

Inquiry into the Modern Slavery Bill  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
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CANBERRA ACT 2600

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Dear Committee Secretary

### **Inquiry into the Modern Slavery Bill**

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**Committee**) in relation to its inquiry (**Inquiry**) into the Modern Slavery Bill 2018 (Cth) (**Modern Slavery Bill**).

Due to time constraints, ELC's submission is brief. We have also reiterated earlier points we made in a submission dated 19 May 2017 to the Inquiry into establishing a Modern Slavery Act in Australia, conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade. For convenience, we **attach** a copy of that submission (**ELC's May 2017 Submission**).

### **About ELC**

ELC is a community legal centre which specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance and representation to vulnerable, non-unionised workers.

ELC assists thousands of callers each year through its Advice Line service and provides several hundred employees each year with further assistance from a solicitor. Through these activities, ELC has had first-hand experience assisting exploited foreign workers, including those displaying indicators of modern slavery.

ELC is also heavily involved in the Modern Slavery and Human Trafficking Interagency Group and the Perth Freedom Network, both of which have been set up with the purpose of tackling modern slavery in Western Australia.

### ***ELC's views on the Modern Slavery Bill***

In ELC's view, the issue of modern slavery must be addressed as a matter of priority, both internationally and within Australia. In order to tackle modern slavery, it is necessary for numerous and varied strategies to be adopted, one small part of which is to require certain organisations to report on the risks of modern slavery in their supply chains and what steps they are taking to address those risks should form part of any response to modern slavery.

In ELC's view, therefore, the Modern Slavery Bill is a step in the right direction.

If introduced, the Modern Slavery Bill would:

- put the onus on relevant companies to examine to what extent modern slavery is occurring in their supply chains and to consider how to address it, rather than allowing companies to claim that they had no knowledge of the practices of their contractors;
- ensure that Australia's legislation reflected community standards and growing public pressure for companies to conduct their businesses ethically and sustainably;
- show leadership in the Asia-Pacific region; and
- improve consistency in worldwide corporate reporting of efforts to tackle modern slavery.

#### Mandatory requirements as to content of modern slavery statements

Additionally, the Modern Slavery Bill appears to address at least one shortcoming in the UK legislation on which the Bill was based,<sup>1</sup> namely the fact that modern slavery statements must contain certain content. In contrast, the *Modern Slavery Act 2015* (UK)<sup>2</sup> merely provides that organisations may include certain information in their anti-slavery statements, which allows organisations too much scope to provide vague and aspirational statements about what they have done to ensure that slavery is not taking place in their supply chains.

#### Limitations of the Modern Slavery Bill

While ELC supports the introduction of the Modern Slavery Bill, the Bill is limited in its scope and will only go so far in tackling modern slavery. In ELC's view, it could be improved in several key ways, as outlined below.

#### Penalties and consequences for non-compliance

One of the key limitations of the Modern Slavery Bill is that there are no penalties or other consequences where an organisation fails to comply with its obligation to prepare and provide a modern slavery statement to the Minister. This renders the Modern Slavery Bill far less effective, since organisations can simply choose not to comply with their reporting obligations.

In ELC's view, the Modern Slavery Bill should be amended to include penalties for non-compliance.

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<sup>1</sup> *Modern Slavery Act 2015* (UK).

<sup>2</sup> *Modern Slavery Act 2015* (UK), s 54(5).

Recommendation 1: That the Modern Slavery Bill include penalties for non-compliance.

*Independent Anti-Slavery Commissioner*

Another significant limitation of the Modern Slavery Bill is that it does not establish an independent Anti-Slavery Commissioner.

The *Modern Slavery Act 2015* (UK), in contrast, creates the role of an Anti-Slavery Commissioner who “must encourage good practice in... the prevention, detection, investigation and prosecution of slavery and human trafficking offences; and the identification of those offences.”<sup>3</sup>

In carrying out this role, the Commissioner is empowered to do the following things (the list is not exhaustive):<sup>4</sup>

- make reports;
- make recommendations to any public authority about the exercise of its functions;
- undertake or support the carrying out of research;
- provide information, education or training;
- consult public authorities, voluntary organisations and other persons; and
- co-operate with or work jointly with public authorities, voluntary organisations and other persons.

Additionally, the Commissioner has the power to request that a public authority co-operate with the Commissioner in any way that he or she considers necessary for the purposes of the Commissioner’s functions.<sup>5</sup> Where a public authority receives such a request, it must “so far as reasonably practicable” comply with the request.<sup>6</sup>

In ELC’s view, an Anti-Slavery Commissioner should exist in Australia. By providing an independent Commissioner with the specific task of considering Australia’s responses to modern slavery and providing that person with some ability to hold other government agencies to account, this would potentially assist in addressing some of the problems with Australia’s current approach to modern slavery, which will be discussed further below.

For example, the Commissioner could recommend that a public authority carry out its functions in a particular way and thereby seek to address the fact that potential victims of human trafficking seem to have borne the brunt of enforcement action to date, whereas employers and others involved in facilitating modern slavery seem to have largely escaped liability.

Having said that, the powers of the Commissioner in the UK legislation seem to be relatively weak

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<sup>3</sup> *Modern Slavery Act 2015* (UK) s 41(3).

<sup>4</sup> *Ibid* s 41(3).

<sup>5</sup> *Ibid* s 43(1).

<sup>6</sup> *Ibid* s 43(2).

and, in ELC's view, do not go far enough.

For example, the Commissioner's duty to "encourage good practice" in human trafficking seems fairly vague. Additionally, the power to "make reports" and "make recommendations" are reasonably weak if the Commissioner's recommendations are not binding.

In ELC's view, the functions of the Commissioner should be strengthened and set out more clearly in Australian legislation. Regard should be had to other comparable pieces of legislation in which commissioners of this type are established.

Another weakness of the UK legislation is that other public authorities are merely obliged to comply with the Commissioner's requests "so far as reasonably practicable". This appears to give other agencies a fair degree of leeway not to comply with the Commissioner's requests.

In ELC's view, in order for the Commissioner to be effective, his or her powers to require cooperation from other government agencies should be enhanced.

Recommendation 2: That the Modern Slavery Bill provide for the establishment of an Anti-Slavery Commissioner.

Recommendation 3: That the functions of the Anti-Slavery Commissioner be strengthened and set out more clearly than in the *Modern Slavery Act 2015* (UK). Regard should be had to other comparable pieces of legislation in which commissioners of this type are established. For example, we query whether the Commissioner should have the power to enter premises, to compel witnesses to answer questions, or to compel individuals or organisations to produce documents and so forth.

Recommendation 4: That the powers of the Anti-Slavery Commissioner to require cooperation from other government agencies be enhanced as compared to the *Modern Slavery Act 2015* (UK). For example, public authorities should not merely be obliged to comply with the Anti-Slavery Commissioner's requests "so far as reasonably practicable".

#### Other measures in the UK legislation

The *Modern Slavery Act 2015* (UK) contains a number of measures in Part 5 which seek to protect victims of human trafficking and slavery. In ELC's view, these measures should be introduced in Australia, either through the Modern Slavery Bill or other legislation.

Some of the key measures in Part 5 of the UK legislation include:

- section 45, which provides that slavery or trafficking victims are not guilty of an offence where that offence is committed because the person was compelled to do so due to slavery or exploitation; and
- section 52, which requires certain government agencies to notify the Secretary of State

where they have reasonable grounds to believe that a person may be a victim of human trafficking.

These measures are consistent with the UN OHCHR Recommended Principles which emphasise that protecting trafficking victims is paramount.<sup>7</sup>

In ELC's view, measures which protect trafficking victims are what is most lacking in Australia's current regulatory framework.

In ELC's view, all of the measures set out in Part 5 of the Modern Slavery Act should be adopted in Australia (with the necessary changes).

Recommendation 5: That all of the measures in Part 5 of the *Modern Slavery Act 2015* (UK) be adopted (with the necessary changes), either through the Modern Slavery Bill or through other legislation.

### *Problems with Australia's current approach to modern slavery which should be addressed*

As noted above, in ELC's view, there are several weaknesses in Australia's current response to modern slavery, which we believe should be addressed as a matter of priority by the Australian government. This could either occur through amendments to the Modern Slavery Bill or through other legislation.

Some of the key problems are as follows.

- There have been numerous recent cases involving migrant workers who were potentially victims of human trafficking, in which the workers were almost immediately detained after raids occurred and were either deported or at least "facing deportation"<sup>8</sup> because they did not have valid visas. This occurred regardless of the fact that they displayed multiple indicators of human trafficking.

For example, we understand this occurred in two recent matters in Western Australia in which ELC had some involvement, in Carabooda<sup>9</sup> and in Pemberton.<sup>10</sup> We understand this is occurring elsewhere in Australia as well.<sup>11</sup>

Australia's current approach to potential slavery and trafficking cases does not reflect international best practice, as outlined in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the United Nations Office of the High Commissioner for Human Rights (**UN OHCHR Recommended Principles**) and as

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<sup>7</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E2002/68/Add.1).

<sup>8</sup> We use the term "facing deportation" here because government officials refused to confirm whether some of the relevant workers were indeed deported.

<sup>9</sup> See e.g. "Carabooda raids: Numerous charges after WA operation targets organised crime", *ABC News* (online), 5 May 2014, <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>; "Illegal migrant workers could help do in criminals involved in human trafficking", *ABC News* (online), 28 July 2015, <http://www.abc.net.au/news/rural/2015-07-28/salvos-warn-human-trafficking-agworkers-is-rife/6651322>; David, Fiona, "Companies must ensure suppliers don't use forced labour", *The Sydney Morning Herald* (online), 5 May 2015,

<sup>10</sup> Department of Immigration & Border Protection, "50 non-citizens located in major Taskforce Cadena operation in WA" (Media release, 2 March 2017), <http://newsroom.border.gov.au/releases/50-non-citizens-located-in-major-taskforce-cadena-operation-in-wa>.

<sup>11</sup> See e.g. "Border Force crackdown: Illegal blueberry farm workers detained on NSW Mid North Coast", *ABC News* (online), 24 August 2016, <http://www.abc.net.au/news/2016-08-24/illegal-workers-detained-on-woolgoolga-blueberry-farm/7782064>.

discussed in ELC's May 2017 Submission.

- Some of the principles in the UN OHCHR Recommended Principles are reflected in the *National Action Plan to Combat Human Trafficking and Slavery 2015-19 (National Action Plan)*. However, we are aware of several instances where Australian government agencies do not appear to have adhered to the National Action Plan, as discussed in ELC's May 2017 Submission.
- Additionally, the National Action Plan is not legally binding. In ELC's view, in order to ensure that government agencies comply with any obligations regarding potential victims of slavery, such obligations need to be enshrined in legislation instead.

Recommendation 6: That consideration be given to whether the procedures set out in the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* should be enshrined in the Modern Slavery Bill or other legislation.

Recommendation 7: That Australia adopt anti-slavery legislation (either through the Modern Slavery Bill or other legislation) which reflects the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the United Nations Office of the High Commissioner for Human Rights.

Such legislation should provide that people displaying indicators of human trafficking must be granted bridging visas and not be detained.

- Where government agencies take the above approach and promptly detain and deport potential victims of human trafficking after conducting raids, this makes it far less likely that any such victims will participate in any criminal investigation or prosecution.
- Based on ELC's research, it appears that there have been no convictions for modern slavery offences in Western Australia.
- The potential victims of human trafficking appear to be the ones bearing the brunt of the enforcement action, whereas the criminal syndicates who organise visa fraud and the exploitation of foreign workers seem to have largely escaped liability to date.
- The approach by enforcement agencies is highly likely to create fear amongst potential human trafficking victims and discourage such victims from reporting unlawful conduct to authorities, contrary to the stated intention of the Employment Minister, the Hon. Michaelia Cash, in a recent media release.<sup>12</sup>
- This in turn is likely to make it harder to stamp out modern slavery, since there is little to deter rogue employers from relying on a business model involving modern slavery and such situations are likely to go vastly under-reported.

The above propositions are supported by the UN OCHCHR Recommended Principles.<sup>13</sup>

In ELC's view, the government needs to address the above problems as part of any response to modern slavery in Australia.

<sup>12</sup> Senator the Hon Michaelia Cash, "Cracking down on dodgy bosses" (Media release, 1 March 2017), <https://ministers.employment.gov.au/cash/cracking-down-dodgy-bosses>.

<sup>13</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E2002/68/Add.1)

***Conclusion***

Overall, ELC supports the introduction of the Modern Slavery Bill. However, there is an opportunity right now for Australia to show further leadership by strengthening the Bill to address the key limitations of the Bill and numerous problems with Australia's current approach to modern slavery, as outlined above.

***Further information / consultation***

We would be happy to provide further information in relation to the Inquiry and to participate in public hearings in Western Australia should there be any opportunity to do so.

Yours faithfully

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Rowan Kelly  
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