



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

Elizabeth Kikkert MLA (Chair), Michael Pettersson MLA (Deputy Chair),
Andrew Braddock MLA

Submission Cover Sheet

Inquiry into the Modern Slavery Legislation Amendment Bill 2023

Submission Number: 11

Date Authorised for Publication: 25 May 2023



Standing Committee on Public Accounts
ACT Legislative Assembly
GPO Box 1020
Via LCommitteePA@parliament.act.gov.au

22 May 2023

Dear Committee Secretary

ACT Human Rights Commission submission to Inquiry into the Modern Slavery Legislation Amendment Bill 2023

The ACT Human Rights Commission is pleased to provide a written submission to the Standing Committee's inquiry into the Modern Slavery Legislation Amendment Bill 2023, and strongly supports the objectives underpinning this Private Members Bill.

Modern slavery in all its forms constitute a serious violation of human rights, including the freedom from forced labour protected in s 26 of the *Human Rights Act 2004*. Although the Commission does not oppose the creation of a dedicated Anti-Slavery Commissioner, we note that the incidence of modern slavery in the ACT merits closer scrutiny. As a broad range of agencies may identify indicators and risks of modern slavery in performing their functions, our submission therefore favours the ACT Government formally establishing a collaborative oversight model as a means of triaging effective responses and informing any necessary or desirable legislative change.

We do not object to this submission being published in full on the Committee's website and are available to discuss its content with the Committee, if necessary.

Yours sincerely

Dr Helen Watchirs OAM
President and Human
Rights Commissioner

Jodie Griffiths-Cook
Public Advocate and
Children and Young
People Commissioner

Karen Toohey
Discrimination, Health
Services, and Disability
and Community Services
Commissioner

Heidi Yates
Victims of Crime
Commissioner

About the ACT Human Rights Commission

1. The ACT Human Rights Commission is an independent agency established by the Human Rights Commission Act 2005 (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
 - i. the President and Human Rights Commissioner;
 - ii. the Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner;
 - iii. the Public Advocate and Children and Young People Commissioner (PACYPC); and
 - iv. the Victims of Crime Commissioner.
2. Measures addressing risks of modern slavery, including any instances that may occur within the ACT or within ACT Government supply chains, align with the Commission's vision of an inclusive community that respects and realises human rights and ensures access to justice for everyone. The Commission therefore welcomes that the *ACT Labor and ACT Greens Parliamentary and Governing Agreement for the 10th Australian Capital Territory Legislative Assembly* provides, as an agreed priority for legislative reform, "to ensure ACT legislation can identify and effectively respond to modern day slavery." (Appendix 2, Item 5).
3. Though an issue of global concern, individuals and groups who access the Commission's services, including complaints, advocacy, victims support services, may experience situations that constitute, or risk escalating into, forms of modern slavery. While unethical practices, like substandard working conditions, long hours, wage theft or underpayment, do not themselves represent modern slavery, such unacceptable working conditions, if left unchecked, can escalate into situations that could become modern slavery. Accordingly, the Commission supports the development of effective measures to proactively identify and address risks of modern slavery, whether arising in the ACT or in the supply chains of ACT Government agencies or suppliers.
4. The President and Human Rights Commissioner, Dr Helen Watchirs, the DHSDCS Commissioner, Ms Karen Toohey, and the Victims of Crime Commissioner, Ms Heidi Yates, each met with the Bill's sponsor, Ms Jo Clay MLA, during development of the Modern Slavery Legislation Amendment Bill 2023 ('the Bill').
5. We understand the Bill to introduce three main components aimed at combatting modern slavery in the operations and supply chains of ACT Government agencies and its suppliers. These are:
 - i) An obligation, to be situated in the *Human Rights Act 2004* ('HR Act'), that Territory entities identify risks of modern slavery statements in their respective supply chains and publish voluntary modern slavery statements under the *Modern Slavery Act 2018* (Cth).
 - ii) A requirement that Territory entities expressly consider risks of modern slavery in any procurement of goods and/or services with a value of \$25,000 or more, including statements by tenderers addressing risks of modern slavery and related mitigations.¹
 - iii) The creation of an Anti-Slavery Commissioner within the ACT Human Rights Commission to monitor risks of modern slavery arising in the ACT, and promote action to combat modern slavery, including through referrals to relevant agencies, annual reporting by agencies and the provision of advice and community education.²

¹ Modern Slavery Legislation Amendment Bill 2023 ('Bill'), Part 4; for proposed statements by tenderers, see s 22ZI.

² Bill, Part 6.

Modern slavery and human rights

6. Modern day slavery, or 'modern slavery', refers to a range of the most serious forms of exploitation. Forms of modern slavery include human trafficking, slavery, servitude, forced labour, debt bondage, forced marriage and the worst forms of child labour.³
7. Such conduct principally limits the freedom from forced work, which is protected in section 26 of the HR Act and based on Article 8 of the *International Covenant on Civil and Political Rights* ('ICCPR').

26 Freedom from forced work

- (1) No-one may be held in slavery or servitude.
- (2) No-one may be made to perform forced or compulsory labour.
- (3) In subsection (2):

forced or compulsory labour does not include—

- (a) work or service normally required of an individual who is under detention because of a lawful court order, or who has been conditionally released from detention under a court order; or
- (b) work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or
- (c) work or service that forms part of normal civil obligations.⁴

8. International human rights law (IHRL) recognises that elements of the right to freedom from forced work, being the prohibition on slavery and servitude, are absolute in nature, meaning that it may never be subject to permissible limitations (including as contemplated by s 28 of the HR Act). The prohibition on slavery and 'slavery-like' practices (including serfdom, debt bondage, forced marriage) requires governments to adopt broad statutory and other *positive* measures to guarantee the prohibition, including international and regional cooperation and additional economic measures.⁵
9. Depending on the circumstances, modern slavery may also unreasonably limit a range of other human rights protected in the HR Act, including rights to:

- | | |
|---|--|
| i) Equality and non-discrimination (HR Act, s 8) – insofar as modern slavery and trafficking are disproportionately experienced by women and children | iv) Freedom of movement (HR Act, s 13) |
| ii) Protection from cruel, inhuman and degrading treatment (HR Act, s 10) | v) Liberty and security of person (HR Act, s 18) |
| iii) Protection needed by children by virtue of being a child (HR Act, s 12) | vi) Humane treatment while deprived of liberty (HR Act, s 19) |
| | vii) Just and favourable conditions of work (HR Act, s 27B(2)) |

³ In Australia, the *Modern Slavery Act 2018* (Cth) defines 'modern slavery' as conduct that would constitute an offence under Division 270 or 271 of the *Criminal Code Act 1995* (Cth), trafficking in persons or the worst forms of child labour. These are primarily the offences of human trafficking; slavery; servitude; forced labour; debt bondage; deceptive recruitment for labour or services; forced marriage; and the worst forms of child labour as defined in Article 3 of the International Labour Organisation Convention.

⁴ For more information about the freedom from forced labour, see ACT Government 'Right to Freedom from Forced Work' (Factsheet, 2021), available at: <https://www.justice.act.gov.au/_data/assets/pdf_file/0009/2072439/Fact-Sheet-S-s-26-Freedom-from-forced-work-Human-Rights-Education.pdf>

⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 1993), 149 ([14]).

10. The human rights and corresponding obligations recognised in the HR Act primarily govern the relationship between government and individuals,⁶ and, as a law of the ACT, can only apply with respect to conduct within the Territory's jurisdiction and control. In this regard, Global Estimates by the International Labour Organisation highlight that the majority of forced labour exists within the private economy and often spans interstate and foreign supply chains.⁷
11. Given its nature as a hidden crime, the prevalence of modern slavery is inherently difficult to estimate. According to global estimates by the International Labour Organisation, there were 49.6 million people living in modern slavery on any given day in 2021. This figure accounts for 27.6 million people in forced labour and 22 million in forced marriages.⁸ The Australian Human Rights Institute, in conjunction with a coalition of universities and human rights organisations, has recently published research into the operation of the *Modern Slavery Act 2018* (Cth) ('MS Act') underscoring support among businesses for more robust due diligence obligations, penalties and oversight concerning of risks of modern slavery in Australian supply chains.⁹ This research follows two earlier reports observing high rates of non-compliance with the MS Act, failures to identify obvious modern slavery risks in supply chains, and limited uptake of effective responses.¹⁰
12. It is therefore consistent with the ACT Government's duty under the HR Act to act compatibly with human rights,¹¹ including the freedom from forced labour, that it take its own reasonable steps to protect individuals from third party interferences with human rights, including monitoring and reporting of the incidence of modern slavery in the ACT.
13. Within the ACT, we are aware of at least one prosecution, in 2013, of conduct amounting to modern slavery; this being the intentional possession of a slave involving visa exploitation and debt bondage of at least one sex worker.¹² We also note there have been more recent media reports of conduct constituting modern slavery within the ACT, including exploitation of domestic workers within embassies and diplomatic households,¹³ and a local massage parlour in 2020.¹⁴ Such reports tend to suggest that the incidence and identification of modern slavery as such within the ACT, and ACT Government supply chains, merits further examination, investigation and research.

⁶ Businesses and non-governmental organisations may have obligations to consider and act consistently with rights insofar as they exercise functions of a public nature (HR Act, ss 40(1)(g) and 40A), or otherwise choose to 'opt in' (HR Act, s 40D).

⁷ International Labour Organisation, *Global Estimates of Modern Slavery – Forced Labour and Forced Marriage* (Report, September 2022), available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf>

⁸ Above 7.

⁹ Australian Human Rights Institute (UNSW) et al., *Australia's Modern Slavery Act: Is it fit for purpose?* (Report, April 2023), available at: <<https://www.humanrights.unsw.edu.au/research/testing-effectiveness-Australia-modern-slavery-act>>

¹⁰ Australian Human Rights Institute (UNSW) et al., *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (Report, November 2022); Australian Human Rights Institute (UNSW) et al, 'Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act' (Report, February 2022).

¹¹ HR Act, s 40B(a).

¹² *Nantahkum v R* [2013] ACTCA 40 (25 October 2013).

¹³ Louise Milligan, 'Domestic workers inside Canberra embassies kept in conditions likened to 'slavery'' *ABC News Online (Four Corners)* (Online article, 12 February 2018) <<https://www.abc.net.au/news/2018-02-12/domestic-staff-inside-canberra-embassies-being-exploited/9418920>>

¹⁴ Sally Whyte, 'We were afraid to get sent home': Modern slavery at Canberra massage parlour' *Canberra Times* (Online article, 25 November 2020) <<https://www.canberratimes.com.au/story/6477588/modern-slavery-in-the-nations-heart/>>

Feedback on Bill

14. The Commission strongly supports the policy intent underpinning the *Modern Slavery Legislation Amendment Bill 2023*. We recommend, however, that the Standing Committee consider whether the legislative approach presented in the Bill provides the most effective and risk-based means of identifying and responding to the various manifestations of modern slavery in the ACT. Foremost, we consider it important to first examine the nature and incidence of modern slavery in the ACT to ensure that any legislative response is effective, sustainable and suitably tailored to the ACT.

Review of Commonwealth Modern Slavery Act

15. The obligations proposed by the Bill would, if enacted, leverage voluntary reporting requirements under section 6 of the *Modern Slavery Act 2018* (Cth) ('MS Act'). The MS Act requires Australian businesses with an annual revenue greater than \$100m and other large entities to reports annually to the Attorney-General about their efforts to identify and address modern slavery risks in their respective operations and supply chains.
16. The MS Act, as the Bill's explanatory statement acknowledges, is currently the focus of an independent statutory review, led by Emeritus Professor John McMillan AO. According to its terms of reference, the McMillan Review is intended to identify any additional measures that are necessary or desirable to improve the operation of the MS Act based on its three years of its operation. This will include whether the existing reporting thresholds and timeframes are appropriate for reporting entities and whether it is necessary or desirable to introduce an independent body, such as an Anti-Slavery Commissioner, to oversee the implementation and enforcement of the MS Act. Although due to have been completed within a one-year period (ie by 31 March 2023), the statutory review of the *Modern Slavery Act 2018* is still ongoing as at the drafting of this submission.
17. As this statutory review may lead to potential changes in the nature and content of reporting obligations under the MS Act and the way in which it is administered and monitored, there may be merit in the ACT introducing interim measures ahead of committing to legislative reforms as contemplated by the Bill.

Existing measures

18. The Commission understands that existing Territory legislation and policy frameworks, to some extent, contemplate risks and instances of modern slavery related to the activities of ACT Government agencies, suppliers and other entities.
19. All ACT Government procurements must, irrespective of value, take account of certain prescribed values, including 'fair and safe conditions of work' and 'transparent and ethical engagement'. Together, these values intend that ACT Government not knowingly engage with suppliers that demonstrate objectionable, dishonest, unethical or unsafe business practices and that workers in those businesses have a fair and safe work environment. In managing their procurement activities, Territory entities are required to consider these values in addition to any applicable laws or policies, and report on how they have been applied in any procurement processes that produce a notifiable contract (ie a contract for goods or services valued at \$25,000 or more).¹⁵
20. These obligations, which are enacted through a notifiable instrument – the *Government Procurement (Charter of Procurement Values) Direction 2020* – and supported by the ACT Government's Procurement

¹⁵ *Government Procurement (Charter of Procurement Values) Direction 2020*, available at: <<https://www.legislation.act.gov.au/ni/2020-580/>>

Values Guide,¹⁶ expressly emphasise approaches to procurement that minimise risks of modern-day slavery and the leveraging of national and inter-jurisdictional initiatives to abate such practices. As an interim step, these instruments could potentially be amended to vary the extent to which Territory agencies must evidence that they have expressly considered risks of modern slavery in a procurement activities.

21. In this regard, we understand the ACT's Procurement Framework is currently undergoing a program of reform that may afford opportunities to integrate stronger consideration and reporting of risks of modern slavery into the *Government Procurement Act 2001*, *Government Procurement Regulation 2007* and delegated instruments. It is, in our view, desirable that any amendments consider the ACT's procurement framework as a whole; to ensure that agencies and suppliers are capable of meaningfully engaging with any new obligations in a way that is consistent with their objects and practical intent.
22. The Secure Local Jobs Code (SLJC), first introduced in January 2019, also provides an existing framework for ensuring that ethical and labour standards are evidenced during new high-risk procurements. The SLJC requires all tenderers in new high-value ACT procurements (and contracts) for construction, cleaning, security and traffic management and most other labour to demonstrate compliance with applicable industrial laws and instruments, including the *Fair Work Act 2009* (Cth), *Work Health and Safety Act 2011* (ACT) and *Migration Act 1958* (Cth).
23. Entities that wish to tender for such procurements must undergo a certification process that involves the development of labour relations, training and workplace equity plans and considers their history of compliance as well as that of any related entities (eg associates and directors). Code certified entities are required to ensure that any subcontractors for territory-funded work are also certified. Oversight and enforcement of the SLJC is allocated to a statutorily appointed Secure Local Jobs Code Registrar with powers to investigate and take action in relation to non-compliance.¹⁷
24. The SLJC is supported by model contract terms made under s 22G of the *Government Procurement Act 2001* and articulated in the *Government Procurement (Secure Local Jobs Model Contract Terms) Determination 2018*. Such terms may also provide an interim mechanism for introducing greater due diligence reporting by tenderers and related entities involved in the provision of high-value Territory work.
25. Though not comprehensive, ACT criminal law also provides select offences that may, in some circumstances, be applied to manifestations of modern slavery. These include forcible confinement (*Crimes Act 1900*, s 34) and sexual servitude (*Crimes Act 1900*, s 78), which may be investigated by ACT Policing and prosecuted by the ACT Office of the Director of Public Prosecutions. Slavery and slavery-like offences under the *Criminal Code Act 1995* (Cth) can, however, generally be referred to the Australian Federal Police for investigation and prosecution by the Commonwealth Department of Public Prosecutions.
26. The ACT Government's commitment, in October 2022, to legislate an accessible pathway for individuals to complain about breaches of rights under the HR Act will also soon provide a further means of identifying and redressing allegations of modern slavery. Section 40B of the HR Act currently requires all public authorities, including Ministers, ACT Government agencies and entities performing functions of a public nature, to properly consider relevant human rights when making a decision and act consistently with human rights at all times. These obligations may, but may not always, extend to private companies or organisations that are funded by the Territory to perform a public function for the Territory, in accordance

¹⁶ ACT Government (Suzanne Orr MLA, Minister for Government Services and Procurement) *The Procurement Values Guide* (Guide, September 2020), available at: < https://www.procurement.act.gov.au/_data/assets/pdf_file/0009/1626525/The-Procurement-Values-Guide.pdf >

¹⁷ See Table 1, *Government Procurement (Secure Local Jobs Complaints and Noncompliance Investigation) Guidelines 2018*.

with s 40A of the HR Act. In a procurement context, giving proper consideration to a relevant human right must necessarily, in our view, contemplate a person's right to work and work-related rights (HR Act, s 27B(2)) as well as the freedom from forced labour and slavery (HR Act, s 26).

27. Once enacted, this new jurisdiction will enable free complaints to the Commission about actions or omissions by public authorities that unreasonably limit human rights, including rights to just and favourable conditions of work and freedom from forced labour. A person would, for example, be able to bring a complaint where they believe an ACT Government agency (or potentially a contractor) has failed to properly take account of their forced labour in the procurement of goods and services, or where they consider ACT Government frameworks provided them inadequate protection against exploitation or coercion in employment.

Modern slavery statements by Government

28. The Commission welcomes the proposed amendment to the *Annual Reports (Government Agencies) Act 2004* which would, in substance, require that Government agencies' annual reports each describe actions taken to identify and mitigate risks of modern slavery within their supply chains. This proposed amendment should serve to encourage *individual* directorates and agencies to integrate further due diligence and examination of tenderer's supply chains into their respective procurement activities. Based on experience of human rights reporting by directorates through the Justice and Community Safety Directorate (JACS) Annual Report, it will be important that agencies are supported with guidance, advice and resources about modern slavery to ensure such reporting is meaningful, consistent and measurable.

Proposed amendment to *Human Rights Act 2004*

29. While supportive in-principle of such reporting obligations, the HR Act is not, in the Human Rights Commissioner's opinion, an appropriate legislative vehicle to contain these prescriptive obligations. Legislative bills of human rights within Australia reflect a broadly consistent structure that facilitates reference to analogous interstate jurisprudence.
30. Although the proposed reporting obligations promise to support human rights, the same is true of other legislative frameworks that apply to territory entities (eg the *Discrimination Act 1991*, the *Information Privacy Act 2014*). The HR Act, by contrast, is intended to set out recognised human rights in the ACT and provide the normative framework by which they must be respected, protected and promoted by all arms of government within the Territory. As all human rights are indivisible, interdependent, and interrelated, human rights legislation must be carefully structured to ensure they do not inadvertently infer that the protection of a particular human right, or class of rights, merits greater protection than another.
31. It is the Commission's view that operative procedural obligations for the protection of specific human rights, ought to be included in a standalone Act or otherwise integrated into other related legislation. We therefore recommend that if a requirement that territory entities make voluntary modern slavery statements under the MS Act is accepted, that requirement not be inserted into the *Human Rights Act 2004*.

Anti-Slavery Commissioner

32. The Commission supports in-principle the creation of an independent mechanism to monitor the ethical management of supply chains both within and outside the ACT and ensure accountability. Such a step

corresponds with commentary in the UN Guiding Principles on Business and Human Rights, which emphasises the need for adequate independent monitoring.¹⁸

33. The creation of a dedicated Commissioner would also serve to raise the profile of modern slavery and promote awareness, expert advice, training and community awareness. For such reasons, the AHRI and its coalition partners have endorsed establishing an Anti-Slavery Commissioner at the federal level to monitor reporting under the MS Act, noting appreciable support among those surveyed.¹⁹
34. Despite these observations, it is unclear whether a dedicated Anti-Slavery Commissioner, modelled on the NSW Anti-Slavery Commissioner's role, is necessary given the ACT's geographic size and absence of local government areas. Should an Anti-Slavery Commissioner be established within the ACT Human Rights Commission this function would need to be robustly resourced and staffed to avoid any unintended impacts on the Commission's existing protection of rights services.
35. The Commission does not in-principle oppose the creation of an Anti-Slavery Commissioner role. Providing resources to the HRC or to another agency to establish a collaborative oversight model may, however, provide an initial means of raising awareness of, and identifying, modern slavery risks across ACT Government. In this regard, we would favour the formal establishment of a cooperative oversight body, comprising relevant internal and external stakeholders. Such an oversight model would, in our view, assist to ascertain risks and trends in modern slavery practices associated with the operations of territory entities, identify gaps in protections and recommend legislative reform or other safeguards. Collaborative oversight of adult and youth detention settings provides a comparable model that, in our experience, leverages diverse expertise and shares information efficiently to minimise duplication and triage effective responses.
36. Private sector risks and instances of modern slavery – whether taking place in the ACT, interstate or internationally – will come to the attention of a range of agencies and external stakeholders in a range of different ways and contexts. WorkSafe ACT, the Australian Federal Police (including ACT Policing), Child and Youth Protection Services, Legal Aid ACT, and the ACT Government Procurement Board may each recognise, refer and respond to indicators of modern slavery in the performance of their ordinary functions. Allegations of risks or instances of modern slavery may also be raised with external stakeholders, including unions, the Fair Work Ombudsman, the Australian Red Cross, industry peak bodies (eg Scarlet Alliance) and advocacy organisations such as Be Slavery Free, Anti-Slavery Australia, the Salvation Army and Australian Catholic Religious Against Trafficking of Humans (ACRATH).
37. Within the Commission, we may also recognise forms of coercion and exploitation that constitute, or risk becoming, a form of modern slavery in our various jurisdictions and services. The Family Violence Safety Action Program that operates out of Victim Support ACT might, for example, become aware of visa exploitation or forced marriage in intensive case-tracking and collaboration regarding domestic and family violence. From a complaints perspective, allegations of unlawful occupation- or immigration-based discrimination in employment have, at times, raised issues of wage theft and use of workers' passport or visa status to prevent them challenging poor working conditions. Those working locally within vulnerable industries, such as sex work, may choose to challenge unfair employment conditions and workplace treatment by submitting a discrimination complaint on the grounds of race or occupation status. As noted above, the Commission's upcoming jurisdiction to receive and handle complaints about breaches of rights

¹⁸ See John Ruggie, Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 17th sess, UN Doc. A/HRC/17/31 (21 March 2001), Principle 5.

¹⁹ Above 9, 9.

under the HR Act may also provide for identification, conciliation or referral of practices and risks that tend toward modern slavery.

38. It is therefore critical, in our view, that allegations of coercion or exploitation can be received, triaged and appropriately referred within ACT Government, irrespective of whether they are framed as risks or instances of modern slavery. As victims or relevant agencies may not automatically characterise such conduct as modern slavery, all practices disclosing forms or risks of modern slavery in the ACT or responses to such conduct may not be identified as relevant to the Commissioner's mandate.
39. Insofar as the proposed Commissioner's functions would also involve advocating for the interests of victims of modern slavery, we note there may be some overlap with the Victims of Crime Commissioner's advocacy for the interests of victims of crime generally. To the extent that conduct disclosing modern slavery limits the right to freedom from forced labour, the Human Rights Commissioner section 41 of the HR Act also permits the President and Human Rights Commissioner to audit the effectiveness of legislation, policy and actions, including the ACT's procurement framework, in addressing modern slavery.
40. In light of these considerations, we encourage the Committee to examine the utility of a resourced collaborative oversight model as an interim alternative to the establishment of an Anti-Slavery Commissioner.