is 'likely to take on increased importance in the years ahead.' The NSWASC suggested amending the NSW Act to make collaboration with other Australian and overseas actors a specific function of the Commissioner ([2.145]). Again, the soft language of '*support*' and '*consult and liaise*' are an uncertain foundation for a leadership role.
18. The NSWASC has met with frontline workers in criminal justice, healthcare, homelessness, disability, women's safety, family violence, child protection; they indicated that they want additional resources and training to improve their ability to recognise and assess vulnerability to modern slavery and prevent victimisation (Report, 2.52). Cooperation and coordination with the NSWASC is important to avoid duplication and also avoid the burden upon victims and actors like these frontline workers of multiple consultations.
19. There is an asymmetry between the Australian and NSW Acts. The NSW Act no longer contains a reporting requirement; its first object is to combat modern slavery; other objects include assistance and support for victims, detection and exposure of modern slavery; raising community awareness and providing education. The NSW Act provides explicitly for a complaints hotline although it is not yet been established. The NSWASC considers, with the establishment of the Australian ASC, it is likely that calls to the NSW hotline will come from other States and Territories. This does not seem

fanciful and points to the need for, at least, referral between the two agencies and ideally the creation of a national hotline with articulated support and enforcement responses (Report, 2.142-3).

'Support victims of modern slavery by providing information in relation to government and non-government resources, programs and services' (s20(1)(d))

'Engage with ... victims of modern slavery to inform measures for addressing modern slavery' (s20(1)(e))

20. Even these support and engagement roles are hedged about and constrained in the proposed s20C(1). The ASC 's support for victims is limited to providing information about resources and services. The ASC may not investigate or resolve complaints concerning individual instances, or suspected instances, of modern slavery: s20C(2). EM [19] says that this is for law enforcement.
21. But the AFP is effectively powerless in relation to modern slavery in offshore supply chains Australian entities, and legally so in most cases.¹ The incidence of offshore modern slavery in low labour cost, poorly regulated countries likely dwarfs that occurring onshore. From the outset, Australian proposals for modern slavery regulation have extended to offshore harms. And, of course, complaints relating to off-shore modern slavery in the supply chains of operations of Australian reporting entities and their controlled entities are something of great concern to those reporting entities. Receiving and, if appropriate for policy input, assessing and investigating such complaints, even if their resolution is beyond the capacity of the ASC, is important for the ASC's function of engaging with victims. The ASC might, through such knowledge, inform measures for addressing modern slavery, and promote compliance with the Act by reporting entities, the latter function specified in s20C(1)(a) but without evident content.
22. Further, the definition of modern slavery in MSA s4 includes conduct, on-shore and off-shore, that is not an offence under *Criminal Code* Divs 270 and 271 and therefore may not be the subject of AFP enforcement. Specifically, these are paras (c) and (d) of the definition:
- trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

¹ The slavery offences have the widest extended geographical reach and apply to conduct occurring either within or outside Australia (*Criminal Code Act 1995* (Cth), Schedule: The Criminal Code, s15(4)); however, where the conduct occurs wholly outside Australia, the slavery-like offences (viz, servitude, forced labour, deceptive recruiting for labour or services, forced marriage, and debt bondage) and the trafficking in persons offence apply only where a result of the conduct occurs wholly or partly in Australia or the offender is an Australian citizen, resident or corporation (s15.2(1)).

Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27) or

- the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

23. There is a question as to the scope for the practical operation of these paragraphs and, if significant, a window of opportunity potentially available to the ASC to contribute, through investigation of complaints, to policy formation to secure their elimination.

24. Further, the contemplated pathways for the ASC to inform measures for addressing modern slavery under s20C(1)(e) are unnecessarily constrained. Thus, the ASC may provide advice to the Minister on matters relating to modern slavery but only at the request of the Minister: s20(1)(l). Similarly, the ASC may advocate to the Commonwealth Government under s20(1)(k) on matters relating to modern slavery, including for continuous improvement in policy and practice, but not in individual cases: EM, [18].

'Support, encourage and conduct education and community awareness initiatives relating to modern slavery' (s20(1)(f));

'Support, encourage and evaluate research about modern slavery' (s20(1)(g));

'Collect etc information relating to modern slavery' (s20(1)(h))

25. We arrive at last at what seems to be the core remit of the ASC. While these are important functions, the ASC could and, in my submission, should do much more.

Other functions

26. The MSA requires the Australian Government to prepare a modern slavery statement. In contrast, NSW legislation imposes duties on government agencies and councils to 'take reasonable steps' to ensure that goods and services they procure are not the product of modern slavery. The NSW Procurement Board also has the power to issue directions about reasonable steps to be taken in procurement. The Commonwealth MSA does not create similar duties. It would be helpful if the ASC were given an explicit function and authority with respect to protection against modern slavery in Commonwealth procurement and an authoritative role in the policy formation and oversight process of Commonwealth procurement. Of course, there is much to commend in adoption of the NSW legislative provisions.