



30 October 2017

**Response to Attorney General's Department Report *Modern Slavery in Supply Chains Reporting Requirement* Public Consultation Paper (16 August 2017)**

**Submission by Justine Nolan**  
**Via email: [slavery.consultations@ag.gov.au](mailto:slavery.consultations@ag.gov.au)**

This submission is in response to the proposal to establish a modern slavery in supply chains reporting requirement. I support the proposed requirement and provide some advice on select issues raised in the [consultation paper](#).

**1. Is the proposed definition of 'modern slavery' appropriate and simple to understand?**

The term 'modern slavery' is a fairly recent formulation and not defined in international law but is now having some resonance with the business sector because of its usage in the United Kingdom's *Modern Slavery Act*. It is taken to refer to a range of exceptional circumstances where a person's freedom and ability to make choices for themselves have been very significantly undermined or removed. It is broadly used to refer to human trafficking, slavery and slavery like practices such as servitude, forced labour, deceptive recruiting and debt bondage. The United Kingdom's *Modern Slavery Act* does not itself define the term, instead referring to interpretations and applications of Article 4 of the *European Human Rights Convention*.

Greater legal definition is given to 'forced labour' in international law, which according to the ILO's *Forced Labour Convention* 1930 (No. 29) is: 'all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.'

The proposed definition in the consultation paper which references Div's 270 and 271 of the *Criminal Code* (Cth) is appropriate for this purpose and likely to provide greater clarity to business than the broader terminology referred to in the [Joint Standing Committee's Interim Report](#) [4.31].

**2. How should the government define a reporting 'entity' for the purposes of the reporting requirement? Should this definition include 'groups of entities' which may have aggregate revenue that exceeds the threshold?**

An entity under the proposed modern slavery in supply chain reporting requirement should, at a minimum, be defined to include commercial organisations in a similar manner to those included in s54 (2) UK's *Modern Slavery Act*. That is, it includes a: 'commercial organisation ... if it— (a) supplies

goods or services, and (b) has a total turnover of not less than an amount prescribed ...'. This includes companies, partnerships but also organisations such as universities and not-for-profit organisations.

The reporting requirement should apply to each entity, that separately or together with other entities in its group, meets the proposed threshold requirement. The legislation should provide for a voluntary opt-in for those organisations that do not otherwise meet the threshold.

The reporting requirement should also apply to the government. If the proposal's effectiveness (which does not propose to include financial penalties for non-reporting) is dependent on cooperative engagement and uptake by the commercial sector engaged in the supply of goods and services, then that potential uptake is undermined if the regulator (the government) (which is engaged in similar enterprises), is not also required to report.

**3. How should the government define an entity's 'operations' and 'supply chains' for the purposes of the reporting requirement?**

The consultation paper (p.15) proposes that the definition of supply chains should extend beyond first tier suppliers. I support this proposal and suggest any definition be consistent with terminology used in the [Guiding Principles on Business and Human Rights](#). The Guiding Principles refer to business enterprises and note that the responsibility to respect human rights extends to 'business relationships' which includes 'business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services' [GP 13]. This definition allows for a broad interpretation of operations and supply chains.

**4. Are the proposed four mandatory criteria for entities to report against appropriate? Should other criteria be included, including a requirement to report on the number and nature of any incidences of modern slavery detected during the reporting period?**

I support the inclusion of the proposed four mandatory criteria in the reporting requirement as a minimum disclosure requirement subject to the points discussed below.

In addition, I recommend that the reporting entity provides details of any grievance mechanism and/or other form of remediation that the entity engages with or provides for those impacted by modern slavery practices.

The fourth criteria proposed in the consultation paper asks for information on an 'entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness'. The references to 'effectiveness' is vague and I suggest that such evaluation is best done not by the entity itself but others evaluating the entity's statement and practices.

The Australian legislation should consider building on this reporting requirement over time to mandate that reporting entities conduct human rights due diligence in their supply chains regarding the presence of modern slavery. Such a requirement would be in line with recent and more progressive legislation, such as the French Duty of Vigilance Law and the proposed Dutch Child Labour Due Diligence Law. An Australian precedent for this can be found

in the *Illegal Logging Prohibition Amendment Regulation 2013*, which requires that importers and processors undertake due diligence processes. There was an 18-month transition period during which the Australian government sought to assist and educate companies about the due diligence requirements of the Act. Section 7 of the Act sets out the four-step due diligence process. Step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); Step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country specific guideline (once they are prescribed); Step 3 is risk assessment (section 13); and Step 4 is risk mitigation (section 14) which should be adequate and proportionate to the identified risk. In establishing the requirements of due diligence, the Australian requirements could build on the framework set out in the UN Guiding Principles on Business and Human Rights, but the provision could also encourage the development of sector specific guidelines which can provide more specificity around due diligence requirements.

Currently section 54(5) of the UK *Modern Slavery Act* outlines what a statement may include, but there is no prescribed form of content or length for a statement. It is suggested in the UK Act that companies report on six broad areas: business and supply chain structure, policies, due diligence, risk assessment, effectiveness and training. These topics for reporting are discretionary. Statements submitted to date lack consistency and many companies are not providing substantive disclosure in most of the suggested areas. A more uniform reporting standard as proposed by Australia would provide clearer guidance for reporting entities and may establish a global standard for substantive global supply chain transparency and comparability and also on the requirements of due diligence.

**5. How should a central repository for Modern Slavery statements be established and what functions should it include? Should the repository be run by the Government or a third party?**

A central repository should be established and maintained by the Government that should be free and publicly accessible. A government operated repository would establish the repository as a legitimate and official source of information on supply chain reporting. To be useful, the repository should also include a list of the entities required to report under the legislation. In this way, compliance can be monitored by third parties.

The UK Act did not establish a central repository and as such oversight and accountability for reporting is diminished. A central repository established by the government implies oversight and some level of accountability. In the context of the UK legislation, it appears there is an expectation that the advocacy community take the leading role in tracking and benchmarking companies. This arguably ultimately divests government of its responsibilities or weakens the overall messaging and transformative effect of the UK Act.

**6. Noting the Government does not propose to provide for penalties for non-compliance, how can Government and civil society most effectively support entities to comply with the reporting requirement?**

I support the recommendations set out in the submission of the Advisory Committee of the Modern Slavery Registry on this issue. That is, I support the inclusion of financial penalties for non-compliance where reporting entities:

- fail to produce a modern slavery statement;
- produce statements that fail to meet the minimum requirements of being signed and approved by the relevant entity official;
- produce statements that omit prescribed information.

Such penalties could be phased in and such penalties could also accompany a phased-in due diligence requirement. Australia's *Illegal Logging Prohibition Act* (2012) is again relevant here. This Act incorporates due diligence requirements which obligate the importers and processors of timber to initiate verification and certification processes to ensure the imported timber was not illegally logged. If an importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years' imprisonment and/or heavy fines. The proposed provision in an Australian supply chain reporting requirement on modern slavery could similarly provide a defence for companies that could demonstrate they had robust due diligence programs in place.

Alternative compliance mechanism (to financial penalties) at a minimum should include:

- a requirement to submit the statement to a government maintained central repository;
- a publicly accessible list of all entities subject to the reporting requirements; and
- the development of public procurement incentives that require all entities seeking to participate in public procurement opportunities be first compliant with the modern slavery in supply chain reporting requirements.

I support the Government's proposal to develop modern slavery in supply chain reporting requirements and in so doing it should consider five points:

1. **Prioritise collaboration** with business, civil society, academics and consumers to develop legislation that will have a practical impact on those workers caught in modern slavery.
2. **Emphasise education and awareness raising** on this issue and assist reporting entities in developing expertise to produce statements and develop practices that address modern slavery in a substantial manner.
3. **Require consistency in reporting** that will allow for comparability both between sectors and across reporting years.
4. **Lead by example** with government also participating in the reporting requirements.
5. **Review participation levels and the standards of reporting within three years** of the establishment of the legislation. If the Government's proposed approach to encouraging and cajoling entities to participate and address modern slavery ultimately results in merely acquiescing reporting that is 'all form and no substance' then the Government should be prepared to regulate to incorporate financial penalties for non-compliance. Mandated due diligence requirements would likely offset potential non-compliance.

**Justine Nolan**  
**Associate Professor**  
**UNSW Sydney, Faculty of Law**  
**justine.nolan@unsw.edu.au**