



Law Council  
OF AUSTRALIA

# National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper

**Human Trafficking and Slavery, Australian Border Force**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## **Acknowledgement**

The Law Council of Australia is grateful to its Business and Human Rights Committee, National Human Rights Committee, the Human Rights Committee of its International Law Section, the Migration Law Committee and Industrial Relations Committee of its Federal Litigation and Dispute Resolution Section, Family Law Section, the Law Institute of Victoria, the Victorian Bar, and the Law Society of New South Wales for assistance in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Australian Border Force regarding the Australian Government's Public Consultation Paper (**the Consultation Paper**) on the *National Action Plan to Combat Modern Slavery 2020-24 (the New Plan)*. The New Plan will build upon the *National Action Plan to Combat Human Trafficking and slavery 2015-2019 (the Previous Plan)*, driving Australia's efforts to combat modern slavery over the next five years.
2. Human trafficking, forced labour, debt bondage and forced marriage are all human rights abuses and are all encompassed within the definition of modern slavery in the Commonwealth legislative regime.<sup>1</sup>
3. Modern slavery presents Australia and the globe with a formidable challenge. The International Labour Organization (**ILO**) has estimated there are more than 40 million victims of modern slavery worldwide.<sup>2</sup> Around 16 million of these are exploited in the private economy.<sup>3</sup> It is well established that modern slavery is a business model.<sup>4</sup> It has been estimated that US\$150 billion in profits is generated annually from forced labour alone.<sup>5</sup>
4. The Law Council considers that Australia has a strong criminal law framework that criminalises human trafficking, slavery and slavery-like practices, regardless of whether they occur in Australia or overseas. However, the United States (**US**) Department of State has recently called upon Australia to significantly strengthen its efforts to investigate and prosecute trafficking offences, given its low conviction rates.<sup>6</sup> Moreover, criminalisation is but one tool in the fight to eliminate modern slavery in Australia and worldwide. An overarching strategy accounting for all stakeholders, including governments, companies, civil society and survivors is required, to eliminate modern slavery at its source and provide effective remedies for its victims. A human rights approach should underpin these responses.
5. Australia must continue to build on the considerable progress made under the Previous Plan. There is an important task ahead to communicate, implement and build upon the recently commenced *Modern Slavery Act 2018 (Cth) (MSA)*, which was a key achievement of the Australian Government under the Previous Plan. It is also critical to ensure that traffickers are successfully prosecuted under the criminal justice system, but not at the expense of victims, who must be supported in a manner that upholds their dignity and rights. Going forward, the Law Council considers that it is fundamental that immigration outcomes and support services for victims of slavery are not conditioned upon cooperation with the criminal justice system.
6. This submission recommends that:

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<sup>1</sup> Consultation Paper, 2.

<sup>2</sup> ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva (2017), 49.

<sup>3</sup> *Ibid*, 10.

<sup>4</sup> See, eg, Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10(1) *Brown Journal of World Affairs* 119; Cathy Zimmerman and Ligia Kiss, 'Human trafficking and exploitation: A global health concern' (2017) 14(11) *Public Library of Science PLoS medicine* e1002437. Zimmerman and Kiss explain: Exploitative practise are commonly sustained by business models that rely on disposable labour, labyrinthine supply chains, and usurious labour intermediaries alongside weakening labour governance and protections, and underpinned by deepening social and economic divisions.

<sup>5</sup> ILO, *Profits and Poverty: The Economics of Forced Labour* (2014).

<sup>6</sup> United States Department of State, [2018 Trafficking in Persons Report – Australia](#), 28 June 2018.

- The New Plan should be developed based on an independent evaluation of the Previous Plan. It should specify the full range of relevant international human rights standards which should guide Australia's response;
- Goal 3 should highlight that the New Plan should seek to expand, and be based on, the evidence base regarding modern slavery. Amongst other factors, it should have regard to demographic shifts in migration, and evidence regarding the ethnicity, gender and age of modern slavery victims. In particular, given the disproportionate impact of modern slavery on women and girls, it should adopt a gender equity approach;
- Goal 4 should be amended to advancing and strengthening Australia's legislative framework to combat modern slavery, in line with international and domestic standards and best practice;
- A strong evidence base must be developed to inform the three-year review of the MSA. The review should consider key improvements including: reducing the reporting threshold; introducing penalties for non-compliance; establishing an independent Commissioner; and addressing anomalies in reporting requirements for subsidiaries;
- Goal 5 should be amended to ensure that training of frontline officials is also directed towards referring victims to appropriate support. Training should be expanded to include 'frontline officials' in a wide range of occupations who are likely to be 'first line responders' to modern slavery victims;
- The family violence provisions of the Migration Regulations 1994 (Cth) should be reviewed to ensure that they can be accessed by victims of forced marriage who have experienced family violence, and expanded to cover a broader range of visa holders;
- Goal 8 should be directed towards identifying key sectors of labour exploitation in both regional and urban areas of Australia; assessing and developing appropriate responses to eradicate serious labour exploitation; and providing remedies for victims of such exploitation;
- The Australian Government should publish the final report of the Labour Exploitation Working Group of National Roundtable experts, and its response;
- The period of time should be extended for modern slavery victims on skilled sponsored visas to transfer their sponsors in order to continue residing lawfully on their visa;
- Specific guidance should be provided on how the Australian Government intends to address slavery risks through its procurement processes;
- The Australian Government should commit to adopting a National Action Plan on Business and Human Rights, and continue its reform and promotion of the National Contact Point for the OECD Guidelines on Multinational Enterprises;
- Additional funding should be provided to ensure that people who are trafficked and exploited can access specialised legal assistance services and qualified interpreters, including in regional, rural and remote areas;
- The Australian Government should establish a federal compensation scheme for victims of trafficking, slavery and slavery-related offences;
- The Australian Government should de-link the modern slavery visa and victim support framework from the criminal justice process, and provide for established referral mechanisms from agencies other than AFP;
- The Australian Government should work with its regional counterparts to build awareness of modern slavery and address risks in the Pacific region, including under the Pacific Step-up initiative.
- Goal 12 should refer to deepening the whole of government approach to modern slavery to ensure overarching policy and program coherency.

- The New Plan should identify the responsibilities and commitments of state and territory governments. The roles of non-government stakeholders in addressing modern slavery, including key business and civil society, should also be addressed.
- Appropriate levels of funding should be guaranteed to ensure that civil society organisations can fully support victims of slavery.

## Consultation Questions

### Do the 12 goals capture key areas of focus for Australia over the next five years?

7. The Law Council supports the overarching aim behind the 12 goals in the Consultation Paper, namely to 'address the full cycle of exploitation, from recruitment to reintegration, and aim to give equal weight to the critical areas of prevention, enforcement and victim support'.<sup>7</sup> These goals expand upon the seven key areas of focus identified in the Previous Plan and are expressed in terminology that endorses a more progressive tone.<sup>8</sup>
8. The 12 goals are broad enough to capture many of the pressing issues and areas of focus requiring Government action, including regarding corporate accountability for modern slavery. However, several of the goals are currently imprecisely framed. The Law Council expects these goals to be further developed, with significant detail added in future stages of the consultation process.
9. The Law Council also suggests that the New Plan be developed based on an independent evaluation of what has been achieved under the Previous Plan, and the degree to which existing policies are proving successful.
10. It appreciates that the Australian Government has consulted with the National Roundtable on Human Trafficking and Slavery (**the Roundtable**) regarding future priorities. At times it is difficult, however, to determine whether certain objectives in the Previous Plan were implemented, and how they relate to current goals. For example, it is unclear what actions have been taken to address the key area of focus identified in the 'finalising operational protocols for our response to minors',<sup>9</sup> and why maintaining a specific approach to minors has not been reflected in the Consultation Paper.
11. At this early stage, the Law Council is pleased to make the following observations and recommendations in respect of the goals.

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<sup>7</sup> Consultation Paper, 3.

<sup>8</sup> For example, from 'considering our response to labour exploitation in supply chains' to 'enhance our response to combating serious forms of labour exploitation, including forced labour and deceptive recruiting'.

<sup>9</sup> Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-19* (Publication, 1 December 2014) 2 and 20.



**Recommendation:**

- **The New Plan should be developed based on an independent evaluation of the Previous Plan.**

**Goal 1 – maintain and promote compliance with international standards on modern slavery**

12. The Law Council considers that the Australian Government should specifically identify the international standards which relate to this goal. Eliminating slavery and slavery-like conditions is a global priority and is reflected in commitments set out in international instruments, including the following:
  - the *Convention against Transnational Organized Crime*, including the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Protocol)*;<sup>10</sup>
  - the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;<sup>11</sup>
  - the *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*;<sup>12</sup>
  - the *International Covenant on Civil and Political Rights*<sup>13</sup> (**ICCPR**);
  - the *Convention on the Elimination of All Forms of Discrimination Against Women*;<sup>14</sup> and
  - the *Convention on the Rights of the Child*<sup>15</sup> (**CRC**) and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.<sup>16</sup>
13. These international standards should guide and inform a human rights approach to addressing modern slavery both in and outside Australia.
14. In addition, both the *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*<sup>17</sup> (**UNGPs**) and Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (**OECD Guidelines**)<sup>18</sup> set out standards for companies to ensure that they are not violating human rights, including by profiting from modern slavery, in their operations and supply chains.
15. The development of the New Plan should particularly consider relevant international instruments that Australia has either endorsed or voted to adopt since the Previous Plan was prepared. These include: the 2030 Agenda for Sustainable Development;<sup>19</sup>

<sup>10</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/RES/55/25, annex II art 2(a).

<sup>11</sup> Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>12</sup> UN GA UN Doc A/RES/40/34 (adopted 29 November 1985).

<sup>13</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>14</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>15</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>16</sup> Opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

<sup>17</sup> The Guiding Principles were developed by the Special Representative of the Secretary-General, on the issue of human rights and transnational corporations and other business enterprises. They were annexed to his final report to the Human Rights Council (UN Doc A/HRC/17/31) and endorsed by the Human Rights Council in its resolution 17//4 of 16 June 2011.

<sup>18</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011 edition), OECD Publishing.

<sup>19</sup> UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

the Call to Action to End Forced Labour, Modern Slavery and Human Trafficking;<sup>20</sup> and the UN General Assembly Third Committee resolution on improving the coordination of efforts against trafficking in persons.<sup>21</sup>

**Recommendation:**

- **The New Plan should specify the full range of relevant international human rights standards which should guide Australia's response on modern slavery.**

**Goal 2 – engage the Australian community to understand and combat modern slavery**

16. As noted above, the Law Council is conscious that all stakeholders, including governments, companies, civil society, survivors and their communities, should play a vital role in eliminating modern slavery. Public awareness raising about the problem of modern slavery, including human trafficking is critical to any effective Plan. Tailored engagement and education strategies which are geared to the needs and experiences of each of these stakeholders should therefore be developed under this goal.
17. The Law Council particularly welcomes the efforts undertaken to date by the Australian Government in ensuring that businesses understand their reporting responsibilities under the MSA, including through the *Commonwealth 2018: Guidance for Reporting Entities*<sup>22</sup> (**Guidance**) and awareness building strategies.
18. It recommends that the New Plan make provision for ongoing education for business and corporations, in order to continue assist these entities to identify and address modern slavery occurring within supply chains, as they engage with the new regime. It will also be important to continually review and update the Guidance as issues emerge.
19. In this context, the Law Council welcomes the Australian Government's recent announcement<sup>23</sup> that it will establish an MSA Expert Advisory Group (**the Advisory Group**), which will comprise representatives from business, peak industry bodies, civil society and academia. It will provide advice to Government on implementing the MSA and help shape the Australian Government's engagement with reporting entities.
20. The Law Council considers that it will be important to resource the Advisory Group's activities. The Law Council similarly welcomes the announcement that the Australian Government will establish a Recognition Scheme for efforts to combat modern slavery.<sup>24</sup>
21. While awareness and encouragement measures should not substitute for compliance, the Law Council considers that the continued engagement of the general public on modern slavery issues is important. Businesses can be subjected to intense backlash where their supply chains are revealed to involve modern slavery, which is damaging to their reputation, and encourages broader compliance.

<sup>20</sup> Prime Minister the Rt Hon Theresa May MP, *A Call to Action to end forced labour, modern slavery and human trafficking*, 19 September 2017 <<https://www.gov.uk/government/publications/a-call-to-action-to-end-forced-labour-modern-slavery-and-human-trafficking>>.

<sup>21</sup> UN General Assembly, *Resolution adopted by the General Assembly on 17 December 2015: Improving the coordination of efforts against trafficking in persons*, 16 February 2016, A/RES/70/179.

<sup>22</sup> Department of Home Affairs, *Commonwealth 2018: Guidance for Reporting Entities* (2018).

<sup>23</sup> 31 December 2020: Assistant Minister for Customs, Community Safety and Multicultural Affairs, The Hon Jason Wood MP, *Joint media release with the Hon Marise Payne MP, Hon Christian Porter MP and the Hon Anne Ruston - New initiatives to combat modern slavery*, Media Release, 4 December 2019.

<sup>24</sup> Ibid.

22. Community engagement may also help to promote norms by which modern slavery (and broader forms of exploitation) is unacceptable, fostering investigation and prosecution and the adoption of other necessary measures. For example, the 7-Eleven underpayments case, which received significant public attention following investigations by Fairfax Media<sup>25</sup> and the ABC's Four Corners program,<sup>26</sup> was one factor leading to the Australian Government's establishment of the Migrant Worker Taskforce, which is discussed below.
23. With respect to educating individuals and communities who may be vulnerable to slavery, the Law Council's recent Justice Project canvassed research highlighting that vulnerable groups, including recent arrivals, commonly seek help for legal problems through trusted non-legal channels.<sup>27</sup> This may include seeking help from (inter alia) family, friends, community representatives, community health providers, schools, and migrant resource centres.
24. An overall finding of the project was that joined-up policy approaches, which foster strong awareness, relationships and referral links to appropriate sources of help amongst key communities and community service providers, were important and effective responses.<sup>28</sup>
25. In the slavery context, this will involve identifying such 'first responders', and increasing training and awareness measures to assist them to better understand human trafficking and slavery, including indicators, referral pathways and support available.<sup>29</sup>
26. Engagement on these issues should be seen as providing 'two-way' learning opportunities, in which traditional frontline authorities also benefit from a greater understanding of the communities they are seeking to help, and the most effective likely responses.<sup>30</sup> The Law Council is aware of concerns amongst some Roundtable participants that while the leadership of relevant authorities may be well versed on such issues, this knowledge does not always translate to frontline officers.

### **Goal 3 – promote an evidence-based response to modern slavery**

27. The Law Council considers that the New Plan should seek to expand, and be based on, the evidence base regarding modern slavery. This will guide the basis on which policy choices are developed, and limited taxpayer resources best targeted towards the most critical risks and vulnerabilities.
28. The research base should be both quantitative and qualitative and its objectives should include understanding the underlying causes of, and pathways towards, modern slavery in Australia and its surrounding regions. While the factors which increase individuals' vulnerability to modern slavery will vary widely, they may include poverty, widespread violence and conflict, and displacement from community and family support systems.<sup>31</sup>

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<sup>25</sup> Adele Ferguson and Sarah Danckert, '[Revealed: How 7-Eleven is ripping off its workers](#)', *Sydney Morning Herald*, August 2015.

<sup>26</sup> ABC *Four Corners*, '7-Eleven: The Price of Convenience', 30 August 2015.

<sup>27</sup> Law Council of Australia, *Justice Project – Final Report* (2018), Recent Arrivals [Chapter](#); [Trafficked and Exploited Persons Chapter](#); [People – Building Legal Awareness and Capability Chapter](#).

<sup>28</sup> *Ibid*, [Legal Services Chapter](#).

<sup>29</sup> *Ibid*, Trafficked and Exploited Persons Chapter, 18-19.

<sup>30</sup> *Ibid*, [People – Building Legal Awareness and Capability Chapter](#).

<sup>31</sup> IOM, *Migrants and their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (26 July 2019), [https://publications.iom.int/system/files/pdf/migrants\\_and\\_their\\_vulnerability.pdf](https://publications.iom.int/system/files/pdf/migrants_and_their_vulnerability.pdf)

## Migrants

29. While victims of slavery do not form a homogenous group, it is established that survivors of trafficking are more likely to have been trafficked from overseas, and exploited persons are disproportionately likely to be refugees or migrants.<sup>32</sup>
30. This is exemplified by situations which may amount to labour exploitation and even forced labour. The Fair Work Ombudsman's (FWO's) 2018-2019 *Annual Report* reported that migrant workers make up six per cent of the Australian workforce and account for 22 per cent of all formal disputes completed.<sup>33</sup> Meanwhile, 63 per cent of the court cases initiated by the FWO in 2017-18 involved litigating employers who exploit the vulnerabilities of migrant workers.<sup>34</sup> The FWO relevantly states that:
- The over-representation of migrant workers in our disputes potentially reflects their unique situation: being new to the Australian labour market, not having baseline knowledge about workplace rights and entitlements, and potentially experiencing language and cultural barriers. Some migrant workers may also be reluctant to speak with public officials and may be concerned about their visa status if they raise issues. These factors can make migrant workers particularly vulnerable to exploitative practices from unscrupulous employers.*<sup>35</sup>
31. The International Organization for Migration (IOM) further remarks that migrant workers are vulnerable in certain situations that are 'either unseen, hard to access or simply not covered by existing legal protections'.<sup>36</sup>
32. The Law Council suggests that the development of the New Plan should be developed with close regard to research concerning the experiences of diverse groups of migrants. Culturally competent services should be at the forefront of the Australian Government's response to modern slavery.

## Gender and age issues

33. Global estimates suggest that far more females than males are affected by modern slavery globally (71 per cent versus 29 per cent).<sup>37</sup> This varies across forms. Women and girls are disproportionately victimised above all for forced labour in the private economy (including domestic work and the sex industry) and forced marriage. Women and girls represented 99 per cent of victims of forced sexual exploitation and 84 per cent of victims of forced marriages.<sup>38</sup> Meanwhile, one in four victims of modern slavery are children.<sup>39</sup>
34. Recognising that these are global statistics, comparative data on domestic victims are needed. The Law Council considers that the New Plan requires a gender equity approach so that it effectively responds to modern slavery as it affects women and girls. This should be informed by further consultation with civil society and relevant

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<sup>32</sup> Ibid, Law Council of Australia, [Justice Project – Final Report](#) (2018), People who are Trafficked or Exploited Chapter, 13 citing Jacqueline Joudo Larsen and Lauren Renshaw, 'People trafficking in Australia' (Trends & issues in crime and criminal justice no 441, Australian Institute of Criminology, 2012) and Senate Education and Employment References Committee, A National Disgrace.

<sup>33</sup> FWO, [Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-2019, 'Vulnerable and Migrant Workers'](#).

<sup>34</sup> IOM, *Migrants and their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (26 July 2019), 10.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva (2017) 5.

<sup>38</sup> Ibid, 21.

<sup>39</sup> Ibid, 5.

government and law enforcement agencies. Data collection must include gender, country of origin, ethnicity and language spoken. This will inform the development of trauma-informed policy and program responses, and effective communication with/expectations of victims, including in the criminal justice sphere. However, it is essential that any data collection is subject to legal professional privilege, client confidentiality and privacy requirements.

### *Domestic geographic trends*

35. As noted, victims of slavery in Australia are disproportionately likely to be migrants. The Law Council's Justice Project,<sup>40</sup> which canvassed the barriers and experiences of a range of vulnerable groups in accessing justice, noted that Australia's overseas-born population is more likely to live in capital cities.<sup>41</sup> However, the numbers of overseas-born persons living outside of Sydney and Melbourne increased by 30 per cent between 2001 and 2011 (reaching just over one million),<sup>42</sup> and some inland areas have seen their dwindling Australian-born populations 'propped up' by the increase of immigrant populations.<sup>43</sup> The role of international migration in non-metropolitan Australia is predicted to become increasingly significant into the future.<sup>44</sup>
36. Close regard is required to such demographic shifts which are likely to impact on the efficacy of Australia's domestic slavery response. As discussed below, the Law Council is concerned that planning for services to assist victims and educate communities must take account of these shifts, as many victims of slavery may be geographically isolated and far from practical support – including individuals in domestic servitude situations, and people on regional visas who are exploited by unscrupulous employers.

#### **Recommendations:**

- **Goal 3 should highlight that the New Plan should seek to expand, and be based on, the evidence base regarding modern slavery. Amongst other factors, it should have regard to demographic shifts in migration, and evidence regarding the ethnicity, gender and age of modern slavery victims.**
- **In particular, given the disproportionate impact of modern slavery on women and girls, the New Plan should adopt a gender equity approach, which is absent in the current draft.**

### **Goal 4 – maintain a robust and comprehensive legislative framework to combat modern slavery**

37. The Law Council recommends that this goal should be amended to add 'that is regularly reviewed against international and domestic standards and best practice'. Furthermore, rather than simply seeking to 'maintain' a robust and comprehensive legislative framework, it considers that the Australian Government should 'advance and strengthen' this framework. While it is too early to determine the MSA (mo's

<sup>40</sup> Law Council of Australia, *Justice Project – Final Report* (2018), [Recent Arrivals Chapter](#); [Regional, Rural and Remote Australians Chapter](#).

<sup>41</sup> Australian Bureau of Statistics, *2011.0 – Reflecting a Nation: Stories from the 2011 Census – Cultural Diversity in Australia* (2012-13).

<sup>42</sup> 82 per cent in 2011, compared to 66 per cent of all people in Australia: Graeme Hugo et al, Regional Australia Institute, *Population Dynamics in Regional Australia* (January 2015) 69.

<sup>43</sup> *Ibid* 9.

<sup>44</sup> *Ibid*.

effectiveness, given that most eligible businesses will not be reporting until the end of 2020, the Law Council considers that there is room for future improvement.

38. As set out in its submission on the MSA, the Law Council considers the \$100 million revenue threshold for attracting the reporting requirements is set too high to achieve the Act's stated aims, and supports a lower threshold closer to \$60 million, which is approximately equivalent to the UK *Modern Slavery Act 2015* (UK) (**UK Act**) threshold.<sup>45</sup> The threshold in the *Modern Slavery Act 2018* (NSW) (**NSW Act**) is \$50 million.<sup>46</sup>
39. The federal threshold should be a figure that corresponds with the legislative purpose, ie, to address modern slavery risks in the supply chains of goods and services, by requiring companies which are large enough to influence suppliers to report. Achieving greater consistency in this regard will minimise confusion and compliance costs that may result from the same entity being classed differently under different legislation. The Law Council has also previously outlined certain anomalies which apply to capture subsidiaries in Australia differently under the MSA depending on whether their parent company is foreign or Australian. This creates an uneven playing field between Australian headquartered companies and foreign headquartered companies and should be addressed in the future.
40. The legislation should also include penalties for non-compliance, which would overcome the inherent unreliability of leaving compliance incentives to the market and consumers.<sup>47</sup> Penalties need not be imposed in the first instance, but should form a last resort for entities which flout their obligations after guidance and warning. At the very least, consideration should be given to requiring the Government, after a reporting period, to publish a list of names of entities which were supposed to report in that period but failed to do so.
41. The Law Council remains supportive of establishing an independent Anti-Slavery Commissioner (**Commissioner**).<sup>48</sup> In its view, the case for a Commissioner was well-made in the *Hidden in Plain Sight* report by the Joint Committee on Foreign Affairs, Defence and Trade,<sup>49</sup> which noted that it would complement existing departmental and official roles.<sup>50</sup> As well as providing guidance to businesses on the MSA, preparing and publishing a list of entities required to report, overseeing the register of reporting statements and monitoring compliance, the Commissioner could also oversee the New Plan's implementation, and coordinate a whole-of-government approach to modern slavery, as discussed below.
42. Penalties and a Commissioner role also form stronger features of the NSW Act, recognising that this legislation is currently under review.<sup>51</sup> The Law Council considers that these features should remain in the NSW Act and serve to inform the three year review of the MSA, thereby enhancing the consistency of state and federal regimes in a manner which enshrines best practice rather than the lowest common denominator.

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<sup>45</sup> Law Council, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Modern Slavery Bill 2018 (24 July 2018), 6.

<sup>46</sup> NSW Act, s 24.

<sup>47</sup> Law Council of Australia, *Modern Slavery Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee (24 July 2018), 7-8.

<sup>48</sup> *Ibid*, 8-9.

<sup>49</sup> Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017) [4.61].

<sup>50</sup> Such as the Ambassador for People Smuggling and Human Trafficking: *Ibid*.

<sup>51</sup> By the New South Wales Parliament's Standing Committee on Social Issues.

43. The Consultation Paper does not currently refer to the federal criminal law framework to address modern slavery under the *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth) and *Migration Act 1958* (Cth). However, the Law Council understands that the Australian Government intends to review existing offences to ensure that they remain fit for purpose, particularly with respect to specific scenarios such as organ trafficking and overseas orphanages. It looks forward to engaging with this review.

**Recommendations:**

- **Goal 4 should be amended to commit to advancing and strengthening Australia’s legislative framework to combat modern slavery, in line with international and domestic standards and best practice.**
- **A strong evidence base must be developed to inform the three year review of the MSA. The review should consider key improvements including: reducing the reporting threshold; introducing penalties for non-compliance; establishing an independent Commissioner; and addressing anomalies in reporting requirements for subsidiaries.**

**Goal 5 – train frontline officials to support the identification of victims and effective investigations of modern slavery**

44. Ongoing commitment is required towards comprehensive training to ensure frontline officials are competently skilled and experienced to identify indicators of potential victims of human trafficking and modern slavery. The Law Council recognises that the Australian Government has significantly invested in this area to date and welcomes this effort. The US *2018 Trafficking In Persons Report- Australia (TIP Report)* noted that the Australian Government had funded and facilitated training on trafficking investigations, legal provisions and victim support for more than 500 law enforcement and immigration officials.<sup>52</sup> The Australian Federal Police (AFP) had also develop online training for frontline officers during the reporting period.<sup>53</sup>
45. At the same time, the TIP Report included findings that that the Australian Government did not adequately screen for such indicators among vulnerable groups, and that its efforts needed to be strengthened to proactively identify trafficking victims amongst vulnerable groups.<sup>54</sup> Provided that it is subject to appropriate safeguards, screening by border patrol and visa processing officers may be particularly important in this regard, as they can refer possible victims for support before they are exploited.
46. In this vein, Goal 5 is characterised as training ‘to support the identification of victims and effective investigations of modern slavery’. The Law Council considers that a human rights approach would emphasise as part of this overarching goal training ‘to refer victims to appropriate support’. As flagged below, it considers that access to the support program should be based on referrals made by recognised authorities beyond the AFP alone.
47. The Law Council suggests that careful consideration be given to the training of the frontline officials who are most likely to encounter victims of slavery, beyond the most obvious candidates including police, labour inspectors, border patrol, immigration compliance and visa processing officials. Building the evidence base regarding

<sup>52</sup> US Department of State, [TIP Report](#) (2018).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

common pathways of victims towards help will be important in this regard, noting that these will vary depending on the kind of offence and victim.

48. As suggested above, depending on the scenario, 'frontline officials' responding to modern slavery situations may also include community health providers, migrant resource centres, refugee settlement services, schools and/or marriage celebrants. Training and awareness measures regarding relevant indicators, and referral pathways to available support should be considered with respect to these broader groups. While not all occupations can be targeted equally, evidence concerning key areas of risk for specific groups of modern slavery victims may help to guide the educative focus.
49. Such efforts are likely to extend well beyond the Commonwealth's functions. In this context, the Joint Standing Committee on Law Enforcement (**JSCLE**) acknowledged in 2017 that there is a need for frontline officers in a variety of Commonwealth, state and territory agencies to be able to identify the indicia of human trafficking, slavery and slavery-like practices and refer suspected victims to the relevant authority and support, and recommended this training be provided.<sup>55</sup> As such, the Law Council recommends below that the New Plan should identify the responsibilities and relevant commitments of state and territory governments, as well as those of the Commonwealth.

**Recommendations:**

- **Goal 5 should be amended to ensure that training of frontline officials is also directed towards referring victims to appropriate support.**
- **Training should be expanded to include 'frontline officials' in a wide range of occupations who are likely to be 'first line responders' to modern slavery victims, such as community health providers, migrant resource centres, schools and marriage celebrants.**

**Goal 6 – progress effective prosecutions to secure convictions against offenders**

50. Goal 6 introduces a new, explicit goal to 'progress effective prosecutions to secure convictions against offenders'. The Law Council welcomes efforts to ensure that the criminal justice system investigates and prosecutes suspected modern slavery crimes effectively.
51. This commitment is particularly important noting that in 2018, the US TIP Report recommended that Australia 'significantly strengthen efforts to investigate and prosecute trafficking offences, with increased focus on labour trafficking, and convict and stringently sentence sex and labour traffickers'.<sup>56</sup> It highlighted its concerns that in 2017, the government investigated 166 suspected cases of trafficking, and convicted just five traffickers. While this was an improvement over previous years, particular concerns were raised that 'authorities often opted to pursue labour or employment violations in lieu of trafficking charges, resulting in potential labour traffickers receiving only fines and other civil penalties that were inadequate that were inadequate to deter trafficking crimes.'<sup>57</sup>
52. Similarly, in 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade (**JSCFADT**) found that 'despite Australia's strong legislative and policy

<sup>55</sup> JSCLE, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (2017) xi, 28.

<sup>56</sup> US [TIP Report](#) (2018).

<sup>57</sup> Ibid.



frameworks for combatting human trafficking and slavery, criminal justice responses could be more effective in investigating and prosecuting modern slavery cases.<sup>58</sup> While the Law Council understands that the AFP has received increased referrals for human trafficking and slavery matters, prosecutions remain low.

53. The Law Council suggests that it is important to engage with victims and victims' support services, as well as police and prosecutors, to identify the underlying barriers in this area. Amongst other responses, as flagged below, measures to delink the criminal justice process from the trafficking visa and support framework (or at least to increase the length of initial support available and provide for non-AFP referrals) may, in the long term prove more effective from a criminal justice perspective. Such measures may better address victims' trauma and stabilise their situations, allowing them to better engage with criminal justice authorities when they are in a position to do so.

### **Goal 7 – enhance our response to combat forced marriage**

54. The Law Council welcomes the Australian Government's recent announcement that it will change eligibility requirements to give victims of forced marriage greater access to victim support on an ongoing basis, following its recent trial in this area.<sup>59</sup> More generally, the Law Council would appreciate greater detail regarding what measures are proposed to be adopted to enhance the Australian Government's current response to forced marriage.
55. The Law Council understands that referrals of suspected forced marriage to the AFP have significantly increased in recent years.<sup>60</sup> This 'spike' in reporting is likely explained by the fact that forced marriage was criminalised in Australia in 2013 and the resulting increased awareness surrounding the practice.
56. Many of the forced marriage cases identified in Australia involve female Australian citizens under the age of 18 whose parents have forced them, or are forcing them, to marry a man the parents have selected.<sup>61</sup> However, Simmons and Burn have observed that the reality is often more complex, with forced marriage existing along a continuum of coercive practices where men and women are pressured into fulfilling expected gender roles, and are thereby deprived of the opportunity to fully and freely consent to marriage.<sup>62</sup> The authors have also observed that forced marriage is different from the practice of sham marriage, where an Australian citizen fraudulently claims to be in a genuine relationship with a non-citizen in order to sponsor them to come to Australia as their 'spouse',<sup>63</sup> though such arrangements have been used by traffickers to bring people to Australia for the purpose of exploitation and domestic servitude.<sup>64</sup>
57. Recently reported cases illustrate the extent to which intimate partner exploitation in its most extreme forms can comprise human trafficking, or in some cases, forced marriage. Intimate partner violence may be connected to trafficking and exploitation

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<sup>58</sup> JSCFADT, *Hidden in plain sight: Inquiry into establishing a Modern Slavery Act in Australia* report (2017), Ch 7.

<sup>59</sup> Assistant Minister for Customs, Community Safety and Multicultural Affairs, The Hon Jason Wood MP, *Joint media release with the Hon Marise Payne MP, Hon Christian Porter MP and the Hon Anne Ruston - New initiatives to combat modern slavery*, Media Release, 4 December 2019.

<sup>60</sup> Australian Government, *Report of the interdepartmental committee 2015-16* (2016).

<sup>61</sup> See Australian Government, *Report of the interdepartmental committee 2015-16* (2016) 23.

<sup>62</sup> See Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36 *Melbourne University Law Review* 970, 973 ('*Forced Marriage in Australia*').

<sup>63</sup> *Ibid* 979-980.

<sup>64</sup> Such as in the case of *Re Kovacs* [2009] 2 Qd R 51; (2009) 192 A Crim R 345.

in situations where women come to Australia to marry, with the intention of studying and improving their circumstances, based on promises that have been made by their partners and others, and then meet with very different arrangements upon arrival.<sup>65</sup>

58. In this broader context, the Law Council notes that existing family violence provisions in migration legislation allow certain persons to apply for permanent residence in Australia to continue with their application after the end of a relationship, if they or a member of their family have experienced family violence by their partner.<sup>66</sup>
59. The Law Council notes that, there is a requirement to prove the genuineness of the relationship before the family violence provision can be invoked.<sup>67</sup> The inherent nature of a forced marriage therefore would not satisfy the requirement of a 'genuine relationship' as there was no consent to the marriage by the victim.<sup>68</sup> It is proposed that the family violence provisions be reviewed, with consideration given to expanding them to include circumstances where the marriage was forced, and there was no 'genuine relationship'.
60. These provisions are also limited to holders of temporary partner visas (subclass 309 or 820) or Prospective Marriage visas (subclass 300) who experience family violence. There is no provision for family violence to allow the grant of a permanent visa to an applicant who was a dependent of a skilled employer sponsored visa holder. The Law Council recommends that the above review also consider expanding these provisions to cover other visa categories, such as skilled migration visas, to ensure consistency.

**Recommendation:**

- **The family violence provisions of the Migration Regulations 1994 (Cth) should be reviewed to ensure that they can be accessed by victims of forced marriage who have experienced family violence, and expanded to cover a broader range of visa holders.**

**Goal 8 – enhance our response to combating serious forms of labour exploitation, including forced labour and deceptive recruiting**

61. Furthermore, the Law Council agrees with the emphasis in Goal 8 on combating the most serious forms of labour exploitation in Australia. There have been a number of reported cases in recent years, particularly in the horticultural sector, which suggest that labour exploitation is widespread in Australian businesses and operations connected through supply chains.<sup>69</sup>
62. According to the Global Slavery Index, cases of forced labour exploitation in Australia predominantly occur in industries considered at risk, including agriculture, construction, domestic work, meat processing, cleaning, hospitality, and food services.<sup>70</sup> The Index further notes that many of these industries employ a high

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<sup>65</sup> Such as 'Maria', an example of a woman enslaved in a relationship, based on clients with whom Anti-Slavery Australia has worked: Anti-Slavery Australia, *Face of slavery in Australia – Woman enslaved in relationship – Maria, 24, Philippines* (2017) <<http://www.antislavery.org.au/home/face-of-slavery-in-australia/aria.html>>.

<sup>66</sup> Eg, Migration Regulations 1994 (Cth) (**Migration Regulations**), Sch 2, Subclass 801 (Partner), cl 801.221(6).

<sup>67</sup> Migration Regulations, Div 1.5 (Special Provision Family Violence), regs 1.21 to 1.27.

<sup>68</sup> Migration Regulations.

<sup>69</sup> See, eg, Mosiqi Acharya, '[26 migrants exploited at NSW blueberry farm](#)' SBS (online, 25 August 2016; Nick McKenzie, 'Fruit supplier to Coles and Woolworths using illegal foreign workers' (15 November 2016) ABC News [online](#).

<sup>70</sup> Global Slavery Index, [2018 Country Findings – Australia](#).

percentage of migrant workers who enter Australia through its temporary visa scheme designed to fulfil Australia's labour shortages.<sup>71</sup>

63. Agriculture is widely recognised as a sector in which modern slavery is particularly common. Given Australia's vast swathes of farmland in regional, rural and remote areas and a visa system which often ties employees to employers in the agricultural sector,<sup>72</sup> assessing and eradicating labour exploitation should be a significant focus.
64. Similarly, there seems to be insufficient attention to identifying, raising awareness of and eradicating city-based exploitation. In the United Kingdom (UK), key sectors that have been identified to have a high risk of modern slavery include car wash services and nail bars.<sup>73</sup> These are sectors in which the employee is often disempowered, from a non-English speaking background, and may be the victim of human trafficking. With respect to Australia, the Law Council's committee members have also highlighted particular concerns with respect to the hospitality industry, which has a high reported incidence of wage theft, and the textile industry, which may rely upon outsourcing to migrant workers who are working in exploitative conditions.
65. The Law Council therefore recommends a more targeted goal in terms of labour exploitation than that currently proposed in the 2020-24 Plan. It proposes a goal of: identifying key sectors of labour exploitation in Australia in both regional and urban areas; assessing and developing appropriate responses to eradicate serious labour exploitation; and providing remedies for victims of labour exploitation.
66. As flagged, the Law Council is concerned about the serious exploitation of migrant workers. The recent Migrant Workers Taskforce report<sup>74</sup> and the findings of the Migrant Worker Justice Initiative's *National Temporary Migrant Worker Survey* provide empirical evidence that migrant workers are over-represented in systemic wage underpayment and exploitative practices in a range of industries.<sup>75</sup>
67. The Law Council recognises that there have been significant movements to address these concerns, including through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*. This Act increased employer penalties for serious contraventions of workplace laws and strengthened investigatory powers. The Law Council generally welcomed this legislation, noting its potential to strengthen Australia's modern slavery framework.<sup>76</sup>
68. Additionally, the Migrant Workers Taskforce Report was released in March 2019. The Taskforce was established in 2016 to propose improvements to more quickly identify and rectify any cases of migrant worker exploitation.<sup>77</sup> The Australian Government announced that it in-principle supported all 22 recommendations.<sup>78</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> See, eg, JSCFADT, *Inquiry into establishing a Modern Slavery Act in Australia* (2017), Ch 9.

<sup>73</sup> UK Department of Justice, *Annual Report on Modern Slavery*, October 2019, 19.

<sup>74</sup> Australian Government, *Report of the Migrant Workers Taskforce* (2019) (**Migrant Workers Taskforce Report**).

<sup>75</sup> Ibid; Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (November 2017); see also Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (October 2018).

<sup>76</sup> Subject to key areas of proposed improvement, as set out in Law Council of Australia, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Submission to the Senate Standing Education and Employment Legislation Committee, 20 April 2017.

<sup>77</sup> AGD, '[Migrant Workers Taskforce](#)'.

<sup>78</sup> AGD, '[Government response to the Migrant Workers Taskforce Report](#)', April 2019.

69. Since then, the Law Council has been pleased to respond to the AGD's Discussion Paper, *Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance*,<sup>79</sup> which was released in September 2019. This paper responded to aspects of the Migrant Taskforce Report and sought responses on the adequacy of the existing penalty framework, and the introduction of criminal sanctions for the most serious forms of exploitative workplace conduct. The Law Council's submission indicated that:
- it was generally supportive of increased pecuniary penalties, particularly where employers deliberately or knowingly underpay employees; and
  - while criminal sanctions could play an important deterrent effect, they alone will not alter the vast majority of cases of underpaid workers. The adequacy of compliance and enforcement tools and resources available to regulators and the courts are also highly relevant considerations.<sup>80</sup>
70. However, the Law Council considers that there remains room for further improvement. It refers to the establishment in 2016 by the Australian Government of a Labour Exploitation Working Group (**LEWG**) consisting of the National Roundtable to 'inquire into and provide recommendations to the Australian Government on strengthening Australia's response to serious and criminal forms of labour exploitation in Australia'. The LEWG was chaired by then-Law Council President Fiona McLeod AO SC and was comprised of a subset of National Roundtable representatives.
71. The LEWG delivered its final report at the 2018 National Roundtable. It considered that Previous Plan established 'a robust framework to respond to criminal labour exploitation' but noted that 'criminal forms of labour exploitation are still under-reported, under-detected, and under-prosecuted'.<sup>81</sup> Accordingly, it made 27 recommendations within the areas of 'Prevention', 'Identification and Referral', 'Investigation and Prosecution', 'Access to Justice and Remedies', 'Victim Support Services' and 'Building a Comprehensive Response'. The 82 page report set out a detailed case for reform with respect to each recommendation.<sup>82</sup>
72. The Law Council considers that this work remains an important starting point for future reforms in this area. While there may be some overlap with the Migrant Worker Taskforce report and the Australian Government's response, it considers that the LEWG's report deserves a full response in its own right, as it represents a holistic response by modern slavery experts and a key area in which Roundtable participants have sought to advise the Australian Government. It recommends that the Australian Government publish the report, including its response to each recommendation.
73. The Law Council also reiterates that careful consideration must be given to the US TIP Report concerns highlighted above, that authorities may be pursuing labour or employment violations in lieu of trafficking charges, resulting in potential labour traffickers receiving only fines or civil penalties that are inadequate to deter trafficking crimes. If these concerns remain, it notes that there would be serious anomalies given

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<sup>79</sup> AGD, [Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance](#) (September 2019).

<sup>80</sup> Law Council of Australia, [Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance](#), Submission to the AGD (2019).

<sup>81</sup> National Roundtable on Human Trafficking and Slavery's Labour Exploitation Working Group, *Strengthening Australia's Approach to Serious Forms of Labour Exploitation* (August 2018) 3.

<sup>82</sup> *Ibid* 5-8.

the over-incarceration of many First Nations children, often for minor crimes,<sup>83</sup> compared to an overly lenient approach towards far more serious offences.

#### *Visa issues*

74. The Law Council adds that specific measures should be considered to improve flexibility of migrant workers to change employers and to reduce their vulnerability to exploitation and modern slavery. For example, with respect to visa conditions on skilled sponsored visas (Subclasses 457 or 482), they are only able to work for their sponsoring employer and in their approved role.<sup>84</sup> An exception to this is when they are changing employers, however there is a strict time limit to find a new sponsor.<sup>85</sup> Currently, it is a condition of the temporary skilled visa that when they leave their sponsor they have exactly 60 days to find a new employer to sponsor and nominate them to continue working in Australia.<sup>86</sup>
75. The consequences of this 60 day condition include a chilling effect on those who might otherwise make a complaint, such as about their lack of remuneration. Most individuals would (rightly) assume that if they make a such a complaint they will lose their job. While the *Fair Work Act 2009* (Cth) makes it unlawful to terminate employment because a person has made a complaint about their employment,<sup>87</sup> it is an unfortunate reality that many vulnerable workers nevertheless do lose their job in these circumstances.
76. Furthermore, if they do make a complaint, it is very unlikely to be resolved within 60 days. Then, once out of the country, they are unlikely to be able to obtain their back-pay. That is in large part because once of the country it is difficult to prosecute a back-pay claim.
77. As a result, it is not uncommon that workers lose their job as a consequence of their employer not complying by the law, and then have to leave the country without the back-pay that was required to be paid to them. Only if the FWO pursues the case (which is not easy to do in the absence of the worker) will the employer suffer any detriment.
78. The Law Council is concerned that many vulnerable workers would prefer to work for a very low wage than complain and be forced out of the country. Unscrupulous employers take advantage of that fact to sponsor vulnerable workers and they pay them very low rates of pay. More needs to be done to prosecute employers who take advantage of workers in this fashion. Furthermore, those workers who have been exploited ought to be able to remain in Australia long enough to both find alternative employment and obtain their back-pay.
79. The Law Council supports consideration being given to extending the period of time (eg to 120 days) for victims of modern slavery or trafficking to transfer their sponsors in order to continue residing lawfully on their visa.

#### *Additional points*

80. The Law Council considers that it will be important to deliver targeted education to workplaces and industries which may be particularly susceptible to labour

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<sup>83</sup> Law Council of Australia and Australian Medical Association, [Minimum Age of Criminal Responsibility: Policy Statement](#) (2019).

<sup>84</sup> Migration Regulations, sch 8, cl 8107.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Fair Work Act 2009* (Cth), Pt 3-1.

exploitation, and information on where vulnerable workers can seek help. During the Justice Project, the Law Council received advice from specialist community lawyers that information which is only provided in written, online form and/or in English is often largely ineffective if intended for vulnerable migrant populations. Face-to-face education, interpreters and translations are needed.<sup>88</sup>

81. The Law Institute of Victoria further specifically recommends in this area that:

- the Australian Government should adequately resource FWO inspectors to ensure that any complaints or tip-offs are investigated swiftly and thoroughly. It recognises that there is a careful balance required, and that at the same time ‘over-policing’, such as the deployment of additional powers which override employee privacy and subject employers to heavy-handed compliance mechanisms, should be avoided;
- the FWO and Department of Home Affairs should remain legally separated, so that any person can provide intelligence about a potential case of modern slavery without fear of being deported back to their home country due to their home status;
- FWO should enter into more enforceable undertakings and compliance partnerships with contraveners to improve workplace and employment systems and achieve compliance;
- the potential of reducing the MSA reporting threshold for reporting entities (as recommended above) for providing a wider pool of relevant information from commercial entities should be considered, as this may assist in identifying common gaps and risks across various industries and specific geographic regions;
- legislation should be enacted which limits subcontracting arrangements to a maximum of two levels to ensure sufficient controls are in place, as was recommended in the Law Council’s recent submission to the Employment References Committee regarding the exploitation of general and specialist cleaners,<sup>89</sup> and
- legislative confidentiality restrictions inhibiting the ability of the ATO to receive information from the Australian Securities Investments Commission and other key governmental agencies should be amended to better assist in the anticipation, identification and prevention of illegal phoenix activity, subject to appropriate safeguards, as also recommended in the above submission.<sup>90</sup>

#### **Recommendations:**

- **Goal 8 should be directed towards identifying key sectors of labour exploitation in both regional and urban areas of Australia; assessing and developing appropriate responses to eradicate serious labour exploitation; and providing remedies for victims of such exploitation.**
- **The Australian Government should publish the final report of the Labour Exploitation Working Group of National Roundtable experts, and its response to the report’s recommendations.**
- **The period of time should be extended for victims of modern slavery on skilled sponsored visas to transfer their sponsors in order to continue residing lawfully on their visa.**

<sup>88</sup> Law Council of Australia, *Justice Project – Final Report*, Recent Arrivals chapter, 18.

<sup>89</sup> Law Council of Australia, *Exploitation of general and specialist cleaners*, Submission to the Education and Employment References Committee, 25 July 2018.

<sup>90</sup> *Ibid*, 14.

## Goal 9 – promote transparency and accountability for combating modern slavery risks in global supply chains, including in Government procurement

### *Modern Slavery Act*

82. A number of measures to assist and encourage reporting entities to implement their responsibilities under the MSA have been discussed above, including:
- implementing the new Advisory Group and Recognition scheme;
  - the provision of tailored education to specific industries; and
  - reviewing and updating of the Guidance in response to emerging issues.
83. At the same time, measures should be adopted to promote transparency and accountability. The reforms proposed above to introduce penalties for non-compliance are relevant in this regard. An independent Commissioner could also assist in achieving these objectives by playing a vital oversight and coordination role.
84. The Law Council considers that dedicated departmental resources will be needed to monitor reporting entities' statements closely to ensure that they meet the MSA's objectives, and to properly inform its three year review. While monitoring will underpin the regime's legitimacy, the extent to which the Australian Government has budgeted for such resources is unclear. More public information should be also readily accessible regarding which entities are required to report under the MSA, to remove any ambiguity in this area.
85. The online central register for reporting entities under the MSA should be implemented so that it is easily accessible by a range of business and civil society users. This will also be essential in promoting transparency and accountability of MSA reporting. The Law Council has received feedback that it will be important to build on lessons learned from the implementation of a central reporting register under the UK Act, as it has received feedback that it has not been easily accessible. The Law Council is willing to assist in the development of this tool.
86. It is commendable that the Consultation Paper identifies Government procurement as a specific area of focus. The commitment by the Australian Government to lead by example by complying with the modern slavery reporting requirements under the MSA has been recognised as a world first initiative.<sup>91</sup> As required by the Act, this will require the preparation of annual statements about modern slavery risks in government procurement and investments.
87. The Law Council recommends that the New Plan expand on this point, as actions taken by the Australian Government in this area will drive widespread change across the wide range of industries from which it purchases services, from construction to defence. As such, the Law Council understands that businesses seeking to tender or maintain government contracts are looking to the Australian Government for specific guidance on how it intends to implement these obligations in practice – such as through its requests for tender, decision-making processes and broader contractual arrangements. This guidance, which may be set out in the Department of Finance's Commonwealth Procurement Rules, will send an important signal about the seriousness with which the Australian Government approaches modern slavery issues.

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<sup>91</sup> Abigail McGregor, JP Wood and Greg Vickery, '[Modern Slavery Reporting for Commonwealth Procurement](#)'. Norton Rose online publication, May 2018.

88. The Law Council understands that internationally, governments are increasing the use and better enforcement of labour clauses in public procurement contracts. For example, the Danish Government has committed to increasing its use of labour clauses, such as in all public tender calls by government contracting authorities for construction projects.<sup>92</sup> These are directed towards ensuring fair and reasonable pay and working conditions in line with ILO standards.<sup>93</sup> Meanwhile, the German Government is currently implementing several public procurement measures with regard to its international human rights obligations. Its further commitments include exploring the inclusion of binding minimum requirements for the corporate exercise of human rights due diligence being enshrined in procurement law.<sup>94</sup> Movements to date in this area may help inform the Australian Government to establish its own procuring arrangements.

**Recommendation:**

- **The Australian Government provide specific guidance on how it will address slavery risks through its procurement processes in practice.**

*Broader measures*

89. Corporate recognition of human rights norms has 'significant consequences for domestic constituencies, including shareholders, consumers and employees.'<sup>95</sup> Ongoing government leadership which seeks to expand business engagement in this area is critical.<sup>96</sup> The MSA represents an excellent starting point in this regard and resonates with growing international consensus that both governments and businesses have duties with respect to respecting, protecting and fulfilling human rights. However, it is focused on a relatively narrow subset of entities and issues.
90. As indicated above, the broader responsibilities of business to protect human rights are articulated by the UNGPs. Together with the OECD Guidelines and other sector-specific international guidelines, these set out standards and guidelines for companies to ensure that they respect human rights and avoid causing adverse human rights impacts through their activities.
91. The Guiding Principles recommend that companies ensure compliance with this responsibility to respect human rights through:
- expressing their commitment through a statement of policy;
  - implementing effective human rights due diligence (HRDD) to identify, prevent and address actual or potential human rights impacts;
  - mainstreaming human rights consideration across business operations and activities based on that due diligence; and

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<sup>92</sup> Eg, Government of Denmark, *Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights* (March 2014), [2.4].

<sup>93</sup> Ibid.

<sup>94</sup> Government of Germany, *National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020* (2017), 16.

<sup>95</sup> Sandeep Gopalan and Karina Hogan, 'Ethical Transnational Corporate Activity at Home and Abroad: A proposal for reforming continuous disclosure obligations in Australia and the United States' (2015) *Columbia Human Rights Law Review* 46(2) 1, 4.

<sup>96</sup> UN Human Rights Special Procedures, *Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163), Corporate human rights due diligence: emerging practices, challenges and ways forward.*



- enabling access to effective grievance mechanisms by affected groups and individuals.<sup>97</sup>
92. In August 2017, a multi-stakeholder advisory group convened by the Minister for Foreign Affairs advised how the Australian Government could best implement the Guiding Principles, including through the development of a National Action Plan on Business and Human Rights. However, federal action to implement such a plan has not been further considered.
93. In December 2017, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises wrote to the Australian Ambassador at the UN in Geneva, highlighting its strong preference that the Australian Government develop a National Action Plan on Business and Human Rights, notwithstanding its work on the specific issue of modern slavery. The letter stated:
- ... the proposed modern slavery legislation as well as other measures to eliminate modern slavery (such as the Bali Process) should not be seen as a substitute for developing a NAP on business and human rights. As we had noted in our May 2017 letter, “governments need to consider the full range of internationally recognized human rights when seeking to meet the State’s duty to protect against human rights abuse involving business enterprises. While efforts to address forced labour are laudable and necessary, governments should take steps towards full implementation of the UNGPs, including through the development of national action plans.”<sup>98</sup>*
94. A National Action Plan on Business and Human Rights, on the other hand, would provide a coordinated and concrete plan to help business enterprises meaningfully respect all relevant human rights in conformity with the UNGPs.<sup>99</sup> It would ensure that businesses understand their human rights responsibilities as expansive. It would also put these responsibilities in the language of business, and on a level playing field between businesses, rather than leaving it to individual businesses to interpret how international human rights instruments should apply in their day-to-day business practices, which risks playing to the lowest common denominator. The United Nations (UN) Working Group on Business and Human Rights reports that the business sector has previously been open in its wish to receive guidance from government when it comes to human rights obligations.<sup>100</sup>
95. To spur action within the private sector, the Law Council recommends that the Australian Government consider adopting a National Action Plan on Business and Human Rights to support a shift to sustainable, ethical, and human rights compliant business practices. In doing so, Australia can draw on international best practice: according to UNICEF Australia in 2019, 23 countries around the world already had a National Action Plan on Business and Human Rights, and 12 other countries were in

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<sup>97</sup> UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) HR/PUB/11/0.

<sup>98</sup> Letter from Surya Deva, Chairperson, UN Working Group on Business and Human Rights, to John Paton Quinn, Permanent Representative, Permanent Mission of Australia to the United Nations Office and other international organizations in Geneva, 18 December 2017, 2.

<sup>99</sup> UN Working Group on Business and Human Rights, [Guidance on National Action Plans on Business and Human Rights](#) (November 2016).

<sup>100</sup> Letter from Surya Deva, Chairperson, UN Working Group on Business and Human Rights, to John Paton Quinn, Permanent Representative, Permanent Mission of Australia to the UN Office and other international organizations in Geneva, 18 December 2017, 3.

the process of developing one.<sup>101</sup> Thailand was recently the first country in Asia to have adopted a national plan.<sup>102</sup>

96. In addition, several European countries have either adopted, or started to consider legislation that embeds elements of human rights due diligence (HRDD) into law.<sup>103</sup> In France, the duty of vigilance law adopted in 2017, requires the largest French companies to develop, publish and implement plans that include 'reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms'.<sup>104</sup> The new Finnish Government has committed to conducting a study with a view to adopting mandatory HRDD legislation at national and European Union level<sup>105</sup> addressing both domestic and transnational activities. The study will be conducted with employers' associations, entrepreneurs' associations and employee organisations, taking into consideration the position of SMEs.<sup>106</sup>
97. The Law Council considers that more is required to ensure that Australia builds on the international leadership demonstrated through the passage of the MSA, ensuring that it does not fall behind in other areas which complement and bolster these objectives. Its view is that the development of a National Business and Human Rights Action Plan, which addresses potential HRDD responsibilities, as well as broader educative measures, would progress this national conversation.
98. The Law Council also recommends that the Australian Government continue reform of the National Contact Point for the OECD Guidelines on Multinational Enterprises to ensure additional resources for joint fact-finding, improved mediation services, determination of grievances and wider promotion of the National Contact Point.
99. While the Law Council recognises that these recommendations may be considered to fall outside the scope of the New Plan, it considers they should be considered in light of their potential to progress that plan's core objectives.

**Recommendation:**

- **The Australian Government commit to adopting a National Action Plan on Business and Human Rights, and continue its reform and promotion of the National Contact Point for the OECD Guidelines on Multinational Enterprises.**

**Goal 10 – provide appropriate support, protections and remedies to empower victims of modern slavery**

*Awareness raising*

100. The Law Council recommends that goal 10 should emphasise ensuring that victims of modern slavery are aware of various support and protection measures available to them. This awareness-raising should make clear that foreign nationals without a valid

<sup>101</sup> UNICEF Australia, *Building Better Business for Children* (2019) 8.

<sup>102</sup> Business and Human Rights Resource Centre (BHRC), 'Thailand: Government adopts first NAP on business & human rights'.

<sup>103</sup> BHRC, 'National movements for mandatory human rights due diligence in European countries', 22 May 2019.

<sup>104</sup> Anna Triponel and John Sherman, 'Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law', International Bar Association, Corporate and M&A Law Committee publications, 17 May 2017.

<sup>105</sup> BHRC, 'Finland commits to mandatory human rights due diligence at national & EU level',

<sup>106</sup> Ibid.

visa who are suspected of being victims of modern slavery may remain lawfully in Australia, both on a temporary and permanent basis, depending on the circumstances, under the Human Trafficking Visa Framework. Further improvements needed to this visa framework are set out below.

101. The establishment of a free and confidential national online and multi-lingual telephone hotline to incentivise the reporting of modern slavery should be considered. Ensuring that adequately funded services are in place to support victims when they do seek help will be essential if a hotline is pursued. The Law Council has been concerned by awareness raising initiatives in other contexts which have led to greater demand, without corresponding funding provided to ensure that appropriate services are available.

#### *Urban focus of anti-trafficking and anti-exploitation services for victims*

102. The UN Office of Drugs and Crime International Framework for Action to Implement the Trafficking in Persons Protocol recommends that appropriate services offering support to trafficked people be provided throughout the country.<sup>107</sup>
103. It has been identified that most anti-trafficking services are located in Australia's two main urban centres, Sydney and Melbourne.<sup>108</sup> While the scope of services are expanding throughout Australia, this suggests that modern slavery victims in regional or remote areas may lack support.<sup>109</sup> The Law Council considers that there is a particular need for specialised legal services for trafficked and/or exploited people in rural, regional and remote areas, as discussed below.

#### *Access to justice*

104. The Law Council's Justice Project,<sup>110</sup> which investigated barriers to accessing justice for a range of groups experiencing significant disadvantage in Australia, included a final report chapter on Trafficked and Exploited People (and other chapters of key relevance, such as on Recent Arrivals). It identified the formidable barriers experienced by many trafficked and exploited people in accessing justice effectively, including:
  - a frequently limited understanding of Australian laws and society (particularly amongst migrant and non-English speaking groups) and an inability to identify that they have a legal problem. As a result, many trafficked and exploited people may not know where to go for assistance, and instead rely on members of the community to identify their issue and refer them appropriately.<sup>111</sup> They may present to non-legal community services seeking help, who are unaware of their legal situation or where to refer them;
  - poorer levels of English language skills;

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<sup>107</sup> UN Office on Drugs and Crime, [International Framework for Action to Implement the Trafficking in Persons Protocol](#) (2009) 30.

<sup>108</sup> Andreas Schloenhardt and Rose Hunt-Walsh, 'The Role of Non-Governmental Organisations in Australia's Anti-Trafficking in Persons Framework' (2012) 36(1) *University of Western Australia Law Review* 57, 77 ('NGOs and Australia's Anti-Trafficking Framework').

<sup>109</sup> There is growing evidence of people trafficked and/or exploited in remote or regional areas: see, eg, Australian Government, *Report of the Trafficking Interdepartmental Committee Trafficking in Persons: The Australian Government's Response 1 June 2010-30 June 2011* (2011) 33; Andreas Schloenhardt et al, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32(1) *University of New South Wales Law Journal* 27, 31.

<sup>110</sup> Law Council of Australia, *Justice Project – Final Report* (2018); Trafficked and Exploited People chapter; and Recent Arrivals chapter.

<sup>111</sup> See WEStjustice, *Not just work – ending the exploitation of migrant and refugee workers in Australia* (2017) 121.

- trauma and fear of authorities – trafficked persons are often subject to traumatic experiences including forms of psychological and/or physical abuse.<sup>112</sup> Seeking help, as well as navigating the legal system, is especially difficult for persons who have experienced trauma.<sup>113</sup> In addition, people who have experienced trauma may fear those with authority, such as the government, police and lawyers, which prevents them from seeking help;<sup>114</sup>
  - fear of deportation, job loss or other consequences – this is particularly the case for those with temporary visas or precarious places in Australian society who are reliant on employers to extend, renew or continue their visa arrangements.<sup>115</sup> Undocumented persons who experience labour exploitation are less likely to report their exploitation, due to the risk of deportation;<sup>116</sup>
  - poor previous experiences with the legal system, including in their country of origin, which are likely to discourage further such interaction;<sup>117</sup>
  - financial constraints;<sup>118</sup> and
  - the stigma and stereotyping involved with being identified as a victim – which acts as a barrier to people who have been trafficked and exploited from coming forward.<sup>119</sup>
105. At the same time, the legal position of people who are trafficked or exploited is frequently highly complex, requiring consideration of their situation under immigration, family, employment and criminal laws. Victims depend on such advice to make informed and empowered choices about their futures. This reinforces the need for publicly funded, culturally competent and specialised legal assistance services.
106. While the Justice Project identified examples of best practice in this area, there are few such services available to respond to the needs of trafficked and exploited people Australia-wide. Strong examples include Anti-Slavery Australia and WEstjustice in Melbourne’s western suburbs, which includes a Newly Arrived and Refugee Employment Law Service. However, as discussed, available services tend to exist in urban areas on the eastern seaboard, while projects are based on unstable pilot funding.
107. This reflects a broader picture of vastly inadequate funding for civil legal assistance services, noting that urgent, significant injections of funding recommended by the Productivity Commission in 2014 remain unrealised.<sup>120</sup> For example, community legal centres turn away more than 100,000 people seeking help annually.<sup>121</sup>
108. During the Justice Project, legal assistance services indicated that they could not meet demand and were particularly concerned about the lack of coverage to regional,

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<sup>112</sup> Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, ‘Barriers to trafficked persons’ involvement in proceedings’, 2.

<sup>113</sup> Pascoe Pleasence et al., *Reshaping legal assistance services: building on the evidence base* (2014) 110, 132.

<sup>114</sup> Ibid 138.

<sup>115</sup> Law Council of Australia, *Justice Project – Final Report* (2018), People who are Trafficked or Exploited Chapter, 17, citing WEstjustice submission; Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Holders* (2016), 145, 150, 247, 248.

<sup>116</sup> Stephen Clibborn, ‘Why undocumented immigrant workers should have workplace rights’ (2015) 26(3) *The Economic and Labour Relations Review* 465, 467; Fiona David, ‘Labour trafficking’, 23.

<sup>117</sup> Pascoe Pleasence et al., *Reshaping legal assistance services: building on the evidence base* (2014), 135.

<sup>118</sup> Ibid 46.

<sup>119</sup> Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, ‘Barriers to trafficked persons’ involvement in proceedings’.

<sup>120</sup> Productivity Commission, *Access to Justice Arrangements* report (2014).

<sup>121</sup> National Association of Community Legal Centres, *National Census of Community Legal Centres, National Report* (2017), 14.

rural and remote areas despite obvious need.<sup>122</sup> For example, WEstjustice observed the critical lack of legal advice available for employment matters across Victoria:

*JobWatch, a community legal centre specialising in employment matters, is unable to meet 57 per cent of demand for help. Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for, however only around one fifth of matters receive much needed help. In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services...*<sup>123</sup>

109. The Law Council's Family Law Section further highlights the need for adequate resourcing of legal assistance services to represent clients who may, for example, be minors in forced marriages and seeking urgent annulment, injunctive relief or parenting orders under the *Family Law Act 1975* (Cth). In the past, legal aid commissions have assisted minors in these circumstances.
110. While services such as the FWO are vitally important, they are insufficient on their own as they cannot provide a comprehensive picture of a victim's legal situation. Community legal services also play an important outreach role in educating communities about their protections and responsibilities under Australian law. The Law Council recommends that additional funding is required to ensure that trafficked and exploited people have ready access to specialised legal assistance services, including in regional, rural and remote areas.
111. At the same time, the issue of appropriate interpreter and language services for culturally and linguistically diverse populations was one of the most fundamental service gaps identified in the Justice Project. This was a particular barrier for recent arrivals speaking a wide range of languages, and for those in regional, rural and remote areas.<sup>124</sup> It affected individuals' ability to negotiate the justice system at every stage of the legal process, from successful communication during police interviews, to evidence provided in courtrooms, to understanding final court orders.
112. The Law Council also recommends that in planning supports which empower victims of slavery, specific attention be given to ensuring the ready availability of appropriately qualified, skilled and professional interpreters across the full range of language needs.

**Recommendation:**

- **The Australian Government should commit additional funding, matched by state and territory government contributions, to ensure that people who are trafficked and exploited can access specialised legal assistance services and qualified interpreters, including in regional, rural and remote areas.**

*Victims compensation scheme*

113. Providing victims of modern slavery with greater self-determination in the pursuit of remedies, in particular by introducing a civil remedy, is one way to ensure victims are empowered. The recent UK parliamentary report arising from a review into business

<sup>122</sup> Law Council of Australia, *Justice Project – Final Report*, Recent Arrivals Chapter, citing WEstjustice submission.

<sup>123</sup> WEstjustice, *Not just work – ending the exploitation of migrant and refugee workers in Australia* (2017) 139.

<sup>124</sup> See, eg, Law Council of Australia, *Justice Project – Final Report*, Recent Arrivals Chapter, 19-22.

and human rights, including with respect to modern slavery, examined the importance of the enhancement of the availability of civil remedies.<sup>125</sup>

114. The Protocol, to which Australia is a party, provides that:

*each State Party shall ensure that its domestic legal system contains measures that offer victim of trafficking in persons the possibility of obtaining compensation for damage suffered*<sup>126</sup>

115. In addition, the ICCPR provides that a person has a right to an ‘effective remedy’ where their rights have been violated,<sup>127</sup> which includes compensation.<sup>128</sup>

116. However, despite its international obligations to provide restitution for victims of trafficking, slavery and slavery-like practices, Australia still lacks a federal compensation scheme for victims of slavery. As has been identified by Anti-Slavery Australia and others, compensation for victims of crime exists at the state level in Australia, but human trafficking, slavery and slavery-like offences are crimes at the federal level, and do not exist in the states’ legal framework.<sup>129</sup> This leaves victims of trafficking and exploitation related crimes without the ability to access compensation for the crimes that have been committed against them, unless they can approximate their situation with crimes that exist at the state level.<sup>130</sup> The amount of compensation available varies between states and is not necessarily available for the type of harm suffered by victims, including harm related to psychological trauma.<sup>131</sup>

117. In 2016, Anti-Slavery Australia and the Law Council of Australia published a report which set out a case for a national compensation scheme. The report included proposed models for a scheme and addressed issues relevant to how it would function, such as burden of proof, caps on award, compensable harm, funding for the scheme, the constitutional basis for its creation, and how it would interact with the visa program.<sup>132</sup> The report emphasised that eligibility for the compensation scheme should be de-linked from any requirement to cooperate with law enforcement.

118. The UN Special Rapporteur on Trafficking in Persons, especially Women and Children (**Special Rapporteur**), has previously recommended that, in light of Australia’s international obligations, the Australian Government should establish at the federal level, a comprehensive compensation scheme for survivors of trafficking.<sup>133</sup> The 2018 US TIP Report of 2018 also recommended that Australia should consider establishing a national compensation scheme for trafficking victims.<sup>134</sup>

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<sup>125</sup> UK Parliament House of Lords and House of Commons, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016-2017 (HL 153, HC443), London.

<sup>126</sup> UN Convention against Transnational Organized Crime, GA RES 55/25, UN GOAR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) annex II, article 6(6)

<sup>127</sup> ICCPR, art 2(3).

<sup>128</sup> Frances Simmons and Jennifer Burn, *Evaluating Australia’s response to trafficking*, 728.

<sup>129</sup> Anti-Slavery Australia and the Law Council of Australia, [Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime](#) (2016) 1.

<sup>130</sup> Ibid 4, typically requiring proof that it is ‘an act of violence’.

<sup>131</sup> Ibid.

<sup>132</sup> Anti-Slavery Australia and the Law Council of Australia, *Establishing a National Compensation Scheme*, 1.

<sup>133</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012) [64] (*Report of the Special Rapporteur*).

<sup>134</sup> US Department of State, [TIP Report](#) (2018).

119. Since 2012, multiple Parliamentary inquires have recommended the establishment of a national compensation scheme for victims of human trafficking, slavery and slavery-like practices.<sup>135</sup> The Law Council considers that such a scheme is well overdue.

**Recommendation:**

- **The Australian Government should establish a federal compensation scheme for victims of trafficking, slavery and slavery-related offences.**

*Delink victim support and visas from cooperation with criminal justice system*

120. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking establish the principle that the human rights of trafficked persons should be 'at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to trafficked persons.'<sup>136</sup>

121. Australia's anti-trafficking strategy has four key elements: prevention, detection and investigation, criminal prosecution, and victim support and rehabilitation.<sup>137</sup> Australia's response to trafficking has in the past been criticised for focusing too extensively on law enforcement instead of the rights of trafficked people.<sup>138</sup> Though many early criticisms of Australia's criminal justice approach to trafficking have been addressed by subsequent law reform,<sup>139</sup> amendment to eligibility requirements and conditions on visa programs and expansion of support programs,<sup>140</sup> concerns remain in the areas of amendment to eligibility requirements and conditions on visa programs and expansion of support programs.

122. Under the Human Trafficking Visa Framework:

- (a) If the AFP suspects that a person may have been trafficked, that person may be granted an initial Bridging Visa F (BVF), without working rights. This is a temporary visa, which is intended to offer short-term protection to suspected trafficked persons in order for them to stay in Australia lawfully, obtain initial support and advice as well as to determine whether to cooperate with any criminal investigation. This visa usually lasts for up to 45 days, with a discretionary extension of 45 more days;

<sup>135</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) [3.88] (recommendation 2); JSTFADT, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) xviii (recommendation 6); JSCLE, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (2017) xii, 35-37; JSTFADT, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) [6.133] – [6.136].

<sup>136</sup> *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council – Addendum – Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (20 May 2002) [1].

<sup>137</sup> Attorney-General's Department, *National Action Plan*, 19.

<sup>138</sup> See, eg, Dorevitch and Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1; Burn, Blay and Simmons, 'Combating Human Trafficking: Australia's Response to Modern Day Slavery' (2005) 79 *ALJ* 543; Burn and Simmons, 'Trafficking and Slavery in Australia: An evaluation of victim support strategies' (2006) 15 *Asian and Pacific Migration Journal* 4553; Burn and Simmons, 'Rewarding witnesses, ignoring victims: An evaluation of the new trafficking visa framework' (2005) 24 *Immigration Review* 6; and Segrave, 'Surely Something is better than nothing? The Australian response to the trafficking of women into sexual servitude in Australia' (2004) 16(1) *Current Issues in Criminal Justice*.

<sup>139</sup> Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36 *Melbourne University Law Review* 970, 988.

<sup>140</sup> Frances Simmons and Jennifer Burn, 'Evaluating Australia's response to all forms of trafficking: Towards rights-centered reform' (2010) 84 *Australian Law Journal* 712, 715-716; Jennifer Burn and Frances Simmons, 'Prioritising Protection: Changes to the visa framework for trafficked people' (2009) *Immigration Review* 42.

- (b) If a person is assisting with a trafficking investigation or prosecution, they may be granted an extended BVF, with work rights, that will last for the duration of the criminal justice process; and
- (c) If a person has made a contribution to an investigation or prosecution, and would be in danger if they returned home, they may be eligible for a Referred Stay (permanent) visa. This enables them to stay and work in Australia. Immediate family members may also be eligible. An AFP official is who is at the rank of Commander must have signed the relevant assessment.
123. This means that the eligibility of victims for permanent visa protection is hinged on their ability to cooperate with relevant investigations. Hence, a victim unwilling, or incapable of assisting will be deemed ineligible for the visa and depart the country after a much shorter time. While this is intended to increase the number of convictions by encouraging victims to testify against their perpetrators, Australia's conviction rate remains low, as discussed above.
124. Similar issues exist with respect to the Support for Trafficked People Program (**the Program**), which assists all eligible victims of human trafficking, slavery and slavery-like practices. Longer-term access to the Program is similarly dependent on the victim assisting the criminal justice process. It generally consists of:
- an Initial Assessment and Intensive Support Stream of 45 days to all trafficked people referred by the AFP, irrespective of whether they are willing or able to assist with the investigation or prosecution of an offence;
  - an Extended Intensive Support Stream of a further 45 days' support for clients who are willing, but not able, to assist with an investigation or prosecution;
  - a Justice Support Stream - providing support until the investigation and prosecution of a human trafficking or slavery-related matter is finalised;
  - a Temporary Trial Support Stream – providing intensive support for trafficked people who return to Australia to give evidence in a prosecution; and
  - a 20 day working day transition period for clients leaving the program.<sup>141</sup>
125. As discussed below, a different approach applies under the Program for people who are in, or are at risk of, a forced marriage.
126. The weakness in both the visa and Program framework is that there are significant barriers to involvement in criminal justice proceedings for victims of modern slavery. Access to permanent protection and support also depends on arbitrary factors, such as a prosecutor's decision regarding the likely presentation of a witness.
127. Experience has shown that victims of trafficking in persons are unlikely to cooperate with government authorities if they are in fear of deportation.<sup>142</sup> Furthermore, in many instances, victims are unable to continue to assist police in lengthy investigations of offences due to extreme psychological distress because of the severe exploitation they have endured.<sup>143</sup> Victims of trafficking and exploitation commonly fear those with authority, including the police and lawyers.<sup>144</sup> They may also fear reprisals for family

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<sup>141</sup> Australian Government Department of Social Services (DSS), '[Support for Trafficked People Program](#)' (undated).

<sup>142</sup> Fiona David, 'Labour Trafficking (Research and Public Policy Series 108, Australian Institute of Criminology, 2010) 37.

<sup>143</sup> Ibid.

<sup>144</sup> Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (Trends and issues in crime and criminal justice no 451, Australian Institute of Criminology, 2013), 2.



members if they are involved with authorities, and be ashamed of being identified as a victim of modern slavery.

128. Regarding the impacts of trauma on victims, United Nations Association of Australia has summarised relevant research that:

*Trafficked victims with PTSD have presented difficulties when engaging with the criminal justice process. When asked to recount their experiences, victims are often left with little trust, memory gaps, and a fear of reprisal from their captors. The challenges in addressing these complex mental health needs lie in the direct conflict with the needs of the victim and with the justice system's need to investigate, prosecute and convict, where more harm may be inadvertently caused. The criminal justice practices can harm prosecution cases by causing victims to fear or refuse participation, bringing the process to a halt. Victims can also appear to lack credibility due to their memory gaps, or not appear as the 'ideal' victim, which can influence the prosecution's decision in not pursuing a case, leading to a failure to convict.*<sup>145</sup>

129. In such circumstances, there is a clear potential for further harm to be caused to the victim, due to being disbelieved and seen to lack credibility.

130. Linking the visa framework and Program to participation in the criminal justice process may serve to deter victims from seeking help. McLeod AO SC has noted that:

*One well-founded criticism of the current Support Program is that it links ongoing support for trafficked people to their assistance to the criminal justice process, thus 'incentivising' cooperation by victims with law enforcement agencies. This approach appears to be an instinctive policy response to drive co-operation... rather than an evidence-based approach and is contrary to the human rights approach encouraged by the Trafficking Protocol... it may in fact discourage reporting by victims. Further the program operates in accordance with arbitrary factors such as the physical presence of traffickers in Australia, or an ad hoc assessment of the usefulness of the victim's support, thus involving an unscrutinised exercise of discretion of police and prosecutors.*<sup>146</sup>

131. During the Justice Project, submissions were made to the Law Council that if victims were better supported and had longer periods of time to address trauma they would be more able and willing to meaningfully participate in criminal proceedings.<sup>147</sup> A case study was provided concerning a woman who was initially granted access to the Program but ultimately evicted, on the basis that investigation of her case would not lead to any convictions. This was despite her experiencing significant trauma and potentially severe ramifications if expatriated.<sup>148</sup>

132. In a different approach, the Australian Government has recently conducted a Forced Marriage Support Stream Trial, which provides intensive support for up to 200 days. Clients are referred by the AFP but are not required to contribute to a criminal investigation or prosecution to access this support.<sup>149</sup> In late 2019, the Australian Government announced that it would change eligibility requirements to give victims of

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<sup>145</sup> United Nations Association of Australia, Submission No 90 to the JSTFADT, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017) 4.

<sup>146</sup> Fiona McLeod AO SC, 'Human Trafficking and Modern Day Slavery – An Affront to Human Dignity' 2 *Griffith Journal of Law and Human Dignity* 1 (2014) 144, 157.

<sup>147</sup> Law Council of Australia, *Justice Project – Final Report* (2018), People who are Trafficked and Exploited Chapter, citing Project Respect submission.

<sup>148</sup> Ibid.

<sup>149</sup> DSS, '[Support for Trafficked People Program](#)' (undated).

forced marriage greater access to the program, once the trial period ended.<sup>150</sup> These changes were intended to recognise 'the need to provide comprehensive, effective and tailored support without requiring forced marriage victims to participate in the criminal justice process.'<sup>151</sup> The Law Council welcomes this additional assistance to victims of forced marriage, but queries why it would not also be extended to other victims of slavery who have also undergone significant trauma.

133. The former Special Rapporteur has observed that any person who does not engage with the AFP will automatically be excluded from the Framework and Support Program.<sup>152</sup> She believed that the linking of ongoing support services to contribution to criminal processes should be removed, as it imposed an additional burden on victims of trafficking and does not represent an adequate acknowledgment of their status as victims.<sup>153</sup> Several Parliamentary inquiries have also recommended de-linking the support and visa framework from cooperation with law enforcement.<sup>154</sup>
134. Noting the lack of success in prosecutions to date, the Law Council queries whether the current approach is well justified. It is worth pursuing a visa and victim support framework which is not conditional on a victim of slavery providing assistance to the criminal justice process, at least on a trial basis. This scheme would:
- enable an initial BVF to be granted which provides adequate time for a suspected slavery victim to stabilise their situation and make a well-informed decision about their options. This would be extended to at least 90 or 120 days, with multiple extensions permitted and work rights attached;
  - provide for a substantive temporary visa which allows for a period of stay which is sufficient for the victim to properly seek support, recover, obtain advice and assess their future options; and
  - provide for a permanent Referred Stay Visa for victims of slavery which is not hinged on the contribution and close co-operation with an investigation into a human trafficking or slavery offence. Other reputable authorities, such as recognised victim support services and/or health authorities could instead verify the victim's claims, and the likely ramifications if the victim is repatriated.
135. The Program support would be aligned with the visa scheme, and would include counselling, medical treatment, legal advice and visa support. It would offer full support to victims to access the criminal justice system, but not be predicated on such access.
136. The Law Council suggests that if the above recommendations are not accepted, consideration should be given to:

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<sup>150</sup> On 31 December 2020: Assistant Minister for Customs, Community Safety and Multicultural Affairs, The Hon Jason Wood MP, *Joint media release with the Hon Marise Payne MP, Hon Christian Porter MP and the Hon Anne Ruston - New initiatives to combat modern slavery*, Media Release, 4 December 2019.

<sup>151</sup> *Ibid.*

<sup>152</sup> Joy Ngozi Ezeilo, Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/20/18/ Add.1 (18 May 2012) 14 [53].

<sup>153</sup> *Ibid.* For further criticism of the requirement that trafficking victims cooperate with law enforcement in order to access assistance, see Anna Dorevich and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1; Frances Simmons and Jennifer Burn, *Evaluating Australia's response to trafficking*, 1006.

<sup>154</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) vii; JSTFADT, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) xviii; JSCLE, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (2017) xii, 35; JSTFADT, Parliament of Australia, *Hidden in Plain Sight: An inquiry into Establishing a Modern Slavery Act in Australia* (December 2017) [6.79], [6.82].

- substantially extending the period of the initial BVF, allowing for multiple extensions and enabling work rights, while also extending the period of the Initial Assessment and Intensive Support Stream of the Program;
- allowing for referrals to victim support to occur through reputable authorities or services other than the AFP, given that many victims are likely to prefer to avoid involving the police, at least in the early stages.

**Recommendations:**

- **The Australian Government should:**
  - **de-link the modern slavery visa and victim support framework from the criminal justice process; and**
  - **provide for established referral mechanisms from agencies other than AFP.**

*Children*

137. the Law Council refers to Australia's obligations under, for example:

- the Protocol – to provide for the physical, psychological and social recovery of trafficking victims, taking into particular account the special needs of children, including appropriate housing, education and care;<sup>155</sup> and
- the CRC – including to ensure that in all actions concerning children, the best interests of the child are a primary consideration; and to take all appropriate legislative, administrative, social and educational measures to protect the child from violence and exploitation, including establishing social supports to respond to instances of child maltreatment.<sup>156</sup>

138. Currently, there is no self-supporting substantive visa for children who are victims of slavery. They are dealt with under the existing framework of the BVF and Referred Stay Visa discussed above. Children are, however, automatically entitled to access the Extended Intensive Support Stream of the Program if it is in their best interests.

139. As noted, the Law Council recommends that the modern slavery visa and support framework be delinked from the criminal justice process entirely. However, if this is not accepted, it recommends that consideration be given to amending the visa framework to ensure that child victims are eligible to remain in Australia if it is in their best interests, regardless of their participation in the criminal justice process. Factors to be weighed in this regard should include the rights of the child to family reunion and the risks to the child if repatriated. Ongoing support for child victims must be guaranteed.

**Goal 11 – enhance our leadership and partnerships to promote regional and international cooperation on combating modern slavery**

140. The Law Council recommends that goal 11 add 'particularly within the Asia-Pacific region.' This change would reflect the fact that available estimates indicate that modern slavery is particularly prevalent in the Asia-Pacific region, in which 62 per cent of all victims of modern slavery worldwide are located<sup>157</sup> and the prevalence of forced labour is the highest globally<sup>158</sup> and acknowledge Australia's heightened responsibility to its home region. Specific emphasis on the Asia-Pacific would reflect the reality of

<sup>155</sup> Protocol, arts 6.3, 6.4.

<sup>156</sup> CRC, arts 3.1, 19. See also art 35.

<sup>157</sup> ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva (2017), 10, 27.

<sup>158</sup> *Ibid*, 10.

extreme labour exploitation across the region, with an estimated 2.5 million people living in modern slavery in Southeast Asia alone.<sup>159</sup>

141. The Law Council understands that the Australian Government is pursuing international efforts to address trafficking and slavery, particularly in the Asia-Pacific region, through the Bali Process and its 'Pacific-Step Up'<sup>160</sup> initiative.
142. It suggests that the recent Pacific Step-Up initiative could place greater emphasis on the prevention of modern slavery in the Pacific, both through stand-alone initiatives and in implementing all of its flagship priorities, including the \$2 billion Australian Infrastructure Financing Facility for the Pacific, and the Coral Sea Cable.<sup>161</sup>
143. Australian Government procurement policies which identify and address modern slavery risks, and active monitoring of their implementation will be particularly important in this regard. The Law Council recognises that the Pacific Labour Mobility Scheme, which is also a flagship priority, is intended to safeguard against worker exploitation<sup>162</sup> and would welcome evaluations of how the scheme is operating in practice.
144. The Law Council understands that awareness and visibility of modern slavery issues in the Pacific region has historically been low, both domestically and internationally. It is aware of recent efforts to build local awareness of human rights standards, issues and remedies in the region, given the large amount of extractive business activity occurring,<sup>163</sup> and suggests that more can be done in this regard. This might involve local capacity-building with a view to amplifying local voices, documenting human rights issues and engaging with companies.
145. At a foundational level, the Pacific Step-Up is intended to support sovereignty, stability, security and prosperity in the region,<sup>164</sup> and includes measures to support development, police and defence assistance.<sup>165</sup> While welcoming this emphasis, the Law Council recommends that broader attention be given to maintaining and strengthening the rule of law in the Pacific. Beyond policing, this includes support for key law and justice infrastructure. It is essential that express recognition is given to the role of the legal profession and independent courts in facilitating access to justice and protecting the rights of citizens, including with respect to modern slavery. The Law Council continues to strongly support the South Pacific Lawyers Association, the views of which may help to inform policy efforts in this area, alongside other civil society and NGO voices.

**Recommendation:**

- **The Australian Government should work with its regional counterparts to build awareness of modern slavery and address risks in the Pacific region, including as part of the Pacific Step-up initiative.**

<sup>159</sup> Rapeepong Suphanchamat et al, 'Extreme exploitation in Southeast Asia waters: Challenges in progressing towards universal health coverage for migrants workers' (2017) 4(11) *PLoS Medicine* 2.

<sup>160</sup> Australian Government Department of Foreign Affairs and Trade (DFAT), 'Stepping-up Australia's engagement with our Pacific family', Factsheet, September 2019.

<sup>161</sup> Ibid.

<sup>162</sup> DFAT, 'Pacific Labour Scheme', Factsheet, March 2019.

<sup>163</sup> Eg, Business and Human Rights Resource Centre, '[Pacific Business and Human Rights](#)' portal.

<sup>164</sup> Australian Government Department of Foreign Affairs and Trade, 'Stepping-up Australia's engagement with our Pacific family', Factsheet, September 2019.

<sup>165</sup> Ibid.

## Goal 12 – work collaboratively across government, along with non-government stakeholders, to combat modern slavery

146. The Law Council prefaces the comments below by highlighting its strong appreciation for the consistent commitment demonstrated by the Australian Government and its predecessors to working collaboratively with a wide variety of stakeholders through the Roundtable. It considers that this has underpinned key policy and program improvements to address modern slavery over the last decade, and provides a valuable model for broader stakeholder engagement on policy and program reform.

### *Whole of government approach*

147. The Law Council recommends that goal 12 refer to deepening the whole of government approach to modern slavery to ensure overarching policy and program coherency. While this may be assumed inherent to any national action plan, and the Law Council has observed a whole-of-government approach at the Roundtable, it should be explicitly acknowledged as a core overarching objective.

148. The Law Council understands that a common complaint in the UK is that while one arm of the State may promote a supportive stance (for example, through the availability of visas for victims or trafficking, or a policy that a victim of modern slavery ought not be prosecuted for offences related to unlawful forced labour), the actions of other arms of the State (particularly policing or law enforcement and those responsible for making available legal assistance) have tended to mean that the supportive stances were inaccessible or ineffective. Similar disconnections may exist in Australia. Ensuring a truly coherent whole-of-government approach would involve identifying conflicts in policy or practice, and assessing the means of resolving them in the interests of victims.

149. The Law Council envisages that if adopted, a key Commissioner function would involve liaising across government departments in order to identify conflicts in government policy or practice, and the means of resolving them.

### *State and territory government involvement*

150. As discussed above, the Law Council considers that there is a need to improve coordination between Commonwealth, state and territory governments in this area. This includes incorporating relevant roles and responsibilities for state and territory governments into the New Plan.

### *Business*

151. Key issues with respect to informing and engaging closely with reporting entities as they meet their reporting obligations under the MSA are discussed above. The Law Council suggests that the Australian Government seek out multiple business voices as this work progresses – not only the most informed and committed, but also industries and entities which are more reluctantly engaged. Smaller businesses which are not reporting entities but can play a leadership role across the SME sector in voluntarily reporting under the MSA should also be engaged.

152. Going forward, the Law Council suggests that there may be scope for greater business involvement in the Roundtable form. It also considers that the broader responsibilities of business to protect human rights under the UNGPs and OECD Guidelines should be carefully considered, as discussed above.

### *Civil society*

153. As is clearly evident from their participation and expertise at the Roundtable, many civil society organisations play a fundamental role in tackling modern slavery both in, and outside, Australia. The Law Council considers that this role could be better recognised and outlined in the National Plan 2020-2024.
154. In particular, it is imperative that stable and adequate funding be made available to those Roundtable members whose victim support programs form a critical part of Australia's response to human trafficking. In this context, the Law Council notes that victims of trafficking and slavery that do not qualify for the Program must turn to organisations that work with trafficked and exploited people for support and services.
155. As discussed above, the Law Council also encourages the Australian Government to engage fully with the work produced by Roundtable members, such as the LEWG work discussed above, to ensure that it remains a productive and constructive forum.

#### **Recommendations:**

- **Goal 12 should refer to deepening the whole of government approach to modern slavery to ensure overarching policy and program coherency.**
- **The New Plan should identify the responsibilities and relevant commitments of state and territory governments, as well as those of the Commonwealth.**
- **The role of non-government stakeholders in addressing modern slavery, including key business and civil society, should also be addressed.**
- **Appropriate levels of funding should be guaranteed to ensure that civil society organisations can fully support victims of slavery.**