

Human
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Submission to the Senate Legal and
Constitutional Affairs Committee for the Inquiry
and Report on the Modern Slavery Amendment
(Australian Anti-Slavery Commissioner) Bill
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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre has a strong focus on legal and policy reforms to prevent and address forced labour in the operations and supply chains of Australian companies. We have jointly published several research reports evaluating the effectiveness of Australia's modern slavery laws,¹ and have previously provided advice to the Australian Government on these issues through the Modern Slavery Expert Advisory Group and Advisory Group on the Implementation of the UN Guiding Principles on Business & Human Rights.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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¹ Amy Sinclair and Freya Dinshaw, 'Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act' (February 2022); Freya Dinshaw, Justine Nolan, Christina Hill, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss and Peter Keegan, 'Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act' (November 2022); Human Rights Law Centre, 'Submission to the Modern Slavery Act 2018 (Cth) Review' (22 November 2022).

Executive Summary

The Human Rights Law Centre welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee for the inquiry of the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Cth) (the Bill).

We strongly support the Government's proposal to introduce an independent Anti-Slavery Commissioner (the Commissioner) to help oversee and improve compliance with the *Modern Slavery Act 2018* (Cth) (the Act).

A well-resourced, empowered, and independent Anti-Slavery Commissioner is critical to improving the Act's efficacy and helping to protect the rights of workers in Australian supply chains. It has been recommended by a wide range of stakeholders and several previous inquiries, as well as the recent Modern Slavery Act Review undertaken by Professor John McMillan, AO (the Review).²

The Commissioner has the potential to help position Australia as a global leader in tackling modern slavery and to advance Australia's obligations to respect and uphold human rights, including under the Protocol to the Forced Labour Convention and the United Nations Guiding Principles on Business and Human Rights.³

The role will also be central to the successful implementation and oversight of any further reforms to strengthen the Act in accordance with the Review's recommendations, including the potential introduction of penalties and due diligence obligations on companies.

In our view, however, the functions and powers of the Commissioner as listed in the current Bill need to be strengthened and its resourcing expanded if it is to meet this potential.

Currently, the Commissioner's role as set out in the Bill appears largely ambassadorial. Its functions are restricted to awareness raising, supporting collaboration, and disseminating information and advice to government and other stakeholders. It has no role in investigating suspected cases of modern slavery and its direct support for workers and individuals subjected to modern slavery is limited to providing information on existing support services and programs.

Given the acknowledged problems with the Act to date, it is vital that the Commissioner be given the powers and resources needed to perform their role effectively and drive the changes to corporate practices necessary to tackle modern slavery.

In particular, it is critical that the Commissioner be empowered to help monitor and enforce compliance with the Act (including through the administration of penalties and infringement notices where appropriate); receive and handle complaints and undertake investigations regarding suspected instances of modern slavery. The budget for the office should be expanded to support these functions.

² Parliament of the Commonwealth of Australia, '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/Financial_report>, Recommendations 1 and 6; Parliament of Australia, 'An inquiry into human trafficking, slavery and slavery-like practices' (18 July 2017)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Humantrafficking45/~/_media/Committees/le_ctte/Humantrafficking45/report.pdf>, Recommendation 9; Parliament of Australia, 'Modern Slavery Bill 2018 (Provisions)'

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ModernSlavery>.

Recommendation 3; Parliament of Australia, 'Customs Amendment (Banning Goods Produced by Uyghur Forced Labour Bill 2020'

<https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1284>.

Recommendation 12; Professor John McMillan AO, 'Report of the statutory review of the Modern Slavery Act 2018 (Cth)' (2023), 94.

³ International Labour Organization, 'Protocol of 2014 to the Forced Labour Convention' (1930); United Nations High Commission on Human Rights, 'Guiding Principles on Business and Human Rights' (2011).

Recommendations:

1. We recommend that the Bill be enacted with the following amendments:
 - a. The functions of the Anti-Slavery Commissioner listed in Schedule 1, item 20C(1) should be expanded to include:
 - i) Monitoring and enforcing compliance with the Act;
 - ii) Undertaking investigations for the purpose of detecting and exposing cases of modern slavery; providing assistance and support to victims; and referring matters for criminal investigation;
 - iii) Receiving and handling complaints about potential cases of modern slavery and facilitating access to remedy.
 - b. The Commissioner should be given statutory powers to undertake these functions effectively, including enforcement powers and investigatory powers to compel the production of information or records, enter or search premises and direct people or organisations to co-operate with their investigations.
2. The budget for the Commissioner should be significantly expanded to enable the Anti-Slavery Commissioner to effectively drive the changes needed to tackle modern slavery.

1. Monitoring and enforcement

The Commissioner should have a key role in overseeing the monitoring and enforcement of the Act to improve reporting and ensure that companies are taking their obligations under the Act seriously.

The lack of any enforcement mechanism under the current Act has been one of its most consistently criticized failings,⁴ and the Review has recommended the introduction of penalties to address this, in addition to a mandatory requirement that reporting entities undertake human rights due diligence on their operations and supply chains.⁵

In his final report, Professor McMillan noted that the Commissioner could have an important role to play in both areas and suggested several possible ways the role could be used to oversee and improve compliance with the Act:⁶

- **Regulatory oversight:** The Commissioner could monitor faithful compliance by auditing selected batches of statements or appointing an independent auditor to examine compliance with the due diligence procedure;
- **Regulatory enforcement:** The Commissioner could issue infringement notices where companies are found not to have complied with their obligations, akin to the operation of the *Illegal Logging Prohibition Act 2012* (Cth);

⁴ Human Rights Law Centre, 'Submission to the Modern Slavery Act 2018 (Cth) Review' (22 November 2022), 15; Freya Dinshaw, Justine Nolan, Christina Hill, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss and Peter Keegan, 'Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act' (November 2022), 3; Amy Sinclair and Freya Dinshaw, 'Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act' (February 2022), 8.

⁵ Professor John McMillan AO, 'Report of the statutory review of the Modern Slavery Act 2018 (Cth)' (2023), 94.

⁶ *Ibid*, 9, 30 & 70.

- **Penalties:** The Commissioner could be authorised to commence court proceedings for a penalty to be imposed against a company, akin to the illegal logging and anti-money laundering schemes.⁷

In the current Bill, however, the Commissioner's functions include only "promoting compliance" with the Act,⁸) and "supporting" reporting entities to address risks of modern slavery practices in their operations and supply chains.⁹ It is unclear whether these provisions are intended to cover monitoring or enforcement. The Explanatory Memorandum simply specifies that the Commissioner may undertake "a range of activities" to promote compliance.

We recommend that the Bill be amended to clearly specify that Commissioner's functions will include promoting, monitoring and enforcing compliance with the Act. The recent review of the *Modern Slavery Act 2018* (NSW) noted the need for greater compliance and enforcement mechanisms being made available to the NSW Anti-Slavery Commissioner, noting the limitations of seeking deterrence through a 'name and shame' only approach.¹⁰ The last review of the *Modern Slavery Act 2015* (UK) likewise found that the UK Anti-Slavery Commissioner should have the ability to monitor the compliance of business, as well as recommending a strengthened approach to tackling non-compliance through using initial warnings, issuing fines (as a percentage of turnover), a court summons or disqualification of a director.¹¹

Recommendations:

- Amend Section 20C(1(a) so that the function of the Commissioner is to 'promote, **monitor and enforce** compliance with this Act'.
- Introduce enforcement powers for the Commissioner, including the power to issue penalties or infringement notices.

2. Investigations and complaints-handling

The ability to investigate is essential to many of the current functions assigned to the Commissioner under the Bill as well as to many of the recommendations of the Review. While it is appropriate that criminal investigations are explicitly carved out of this function, the Commissioner nonetheless has an important role to play in the following areas:

a) Detecting and exposing potential cases of modern slavery

The Commissioner will become an important point of contact for unions, victim support services, civil society, and industry stakeholders with potential information about possible cases of modern slavery or high-risk sectors or workplaces. To make effective use of this position, the Commissioner should be empowered to conduct investigations on his/her own initiative or upon receipt of information about suspected cases of modern slavery to determine if and how laws are being violated and by whom and whether it may be appropriate to refer the matter to either to law enforcement or to other bodies or organisations such as the Fair Work Ombudsman or Fair Work Commission.

Unless the Commissioner has at least some investigative powers, the office is unlikely to be able to properly perform its functions of supporting victims or promoting compliance with the Act. In the recent review of the NSW Modern Slavery Act, the NSW Anti-Slavery Commissioner noted that he currently has "little practical

⁷ Ibid, 70.

⁸ *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Cth), s20C(1)(a).

⁹ Ibid, s20C(1)(b).

¹⁰ Parliament of New South Wales, 'Review of the Modern Slavery Act 2018' (December 2023), 27–34.

¹¹ The Home Office of the British Government, 'Independent review of the Modern Slavery Act: final report' (May 2019, updated December 2021) <Independent review of the Modern Slavery Act: final report (accessible version) - GOV.UK (www.gov.uk)>, Appendix E.

ability" to detect and expose potential cases of modern slavery, despite this being a key objective of the legislation, due to his current lack of investigatory powers.¹² He recommended that to enable him to perform his functions effectively, he should have the ability to enter and search premises, compel the production of documents and require assistance and co-operation by third parties.¹³

We recommend that similar powers are given to the Commonwealth Anti-Slavery Commissioner. There are many other examples of statutory bodies akin to the proposed role of the Commissioner which hold investigation & complaints handling functions that often sit alongside investigations by law enforcement authorities:

- the *Online Safety Act 2021* (Cth) gives the eSafety Commissioner the ability to investigate complaints made with respect to cyber-bullying and intimate images through means such as issuing notices for appearance or the production of information.¹⁴
- the *Australian Human Rights Commission Act 1986* (Cth) gives its Commissioners the ability to inquire, attempt to conciliate and deal with complaints relating to such issues as unlawful discrimination.¹⁵
- the *Privacy Act 1988* (Cth) gives the Information Commissioner the ability to investigate complaints about an act or practice which may be an interference with the privacy of individuals by conducting preliminary inquiries, conducting hearings, obtaining information and documents, examining witnesses, and directing people to attend compulsory conferences.¹⁶
- the *Fair Work Act 2009* (Cth) empowers the Fair Work Ombudsman to investigate acts or practices that may be contrary to the Act or relevant instruments through means such as entering premises, inspecting and interviewing while on premises, asking for a person's name and address and requiring persons to produce records or documents.¹⁷

b) Facilitating referrals to law enforcement or other relevant organisations

The Commissioner will also be well-placed to receive and triage inquiries and complaints about suspected instances of modern slavery and to refer matters either to law enforcement or, where appropriate, to other relevant organisations that may be able to assist.

We note that while law enforcement authorities obviously have an important role to play in the detection and prosecution of modern slavery, they do not have a strong track record of successfully doing so. The recent review of the *Modern Slavery Act 2018* (NSW) found that only a small number of modern slavery victim-survivors are detected by law enforcement in New South Wales, with Commissioner James Cockayne estimating that between 80 and 98 per cent of victim-survivors remain unidentified.¹⁸ The Australian Institute of Criminology has also released research showing that for every victim-survivor detected in Australia there are approximately four undetected victims.¹⁹

There are many reasons why workers and other individuals trapped in situations of modern slavery do not come forward to law enforcement officials, including mistrust of authorities, geographical or language barriers, fears of retaliation by their employer or visa cancellation. Referral to law enforcement as a first response may be counter-productive in many cases.

¹² Professor John McMillan AO, 'Report of the statutory review of the Modern Slavery Act 2018 (Cth)' (2023), 13.

¹³ Parliament of New South Wales Joint Modern Slavery Committee, 'Review of the Modern Slavery Act 2018' (19 December 2023), 13.

¹⁴ See *Online Safety Act 2021* (Cth), s30, 32 & 199.

¹⁵ See *Australian Human Rights Commission Act 1986* (Cth), s11.

¹⁶ See *Privacy Act 1988* (Cth), s36 & 42-47.

¹⁷ See *Fair Work Act 2009* (Cth), s682(1)(c) & 708-712.

¹⁸ Parliament of New South Wales Joint Modern Slavery Committee, 'Review of the Modern Slavery Act 2018' (19 December 2023), 12.

¹⁹ *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Cth), *Explanatory Memorandum* [5].

Uncovering and addressing modern slavery thus requires a concerted effort by multiple stakeholders, including the new Commissioner, as well as unions, the Fair Work Ombudsman, migrant support services, specialist community legal centres and employers.

c) **Generating evidence for recommendations**

The Commissioner's ability to effectively undertake its functions of advising Government and advocating for improvements in policy and practices effectively will also depend on the office's ability to undertake investigations and research to identify high-risk industries, sectors and products, map trends in compliance and test how key parts of the Act are functioning in practice. The Commissioner should also be able to commission research and funding should be available to ensure that a firm evidence base is established upon which further policy reforms can be based.

Recommendations:

- Amend Section 20C(1)(h) to: 'to **investigate**, collect, analyse, interpret and disseminate information relating to modern slavery'.
- Add a new Section 20C(1)(o) which gives the Commissioner investigative functions and powers as follows: '**to receive and investigate complaints about suspected instances of modern slavery, provide support and assistance to victims to access remedy and, where appropriate, refer cases to law enforcement or other authorities**'.
- Add a new Section giving the Commissioner powers to 'a) **direct a person or organisation to provide specified reasonable assistance and co-operation; b) enter and search a premises and speak to any person in that premises; and c) require a person or organisation to provide information, records or copies**'.
- Remove Section 20C(2) of the Bill and replace it with: 'To avoid doubt, the Commissioner may not undertake **criminal investigations** regarding suspected cases of modern slavery'.

3. An independent, well-resourced office

The Government has committed to providing \$8.0 million over four years from 2023-24 to establish the Anti-Slavery Commissioner.²⁰ While this funding is welcome, it is insufficient to effectively support the policy objectives of the role, particularly if the functions of the Commissioner are strengthened as recommended in this submission and others.

Comparable offices have received significantly more funding. In 2024, for example, the Government committed to providing an additional \$134.1 million over four years for the office of the eSafety Commissioner,²¹ and \$44.3 million over four years for the OAIC to support the Privacy Commissioner.²²

Unless additional funding is provided, the Commissioner is likely to be heavily reliant on the MSBEU, which risks compromising the independence of the office. Most notably, the Commissioner may not be able to exercise their function of promoting compliance with the Act by Government when most of their funding is incorporated into the budget of the Attorney-General's Department.

²⁰ Commonwealth of Australia, 'Budget Measures 2023-24,' <Budget Paper No. 2: Budget Measures>, 60.

²¹ Ibid, 179.

²² Ibid, 64.

With an estimated 29 million people still living in modern slavery in the Asia-Pacific region alone,²³ the government must take the opportunity now to ensure that the budget for the Commissioner matches both the scope of the proposed role and the scale of addressing this enormous global problem.

Recommendation:

- Expand the current \$8 million budget for the office of the Commissioner to enable it to effectively carry out its functions, including the additional functions proposed in this submission.

²³ Walk Free, 'Modern Slavery in Asia and the Pacific' <<https://www.walkfree.org/global-slavery-index/findings/regional-findings/asia-and-the-pacific/>>.