

20 May 2019

Modern Slavery Business Engagement Unit
Department of Home Affairs
6 Chan St, Belconnen
CANBERRA ACT 2617

By email: slavery.consultations@homeaffairs.gov.au

Dear Sir/Madam

Modern Slavery Act 2018: Draft Guidance for Reporting Entities

The Law Council welcomes the opportunity to make submissions to the Department of Home Affairs (**the Department**) regarding its *Modern Slavery Act 2018: Draft guidance for reporting entities (Draft Guidance)*.

The Law Council is grateful for the assistance of its Business and Human Rights Committee, the Law Society of New South Wales and the New South Wales Bar Association in the preparation of this submission.

The Law Council notes that the Chair and individual members of the Law Council's Business and Human Rights Committee contributed directly to the development of the Draft Guidance in their capacity as members of the Department's expert advisory group. The Law Council, guided by its Committee, welcomes the Draft Guidance and generally supports its current form.

The Law Council considers the Draft Guidance to be a comprehensive document and is satisfied that the Department has allowed sufficient time for consultation from interested stakeholders. The final guidance will undoubtedly provide a useful practical resource to reporting entities and legal practitioners advising reporting entities about compliance with the national Modern Slavery Reporting Requirement (**Reporting Requirement**) under the *Modern Slavery Act 2018* (Cth) (**the Act**). Under the Reporting Requirement, certain large entities must publish annual statements (**Modern Slavery Statements**). Through providing guidance and adequate support to reporting entities, the Department can assist in creating a culture of compliance with Modern Slavery obligations.

In this submission, the Law Council wishes to raise some additional comments and suggestions, with the aim of enhancing the Draft Guidance.

Overarching comments

Additional integration of human rights principles

The Law Council supports the integration of the United Nations Guiding Principles on Business and Human Rights (**UNGPs**) in the Draft Guidance to frame and explain each criterion that businesses will be required to address in their Modern Slavery Statements.

The UNGPs are the recognised global standard for preventing and addressing business-related human rights harm, and will provide a useful reference point for businesses seeking to comply with the requirements of the Act.

However, the Law Council considers that there is room for further inclusion and expansion on the overarching principles of international human rights law that inform the obligations under the Act. In this respect, the Law Council notes that other organisations, including the Organisation for Economic Co-operation and Development (**OECD**)¹ and International Bar Association,² have released publications designed to raise awareness of the risk of adverse impacts on human rights by businesses and to promote adherence by businesses to human rights principles. Including references to these publications in the Draft Guidance may assist reporting entities, and the legal practitioners who advise reporting entities, in understanding the overarching international human rights law framework within which the Act is intended to operate.

Reference to provisions of the Act

The Draft Guidance necessarily follows the structure of the Act and adopts expressions used in the Act itself (for example, 'operations' and 'supply chains'). It may assist legal practitioners advising reporting entities on compliance with the Reporting Requirement for the Guidance to include references to the relevant provisions of the Act. This will also assist in distinguishing between legal requirements, on the one hand, and guidance, on the other.

Specific suggested amendments and additions

Inclusion of target audience(s) for Modern Slavery Statements

Individuals preparing a Modern Slavery Statement for their reporting entity may find it useful if the Draft Guidance specifically identified the categories of audience who are likely to read their statement. These audiences could include the Minister, the Department of Home Affairs and, once the statement is published on the Modern Slavery Statements Register, interested members of the general public and non-governmental organisations.

Reference to the Corporations Act 2001 (Cth)

Chapter 2 of the Draft Guidance explains how to determine whether a reporting entity is required to comply with the Reporting Requirement by providing a Modern Slavery statement. Page 15 the Draft Guidance states that the Reporting Requirement applies to foreign entities (with a consolidated revenue of at least \$100 million in the 12-month reporting period) 'carrying on business in Australia at any time in that reporting period'.

The expression 'carries on business in Australia' is defined in paragraph 5(1)(b) of the Act to mean:

- (a) *in the case of a body corporate—carries on business in Australia, a State or a Territory within the meaning of the Corporations Act 2001 (see section 21 of that Act); or*

¹ See the Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (Web page) <<http://mneguidelines.oecd.org/guidelines/>>.

² See the International Bar Association, *Practical Guide on Business and Human Rights for Business Lawyers* (2016) and the International Bar Association, *Business and Human Rights Guidance for Bar Associations* (2015) <<http://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>>.

(b) in any other case—would be taken to do so within the meaning of that Act if the entity were a body corporate.

The box on page 17 of the Draft Guidance refers to section 21 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

Subsection 21(2) of the Corporations Act states that a reference to a body corporate carrying on a business in Australia, includes the body ‘establishing or using a share transfer office or share registration office in Australia’, or ‘administering, managing, or otherwise dealing with, property situated in Australia... as an agent, legal personal representative or trustee, whether by employees or agents or otherwise’. Subsection 21(3) contains a list of circumstances that do not indicate that a body corporate carries on a business in Australia, or in a state or territory.

The Department may wish to consider whether to make specific reference to the matters contained in section 21 of the Corporations Act in the final Guidance.

Voluntary reporting

Chapter 3 of the Draft Guidance provides information about entities that wish to comply voluntarily with the Reporting Requirement.

An important aspect to the voluntary reporting option is that an entity may, pursuant to subsection 6(3) of the Act, revoke its voluntary reporting to the extent that it applies in relation to a reporting period or periods, by ‘giving written notice accordingly to the Minister before the start of the reporting period (or the earliest of the reporting periods)’. The Explanatory Memorandum explains that the provision is intended to prevent an entity that volunteers to comply from withdrawing during a current reporting period to avoid its obligations to report on modern slavery risks identified during that period.³ The Law Council submits that the Guidance should refer to the ability of an entity to revoke its voluntary reporting and the circumstances in which it may do so.

The Draft Guidance could also usefully clarify the application of section 16A of the Act which deals with failures to comply with the Reporting Requirement, to entities that report voluntarily. Section 6 of the Act outlines how an entity may report voluntarily. The definition of ‘reporting entity’ under subsection 5(d) includes an ‘entity which has volunteered to comply with the requirements of the Act under section 6 for that period’. Section 16A outlines the process and powers associated with reporting entities’ failure to comply with requirements to report in sections 13 and 14. As reporting entities include those reporting voluntarily per section 6, this means that voluntary entities are also subject to section 16A. The Law Council submits that this should be made clear in the Draft Guidance. It notes that this information may influence entities’ willingness to participate voluntarily.

Definitions of ‘structure, operations and supply chains’

Paragraph 16(1)(b) of the Act requires a reporting entity to describe its ‘structure, operations and supply chains’ in its Modern Slavery Statement. These terms are not defined in the Act.

The Draft Guidance provides an explanation of the meaning of these terms on page 25. The term ‘operations’ is broadly defined to mean ‘any activity or business relationship undertaken by the entity to pursue its business objectives and strategy, including ‘research

³ Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [86-9].

and development', 'construction', 'production', 'arrangements with suppliers' and 'distribution'.

Given the significance of this definition to the reporting obligations under the Act, reporting entities, and those advising them, may benefit from further explanation of the enumerated activities. For example, it would be useful for the Draft Guidance to clarify whether the 'operations' definition includes customer-side risks, and whether reporting entities are expected to identify links between modern slavery and customer relationships.

Similarly, page 25 the Draft Guidance includes an example of the terms 'structure', 'operations' and 'supply chains' as applied to a hypothetical building company. It may be helpful to include parallel examples for service-based industries such as the legal profession, financial services and media firms.

Identification of risks of modern slavery in operations and supply chains

Paragraph 16(1)(c) of the Act requires a reporting entity to describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and any entities the reporting entity owns or controls.

Page 30 of the Draft Guidance defines 'risks of modern slavery practices' as 'the potential for a reporting entity to cause, contribute to, or be directly linked to modern slavery through its operations and supply chains'. The terms 'cause', 'contribute to', and 'directly linked' are significant in the context of reporting on these criteria. While these words evince an intention to apply these criteria beyond direct suppliers and customers, there remains uncertainty regarding how far up or down a supply chain a reporting entity reasonably needs to investigate in order to satisfy these criteria.

The example in the fourth bullet point on page 30 of the Draft Guidance illustrates this point. The example, which is given as an example of an entity being 'directly linked' to modern slavery practices, states:

For example, your entity may retail electronic goods. These goods may have been manufactured by another entity using minerals sourced from a third entity that were mined using forced labour.

This example has two levels of separation between the modern slavery practice (the third entity) and the reporting entity (an electronic goods retailer).

However, it is not clear whether there is an expectation that further removed risks should also be reported. Namely, would an electronic goods retailer have a risk of being directly linked to modern slavery practices if the goods are manufactured by another entity (electronic goods manufacturer) using components manufactured by a third entity (components manufacturer) itself using raw materials produced using forced labour (mining company)? In this revised scenario, there is a further level of separation in the supply chain between the modern slavery practice and the reporting entity. Clarification as to whether in situations such as these the mining company's modern slavery activities would be 'directly linked' to the electronic goods retailer may be helpful to include.

Page 33 of the Draft Guidance states that 'in many cases, you will need to do a basic scoping exercise to help you identify and describe the risks of modern slavery practices for an entity'. The how-to box on the same page provides some further guidance on scoping modern slavery risks. However, the Draft Guidance does not detail how far such scoping should be reasonably undertaken up or down a supply chain.

As such, it may be worthwhile elaborating on this point to clarify expectations for reporting entities and the legal practitioners advising them in respect of this criteria.

Industry specific guidelines: investors and banks

Page 33 of the Draft Guidance indicates that investments should be scoped and mapped in the same manner as suppliers. The Law Council submits that the treatment of investors and banks should be dealt with in a separate section and provided with specific attention. The Law Council notes that there are many different types of investments and the alignment of suppliers and investees is not always appropriate.

Hypothetical examples could usefully be included in the Draft Guidance, such as those that address reporting by superannuation funds, other fund managers and financial institutions. Special criteria would be helpful regarding these examples, noting that these institutions cannot reasonably be expected to review in detail all the operations of the companies they invest in or provide with loans.

Additionally, the Draft Guidance could be clearer regarding how and when the risk of borrowers should be considered in a scoping exercise.

Geographic and rule of law risks

At pages 63 and 64 of the Draft Guidance, it may be beneficial to include specific resources businesses can refer to in order to assess modern slavery risks, including the World Justice Project *Rule of Law Index* and the Ethical Trading Initiative's list of online resources.⁴

Assessing the effectiveness of actions being taken to assess and address modern slavery risks

Paragraph 16(1)(e) of the Act states that a Modern Slavery Statement must 'describe how the reporting entity assesses the effectiveness of...actions' taken to assess and address modern slavery risks. The section of the Draft Guidance (at pages 43-44) explaining this criterion could be improved by including recommendations and examples of best practice for measuring the effectiveness of specific actions taken to assess and address modern slavery.

Engaging with suppliers

Appendix 2 of the Draft Guidance contains helpful suggestions for working with suppliers to assess and address modern slavery risks. Reporting entities may find it useful if this section were to also include guidance on responding to risks in situations where they have limited leverage over a supplier.

Effect of non-compliance

One aspect of the operation of the Reporting Requirement that is omitted from the Draft Guidance is the effect of non-compliance with the Reporting Requirement.

Section 16A of the Act sets out the effect of non-compliance with the Reporting Requirement. It would assist reporting entities, and legal practitioners advising reporting

⁴ World Justice Project *Rule of Law Index* (2019) <<https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019>>; Ethical Trading Initiative, *Modern Slavery resources* (Web page) <<https://www.ethicaltrade.org/issues/modern-slavery/modern-slavery-resources>>.

entities, to understand how the Minister, his or her delegate, and the Department intend to address issues of non-compliance pursuant to section 16A of the Act.

In this respect, it may assist reporting entities, and legal practitioners advising reporting entities, to understand how issues of non-compliance in the first reporting period are intended to be addressed and whether that may change after the initial reporting period.

Suggestions for next steps

The Draft Guidance notes that the Modern Slavery Business Engagement Unit (**MSBEU**) is not equipped to provide detailed advice about modern slavery risks in specific sectors. The Law Council suggests that as and when capacity permits, the MSBEU develop sector specific guidance to complement the comprehensive guidance for reporting entities. In preparing any sector-specific guidance, the MSBEU may wish to utilise the OECD guidance about due diligence in key sectors and industries,⁵ and adapt it for the Australian context as appropriate.

The Law Council recommends that the Draft Guidance be a 'living document' subject to regular update and review. Topics for inclusion in future editions of the Draft Guidance could include: how a reporting entity can evolve and improve its Modern Slavery Statement by building on each year; and guidance for reporting entities that fall within the scope of both the New South Wales and Commonwealth modern slavery legislation (building on the 'learn more' box located at page 16 of the Draft Guidance).

Should you wish to discuss any of the above, please do not hesitate to contact Ms Sarah Sacher, Policy Lawyer, on 02 6246 3724 or at Sarah.Sacher@lawcouncil.asn.au.



Yours sincerely

Arthur Moses SC
President

⁵ Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises, *Sectoral Guidance* (Web page) <<http://mneguidelines.oecd.org/sectors/>>.