

Ms Elizabeth Kikkert MLA
Chair of the Standing Committee on Public Accounts
Legislative Assembly for the Australian Capital Territory
By email: LACommitteePA@parliament.act.gov.au

22 May 2023

**Re: Submission of the NSW Anti-slavery Commissioner to the Inquiry
into the Modern Slavery Legislation Amendment Bill 2023**

Dear Chair:

1. I write to you as NSW Anti-slavery Commissioner, to offer the **enclosed** submission to the Inquiry into the *Modern Slavery Legislation Amendment Bill 2023* (ACT) (the **Bill**) in two parts: 1) Executive Summary and 2) Submission.
2. In 2018, New South Wales Parliament passed the *Modern Slavery Act 2018* (NSW) (**NSW Act**). The NSW Act came into effect in 2022 following amendments in 2021.¹ The NSW Act creates a new, independent statutory office – the role of Anti-slavery Commissioner (**NSW Commissioner**) – which I am now privileged to occupy. My term runs until 31 July 2027.
3. This submission is offered based on my experience in the role since I took office on 1 August 2022, as well as two decades' prior experience working to combat organized crime, promote human rights and responsible business practice. That experience includes founding the UN's anti-slavery knowledge platform (Delta 8.7), serving as the Chair of the US Council on Foreign Relations Study Group on Trafficking in Persons, and establishing Finance Against Slavery and Trafficking (FAST) in collaboration with the Prime Minister of Liechtenstein, Foreign Ministers of Australia and the Netherlands, and Nobel laureate Muhammad Yunus.
4. It is important to note that as an independent statutory office holder, I do not speak for the New South Wales Government, nor any other government. The NSW Commissioner is appointed by the NSW Governor on the recommendation of the Executive Council, but reports to NSW Parliament, not to the government. My work is however supported by an Office of the Anti-slavery Commissioner, located within the Office of the Secretary of the NSW Department of Communities and Justice. This is currently established with 12 ongoing staff roles, including a Lived Experience Advisor who has survived modern slavery.

¹ See *Modern Slavery Amendment Act 2021* (NSW).

5. The position of the NSW Commissioner is the first such role in Australia, and only the second in the world (after the United Kingdom). The NSW Act gives the NSW Commissioner a range of functions, which together position the NSW Commissioner to work to address the system failure that modern slavery represents.
6. I welcome the prospect of the creation of a role of independent anti-slavery commissioner in the ACT. There are many opportunities for interaction and cooperation between commissioners in NSW and the ACT. I also welcome the other measures in the Bill aimed at combatting modern slavery, namely the obligations on ACT procuring entities to identify and address modern slavery risks in their supply chains.
7. I believe there are particular opportunities for collaboration between our jurisdictions to address modern slavery risks in public procurement, since public entities in the two jurisdictions frequently use the same suppliers, and even where they do not, suppliers are likely to be purchasing from the same supply-chains. Effective mitigation of modern slavery risks in complex supply-chains requires collective action by stakeholders along the value-chain, including amongst buyers.
8. I have already benefited from strong and effective communication with personnel in the Chief Minister, Treasury and Economic Development Directorate of the ACT Government as I work with interested stakeholders to develop an implementation framework for the new public procurement obligations relating to modern slavery risk, in New South Wales (discussed further in the enclosed submission).
9. The submission provides comments on the Bill under the following three areas:
 - public procurement;
 - anti-slavery commissioner; and
 - survivor engagement.
10. Finally, the submission provides some minor editorial comments on the Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum (**Explanatory Memorandum**) and the Modern Slavery Bill 2023 One Page Summary (**Summary**).
11. I hope there may be an opportunity to discuss these matters with the Committee. Please do not hesitate to be in touch if I can be of any assistance.

Yours truly,

Dr James Cockayne
NSW Anti-slavery Commissioner

Our reference: ASC/2023/024

Executive Summary: Submission of the NSW Anti-slavery Commissioner to the Inquiry into the ACT Modern Slavery Legislation Amendment Bill 2023

1. In 2018, New South Wales Parliament passed the *Modern Slavery Act 2018* (NSW) (**NSW Act**). The NSW Act came into effect in 2022 following amendments in 2021. The NSW Act creates a new, independent statutory office – the role of Anti-slavery Commissioner (**NSW Commissioner**). This is a summary of the submission of the current and first NSW Commissioner, Dr James Cockayne, to the Inquiry into the *Modern Slavery Legislation Amendment Bill 2023* (ACT) (the **Bill**). My term runs until 31 July 2027.
2. As an independent statutory office holder, the NSW Commissioner does not speak for the New South Wales Government, nor any other government. The NSW Commissioner is appointed by the NSW Governor on the recommendation of the Executive Council, but reports to NSW Parliament, not to the government.
3. The position of the NSW Commissioner is the first such role in Australia, and only the second in the world (after the United Kingdom). The NSW Act gives the NSW Commissioner a range of functions, which together position the NSW Commissioner to work to address the system failure that modern slavery represents.
4. Dr Cockayne welcomes the prospect of the creation of a role of independent anti-slavery commissioner in the ACT. There are many opportunities for interaction and cooperation between commissioners in NSW and the ACT. He also welcomes the other measures in the Bill aimed at combatting modern slavery, namely the obligations on ACT procuring entities to identify and address modern slavery risks in their supply chains.
5. In his submission, Dr Cockayne begins by describing the system of modern slavery risk management recently introduced in NSW, and the current efforts to implement those arrangements. Under the NSW Act and related legislative provisions, over 300 government entities, local councils and other public entities with a combined annual procurement spend of over AUD 40 billion now have an obligation to take “reasonable steps” to ensure that goods and services they procure are not products of modern slavery, and to report on these steps in annual reporting. These arrangements resemble, in some ways, those proposed by the Bill, but also notably differ in certain respects.
6. Dr Cockayne indicates that he believes there are particular opportunities for collaboration between NSW and ACT to address modern slavery risks in public procurement, since public entities in the two jurisdictions frequently use the

same suppliers, and even where they do not, suppliers are likely to be purchasing from the same supply-chains. These collaborations could range from joint risk analysis and information sharing, to alignment of due diligence guidance provided to the entities that attract due diligence obligations under the NSW and ACT legislative schemes. Effective mitigation of modern slavery risks in complex supply-chains requires collective action by stakeholders along the value-chain, including amongst buyers.

7. The submission provides comments on the Bill under the following three areas:
 - public procurement;
 - anti-slavery commissioner; and
 - survivor engagement.
8. Finally, the submission provides some minor editorial comments on the Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum (**Explanatory Memorandum**) and the Modern Slavery Bill 2023 One Page Summary (**Summary**).
9. This Executive Summary does not provide a comprehensive overview of the submission, but instead focuses on key issues that may warrant the consideration of the Committee as it considers the Bill.

Supervision of ACT public sector bodies and Territory entities

10. The Bill mandates the ACT anti-slavery commissioner to keep a register that includes a list of administrative units or territory units that are non-compliant with the Cth Act.¹ This raises important questions about the relationship between the ACT Commissioner, the Cth Act and any new federal anti-slavery commissioner – a role which the federal government has signalled it will be creating this year. What will happen if the ACT commissioner assesses an entity to be compliant with the Cth Act, but the new federal anti-slavery commissioner, or any other Commonwealth level supervisory actor, reaches the opposite conclusion – or vice versa? Similarly, what will be the result if an ACT procuring entity assesses that a supplier has reporting obligations under the Cth Act, which it has failed to meet, and seeks to exclude the entity from a tender on this basis (as the Bill provides for), but there is no indication from federal government that this supplier does have such reporting obligations – or, indeed, if there is an indication from federal government that it does *not* attract such obligations?
11. The approach recently legislated in New South Wales is somewhat different, and may avoid such pitfalls. The NSW approach creates a separate, state-level reporting system for NSW public entities, distinct from the Cth Act reporting

¹ New section 18H(1)(a)(ii) of the *Human Rights Commission Act 2005*, inserted by section 20 of the Bill.

scheme, which does not create reporting obligations for such entities.² NSW supervisory bodies – including the NSW Anti-slavery Commissioner, the NSW Procurement Board, the NSW Auditor-General – supervise this reporting and the effectiveness of reporting entities' due diligence.

12. The NSW approach also integrates modern slavery risk management into the existing, sophisticated state public procurement supervision arrangements. State and territory governments typically have strong administrative supervision arrangements in place to ensure probity, integrity and effective risk management in public procurement, which may offer the basis for capabilities needed for effective modern slavery risk management.
13. It is also likely that the Cth Act scheme will soon undergo substantial revision. The federal government has recently received the report of a review of the Cth Act conducted by Professor John McMillan AO, but not yet publicly released. It is possible that the federal government may seek to change the nature and content of reporting obligations, or impose administrative, financial or other sanctions for poor, late or otherwise deficient reporting under the Cth Act. Amongst other implications, it is not yet clear how such sanctions would apply to entities that are required by state or territory law to report under the Cth Act's voluntary reporting pathway, but not required to report by the Cth Act itself.
14. In considering the Bill, the Committee may wish to consider the different approach to supervision of reporting and due diligence adopted in NSW, and the implications of a potential revision of the Cth Act scheme in months ahead.

Businesses that tender to the ACT Government or territory entities

15. The reporting requirements under the Bill for businesses who are not reporting entities under the Cth Act are framed as a condition of participation in tenders. These requirements do not appear to vary, regardless of a supplier entity's size, capability or potential connection to modern slavery risks.³
16. In NSW, it is our position that the allocation of scarce procurement and risk management resources should be prioritized primarily through reference to the salience of modern slavery risk⁴, understood as *risk to people* – not based on the size of the procurement contract. Large contracts can sometimes pose low modern slavery risks, which makes use of scarce risk management resources for these contracts inefficient. Conversely, some small contracts can pose salient modern slavery risks, so they should receive heightened due diligence.

² Exceptionally, NSW State owned corporations are referred to the Cth Act's voluntary reporting pathway, but NSW actors' supervision of these entities is consequently limited.

³ *Modern Slavery Legislation Amendment Bill 2023 (ACT)* Part 4 section 13.

⁴ 'Salience' is the established approach under the UNGPs (and indeed under OECD guidance) for assessing human rights risks and prioritising engagement and response. See UN Guiding Principles Reporting Framework, Salient Human Rights Issues, available at <https://www.ungpreporting.org/resources/salient-human-rights-issues/>.

17. This approach is in line with Australia’s existing international commitments and obligations, notably under the UN Guiding Principles on Business and Human Rights (UNGPs), and the OECD Multinational Enterprise Guidelines and the NSW “reasonable steps” approach.
18. It is however also self-evident that buyers have limited resources available with which to undertake modern slavery risk analysis and management. What is ‘reasonable’ must also therefore be understood as a function in part of the buyer’s capability. An approach that calibrates due diligence expectations based *both* on inherent modern slavery risks and on due diligence capabilities will improve the effectiveness of the overall reform effort at the system level, while also offering assurance to buyers that their limited resources are being used efficiently to optimise their own risk exposure.
19. Dr Cockayne also indicates concern that the lack of calibration of due diligence expectations based on supplier capability risks establishing modern slavery due diligence as an unintended barrier to participation by Small and Medium Enterprises (SMEs) and by Aboriginal and Torres Strait Islander tenderers, whether or not they are connected to salient modern slavery risks.

ACT anti-slavery commissioner

20. Dr Cockayne welcomes the proposal to create a role of ACT anti-slavery commissioner (**ACT commissioner**).
21. There is growing recognition that an independent statutory officer or other supervisory body can play important risk-signalling, interpretive, advisory, capacity-building and mobilising roles that encourage subjects of disclosure regimes to move from ‘reporting for reporting’s sake’ to ‘reporting for action’.⁵
22. Dr Cockayne welcomes the proposal to grant the ACT commissioner robust and broad information gathering powers.

Survivor engagement and leadership

23. Dr Cockayne encourages centring survivor engagement and leadership in pursuing all proposed amendments to ACT legislation arising from the Bill and in the exercise of all of the ACT commissioner’s functions under the Bill.
24. Only through reference to lived experience can policy-makers ensure that the interventions they are designing are fit for purpose, and that taxpayers’ resources are being efficiently used.

⁵ See for example the discussions in New Zealand Ministry of Business, Innovation and Employment, Executive summary of consultation on legislation to address modern slavery and worker exploitation: Summary of feedback, n.d., available at <https://www.mbie.govt.nz/have-yoursay/modern-slavery/executive-summary-of-consultation-on-legislation-to-address-modernslavery-and-worker-exploitation-summary-of-feedback/>.

25. In NSW, we are incorporating lived experience into the design, delivery and governance of the work of the Office of the Anti-slavery Commissioner, starting by employing a Lived Experience Advisor in the team to ensure meaningful and safe engagement with people with lived experience, and centre lived experience in new projects and programming.

Explanatory Memorandum and Summary

26. The submission provides the following minor editorial comments on the Explanatory Memorandum and Summary:

- a. NSW public bodies (except State owned corporations) have separate due diligence and reporting obligations outside of the Cth Act;⁶
- b. there are no financial penalties under the NSW Act;⁷
- c. there is no NSW anti-slavery ‘Commission’, rather a NSW Anti-slavery Commissioner (an independent statutory office), currently supported by the Office of the Anti-slavery Commissioner (an administrative unit of the NSW Department of Communities and Justice);⁸ and
- d. neither Dr Cockayne nor the Office of the Anti-slavery Commissioner were consulted in the drafting of the Bill.⁹

27. Dr Cockayne requests that the Explanatory Memorandum and the Summary please be amended for accuracy.

⁶ Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum paragraph 1.

⁷ Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum paragraph 3.

⁸ Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum paragraph 3.

⁹ Modern Slavery Bill 2023 One Page Summary paragraph 1.

Our reference: ASC/2023/024

Submission of the NSW Anti-slavery Commissioner to the Inquiry into the ACT Modern Slavery Legislation Amendment Bill 2023

22 May 2023

1. In 2018, New South Wales Parliament passed the *Modern Slavery Act 2018* (NSW) (**NSW Act**). The NSW Act came into effect in 2022 following amendments in 2021.¹ The NSW Act creates a new, independent statutory office – the role of Anti-slavery Commissioner (**NSW Commissioner**) – which I am now privileged to occupy. My term runs until 31 July 2027.
2. This submission is offered based on my experience in the role since I took office on 1 August 2022, as well as two decades' prior experience working to combat organized crime, promote human rights and responsible business practice. That experience includes founding the UN's anti-slavery knowledge platform (Delta 8.7), serving as the Chair of the US Council on Foreign Relations Study Group on Trafficking in Persons, and establishing Finance Against Slavery and Trafficking (FAST) in collaboration with the Prime Minister of Liechtenstein, Foreign Ministers of Australia and the Netherlands, and Nobel laureate Muhammad Yunus.
3. It is important to note that as an independent statutory office holder, I do not speak for the New South Wales Government nor any other government.
4. This submission provides comments on the Inquiry into the Modern Slavery Legislation Amendment Bill 2023 (ACT) (the **Bill**) under the following three areas:
 - public procurement;
 - anti-slavery commissioner; and
 - survivor engagement.
5. Finally, this submission provides some minor editorial comments on Modern Slavery Legislation Amendment Bill 2023 (ACT) Explanatory Memorandum (**Explanatory Memorandum**) and the Modern Slavery Bill 2023 One Page Summary (**Summary**).

¹ See *Modern Slavery Amendment Act 2021* (NSW).

Public procurement

Overview of the Bill

6. The Bill proposes a number of significant changes to ACT procurement:
- changes to the *Annual Reports (Government Agencies) Act 2004* (ACT) that require certain ACT public sector bodies and Territory entities to include in their annual reports a statement describing:
 - the actions the entity has taken to identify and mitigate the risk of modern slavery happening in its supply chains;
 - the actions taken by the entity in response to any instance of modern slavery identified in its supply chains;
 - any advice or guidance given by the Anti-slavery Commissioner to the entity in relation to modern slavery;²
 - changes to the *Auditor-General Act 1996* (ACT) that empower the Auditor General to consider, when conducting a performance audit, the risk of modern slavery happening in the operations being reviewed or examined, and the action taken to mitigate the risk;³
 - changes to the *Government Procurement Act 2001* (ACT) that:
 - amend the definition of “value for money” to include modern slavery considerations;⁴
 - oblige all tenderers submitting a tender for ACT Government procurements valued at \$25,000 or more to include a modern slavery statement⁵ and prohibit ACT procuring entities from awarding a tender to an “excluded tenderer” who have failed to comply with this requirement, or failed to submit a modern slavery statement under the *Modern Slavery Act 2018* (Cth) (**Cth Act**);⁶ and
 - changes to the *Human Rights Act 2004* (Cth) that require certain administrative units or Territory entities to submit a voluntary modern slavery statement under the Cth Act.⁷
7. These proposed changes bear some resemblance to recent legislative reforms in New South Wales, which I am now in the process of helping affected entities to implement. Below I provide an overview of these changes, and then offer some reflections.

² *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 2 section 5.

³ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 3 section 7.

⁴ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 4 section 10.

⁵ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 4 section 13.

⁶ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 4 section 13.

⁷ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 5 section 16.

Overview of NSW system

8. The federal *Modern Slavery Act 2018* (Cth) (**Cth Act**) creates modern slavery reporting and due diligence obligations for large commercial organisations. It also creates reporting obligations for certain Commonwealth entities. However it does not, in its current form, create reporting obligations for state or territory government or local council entities.
9. The Cth Act has recently undergone a review led by Professor John McMillan AO. A federal government response is expected soon. It is possible that the content and operation of the Cth Act could change considerably, with implications for those entities reporting under the Cth system, as the Bill would require certain ACT entities to do.
10. I am not aware of any indication to date that changes to the Cth Act would include the creation of obligations for state government or local council entities. Accordingly, it seems likely that it will continue to fall to individual state or territory governments, or local councils, to address modern slavery risks in their own government and public procurement arrangements.
11. Under the NSW Act and related changes introduced into NSW law through the *Modern Slavery Amendment Act 2021* (NSW), a small number of NSW State owned corporations are required to submit modern slavery statements under the voluntary reporting pathway provided in the Cth Act, as they operate and are treated like commercial businesses. Notably, the NSW legislation chooses *not* to refer NSW government and local council entities to the Cth reporting pathway, but instead to integrate modern slavery risk management into the existing public procurement and risk management infrastructure in NSW.
12. Under the NSW Act and related legislative provisions, over 300 government entities, local councils and other public entities with a combined annual procurement spend of over AUD 40 billion now have an obligation to take “reasonable steps” to ensure that goods and services they procure are not products of modern slavery, and to report on these steps in annual reporting. The relevant legislation has embedded this anti-slavery objective as one of the formal Objectives of the NSW Procurement Board (*Public Works and Procurement Act 1912* s 171(b1)). The NSW Procurement Board is empowered to issue directions or policies to affected agencies regarding “reasonable steps” to achieve this Objective. In parallel, local councils (which are not subject to the NSW Procurement Board) are obliged to take reasonable steps to ensure that goods and services procured by and for the council are not the product of modern slavery (*Local Government Act* s 438ZE).
13. NSW Government entities, local councils, and various other entities are also obliged to report on these reasonable steps through their annual reporting. Drawing on legal advice, my Office has to date identified over 300 entities with such reporting obligations, with a combined annual procurement spend in the order of AUD 40 billion.

14. Where these entities are subject to the jurisdiction of the NSW Auditor-General, there is also a possibility of a risk-based “modern slavery audit”.⁸
15. The NSW Commissioner also has a number of important supervision powers under the NSW Act. Under section 26 of the NSW Act, the NSW Commissioner is to keep a public register in electronic form that:
 - a. identifies any government agency failing to comply with directions of the NSW Procurement Board under section 175 of the *Public Works and Procurement Act 1912* (NSW) concerning procurement (within the meaning of Part 11 of that Act) of goods and services that are the product of modern slavery and whether the government agency has taken steps to ensure compliance in the future, and
 - b. identifies any State owned corporation that has failed to provide a modern slavery statement in accordance with the Cth Act; and
 - c. includes other information the NSW Commissioner thinks appropriate.
16. The NSW Commissioner also has the ability to raise “significant issues” concerning the operations of certain agencies, in which case they must include in their annual reporting a statement of the action taken by the agency in relation to that significant issue.⁹
17. The NSW Commissioner is also required to report to the NSW Parliament annually, including an evaluation of the response of relevant government agencies to the recommendations of the NSW Commissioner. The NSW Commissioner may also, at any time, report to the NSW Parliament on any particular issue relating to the NSW Commissioner’s functions under the NSW Act.¹⁰
18. The NSW Commissioner may also develop and make publicly available codes of practice for the purpose of providing guidance in identifying modern slavery taking place within the supply chains of organisations and steps that can be taken to remediate or monitor identified risks.¹¹
19. The NSW legislation also obliges the NSW Commissioner, Auditor-General and Procurement Board to regularly consult on the effectiveness of due diligence reforms.

⁸ See *Public Works and Procurement Act 1912* (NSW) s 176(1A) which obligates government agencies to take “reasonable steps” to ensure that goods and services procured by and for the agency are not the product of modern slavery; *Annual Reports (Departments) Regulation 2015* (NSW) cll 6(b1) and 6(b2), *Annual Reports (Statutory Bodies) Regulation 2015* (NSW) cll 8(b1) and 8(b2) which obligates government Departments and statutory bodies to include modern slavery statements in their annual reports; and the *Local Government Act 1993* (NSW) ss 438ZE and 428 which obligates NSW Local Councils to take reasonable steps to ensure that goods and services procured by and for the Council are not the product of modern slavery and report in their annual reports.

⁹ *Modern Slavery Act 2018* (NSW) section 31(1)(a).

¹⁰ *Modern Slavery Act 2018* (NSW) section 19.

¹¹ *Modern Slavery Act 2018* (NSW) section 26.

20. These new 'reasonable steps' and reporting obligations took force on 1 July 2022. Since I took office on 1 August 2022, I have been working with a wide range of affected entities to develop an implementation programme.
21. In September 2022, I published a Discussion Paper laying out ideas for implementing these new obligations.¹²
22. In October 2022, the NSW Procurement Leadership Group, which reports to the Procurement Board, endorsed my proposal to work with affected entities to develop a 'Shared Implementation Framework' – a package of formal Guidance, implementation tools and materials, and training – to support entities subject to these new modern slavery due diligence and reporting obligations. To develop this Shared Implementation Framework, I have convened a Working Party that has met seven times to date to discuss specific aspects of this work.
23. Based on these consultations, I anticipate publishing detailed NSW Anti-slavery Commissioner's Guidance on Reasonable Steps for Public Buyers, in mid-2023. We anticipate that this Guidance will be presented to the NSW Procurement Board for consideration and potential endorsement. Should the Procurement Board choose to endorse the Guidance through a Direction, this would have the force of law. In parallel, we anticipate the Guidance being referenced in new Tendering Guidelines published by the NSW Office of Local Government – a key reference for NSW local councils.
24. The Guidance will cover a wide range of issues relating to 'reasonable steps' at every stage of the procurement process, including market analysis, pre-registration, tendering, selection, contracting, contract management, grievance handling, modern slavery remediation, responsible exit and reporting. It is being drafted to conform with Australia's international commitments, including to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines on Multinational Enterprises, and the WTO Agreement on Government Procurement, amongst others.
25. Alongside this Guidance, I am also preparing tools, materials and other infrastructure to support implementation of the NSW legislative provisions, notably:
 - a tool for identifying the inherent modern slavery risk associated with purchasing particular procurement category goods and services;
 - possibly, a 'High Modern Slavery Risk Product List' which identifies specific products considered to actually be made with modern slavery;
 - a twice-yearly Anti-slavery Forum, which will include a component focused on public procurement, fostering exchange on lessons learned, good practice and development of a community of purpose.

¹² See <https://dcj.nsw.gov.au/documents/legal-and-justice/anti-slavery-commissioner/nsw-asc-discussion-paper-nsw-public-procurement-and-modern-slavery.pdf>.

26. I hope that these materials and tools may prove useful for any efforts to address modern slavery risks in ACT public procurement. For example, it would be open to ACT government actors, or the ACT anti-slavery commissioner (**ACT commissioner**), to make reference to the NSW Commissioner's Guidance, in their own consideration of the steps undertaken by ACT entities to address modern slavery risks.
27. Given the overlap in the supplier base used by NSW and ACT public buyers, there are obvious benefits to ensuring consistency between expectations imposed by buyers on suppliers in the two jurisdictions. Going further, there may be efficiency gains and impact benefits from joint risk analysis, information-sharing or even performance evaluation across the two jurisdictions.
28. There are notable similarities between the NSW legislative provisions summarised above, and the arrangements that would be created by the Bill. There are also some key differences, to which I now turn.

Supervision of ACT public sector bodies and Territory entities

29. Under the Bill:
- ACT administrative units and territory entities will be required to submit voluntary modern slavery statements under the Cth Act; and
 - certain ACT public sector bodies and Territory entities will be required to include modern slavery statements in their annual reports.
30. This raises important questions about who will supervise compliance with ACT law and the Cth Act, if the Bill is enacted.
31. The Cth Act seems likely to change later this year. How it will change remains unknown, in the absence of a tabled response from the federal government to the McMillan Review report. That response is anticipated by the end of June 2023. It is possible that the federal government may seek to change the nature and content of reporting obligations, or impose administrative, financial or other sanctions for poor, late or otherwise deficient reporting. It is unclear how such sanctions would apply to entities that are required by state or territory law to report under the Cth Act's voluntary reporting pathway, but *not* required to report by the Cth Act itself.
32. The Bill mandates the ACT anti-slavery commissioner to keep a register that includes a list of administrative units or territory units that are non-compliant with the Cth Act. (New section 18H(1)(a)(ii) of the *Human Rights Commission Act 2005*, inserted by section 20 of the Bill.) This raises questions about potential conflicts between compliance assessments by the ACT commissioner and any federal authorities assessing compliance with the Cth Act. What will happen if the ACT commissioner assesses an entity to be compliant with the Cth Act, but

the new federal anti-slavery commissioner, or any other Commonwealth level supervisory actor created by the federal government in response to the McMillan Review, reaches the opposite conclusion – or *vice versa*?

33. Similarly, the Bill risks complications relating to supervision of obligations for businesses tendering to ACT Government and territory entity procurement processes. These are discussed at more length below. The Bill seeks to exclude entities that *should* have reported under the Cth Act, but have failed to do so, from ACT tendering processes. This requires ACT entities to assess whether a tendering entity should have reported under the Cth Act. Since the federal government does not currently publish a definitive list of entities obliged to report under the Cth Act, this creates potential pitfalls for ACT buyers, for example where they assess a supplier as having failed to meet reporting obligations under the Cth Act, and seek to exclude a supplier from a tender process on this basis, in the absence of any indication of such an expectation from federal authorities.
34. The NSW approach avoids these potential pitfalls by creating a separate, state-level reporting system for NSW public entities, distinct from the Cth Act reporting scheme. (Exceptionally, NSW State owned corporations are referred to the Cth Act’s voluntary reporting pathway, but NSW actors’ supervision of these entities is consequently limited.) NSW entities supervise this reporting, removing the risk of conflicting assessments of compliance between NSW and Commonwealth supervisory bodies.
35. The NSW approach also has the advantage of integrating modern slavery risk management into the existing, sophisticated state public procurement supervision arrangements. One of the key criticisms levelled by researchers on modern slavery due diligence and reporting schemes has been that there has frequently been limited administrative oversight of reporting by these entities.¹³ In my submission to the McMillan Review (the review of the Cth Act), I considered what such an administrative supervision infrastructure might entail.¹⁴ State and territory governments typically have strong administrative supervision arrangements in place to ensure probity, integrity and effective risk management in public procurement, which may offer the capabilities needed for effective modern slavery risk management.

¹³ See Human Rights Law Centre et al., *Paper Promises? Evaluating the early impact of Australia’s Modern Slavery Act* (Feb 2022), available at <https://www.hrlc.org.au/reports-news-commentary/2022/2/3/paper-promises-evaluating-the-early-impact-of-australias-modern-slavery-act>.

¹⁴ *Reporting for Action: Submission of the NSW Anti-slavery Commissioner to the Review of the Modern Slavery Act 2018* (Cth) (December 2022), available at: <https://dcj.nsw.gov.au/documents/legal-and-justice/anti-slavery-commissioner/plans-and-discussion-papers/oasc-discussion-paper-003-reporting-for-action.pdf>.

36. The NSW approach empowers NSW actors – the NSW Commissioner, the NSW Auditor-General and the Procurement Board – to supervise the content and effectiveness of modern slavery decision-making and reporting in public procurement processes in the state. Indeed, the legislation requires the NSW Commissioner, the Auditor-General and the Procurement Board to work together to monitor the “effectiveness” of due diligence reforms. This provides a mechanism by which we can ensure that the reforms being undertaken in NSW public procurement do in fact work to address modern slavery risks, and do not simply become an expensive and pointless compliance exercise.
37. The Bill mandates the ACT anti-slavery commissioner to “work with other entities to effectively exercise any function”, providing as examples of other entities “ACT Government Procurement Board” and “auditor-general”. The anti-slavery commissioner is given discretion to monitor and report on the effectiveness of the legislation. And the Bill also mandates the Minister to assess the effectiveness of the Bill (once enacted) in combating modern slavery, within four years of the commencement of the Bill.
38. The Bill also provides for the auditor-general to consider, in the conduct of a performance audit, “the risk of modern slavery happening in the operations being reviewed or examined, and the action taken to mitigate the risk” (Part 3). It is unclear whether this drafting intentionally limits this audit power to the consideration of modern slavery risks in *operations* alone, thereby excluding modern slavery risks arising in procurement or supply-chains.

Businesses that tender to the ACT Government or territory entities

39. Under the Bill, businesses that tender to the ACT Government or territory entities will have new obligations, depending on whether they are a reporting entity under the Cth Act or not:
- Businesses which are a reporting entity under the Cth Act who meet the \$100M revenue threshold and which have failed to comply with their reporting obligations under the Cth Act, will be unable to tender to the ACT Government. There are some limited exceptions to this.
 - All other businesses who are not reporting entities under the Cth Act, regardless of their size or revenue, which would like to tender to the ACT Government for a tender of a value greater than \$25,000 will be required to provide information about the risk of modern slavery happening in the supply chains for the goods, services or works being procured and how the tenderer will mitigate or address those risks. If they fail to do so, the procuring entity cannot award the contract to them. There are no available exceptions.

40. As raised earlier, this could create complications where ACT buyers and federal authorities reach diverging conclusions regarding the reporting obligations, under the Cth Act, of a specific entity. The provisions relating to businesses who are not reporting entities under the Cth Act are examined in further detail below.
41. Part 4 section 13 of the Bill creates an obligation on all tenderers who submit a tender for ACT Government procurements of \$25,000 or more to provide modern slavery information detailing the risk of modern slavery in its supply chains, the nature and circumstances of those risks, and the actions of the tenderer to mitigate and address those risks. Part 4 section 13 of the Bill also prohibits Territory entities from accepting a tender or entering into a contract with a tenderer unless this information has been provided.
42. As noted in paragraphs 16 and 17 above, under the NSW Act and related legislative provisions, a wide variety of government entities, local councils and other public entities now have an obligation to take “reasonable steps” to ensure that goods and services they procure are not products of modern slavery. NSW Government entities, local councils, and various other entities are also obliged to report on these reasonable steps through their annual reporting. Under the NSW Act, these “reasonable steps” and reporting obligations apply *regardless of revenue*.
43. This approach is consistent with Australia’s existing international commitments and obligations, notably under the UN Guiding Principles on Business and Human Rights (UNGPs), and the OECD Multinational Enterprise Guidelines. What is reasonable depends on the level of modern slavery risk involved in a specific procurement process – that is the level of *risk to people*, not risk to the procuring entity.
44. The level of risk to people is not necessarily a function of the size of the procurement contract. It may owe more to the scope of the modern slavery practices involved in the production and distribution of the goods and services in question; the severity of the harms caused by those practices; and the remediability of that harm. Together, these factors are understood as the ‘salience’ of modern slavery risk. ‘Salience’ is the established approach under the UNGPs (and indeed under OECD guidance) for assessing human rights risks and prioritising engagement and response.¹⁵
45. Even a low-value contract for a good made with modern slavery may pose a grave risk to people. Nonetheless, it is self-evident that buyers have limited resources available with which to undertake modern slavery risk analysis and management. What is ‘reasonable’ must also therefore be understood as a function in part of the buyer’s capability.

¹⁵ See UN Guiding Principles Reporting Framework, Salient Human Rights Issues, available at <https://www.ungpreporting.org/resources/salient-human-rights-issues/>.

46. For these reasons, the Shared Implementation Framework that we are currently developing in NSW calibrates due diligence and risk management expectations *not* based on the value of a procurement contract, but rather based on the inherent risk of modern slavery associated with purchasing a particular product or service, and the existing procurement capability of the buyer.
47. The inherent risk of procuring a particular good or service can be assessed based on factors associated with the production and distribution of that good and service. My Office is currently developing an Inherent Risk Identification Tool to assist public buyers with this risk assessment process. Once a buyer has identified the inherent risk associated with procuring a particular product or service, they are still obliged to undertake supplier-specific due diligence, risk management and potentially remediation actions. The form these take depends, amongst other things, on the capability of the buyer. The buyer's capability is assessed by reference to their procurement accreditation level (for NSW Government entities) or other objective factors (for local councils and other entities).
48. Through this approach, we aim in NSW to ensure that scarce procurement and risk management resources are focused not just on the largest contracts, which may include some procurements that are very low risk, and exclude some that are very high risk; but rather on those where modern slavery risks are most salient, and where buyers have the greatest leverage and capability to effect change. This improves the likely effectiveness of the overall reform effort at the system level, while also offering assurance to buyers that their limited resources are being used efficiently to optimise their own risk exposure.
49. It also seems germane to flag the potential barriers to participation in ACT procurement that could unintentionally be created by the supplier reporting requirements created by the Bill. The Bill frames reporting requirements as a condition of participation and does not calibrate these obligations to a supplier entity's size, capability or potential connection to modern slavery risks. All suppliers are treated alike. The risk in this approach is that it creates unintended barriers to for Small and Medium Enterprises (SMEs) or Aboriginal and Torres Strait Islander tenderers, whether or not they are connected to salient modern slavery risks.
50. The UNGPs state that while the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure, the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size.¹⁶ Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and

¹⁶ UN Guiding Principles on Business and Human Rights principle 14 and commentary, available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

processes will take on different forms.¹⁷

51. The UK Government's Guidance PPN 02/23: Tackling Modern Slavery in Government Supply Chains, published 10 February 2023 (**UK Guidance**) states that procuring entities must be proportionate in approaching how modern slavery risks can be addressed during the procurement process, and not impose any unnecessary burdens that would deter a wide diversity of suppliers including small and medium sized enterprises.¹⁸

Procurement principle – value for money

52. Part 4 section 10 of the Bill makes an amendment to the definition of value for money under the *Government Procurement Act 2001* (ACT) to include:
- a) probity and ethical behaviour, including modern slavery considerations; and
 - b) management of risk, including the risk of modern slavery.
53. We welcome this inclusion as it integrates modern slavery considerations into the value for money assessment required for every procurement activity under section 22A of the *Government Procurement Act 2001* (ACT).
54. This will, however, likely create significant demand from ACT procuring entities for guidance on how to meaningfully integrate modern slavery into tender evaluations. There are several existing sources of guidance available, such the Modern Slavery Tender Clauses and Guidance published by the Commonwealth; the recently published UK Guidance; and the Guidance we are currently developing in New South Wales. It may be useful for the Committee to consider how the Bill could encourage or mandate reference to such external guidance in ACT government procurement, or the resources that may be required to develop bespoke ACT guidance.

ACT anti-slavery commissioner

55. I welcome the proposal to create a role of ACT anti-slavery commissioner (**ACT commissioner**). I note that the proposed ACT Anti-Slavery Commissioner will be established as an extension to the ACT Human Rights Commission. While it is not for me to comment on the proposed location of this role, the following reflections on the NSW experience are offered to inform the Committee's reflections.

¹⁷ UN Guiding Principles on Business and Human Rights principle 14 and commentary, available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁸ UK Government's Guidance PPN 02/23: Tackling Modern Slavery in Government Supply Chains published 10 February 2023 p 9, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149941/PPN_02_23_-_Reissue_-_Tackling_Modern_Slavery_in_Government_Supply_Chains_2023_-_Guidance.pdf

Independence

56. The NSW Commissioner is independent of NSW Government and is not subject to the control and direction of the Minister (section 7 of the NSW Act). The NSW Commissioner's role is further buttressed by other measures, such as the provision of absolute immunity from NSW defamation law (*Defamation Act 2005* (NSW) section 35). Immunity from defamation law ensures that the Commissioner is able to identify sources of modern slavery risk, perpetrators and non-compliant entities.
57. This independence is critical to the effective functioning of the NSW Commissioner. There is growing recognition that an independent statutory officer or other supervisory body can play important risk-signalling, interpretive, advisory, capacity-building and mobilising roles that encourage subjects of disclosure regimes to move from 'reporting for reporting's sake' to 'reporting for action'.¹⁹

Information gathering powers

58. I welcome the proposal to grant the ACT Commissioner robust information gathering powers, under section 20 of the Bill.
59. I note the ACT Commissioner's powers are broad: the ACT Commissioner can issue a written notice to any person to provide information or produce a document or thing if the ACT Commissioner believes on reasonable grounds it would be relevant to any of the Commissioner's functions. The written notice must also include the period the person must comply within.
60. There are also financial penalties if a person fails to comply with a written notice (50 penalty units), unless they have a reasonable excuse. In our view, the inclusion of penalties for non-compliance with a notice request from the Commissioner would provide an important tool to ensure cooperation with the mandate.
61. In our experience in NSW, the ability to gather information from government agencies and non-governmental entities can prove particularly important in discharging the referral function of an anti-slavery commissioner. (In NSW, section 9 of the NSW Act; in the ACT, this would fall within new section 18I of the *Human Rights Commission Act 2005*). Reliable and timely access to information can help an anti-slavery commissioner ensure the effective functioning of support services, justice systems and remedial mechanisms, to support those with lived experience of modern slavery.

¹⁹ See for example the discussions in New Zealand Ministry of Business, Innovation and Employment, Executive summary of consultation on legislation to address modern slavery and worker exploitation: Summary of feedback, n.d., available at <https://www.mbie.govt.nz/have-yoursay/modern-slavery/executive-summary-of-consultation-on-legislation-to-address-modernslavery-and-worker-exploitation-summary-of-feedback/>.

Survivor Engagement

62. In our view, it is critical that survivor engagement and leadership is at the centre of the development and implementation of the Bill. Only through reference to lived experience can policy-makers ensure that the interventions they are designing are fit for purpose, and that taxpayers' resources are being efficiently used.
63. In NSW, we are incorporating lived experience into the design, delivery and governance of the work of the Office of the Anti-slavery Commissioner, ensuring, where possible, survivors are paid for their time and expertise, and provided with trauma-informed safeguards and skills development.
64. We have started by employing a Lived Experience Advisor in my team. As a full member of the team from the outset, our Lived Experience Advisor is working with us to ensure we meaningfully and safely engage with people with lived experience, and helping us centre lived experience in new projects and programming. We will also centre lived experience on our Advisory Panel, through paid participation, and through participation in our twice yearly NSW Anti-slavery Forum.
65. We are also committed to ensuring that we raise awareness of modern slavery through communication that empowers people with lived experience.
66. I note that the Bill inserts a new object into the *Human Rights Commission Act 2005* (ACT) to “combat modern slavery, and acknowledge, protect and promote the rights of victims of modern slavery”²⁰ and the ACT Commissioner has a proposed function “to acknowledge, protect and promote the rights of victims of modern slavery”.²¹ I encourage centring survivor engagement and leadership in pursuing all proposed amendments to ACT legislation arising from the Bill and in the exercise of all of the ACT Commissioner’s functions under the Bill.

²⁰ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 6 section 18.

²¹ *Modern Slavery Legislation Amendment Bill 2023* (ACT) Part 6 section 20.

Explanatory Memorandum and Summary

67. The below comments on the text of the Explanatory Memorandum and Summary are provided to encourage accurate description of the NSW Act and related arrangements, in the Bill and related legislative materials.

Explanatory Memorandum

68. Paragraph 1 of the Explanatory Memorandum says that:

“Territory entities will be required to submit their own voluntary Commonwealth modern slavery statements. This will ensure that Territory entities consider the risk of modern slavery in their own supply chains.

This is consistent with New South Wales legislation, which requires each government entity to submit their own modern slavery statement.”

69. This is not correct. Under section 25B of the NSW Act, only State owned corporations are required to submit modern slavery statements under the Cth Act.

70. All other public bodies under the NSW Act have separate due diligence and reporting obligations outside of the Cth Act. The NSW Act and the *Modern Slavery Amendment Act 2021* (NSW) made a number of changes to other related pieces of legislation to create new due diligence obligations for certain covered government entities and for local councils, and new reporting obligations for them.²²

71. Paragraph 3 ‘*Educative and iterative approach*’ of the Explanatory Memorandum refers to penalties under the NSW Act. The NSW Act does not currently impose financial penalties for failure to report or for other violations, except in relation to cooperation with the NSW Parliament Modern Slavery Committee.

72. Paragraph 3 ‘*Stakeholder consultation*’ refers to consultation with individuals involved in the New South Wales interim commission. There is no anti-slavery ‘Commission’ in New South Wales. The NSW Act creates the Anti-slavery Commissioner as an independent statutory office. The Commissioner is currently supported by the Office of the Anti-slavery Commissioner, an administrative unit of the NSW Department of Communities and Justice. Professor Jennifer Burn was the Interim Anti-slavery Commissioner in 2019-2020, prior to the substantive amendment of the NSW Act in 2021.

²² See *Public Works and Procurement Act 1912* (NSW) s 176(1A)) which obligates government agencies to take “reasonable steps” to ensure that goods and services procured by and for the agency are not the product of modern slavery; *Annual Reports (Departments) Regulation 2015* (NSW) cll 6(b1) and 6(b2), *Annual Reports (Statutory Bodies) Regulation 2015* (NSW) cll 8(b1) and 8(b2) which obligates government Departments and statutory bodies to include modern slavery statements in their annual reports; and the *Local Government Act 1993* (NSW) ss 438ZE and 428 which obligates NSW Local Councils to take reasonable steps to ensure that goods and services procured by and for the Council are not the product of modern slavery and report in their annual reports.

Summary

73. Paragraph 1 of the Summary refers to consultation with “those involved in the NSW Commission.” Neither the NSW Commissioner nor the Office of the Anti-slavery Commissioner were consulted in the drafting of the Bill and, as explained above, there is no anti-slavery ‘Commission’ in NSW.

74. I would request that the Explanatory Memorandum and the Summary please be amended to accurately describe sections relating to the NSW Act.

Conclusion

75. I would welcome the opportunity to meet with the Committee and answer any questions about the NSW Act or issues raised in this submission.

Dr James Cockayne
NSW Anti-slavery Commissioner

22 May 2023