

Modern Slavery in Supply Chains Reporting Requirement – Public Consultation

Focus on Labour Exploitation (FLEX)

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Summary

Focus on Labour Exploitation (FLEX) welcomes the opportunity to submit evidence to the Australian Government's public consultation on a proposed modern slavery in supply chains reporting requirement.

This submission draws on FLEX's experience, as an active participant in the UK Modern Slavery Bill passage through parliament into law. FLEX is unique in its focus on human trafficking for labour exploitation and leads global efforts in this area. FLEX draws its expertise from its leading role in developing NGO guidance on corporate compliance and gold standard approaches to Section 54 of that Bill; its role on the Advisory Committee of the UK Modern Slavery Registry; its position as founders of the leading database of law and policy that to ensure individual and corporate accountability for forced labour, trafficking, slavery and servitude – the accountability hub (accountabilityhub.org); and as recognised experts in domestic and international responses to human trafficking for labour exploitation. FLEX refers to its submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into modern slavery, which is attached as Appendix A. FLEX also refers to the submission of the Advisory Committee of the Modern Slavery Registry, which it supports.

FLEX encourages the Australian government to take this opportunity to learn from and build upon the experience of the Modern Slavery Act reporting requirements in the UK, and to view with clarity the specific role and the limitations of that legislation. In particular, FLEX encourages the Australian government to take an approach that is much more robust and more comprehensive than that taken in the UK, that truly provides a 'level playing' field. FLEX is strongly of the view that any modern slavery in supply chains reporting requirement must be part of a broader effort to ensure corporate accountability and prevent labour exploitation in corporate supply chains. FLEX further stresses that effective responses to modern slavery must not only focus on the particular issue of supply chain transparency and reporting, but also on the protection of workers' rights and on their access to both civil and criminal justice for abuses committed against them.

In this submission FLEX stresses that for any reporting requirement to be effective, it must be backed up by strong monitoring and enforcement mechanisms, including a list of companies required to report, and a penalty for non-compliance. It must also be part of a more comprehensive approach to the prevention of the labour violations that lead to modern slavery in domestic supply chains, including strengthening of labour inspection and enforcement systems, and the protection of the rights of vulnerable workers, in particular migrant workers. Without such measures, there is a significant risk that the reporting requirement will become a superficial and tick-box exercise, that will not succeed in eliminating modern slavery from the supply chains of Australian companies.

Response to Consultation Questions

1. Is the proposed definition of ‘modern slavery’ appropriate and simple to understand?

As a preliminary point, FLEX notes that the term ‘modern slavery’ currently has no legal meaning under either domestic or international law. It has recently come into use as an umbrella term for a wide and varying range of practices that are prohibited under both Australian and international law, including human trafficking, forced labour, slavery, and forced marriage. It is therefore important that in its use of the term, both in relation to reporting and otherwise, the Australian government makes clear to what practices it is referring, and where possible, refers to those practices directly. FLEX therefore supports the proposal that the reporting legislation specify the conduct to which it relates, and that this conduct be that constituting existing human trafficking, slavery and slavery-like offence provisions in Divisions 270 and 271 of the *Commonwealth Criminal Code*.

2. How should the Australian Government define a reporting ‘entity’ for the purposes of the reporting requirement? Should this definition include ‘groups of entities’ which may have aggregate revenue that exceeds the threshold?

An ‘entity’ should be defined broadly to include commercial organisations, including bodies corporate and partnerships, superannuation funds, and public bodies. The inclusion of public bodies is important to ensure that the Government leads by example in examining its own practices and sharing the responsibility of all buyers to improve labour conditions in supply chains. In making itself subject to the reporting requirements, the Government will both contribute to the raising of reporting and due diligence standards, and will encourage the private sector to come along with it in evolving efforts to address modern slavery in supply chains. The inclusion of public bodies also recognises the significant influence of government as a major purchaser of goods and services, and advances the duty of government to protect human rights in its own activities. The failure of the UK Modern Slavery Act to include public bodies has been widely criticised, most recently by FLEX in its report ‘Risky Business: Tackling Exploitation in the UK Labour Market’¹ as well as by a high-profile UK Parliament Select Committee². This issue is currently the subject of a Private Members Bill introduced to the UK House of Lords by Baroness Young of Hornsey.³

¹ FLEX (2017) *Risky Business: Tackling Exploitation in the UK Labour Market*, p. 37, available at <http://www.labourexploitation.org/publications>

² Joint Committee on Human Rights, Human Rights and Business 2017: Promoting responsibility and ensuring accountability, Sixth Report of Session 2017, HL Paper 153 / HC 443, 40, available at <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

³ See <https://services.parliament.uk/bills/2017-19/modernslaverytransparencyinsupplychains.html>

The reporting requirement should cover all entities that individually, or together with other entities in its group, meet the relevant revenue threshold.

3. How should the Australian Government define an entity's revenue for the reporting requirement? Is \$100 million total annual revenue an appropriate threshold for the reporting requirement?

As the consultation document notes, "large" businesses are both at risk of modern slavery in their supply chains, and are well placed to play a key role in combatting modern slavery. The *Corporations Act 2011* defines a proprietary company as "large" if the consolidated revenue for the company and its entities is \$25 million or more; if the value of its assets is \$12.5 million or more, and/or; if it has 50 or more employees. Large already proprietary companies are subject to greater reporting requirements, including submitting a financial report and directors' report each financial year. It would make sense to use the same revenue threshold for the modern slavery reporting requirement. Using the same revenue threshold would in particular make it easier to identify those proprietary companies that are required to report, as those companies would already be submitting reports under the *Corporations Act*. This would also ensure that all companies currently reporting under the UK Act, which has a threshold of £36 million, would also be required to report under the Australian legislation.

FLEX understands the advantages of aligning the modern slavery reporting threshold with the ATO corporate tax transparency threshold of \$100 million. However FLEX believes that such a high threshold would mean insufficient coverage of the reporting obligation throughout the economy, and consequently insufficient impact to make meaningful change. In 2014-15 there were only 1579 Australian public and foreign – owned companies with an income of \$100 million or more,⁴ compared with the estimated 12,000 companies covered by the UK Modern Slavery Act's £36 million threshold. The UK threshold was set following a specific consultation in which many, including businesses, asked for an even lower threshold. FLEX is concerned that the economy-wide engagement and necessary cultural change required to make the reporting requirement effective would not be achieved with a threshold of \$100 million.

4. How should the Australian Government define an entity's 'operations' and 'supply chains' for the purposes of the reporting requirement?

It is important that the reporting requirement cover both the company's own operations and its supply chains, to ensure that the impact of the requirement is felt at all levels, and in particular at the lower levels of lengthy supply chains where the risk of exploitation is greatest. The ILO has defined 'global supply chains' as "the cross-border organization of the activities required to produce goods or services and

⁴ Australian Tax Office, *Corporate tax transparency report for 2014-15*, available at <https://www.ato.gov.au/Media-centre/Media-releases/Corporate-tax-transparency-report-for-2014-15/>

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bring them to consumers through inputs and various phases of development, production and delivery”.⁵ The definition of “supply chains” in the UK Modern Slavery Act is its “everyday meaning”, and is clearly intended to extend beyond first tier suppliers. Guidance on Section 54 of the *UK Modern Slavery Act* explains that this provision “means an organisation must set out the steps it has taken in relation to any part of the supply chain”.⁶

5. How will affected entities likely respond to the reporting requirement? As this is how the regulatory impact is calculated, do Government’s preliminary cost estimates require adjustment?

The available evidence suggests that some entities covered by the reporting requirement may respond with increased internal dialogue, broader internal and external engagement on the issue of modern slavery, and a focus on training and policy development.⁷ However, without a penalty for non-compliance, these impacts will be limited to those companies with a significant reputational stake in compliance, meaning that companies without a strong ‘brand’ or public face are likely to do very little if anything to either comply or change their practices.

A study conducted by the Ethical Trading Initiative and Hult International Business School in 2016 found that the main changes to company behaviour as a result of the UK Modern Slavery Act have been at a relatively superficial level. Steps taken include an increase in: CEO engagement with the issue of modern slavery, training and awareness raising, risk assessments, communication between companies and their suppliers, and communication between companies and NGOs.⁸

However it is important to note that there is currently no evidence that any of these changes have resulted in tangible changes in conditions for workers in supply chains, increased identification, or in a reduction of incidences of modern slavery. Some of the steps taken by companies in the UK to date could ultimately lead to meaningful change, but this is by no means guaranteed, particularly where no steps are taken by the UK government to compel UK companies to report or to build on their work in this area year on year. In order to bring about real change, a more comprehensive regulatory approach to corporate accountability is required, that includes not only reporting legislation, but also a strengthened labour inspection and enforcement

⁵ International Labour Organisation (2016) *Decent work in global supply chains*, Report IV, International Labour Conference, 105th session, p. 1.

⁶ UK Home Office, (2016) *Transparency in supply chains etc. A practical guide*, at [2.2], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final_.pdf

⁷ See, Historic Futures & Ergon Associates (2016) *Has the Modern Slavery Act had an impact on your business?*, available at <https://business-humanrights.org/sites/default/files/documents/msa-report-ergon-oct2016.pdf>

⁸ Lake et al (2016) *Corporate Leadership on Modern Slavery*, The Ethical Trading Initiative & Hult International Business School, 11.

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system; prioritisation of the rights of workers, including undocumented and temporary workers; and clear and accessible routes to remedies for exploited workers.

The ILO Forced Labour Protocol requires States to ensure that “(i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;” In the Australian context this means strengthening the investigative powers and capacity of the Fairwork Ombudsman. It also means ensuring that vulnerable workers, and in particular temporary visa holders, are able to bring claims against exploitative employers, and that labour rights are prioritised above immigration status.⁹

- 6. What regulatory impact will this reporting requirement have on entities? Can this regulatory impact be further reduced without limiting the effectiveness of the reporting requirement?**
- 7. Are the proposed four mandatory criteria for entities to report against appropriate? Should other criteria be included, including a requirement to report on the number and nature of any incidences of modern slavery detected during the reporting period?**

FLEX supports the inclusion of the four suggested mandatory criteria. In addition to these criteria, FLEX would recommend the inclusion of the following criteria:

- Information about how the entity identifies, addresses and monitors the risk of modern slavery in its supply chains, including the extent to which the company conducts audits or inspections and how and by whom such processes are carried out.
- Information about the stakeholders with whom the entity engages in identifying and addressing risks of modern slavery, in particular its engagement with unions and worker organisations.
- Information about any complaints and grievance mechanisms that allow workers or other stakeholders to report abuses, and processes for remediation or compensation of affected workers.

FLEX submits that, more important than reporting on the number and nature of incidences of modern slavery detected, is a requirement that companies report on how they have detected and responded to such incidences. In order to develop and share good practice, and to ensure that cases of modern slavery are being

⁹ See recommendations of the 2016 Senate Committee report “A National Disgrace: The Exploitation of Temporary Work Visa Holders”, available at https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report

appropriately addressed, it is most important that companies report on their response to cases identified, and in particular on the outcomes for the exploited workers.

FLEX also recommends that the proposed legislation include the requirement that all statements be approved by the Board and signed by a Director (or equivalent body and position-holder in a non-corporate entity). The requirement that the statement be approved by the Board is key to ensuring that the issue of modern slavery is escalated within the company and given due attention by the highest company officers. The requirement for approval and signature also engages the fiduciary duties of Directors to ensure the accuracy of the report, and helps in ensuring that the report is treated with the seriousness it requires.

8. How should a central repository for Modern Slavery Statements be established and what functions should it include? Should the repository be run by the Government or a third party?

FLEX argued strongly during the passage of the UK Modern Slavery Act that the UK Government should be duty bound to establish a central repository for Modern Slavery Statements that clearly lists those companies that are obliged to report under Section 54. Sadly the UK government continues to resist such calls. Experts in this field have repeatedly observed that without a clear picture of those companies that are required to report and a centralised database it is impossible for even the most industrious consumer to engage in activity holding companies to account for action to address modern slavery in their supply chains. FLEX believes that a registry funded and operated by the government would have most credibility and influence with both entities required to report and with users. A registry operated by government would also have the most ready access to the information required to compile the registry and the list of companies required to report.

The two primary aims of the repository should to identify entities who have / have not reported, and to facilitate the retrieval, scrutiny and comparison of reports. In particular, the repository should at a minimum allow users to easily:

- Ascertain which entities are required to report in that financial year;
- Search and find the reports of entities who have reported, by name (including trading name), sector and location;
- Compare the reports of different entities in the same sector, and of the same entity over different years;
- Ascertain which entities are required to report and have not reported;

In order to perform these functions and promote compliance with the reporting obligation a list of the companies required to report in each financial year will be essential. A list of companies that have failed to report by the required deadline will also be important to ensure the integrity of the legislation and the accountability of entities that fail to meet their obligations. The experience of both the UK legislation and the legislation in California demonstrates that without such lists it will be very

difficult to determine which companies should and have reported, and makes it significantly harder for civil society to hold companies to account for their actions.

Having a single and central repository would also reduce the confusion that would arise (as in the UK) from having multiple registries operating at the same time.

9. Noting the Government does not propose to provide for penalties for non-compliance, how can Government and civil society most effectively support entities to comply with the reporting requirement?

FLEX strongly submits that penalties for non-compliance are required to ensure the integrity and effectiveness of the legislation. The experience of both the UK and Californian legislation is that without a system for monitoring compliance, and a penalty for non-compliance – significant numbers of companies will flout their legal obligations and will simply not report. In both countries, civil society efforts to identify and collate reports have identified reports from only about a third of companies believed to be required to report.¹⁰ To have a law with which up to two thirds of covered companies have refused to comply, without penalty, completely undermines both the integrity and the effectiveness of the law. It also prevents the law from achieving its objectives of raising standards across the board and creating a level playing field, as only those companies who are most responsible and/or most concerned with reputation will have incentive to comply.

Penalties for non-compliance should include a financial penalty, and the listing of the entity on a public list of companies that have failed to report, produced on an annual basis. Penalties should be imposed for failing to report, and for failing to comply with the procedural requirements of Board approval, Director signature, and display on the entity website. Reports that do not comply with the prescribed content criteria should be required to be re-submitted upon threat of financial penalty.

The government should also consider implementing a provision modelled on Section 7 of the UK Bribery Act. This provision makes companies criminally liable when a person associated with the company bribes another person, intending to obtain or retain business for the company, or to obtain or retain an advantage in the conduct of business for the company. However, companies have a defence to this offence if they have 'adequate procedures' in place to prevent bribery, including due diligence mechanisms. Recent research has demonstrated this provision is significantly more effective the reporting provision in the Modern Slavery Act in driving deeper changes to corporate conduct.¹¹ In the current context, a provision could be included in the proposed Australian legislation making companies criminally liable for modern slavery offences committed on their behalf, but providing a defence where the

¹⁰ Know the Chain (2015) *Insights Brief: Five Years of the California Transparency in Supply Chains Act*, p. 5, available at https://kctcdevlab.wpengine.com/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf; See also submission of the Advisory Committee of the Modern Slavery Registry to the present inquiry, p. 5.

¹¹ Le Baron & Ruhmkorf (2017) 'Steering CSR Through Home State Regulation: A comparison of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance', *Global Policy*, Vol. 8.

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company has a) produced a modern slavery report, and b) has in place adequate measures to address modern slavery in their supply chains.

In addition to penalties, the government should use its power as a major purchaser to incentivise companies to comply. This approach to public procurement is now being widely adopted at the local level in the UK – Wales, a UK constituent country, recently adopted such a Code of Practice and the Mayor of London is currently drafting such a Code for London public procurement. The Australian government should consider developing a Code of Practice for Ethical Employment in Supply Chains similar to that adopted in Wales,¹² which requires contracting authorities to a) have regard to contractors' modern slavery policies and processes as part of the procurement selection criteria, and b) exclude contractors that have not reported under the legislation and/ or do not have adequate policies or procedures to protect the labour rights of workers in their supply chain.

In order to support the quality of compliance, and to encourage entities to report effectively, the government should produce guidance on reporting. The guidance should include best practice in identifying, assessing, addressing risk of modern slavery in supply chains. It should provide detail on due diligence processes, and on the structure of necessary complaints and remediation mechanisms. It should also cover monitoring and evaluation of modern slavery policies and procedures, and the importance of engaging with civil society and worker stakeholders in this process. FLEX believes that it is the role of Government to set out what it considers the 'gold standard' reporting framework and to actively seek companies to act as flag bearers in this regard.

Critically, the government should support companies seeking to identify and address labour exploitation in their supply chains by strengthening Australia's labour inspection and enforcement framework. The Fairwork Ombudsman currently investigates only a small number of cases each year, and very rarely (if ever) refers cases for criminal investigation. Compared to that of many labour inspectorates in Europe, such as the Netherlands or Norway,¹³ the Fairwork Ombudsman's role is more reactive and less focused on inspection and enforcement. Yet the Ombudsman could play a key role in assisting companies to identify and assess areas of risk within the Australian labour market, and to identify cases of exploitation in supply chains that are not identified through company auditing processes. FLEX strongly recommends that the government review and strengthen the operation of the Fairwork Ombudsman, including adequately resourcing and empowering the Ombudsman to carry out proactive inspections across the labour market.

¹² Welsh Government, *Code of Practice: Ethical Employment in Supply Chains*, 2017. Available at <http://gov.wales/docs/dpsp/publications/valuewales/170502-ethical-en.pdf>

¹³ For more detail on these inspectorates, see FLEX (2017) *Risky Business: Tackling Exploitation in the UK Labour Market*, p. 17

10. Is the five month deadline for entities to publish Modern Slavery Statements appropriate? Should this deadline be linked to the end of the Australian financial year or to the end of entities' financial years?

Allowing companies to report according to their own financial year would make for smoother reporting processes internally. However FLEX believes that linking the deadline to the end of the Australian financial year would make compliance easier to track and make the reports easier to compare. In particular linking the deadline to the financial year will make it easiest to compile the list of companies required to report.

11. Should the reporting requirement be 'phased-in' by allowing entities an initial grace period before they are required to publish Modern Slavery Statements?

12. How can the Australian Government best monitor and evaluate the effectiveness of the reporting requirement? How should Government allow for the business community and civil society to provide feedback on the effectiveness of the reporting requirement?

The most important tools for monitoring compliance with the reporting requirement will be the establishment of a single central registry, and the annual publication of a list of the companies required to report. A rigorous annual review of the contents of company statements is absolutely critical to understanding the degree to which companies have taken action. One of the most damning assessments of the, albeit limited, number of UK company reports shows respondents have largely provided vague and sweeping statements in their reports. A full review of reports, setting out best practice examples of reporting and identifying where reports have had an impact for workers on the ground would deliver real meaning to the requirement.

Evaluating the effectiveness of the reporting requirement means assessing the extent to which it has achieved its objective to "equip and enable the business community to respond more effectively to modern slavery and develop and maintain responsible and transparent supply chains". This will require analysis of both the content of the reports produced, the impact of the reporting requirement on entity actions, and the impact of the steps taken by entities and outlined in the reports.

To date, in the UK there has been some analysis of the content and quality of statements produced under the Modern Slavery Act.¹⁴ There has also been some analysis of the impact of the Act on companies' policies and procedures, including

¹⁴ See e.g. Business and Human Rights Resource Centre (2017) *First year of FTSE 100 Reports under the UK Modern Slavery Act: Towards elimination?*, available at <https://business-humanrights.org/sites/default/files/FTSE%20100%20Report%20Public.pdf>; CORE (2017) *Risk Averse? Company reporting on raw material and sector-specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015*, available at http://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf

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the development of new policies and provision of training to staff.¹⁵ However there has been very little analysis of the impact or effectiveness of the actions described in these statements 'on the ground', and in particular on their effectiveness in preventing, identifying or addressing cases of exploitation.

In order to provide a complete picture of the effectiveness of the reporting requirement, analysis of each of these three areas is required. This analysis could be conducted via an independent oversight mechanism, or commissioned by the government and conducted by NGO experts.

This analysis, as well as feedback from business, NGOs, academics, worker organisations and unions, should contribute to a regular review of the legislation, conducted by an independent oversight mechanism within two years of the passage of the legislation, and annually thereafter.

13. Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society? If so, what functions should the oversight mechanism perform?

An independent oversight mechanism would substantially assist in encouraging compliance with the reporting requirement, in improving the quality of compliance, and in monitoring and evaluating the impact and effectiveness of the requirement. Functions could include:

- Reporting annually on the level of compliance, and measures required to improve compliance.
- Taking actions to stimulate compliance, including compiling and publishing a list of non-compliant entities and writing to non-compliant entities to remind them of their duty to report.
- Reporting annually on the content and quality of reporting, including comparative analysis of reports and the identification of best practice in reporting.
- Conducting or commissioning research into the impact of the reporting requirement on a) company actions, policies and procedures, b) the ability of companies to identify and appropriately address modern slavery in their supply chains, and c) the impact of reporting on workers in company supply chains.
- Producing guidance on both reporting and on recommended actions to identify, address and monitor risk of modern slavery in supply chains.
- Making recommendations for other measures required to support entities in identifying and addressing exploitation in their supply chains, including measures to be taken by law enforcement, the Fairwork Ombudsman, procurement authorities, and other government agencies.

¹⁵ Lake et al (2016) *Corporate Leadership on Modern Slavery*, The Ethical Trading Initiative & Hult International Business School, 11.

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14. Should Government reconsider the other options set out in this consultation paper (Options 1 and 2)? Would Option 2 impose any regulatory costs on the business community?

FLEX does not support Option 1 (business as usual) and does not consider that Option 2 alone is sufficient. FLEX also reiterates that Option 3 itself is not definitive solution, but should be seen as part of a broader effort to ensure corporate accountability and prevent labour exploitation in corporate supply chains, including through strengthened labour inspection, protection and enforcement.

For further information please contact Claire Falconer, Legal Director, at clairefalconer@labourexploitation.org.