



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON PUBLIC ACCOUNTS

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## Submission Cover Sheet

### Inquiry into the Modern Slavery Legislation Amendment Bill 2023

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Dear Dr Lloyd,

Thank you for this opportunity to comment on the *Modern Slavery Legislation Amendment Bill 2023* (ACT).

I make these comments in my personal capacity, drawing on more than 25 years of experience working internationally and in Australia, to prevent modern slavery and related crimes.<sup>1</sup> This includes:

- research, advocacy and involvement in the development of the Federal Criminal Code slavery and human trafficking offences, and the Federal, UK and NSW Modern Slavery Acts;
- leading world-class research, including creating the Walk Free *Global Slavery Index* which provides metrics on prevalence and government responses to modern slavery in more than 160 countries;
- negotiating and securing the on-going relationship between the International Labour Organization, the International Organization for Migration and Walk Free, which enabled production of the UN Global Estimates on Modern Slavery, to track progress of the United Nations Sustainable Development Goal (SDG) 8.7.

I commend the focus of the ACT Legislative Assembly on modern slavery. As we know from the recently updated UN Global Estimates of Modern Slavery, in 2021, an estimated 50 million people were living in modern slavery.<sup>2</sup>

In my submission, I note my strong support for the Bill. However, I also note some areas that could be strengthened.

### Summary of Recommendations

1. For consistency with the Commonwealth regime, and the UN Guiding Principles for Business and Human Rights (UNGPs), it is recommended that coverage is extended to include “operations” alongside “supply chains” for risk assessment, mitigation and remedy, throughout the Bill.
2. It is recommended that “due diligence” is included in the Bill alongside “risk”. This will clarify the expected process to be followed when undertaking risk assessments. This language will help link steps articulated in the Bill to emerging good practice on hallmarks of “serious” due diligence, in the UNGPs and elsewhere.<sup>3</sup>
3. It is recommended that the powers of the Auditor-General are extended to include actions taken to *remedy* modern slavery abuses, in performance audits.

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<sup>1</sup> Submission prepared by Fiona Davd with research assistance by Tahia McDona d.

<sup>2</sup> International Labour Organization, Walk Free, International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2022), [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_854733/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_854733/lang-en/index.htm).

<sup>3</sup> Sh ft, “Signals of Seriousness” for Human Rights Due Diligence (2021), <https://shftproject.org/resource/signals-draft1/>.

4. The proposal to require risk statements from businesses of any size or risk profile, from tendering for ACT work over \$25,000, should be reconsidered. In its place, a risk-based system, overseen by the Anti-Slavery Commissioner, could be considered.

5. It is recommended that consideration is given to extending the powers of the ACT Anti-Slavery Commissioner, to ensure the office holder can effectively contribute to achieving the aims of the bill, through oversight, coordination and capacity building.

### **Summary of the ACT Bill**

Sitting alongside its counterparts, the *Modern Slavery Act 2018* (Cth), and the *Modern Slavery Act 2018* (NSW), the ACT Bill seeks to complement and build on existing anti-slavery efforts, by giving effect to the following changes:

1. Require ACT Government Agencies to include information on modern slavery risk identification, mitigation and responses in their Annual Reports.
2. Require the Auditor-General to take account of modern slavery considerations, alongside environmental considerations, in performance audits.
3. Prevent Territory entities from procuring from entities that have failed to comply with the Commonwealth Modern Slavery Act.
4. Require entities wanting to be part of ACT procurement worth more than \$25,000 to give a statement covering the risk of modern slavery in relation to this work.
5. Require ACT administrative units to make voluntary modern slavery statements under the Commonwealth Modern Slavery Act.
6. Add an Anti-Slavery Commissioner, alongside other critical roles such as the Children and Young People's Commissioner and Health Services Commissioner, in the ACT Human Rights Commission.
7. Require a legislative review of the proposed amendments, commencing within 3 years of the passage of the Bill.

This submission considers each of these changes in order.

### **Annual Reports by the ACT Government – “supply chains” or “operation and supply chains”?**

The Bill will amend the *Annual Reports (Government Agencies) Act 2004* (ACT) to effectively require that public service agency annual reports include a statement on the following:

- “(a) the actions the entity has taken to identify and mitigate the risk of modern slavery happening in its supply chains;
- (b) the actions taken by the entity in response to any instance of modern slavery identified in its supply chains;
- (c) any advice or guidance given by the anti-slavery commissioner to the entity in relation to modern slavery.”

This focus on procurement is an important step forward for the ACT, which annually spends around \$1.5 billion on procurement relevant to public services, infrastructure, economic growth and

community wellbeing.<sup>4</sup> Broadly speaking, the approach taken in the ACT Bill is similar to that taken by both the Commonwealth and NSW Governments, seeking to bring government agencies into line with steps required of business. The ACT approach is commendable, seeking individual agency statements, rather than a single combined statement on behalf of all agencies, as is the case in the Commonwealth.

However, as presently drafted, the reporting obligations in proposed 3A of the Annual Reports (Government Agencies) Act 2004 are narrower in scope than the Commonwealth equivalent, which refers to risk “**in the operations and** supply chain of the reporting entity” (emphasis added, see further sections 15 and 16 of the *Modern Slavery Act 2018* (Cth)). The broader language found in the Commonwealth Act is consistent with the United Nations Guiding Principles on Business and Human Rights (UNGP), which refer to human rights due diligence being undertaken “not only to “supply chains” but also to “operations and business relationships throughout its value chain.” The UNGPs provide the leading international standard on the expectations of businesses regarding respect for human rights.

For consistency with the Commonwealth Act, and also for consistency with the UNGP, it is recommended that the word “operations” is added alongside “supply chains”, throughout the ACT Bill. This will require drafting amendments to at least proposed 3A of the Annual Reports (Government Agencies) Act 2004, and 18G(c) of the Human Rights Commission Act (Anti-Slavery Commissioners functions).

#### **Report risk or report on due diligence to identify risk?**

The reporting obligations in the ACT bill are framed around “risk”. While there is nothing inherently wrong with reporting on risk, as the NSW Anti-Slavery Commissioner has argued in relation to the Federal system, the purpose of reporting is not to produce a report, it is to produce an *outcome* – that is, action to reduce and respond to modern slavery.<sup>5</sup> As such, the coherence and quality of the process or method that is used to identify and respond to risk is of the utmost importance.

As drafted, the ACT bill does not provide any guidance on how government agencies should seek to assess risk. While the Commonwealth Modern Slavery Act is itself fairly broadly, critically it does include reference to “due diligence and remediation” (see further, section 16(1)(d)). This provides a link between the Modern Slavery Act (Cth) and the UNGP, which set out the key elements and nature of a process for identifying risk through human rights due diligence (defined in Principle 17).<sup>6</sup> This link is further elaborated in the Commonwealth Guidance for Reporting Entities on complying with the Act.<sup>7</sup>

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<sup>4</sup> Procurement Reform Program ACT Government, accessed May 2023, <https://www.procurement.act.gov.au/about/act-government-procurement-reform>.

<sup>5</sup> Office of the Anti-Slavery Commissioner, *Reporting for Action: Submission of the NSW Anti-Slavery Commissioner to the Review of the Modern Slavery Act 2018 (Cth). Discussion Paper #3*, (2022), <https://dcj.nsw.gov.au/documents/ega-and-justice/anti-slavery-commissioner/papers-and-discussion-papers/oascd-discussion-paper-003-report-ng-for-act-on.pdf>.

<sup>6</sup> Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2011), 17-19, [https://www.ohchr.org/sites/default/files/documents/pub\\_catchons/guidngprncp esbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/pub_catchons/guidngprncp esbusinesshr_en.pdf).

<sup>7</sup> Department of Home Affairs, *Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities*, <https://www.homeaffairs.gov.au/crm/na-justice/files/modern-slavery-reporting-entities.pdf>



It is recommended that the ACT consider referencing “due diligence” in the Bill. “Due diligence”, a method used to assess risk, has a technical meaning, in line with the UNGPs. The methodology involved, for example, in how an agency might go about the task of “assessing” and “responding” to risk will be much clearer, if key terms are defined in line with the UNGPs. This will help link the ACT process to international human rights legal frameworks, and drive certainty and coherence across the different legislative regimes.

#### *What are the hallmarks of “serious” due diligence?*

Knowledge is still emerging on the sorts of indicators that governments might look for, to help signal that a human rights due diligence process is “serious”. In the European context, Shift, a leading business and human rights NGO, has recently published a list of “signals of seriousness” for human rights due diligence.<sup>8</sup> The list is more expansive than risk assessment for modern slavery risk. However, elements of this methodology are relevant, whether applied to preventing discrimination or modern slavery, and whether applied to a supply chain or an entities’ entire operations. They cover:

- The critical role of the Board in providing governance of human rights risks.
- Engagement between the entity and affected stakeholders.
- Company processes for risk identification and prioritization.
- Taking action on identified risks.
- Monitoring and evaluating progress in addressing risks.
- Providing and enabling remedy.

The Shift guidance is a great example of the type of practical guidance that an Anti-Slavery Commissioner could look to in future, to help give clearer shape and structure to requirements for reporting on modern slavery risk identification, mitigation and response. Indeed, this is the approach taken in NSW, where it is proposed that these principles help give shape to the meaning of “effective due diligence”.<sup>9</sup>

Inclusion of the language of due diligence will enable consistency and coherence between ACT practice, and practice in other jurisdictions in Australia and internationally. Also, the emerging knowledge will help ensure the focus stays on outcomes, rather than reporting. For example, as drafted, the Bill refers to ACT Government agencies reporting on “the actions taken by the entity *in response to* any instance of modern slavery identified in its supply chains.” The UNGPs set out an understanding of what constitutes remediation. As further elaborated by the Shift draft principles, it is clear that “action on identified risk” should focus on *outcomes for affected stakeholders*. Rather than simply “doing no harm”, the principles suggest entities work toward achieving positive human rights outcomes as part of preventing and mitigating risk.<sup>10</sup>

#### **Role of the Auditor General in relation to efforts to combat modern slavery**

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<sup>8</sup> Shift, “*Signals of Seriousness*” for Human Rights Due Diligence (2021), <https://shiftproject.org/resource/signals-of-seriousness-draft1/>.

<sup>9</sup> See proposed definition of “effective due diligence”, <https://dcj.nsw.gov.au/documents/engagement-and-justice/anti-slavery-commissioner/nsw-asc-discussion-paper-nsw-public-procurement-and-modern-slavery.pdf>

<sup>10</sup> Shift, “*Signals of Seriousness*” for Human Rights Due Diligence 5.

The Bill seeks to amend the *Auditor-General Act 1996* (ACT), to add consideration of modern slavery risk and responses to performance audits. Currently, the relevant section of the Act includes consideration of environmental issues. The Bill will add the following, in section 12(2) of the Auditor-General Act 1996:

“In the context of a performance audit, the Auditor-General may, where appropriate, consider -

(a) environmental issues relative to the operations being reviewed or examined, taking into account the principles of ecologically sustainable development; and

(b) the risk of modern slavery happening in the operations being reviewed or examined, and the action taken to mitigate the risk”.

While a welcome addition to the powers of the Auditor-General, it is unclear why the powers of the Auditor-General are not also extended to consider actions taken to *remedy* any modern slavery abuses identified by the agency in question, either in the operations or supply chains. Accordingly, it is recommended that the concept of remedy is added into draft section 12(2)(b) of the *Auditor-General Act 1996*.

The ACT may also want to consider the approach taken in the NSW regime, which enables the Auditor-General to undertake risk-based audits that are specific to efforts to combat modern slavery (as distinct from performance audits generally). This would certainly strengthen the level of independent oversight of the Territory response. Section 38G was added to the Public Finance and Audit Act 1983 (NSW), in the Modern Slavery Act amendment process:

“(1) The Auditor-General may, when the Auditor-General considers it appropriate to do so, conduct a risk-based audit of all or any particular activities of a government agency to determine whether the government agency is ensuring that goods and services procured by and for the agency are not the product of modern slavery.

(2) In exercising functions under this section, the Auditor-General is to consider whether the government agency has exercised due diligence in relation to procurement of goods and services and has complied with any directions of the NSW Procurement Board under section 175 (3) (a1) of the Public Works and Procurement Act 1912.

(3) In subsection (2), due diligence includes taking reasonable steps (whether by way of contractual terms or otherwise) to ensure the primary supplier of goods and services is responsible for implementing processes to eliminate or minimise the risk of the goods or services supplied being products of modern slavery.

(4) A modern slavery audit is separate from, and does not affect, any other audit required or authorised by or under this or any other Act.

(5) A single modern slavery audit may relate to the activities of more than one government agency.”

### **Preventing procurement where entity fails to comply with Modern Slavery Act (Cth)**

The Bill seeks to prevent Territory entities from procuring from entities that have failed to comply with the Commonwealth Modern Slavery Act reporting requirements. This is commendable, as it

both protects the integrity of Territory government procurement and encourages compliance with the Federal law through denial of access to government procurement in the ACT.

### **Require risk statements from businesses tendering for work \$25,000 and over**

The Bill will introduce a requirement that entities (people and businesses) wanting to be part of ACT procurement worth more than \$25,000 must provide a statement covering the risk of modern slavery in relation to the work in question. This departs significantly from the Federal and NSW regimes and introduces a requirement that may affect small and medium sized businesses, who were deliberately excluded from the coverage of these other laws. While everyone certainly has a role to play on this topic, the benefits of mandating a requirement such as this needs to be balanced against the reality that small businesses may struggle to undertake any kind of meaningful risk assessment, given modern slavery is a hidden crime, typically requiring considerable investment of time and resources to uncover.

As the NSW Anti-Slavery Commissioner has noted, when setting thresholds for reporting, there is merit in considering not only the dollar value of the entity involved, but also the risk profile of the operations and supply chain involved. In relation to the Commonwealth regime, Dr James Cockayne has argued:

“The question of who should report under the Act should be answered not by reference to the size of the reporting entity or its revenues, but by reference to its connection to salient modern slavery risks – that is, those risks are most significant in scope, severity and remediability”.<sup>11</sup>

It is recommended that the ACT Legislature reconsider the costs and benefits involved in requiring reporting from companies that may be relatively small, possibly also with a low risk profile, under proposed section 22ZJ in the *Government Procurement Act 2001* (ACT). An alternative approach may be to consider the risk profile of the products and services being procured, and to attach reporting obligations to those with a higher risk profile. This effort could usefully be guided by the Anti-Slavery Commissioner.

### **Require entity administrative units to make voluntary statements under the MS Act (Cth)**

The Bill will amend the Human Rights Act to require ACT administrative units to make voluntary modern slavery statements under the Commonwealth Modern Slavery Act. This will bring ACT Government practice into line with NSW practice on this issue. Like the NSW regime, the ACT Bill requires individual statements from all government entities. This is a step ahead of the Commonwealth Act which requires only a single overarching statement from the Commonwealth Government on behalf of all non-corporate Commonwealth entities. Corporate Commonwealth entities are not required to publish statements unless they are captured by the annual consolidated revenue threshold.

### **Introduce an ACT Anti-Slavery Commissioner**

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<sup>11</sup> Office of the Anti-Slavery Commissioner, *Reporting for Action: Submission of the NSW Anti-Slavery Commissioner to the Review of the Modern Slavery Act 2018 (Cth). Discussion Paper #3* (December 2022), 10, <https://dcj.nsw.gov.au/documents/ega-and-justice/anti-slavery-commissioner/papers-and-discussion-papers/oasc-discussion-paper-003-reporting-for-act-on.pdf>.



The Bill seeks to amend the Human Rights Commission Act to add an Anti-Slavery Commissioner, alongside other critical roles such as the Children and Young People’s Commissioner and Health Services Commissioner. Given the reporting obligations noted above, the Anti-Slavery Commissioner will likely have a critical role in supporting and enabling businesses and territory agencies to understand and meet their obligations regarding risk assessment, risk mitigation and remedy. An excellent example of this is provided in the NSW context, where the NSW Anti-Slavery Commissioner is currently consulting with NSW agencies on proposed ways to prioritize and undertake modern slavery due diligence, using the UNGPs as a framework.<sup>12</sup>

It is vital that the ACT Anti-Slavery Commissioner has sufficient powers to achieve the objectives of the Bill. The NSW Anti-Slavery Commissioner has provided a set of useful recommendations on the functions and powers of a proposed Federal Anti-Slavery Commissioner, that could also be usefully considered for their relevance by the ACT. As the NSW Commissioner notes, “There is growing recognition that an independent supervisory body can play important risk-signalling, interpretive, advisory, capacity building and mobilising roles that encourage subjects of disclosure regimes to move from ‘reporting for reporting’s sake’ to ‘reporting for action’”.<sup>13</sup> He recommends that in the Federal context, the Anti-Slavery Commissioner be empowered to:

- formally designate high risk products, locations, suppliers and supply chains;
- receive complaints and reports of non-compliance or to undertake inquiries into specific cases, reporting entities or sectors;
- issue codes of practice for implementation of the Act in specific sectors;
- cooperate with counterparts, such as the NSW and Commonwealth Commissioners (announced in the May 2023 Budget) to align approaches and combine forces to promote effective modern slavery risk reduction at the system level (for example through mutual recognition of risk analysis);
- issue infringement notices, require adoption of enforceable undertakings, impose license restrictions or conditions relation to an entities participation in public procurement;
- develop training and advisory support offerings to enhance modern slavery risk management capabilities, including on remedy; and
- centralise expertise on identifying and responding to modern slavery.

As presently drafted, the ACT Anti-Slavery Commissioner will have fairly limited powers, being required to maintain a register of non-compliant agencies and exemptions, to refer slavery allegations to other statutory office-holders, and the power to ask for information. It is recommended that the ACT Legislature consider the merits of strengthening the remit of the ACT Anti-Slavery Commissioner, so that they might more effectively support the aims of the bill by contributing to oversight, risk assessment and capacity building.

In terms of the functions as drafted, while it is perhaps implicit, it is notable that at present, there is no reference to the concept of “remedy” in the Anti-Slavery Commissioner’s remit. It is recommended that specific reference to “remedy” is added, for example, at a minimum under proposed section 18G(1)(c) and (2)(b).

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<sup>12</sup> Office of the Anti-Slavery Commissioner, *NSW Public Procurement and Modern Slavery: Discussion Paper #1* (September 2022), <https://dcj.nsw.gov.au/documents/ega-and-just ce/ant-s-avery-comm-ss-oner/nsw-asc-discussion-paper-nsw-public-procurement-and-modern-slavery.pdf>.

<sup>13</sup> Office of the NSW Anti-Slavery Commissioner, *Reporting for Action*, 16.



It will be important to be clear on the intended jurisdictional scope of the Anti-Slavery Commissioners remit. This seems unclear, in section 18I. While some of the modern slavery risk being identified by the Commissioner will occur or originate *within* the ACT, much of the risk to Territory agencies and businesses will flow from activities taking place well outside the ACT borders. It is unclear if, for example, the power of the Commissioner to “refer slavery allegations to other statutory officeholders under section 18I” would apply irrespective of where the slavery allegation has taken place, or only in relation to situations occurring in the ACT. Similarly, would the Commissioner’s powers to require information in relation to their functions extend to requiring information about situations occurring outside of the ACT (for example, in the operations or supply chain of a business seeking to do business with the ACT)?

The proposed section 18I also provides that the Commissioner “may” give any information, document or other thing relating to a slavery allegation to a statutory office holder, if the commissioner considers that the allegation could have been reported to the statutory-office hold and, in the Commissioner's opinion “it would be appropriate” to give that information to the office holder. Given the sensitive nature of allegations of modern slavery, the Commissioner’s consideration should take account of the human rights of those involved, including safety of the victim and their wants and needs. It is recommended that the Bill is amended, to direct the Commissioner to have regard to the *UN’s Recommended Principles and Guidelines on Human Rights and Human Trafficking*,<sup>14</sup> when making decisions such as those under proposed section 18I. The ACT Victims of Crime Commissioner is also well placed to provide advice on this aspect of the Bill.

### Review of the Act

The Bill requires the Minister to review the operation of the Act, which must start as soon as practicable 3 years after the day the Bill commences. Given the Commonwealth is currently considering its own review of the Federal regime and how closely aligned the ACT bill is to that legislation, it may be necessary to amend any bill sooner than this timeframe.

On drafting, there may be an error in numbering in the draft Bill, as it is not clear why a new section ‘122’ would be added to the *Human Rights Commission Act*, which currently includes sections up to only section 105.

Thank you for your consideration of these comments and recommendations. I would be very happy to discuss these further with you, should that be of value to the Committee or legislative process

Yours sincerely,

Fiona David

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<sup>14</sup> Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2003), <https://www.ohchr.org/sites/default/files/Documents/Publications/Trafficking.pdf>.