Law Council
OF AUSTRALIA

# Strengthening Australia's legislative response to modern slavery in supply chains

**Attorney-General's Department**

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*Telephone* +61 2 6246 3788
*Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
*www.lawcouncil.au*

# Contents


Acknowledgements 1

Executive summary 2

Introduction 3

Responses to consultation questions 6

- Question 1—Model 6
  - Application of the offence 6
  - The nexus between the offence and the corporation 7
  - Fault elements 7
  - Defence 11
  - Guidance 12
  - Commencement 12
- Question 2—Impact 12
- Question 3—Support 13
- Question 4—DPA Scheme 14
- Question 5—Civil remedies 15

About the Law Council of Australia 17

# Acknowledgements

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- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Law Society of South Australia;
- the Law Society of Western Australia;
- the Corporations Committee of its Business Law Section;
- the Business and Human Rights Committee;
- the National Human Rights Committee; and
- the National Criminal Law Committee

for their contribution to the preparation of this submission.

# Executive summary

The Law Council of Australia supports measures to strengthen Australia's response to modern slavery and considers that corporations should meaningfully identify, prevent, mitigate and address modern slavery risks in their operations and supply chains. Such measures should also be consistent with established international standards, including the United Nations Guiding Principles on Business and Human Rights (**UNGPs**) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct,[1] which recognise that companies that cause or contribute to the harms of modern slavery have a duty to remediate them.

The Australian Government's proposed failure to prevent modern slavery offence should be carefully considered to promote prevention, accountability and legal certainty. If progressed as proposed, it should have clear and appropriately defined statutory elements supported by practical guidance and drafted to complement existing modern slavery and criminal law frameworks, including to build on progress made by reporting entities. Importantly, it must also be considered in the context of the broader reforms on which the Attorney-General's Department is consulting, including mandatory human rights due diligence and a robust civil penalty regime. The proposed offence should not be considered a substitute for mandatory human rights due diligence and should be framed in a manner that promotes meaningful due diligence.

Alternatively, the Department may wish to consider a graduated approach to reform, beginning with a civil penalty framework followed by review of its effectiveness before introducing any criminal offence. This would support evidence-based law reform and consistency with established criminal law principles.

The Law Council has previously supported a Deferred Prosecution Agreement (**DPA**) scheme tailored to Australian circumstances. If adopted in the modern slavery context, any DPA scheme should seek to encourage self-reporting, cooperation and remediation, while incorporating appropriate safeguards, oversight and accountability. It should not become the default response to offending, nor should it diminish access to remedies otherwise available to victim-survivors.

The Law Council emphasises that effective civil remedies for victim-survivors must remain a central consideration in reforms to Australia's modern slavery framework. Criminal liability alone is unlikely to provide meaningful redress. Consideration should therefore be given to strengthening civil remedies and improving access to justice for victim-survivors of modern slavery, including through purpose-built civil causes of action, where appropriate.

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[1] United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework* (Report, 2011); Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Report, 2023).

# Introduction

1. The Law Council of Australia thanks the Attorney-General's Department for the opportunity to comment on the proposed reforms to the *Modern Slavery Act 2018* (Cth) (**MS Act**) outlined in its Consultation Paper of 21 August 2026.[2]

2. The Law Council has consistently supported measures to strengthen Australia's modern slavery framework. It supported the enactment of the MS Act in 2018, the recommendations of the 2023 statutory review of that Act by Professor John McMillan AO (the **McMillan Review**), the establishment of the Australian Anti-Slavery Commissioner and further consultations concerning the reporting, compliance and enforcement framework.[3]

3. The Law Council reiterates its position that it is vital to the integrity and effectiveness of Australia's modern slavery framework, and to the protection of people who are at risk of or who are victim-survivors of modern slavery, that corporations meaningfully identify, address and report on modern slavery risks in their operations and supply chains or networks.[4] In our view, this includes appropriately resourced regulatory oversight and improved access to appropriate civil remedies for victim-survivors.[5]

4. On 16 July 2026, the Attorney-General announced the Australian Government's intention to introduce a new criminal offence for the failure to prevent modern slavery.[6] This is one of the key proposals for consideration in the Consultation Paper.

5. The Law Council notes that the proposed offence follows Recommendation 19 of the Australian Law Reform Commission's Corporate Criminal Responsibility Final Report.[7] At present, the MS Act primarily seeks to address modern slavery by encouraging corporate transparency in both their operations and supply chains. It does not contain a framework for imposing sanctions, whether in the form of criminal offences or civil penalties, for failure to address modern slavery risks in supply chains and to provide recompense.

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2 Australian Government, Attorney-General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, 21 August 2026).

3 See, for example, Law Council of Australia, *Strengthening the Modern Slavery Act* (Submission to the Attorney-General's Department, 8 September 2025), Law Council of Australia, *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Submission to the Parliament of Australia Senate Legal and Constitutional Affairs Legislation Committee, 9 February 2024), Law Council of Australia, *Review of Australia's Modern Slavery Act 2018* (Submission to the Attorney-General's Department, 13 December 2022), Law Council of Australia, Law Council of Australia, *Modern Slavery Bill 2018* (Submission to the Parliament of Australia Senate Legal and Constitutional Affairs Legislation Committee, 24 July 2018).

4 Law Council of Australia, Submission to the Attorney-General's Department, *Strengthening the Modern Slavery Act* (Submission, 8 September 2025) 6.

5 See Law Council of Australia, *Review of Australia's Modern Slavery Act 2018* (Submission to the Attorney-General's Department, 13 December 2022) 21-22.

6 The Hon Michelle Rowland MP, 'Albanese Government combatting modern slavery' (Media Release, 16 July 2026).

7 Australian Law Reform Commission, *Corporate Criminal Responsibility Final Report* (Report No 136, April 2020).

6. The Law Council has received a range of views from its constituent bodies on the merits of the proposed offence for Australia's modern slavery framework. For example:

- The Law Society of Western Australia considers the current legislative framework to rely too heavily on corporate reporting and transparency obligations, and that the proposed offence would represent an important progression towards meaningful corporate accountability and prevention.
- The Law Society of New South Wales considers that the Australian Government should first implement the recommendations of the McMillan Review, in particular recommendations 11 and 20, concerning mandatory due diligence systems and the introduction of civil penalty offences. If such changes fail to bring about effective outcomes, the Australian Government could then proceed to consider an appropriately framed criminal offence—but it should not precede the introduction of recommendations 11 and 20 as the next step in the maturity of Australia's modern slavery framework.
- The Law Society of South Australia advocates an approach that places a positive obligation on organisations, to support the broader objective of strengthening the prevention of modern slavery rather than punishing it after the fact.
- The New South Wales Bar Association (**NSW Bar**) is not persuaded that a criminal penalty regime, as opposed to a civil penalty regime, is the most appropriate or effective mechanism for addressing modern slavery in supply chains. The NSW Bar's view is that the Australian Government should introduce civil penalties or sanctions for non-compliance with reporting obligations under the MS Act ahead of any further consideration of the proposed criminal offence. The NSW Bar considers a civil penalty framework to confer the following advantages:
  - it may in fact be a more effective deterrent as it would necessarily involve a lower standard of proof;
  - if appropriately designed, it may lead to a higher likelihood of successful prosecutions; and
  - it may offer greater flexibility to negotiate outcomes, which will also reduce the need for lengthy and complex litigation and instead promote early and appropriate settlements.
- The view taken by the NSW Bar and Law Society of New South Wales has also received some support from the Law Council's National Criminal Law Committee.

7. In this context, the Law Council observes that the introduction of a new criminal offence for failing to prevent modern slavery in supply chains, while potentially having a greater deterrent effect than the current regime, will not, on its own, be sufficient in reducing the incidence of modern slavery; cannot be considered a substitute for mandatory human rights due diligence within the MS Act framework; and will not guarantee redress for victim-survivors. The proposed offence needs to be considered in the context of the Government's broader implementation of the McMillan Review recommendations—particularly the introduction of proactive and preventative mandatory due diligence and a robust civil penalty regime[8]—which are

[8] See for example, Professor John McMillan AO, *Report of the statutory review of the Modern Slavery Act 2018 (Cth)* (Report, May 2023) 12-13 [Recommendations 11, 17 and 20].

the subject of ongoing consultation processes by the Department. The range of views within the legal profession, as highlighted above, reinforces the fundamental importance of a broad and holistic consultation process before the Australian Government proceeds with the proposed offence.

8. The introduction of any new criminal offence also needs to be carefully considered alongside existing mechanisms within the MS Act—in particular, the mandatory reporting obligations prescribed by it—to complement, and not undermine, their effectiveness, and to build on the progress made by reporting entities since the Act's commencement.[9] If introduced, a new criminal offence would need to follow robust consultation and be drafted with careful regard to relevant existing criminal offences and other legislative mechanisms beyond the MS Act.

9. In light of the above, the Law Council encourages the Department to release exposure draft legislation should it proceed with the proposed offence, to ensure it is appropriately and carefully framed.

10. In response to Part B of the Consultation Paper, the Law Council considers both a carefully designed DPA scheme and an enhanced civil remedy regime for victim-survivors would be appropriate.

11. Finally, the Law Council notes that Australia's approach to modern slavery should be informed by the UNGPs, including Guiding Principle 17 concerning human rights due diligence, and Guiding Principles 22 and 25 concerning access to remedy.[10] This was emphasised in the recent statement by the UN Working Group on Business and Human Rights, which encouraged amendments to the MS Act that align with the UNGPs.[11] Those Guiding Principles are referred to throughout this submission.

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9 Professor John McMillan AO, *Report of the statutory review of the Modern Slavery Act 2018 (Cth)* (Report, May 2023) 12.

10 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework* (Report, 2011).

11 United Nations Office of the High Commissioner for Human Rights, 'Working Group encourages amendments to Australia's Modern Slavery Act 2018 (Cth) that are in alignment with the UN Guiding Principles on Business and Human Rights' (Statement, 12 August 2026).

# Responses to consultation questions

12. As stated above, the Law Council acknowledges the existence of a range of views in the legal profession about the efficacy and desirability of a modern slavery offence relative to other mechanisms to strengthen Australia's modern slavery framework, and emphasises the importance of broad and holistic consultation by the Department in this regard. Should the Australian Government proceed as intended to introduce the offence, the Law Council provides the following observations.

## Question 1—Model

13. The Law Council considers that the core components of the proposed offence identified in the Consultation Paper broadly address the matters that should be covered in legislation, including the application of the offence, the underlying criminal conduct to be prevented, the required connection with the corporation's sourced products or services and conduct, fault elements, the reasonable steps defence, guidance, penalty and commencement. However, each component should be designed and drafted with sufficient precision to ensure legal certainty, procedural fairness and effective deterrence. The Law Council addresses each of those components below.

### *Application of the offence*

14. To date, Australia's modern slavery framework has been based on mandatory reporting obligations prescribed by the MS Act, which requires companies with an annual consolidated revenue exceeding $100m to submit modern slavery statements addressing seven mandatory criteria. The current legislative scheme does not, however, incorporate any civil or criminal sanctions or penalties, beyond a Minister noting they have not complied with the MS Act under section 16A.

15. The Law Council supports aligning application of the offence with the current reporting threshold under the MS Act.[12] However, noting that serious modern slavery risks are not confined to supply chains of corporations of that size, we suggest that consideration could also be given to a statutory review mechanism capable of extending the offence to a broader class of corporations in future.

16. The Consultation Paper states that the underlying criminal conduct that corporations would be required to prevent would be limited to those types of modern slavery that are currently criminalised under Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).[13] The Law Council considers that the offending conduct element of any proposed failure to prevent offence should therefore be drafted in a way which complements the existing provisions that describe the underlying offences, as well as other legislative frameworks that address modern slavery. For example, the *Proceeds of Crime Act 2002* (Cth) also applies in circumstances involving modern slavery offences. Further, the Criminal Code contains mechanisms for extensions of liability such as in circumstances of complicity and common

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[12] Australian Government, Attorney-General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, 21 August 2026).10.

[13] Australian Government, Attorney-General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, 21 August 2026) 10.

purpose, or the joint commission of an offence as is set out in sections 11.2 and 11.2A. The extension of criminal liability provisions may also be available to prosecute corporate criminal liability for principal modern slavery offences. The extent to which any proposed offence would overlap with, or otherwise practically interact with, these offences or other relevant legislative mechanisms should be clarified.

### *The nexus between the offence and the corporation*

17. The Consultation Paper suggests that the offence, in addition to requiring a nexus between modern slavery and the goods that form part of the corporation's sourcing arrangements, could require an additional link or nexus between the corporation's conduct and the underlying criminal offending.[14]

18. An offence should be carefully drafted in a manner that makes clear that the corporation had caused or materially contributed to the conduct which amounts to modern slavery. This formulation has several advantages: it is clearer to readers, it better accords with conventions of statutory interpretation relating to criminal offences,[15] and it is also more likely to encourage prevention by setting out, in the primary legislation, the clear expectation that the relevant nexus is broader than a sole cause.

### *Fault elements*

19. The Law Council has not identified a consensus position in its consultations on the fault elements on the offence, but members of the legal profession have shared the following observations.

20. In general, the Criminal Code requires that offences consist of physical as well as fault elements, although the Parliament may specify certain offences that do not require fault elements for one or more physical elements.[16] As it stands, there are different views amongst the profession regarding whether the physical elements of the offence should have fault elements or not.

21. Recklessness is a fault element. It is defined at section 5.4 of the Criminal Code in the following way:

> *(1) A person is reckless with respect to a circumstance if:*
>
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*

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[14] Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026), 8 and 11.

[15] See Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (Attorney-General's Department and the Australian Institute of Judicial Administration, 2002) [4.1-F].

[16] See *Criminal Code Act 1995* (Cth) s 3.1.

*(2) A person is reckless with respect to a result if:*

*(a) he or she is aware of a substantial risk that the result will occur; and*

*(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*

22. By contrast, strict liability and absolute liability do not require the prosecution to prove fault beyond reasonable doubt.[17] As acknowledged in the Consultation Paper,[18] the difference between strict and absolute liability is that absolute liability offences do not allow the defence of mistake,[19] whereas that defence is still open for strict liability offences.[20]

23. There is some support in the legal profession for the proposed offence to be one of strict liability as it applies to bodies corporate. This view is supported by the Law Council's Business and Human Rights Committee. A strict liability offence, accompanied by a reasonable steps defence that is grounded in human rights due diligence (see below), would place the legal onus on the corporation to demonstrate that it conducted appropriate human rights due diligence, rather than on the prosecution to prove, in effect, that it did not. Consequently, if a supplier was found to have used forced labour or other forms of modern slavery, the accused corporation would be prima facie liable unless it could prove that its compliance systems, audits, and preventative protocols were robust and reasonable under the circumstances.

24. However, members of the legal profession also note that, in undertaking modern slavery due diligence, companies are naturally reliant on information from third party suppliers. These constitute not only direct (tier-one) suppliers but, in many cases, an extensive number of smaller suppliers further upstream in the supply chain based across different international jurisdictions. For example, an Australia-based company may have certain conditions with their suppliers that are mandated as company policy, but may receive false or inaccurate confirmation that these conditions are being complied with by the suppliers—with limited practical means of independently verifying the compliance of indirect or upstream suppliers. Members of the legal profession have similarly expressed concern that the proposed criminal offence is directed at acts of omission in the context of "complex, multi-tiered supply chains where corporations may have varying levels of visibility and influence over labour practices".[21] In such a context, they consider that criminal sanctions, and the stigma associated with these sanctions, may not be the appropriate path forward.

25. Strict or absolute liability offences will require careful consideration in any event, so that they do not erode or limit the presumption of innocence by imposing criminal liability without proof of fault,[22] even in circumstances where intention may otherwise be difficult to prove. This is of particular concern in circumstances where a strict or

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17 See *Criminal Code Act 1995* (Cth) Div 6.

18 Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026), 12.

19 *Criminal Code Act 1995* (Cth) para 6.2(1)(b).

20 *Criminal Code Act 1995* (Cth) s 9.2.

21 Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026) 7.

22 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 12 January 2016), 290; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

absolute liability offence attracts a high maximum penalty, as contemplated for the proposed criminal offence. As identified in the Consultation Paper, the maximum penalty for existing offences of a similar kind or of similar seriousness is currently 100,000 penalty units. This means that at present, the maximum fine that may be issued following a conviction for the proposed offence is $36.4m.[23]

26. The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the **Guide to Framing Commonwealth Offences**) recognises that offences where strict or absolute liability applies to all physical elements are generally only appropriate in limited circumstances. An offence may fall within those limited circumstances where it can be demonstrated that all the listed criteria apply. The relevant criteria include where the offence is punishable by a fine of up to 300 penalty units for a body corporate in the case of strict liability, or 50 penalty units in the case of absolute liability.[24]

27. In addition to criteria concerning the value of the proposed maximum penalty, the Guide to Framing Commonwealth Offences also sets out the following criteria:

> *The offence is not punishable by imprisonment…*
>
> *The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.* [and]
>
> *There are legitimate grounds for penalising persons lacking fault; for example, because he or she will be placed on notice to guard against the possibility of any contravention.*[25]

28. It is not clear that a strict or absolute liability criminal offence with a maximum penalty of 100,000 penalty units would "significantly enhance" modern slavery prevention over and above the alternative of a civil penalty framework, particularly when accounting for the requirement of proving the physical elements of the offence beyond reasonable doubt.

29. More broadly, the Department should closely consider the principles concerning the appropriateness of strict and absolute liability elements in criminal offences as set out by the Senate Standing Committee for the Scrutiny of Bills. Relevant principles for consideration include that:

- fault-based liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options;
- strict liability should, wherever possible, be subject to program specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate the possibility of any harsh effects;

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[23] Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026), 9-10.

[24] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2024) 24-25.

[25] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2024) 25.

- strict liability offences should, if possible, be applied only where there appears to be general public support and acceptance both for the measure and the penalty—which should not include imprisonment and should be subject to a cap (assessing 60 penalty units to be a reasonable maximum); and
- strict liability should depend, as far as possible, on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must, by necessity, rely on information from third parties in Australia or overseas.[26]

30. Members of the legal profession have expressed concern that a strict liability failure to prevent offence may conflict with the principles in the preceding paragraph. These concerns are magnified by the potentially significant consequences that follow should the reasonable steps defence not be established, including both the magnitude of the potential penalties and stigma attached to criminal liability. In this context, it will be essential for the reasonable steps defence to capable of being interpreted and applied consistently.

31. The Law Council also acknowledges the following concerns raised by other members of the profession regarding the practical difficulties that may arise if recklessness is adopted as the fault element.

32. First, it may be difficult for the prosecution to prove that a corporation carried out the relevant conduct with intention, knowledge or recklessness in a given case, especially if relying on Board of Directors (which is not a separate legal entity but a collection of individuals) or high managerial agent pathways.

33. Secondly, there may be some conceptual difficulty with the application of the reasonable steps defence in circumstances where a fault element of recklessness is established in respect of a high managerial agent. Subsection 12.3(3) of the Criminal Code provides a defence for a high managerial agent pathway in paragraph 12.3(2)(b), provided the body corporate can prove that it exercised due diligence to prevent the conduct, or the authorisation or permission. In practice, a company would be likely to rely on the same or substantially similar evidence in relation to recklessness and the reasonable steps defence for the proposed offence. The corporate culture provision in paragraph 12.3(2)(c) may not cure this difficulty. Subsection 12.3(4) requires regard to whether authority to commit the offence had been given by a high managerial agent of the body corporate, and whether the employee, agent or officer of the body corporate (who committed the offence) believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

34. On balance, the Law Council considers that, if a criminal offence is introduced, an approach to criminalisation that is grounded in the fault elements in the Criminal

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[26] Parliament of Australia Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (Sixth Report of 2022, 26 June 2002) 283-284. See further, ibid, 273.

Code[27]—including recklessness—would be preferable to a strict liability model.[28] The Law Council does not support absolute liability for the proposed offence.

35. Alternatively, the Department may wish to consider a graduated approach to reform. This could involve the introduction of a civil penalty framework, followed by a review of its effectiveness in promoting compliance and preventing modern slavery in supply chains. Should evidence indicate that further measures are necessary, consideration could then be given to a fault-based criminal offence, accompanied by a further review after a sufficient period to allow enforcement action and prosecutions to progress through the justice system. This would support evidence-based law reform to address concerns regarding departures from traditional criminal law standards.

### *Defence*

36. The Consultation Paper proposes that a "reasonable steps" defence should be available where companies can demonstrate, on the balance of probabilities, they had adequate procedures in place to prevent modern slavery in their supply chains.[29]

37. Should the Government proceed with a criminal offence, the Law Council supports this approach. The primary legislation should identify minimum due diligence requirements expected of reporting entities to provide businesses with a reasonable degree of certainty that their practices are lawful, while preserving some flexibility for individual circumstances (for example, based on an entity's size and risk profile).

38. The Consultation Paper further notes that the responsible Minister would issue "clear advice as to the steps that would be considered reasonable for a corporation to take".[30] This guidance would also play an important role to support corporations' understanding of expected conduct and supplement minimum requirements in legislation. Collectively, this approach should also be grounded in the UNGPs and take into account all relevant aspects of an entity's consideration of modern slavery risks within their supply chains rather than being narrowly confined to reasonable steps in relation to the specific instance of the offence.

39. A clear "reasonable steps" test will also assist entities to understand how the defence and associated guidance might operate vis-à-vis comparable international frameworks with which they may also be required to comply. It cannot be assumed that compliance with those international frameworks would necessarily meet the reasonable steps requirement in all cases, and it will be important that the test is drafted in a way that is appropriately targeted to prevent the exploitation that the underlying offences seek to address.

40. While the NSW Bar agrees that a reasonable steps defence would be appropriate should the Australian Government proceed with the proposed offence, it is concerned that a broadly constructed defence will have the effect of limiting the number of

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27 See *Criminal Code 1995* (Cth) (Div 5).

28 See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Report, May 2024) 22-26.

29 Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026) 9; 13.

30 Australian Government, Attorney General's Department, *Strengthening Australia's response to modern slavery in supply chains* (Consultation Paper, August 2026) 13.

successful prosecutions. This would have downstream impacts on the efficient operation of the criminal justice system, potentially occupying significant time in local courts, on matters that may be more appropriately dealt with by ASIC in the Federal Court of Australia. On the other hand, an appropriately constructed civil penalty regime may be more likely to result in successful prosecutions, thereby acting as a more effective deterrent and a more effective motivation for companies to strengthen compliance systems and governance frameworks in relation to supply chains.

41. More broadly, the Law Council strongly encourages the Department to consider the consequences on the justice system of the proposed offence, including with respect to resulting demands on courts and tribunals and legal assistance needs. These concerns are consistent with issues highlighted in the Law Council's Justice Impact Assessment Framework.[31]

### *Guidance*

42. Clear guidance to support any offence will be crucial. The Government should, following consultation, provide targeted education, practical guidance, training and risk assessment tools for corporations and their legal advisers, drawing on existing human rights frameworks. The Law Council further notes there is significant detailed guidance produced by the UN Working Group on Business and Human Rights and the OECD regarding human rights due diligence for companies.[32] Noting Australia's commitment to the UNGPs and OECD Guidelines, it would be appropriate for guidance to refer to those existing materials, rather than seeking to restate or alter them.

### *Commencement*

43. If introduced, the Law Council supports a delay for commencement. We consider this particularly important given that the Framework has not yet reached a level of maturity whereby all companies engage mindfully with due diligence beyond tier-one suppliers. Commencement should also be informed by the timeframe for broader reforms to the MS Act, that have also been subject to recent consultations by the Department.

## Question 2—Impact

44. The Law Council is concerned to ensure the offence does not have adverse implications for the emphasis on transparency in the MS Act through its reporting requirements, including through the corporate chain. The Guidance for Reporting Entities, for example, recognises that "it may take time… to develop an effective response to modern slavery risk" and encourages entities to be "honest about [their] situation" and "honest about situations that may limit [their] ability to take action".[33]

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31 Law Council of Australia, *Justice Impact Assessment Framework* (13 August 2026).

32 See, for example UN Working Group, *UNGPs 10+ A roadmap for the next decade of business and human rights* (Report, 2021); OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (Report, 2018). See further UN Human Rights Office of the High Commissioner, Publications and resources: OHCHR and business and human rights (Web Page, 30 September 2026).

33 Australian Government, *Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities* (Report, May 2023) 50.

Further, the Guidance has acknowledged that entities may need to prioritise the risks to which they respond.[34]

45. There is a risk that the offence may have the result of discouraging this emphasis on transparency in the MS Act and accompanying Guidance. It is conceivable, for example, that companies may be dissuaded from frank reporting, particularly in cases where they have actively identified a modern slavery practice within their supply chain, due to concerns that this may expose them to liability for the offence. This would be a step backwards, as transparency is in the interests of the business community as a whole, allowing businesses to learn from the experiences of others that operate in the same or comparable sectors and/or high-risk contexts and locations.

46. To mitigate concerns that criminal sanctions may discourage organisations from identifying and disclosing modern slavery risks, the Department could consider the introduction of a safe harbour mechanism for reporting entities under the MS Act. Any such mechanism should preserve incentives for transparency and self-reporting while ensuring accountability remains proportionate to an entity's conduct, due diligence efforts and response to harm.

47. In designing a safe harbour framework, consideration should be given to its operation within complex supply chains, particularly where multiple entities may be connected to the same instance of modern slavery. A disclosure by one entity may identify or implicate suppliers or business partners associated with the same conduct. Accordingly, the framework should avoid creating incentives for defensive disclosures or outcomes that unfairly advantage or disadvantage entities based solely on the timing of the disclosure.

48. Eligibility for safe harbour protection should be based on more than self-reporting alone and should have regard to a range of factors, including:

    - the quality and effectiveness of the entity's due diligence processes;
    - the steps taken to identify, prevent and mitigate modern slavery risks associated with the disclosure;
    - the timeliness and completeness of any disclosure;
    - the extent of cooperation with regulators and any related investigation; and
    - the remediation measures undertaken, including the exercise of leverage to address adverse impacts.

49. In our view, this mechanism would better incentivise meaningful due diligence, transparency, cooperation and remediation, while maintaining appropriate distinctions between entities with different levels of responsibility for the underlying harm. This could have the positive effects of strengthening implementation of the UNGPs and bolstering reporting under the MS Act.

## Question 3—Support

50. Please see paragraphs 36 and 40 of this submission.

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[34] Ibid.

## Question 4—DPA Scheme

51. The Consultation Paper suggests the use of a DPA scheme as a practical and proportionate enforcement mechanism.

52. The Law Council has historically expressed its strong support for the implementation of a DPA scheme in Australia in the context of financial crimes, with reference to the success of the UK system since its introduction in 2014.[35]

53. While a DPA scheme does not currently exist in Australia, members of the legal profession have observed that it is not dissimilar to court enforceable undertakings accepted by corporate regulators such as the Australian Securities and Investments Commission, in that it provides a more flexible form of corporate regulation and an alternative to enforcement, albeit for civil as opposed to criminal offences. In that respect, a DPA scheme may offer a more appropriate alternative enforcement mechanism under the MS Act, with potential advantages including earlier intervention in cases of modern slavery, the facilitation of remedial measures and the provision of compensation for victim-survivors.

54. Bearing this in mind, we consider that an appropriately designed DPA scheme could encourage self-reporting of criminal conduct, cooperation, remediation and compensation where appropriate while reducing the cost and uncertainty associated with prosecution.[36] However, any such scheme should include robust safeguards, including clear eligibility criteria, independent oversight, transparency, monitoring and meaningful accountability measures.

55. We also recognise that, dissimilar to other contexts where DPA schemes have been considered (for example, foreign bribery offences), there is a clear, immediate and significant human impact of modern slavery that should be factored into the design and implementation of a DPA scheme in this context. Accordingly, DPAs should not become the default response to offending, nor should they operate in a way to allow corporations to avoid criminal accountability. If a DPA scheme is adopted in this context, consideration should be given to whether it can operate in a way to facilitate restitution, compensation and other remediation measures for victim-survivors. [37] It is also important that such a scheme does not extinguish or limit any other civil claim, compensation pathway or other remedy otherwise available to victim-survivors.

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[35] See, for example, Law Council of Australia, *Discussion Paper: Corporate Criminal Responsibility* (Submission to the Australian Law Reform Commission, 31 January 2020); Law Council of Australia, *Deferred Prosecution Agreement Scheme Code of Practice* (Submission to the Attorney-General's Department, 12 July 2018); Law Council of Australia, *A Proposed Model for Deferred Prosecution Agreement Scheme in Australia* (Submission to the Attorney-General's Department, 3 May 2017); Business Law Section of the Law Council of Australia, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Submission to the Attorney-General's Department, March 2016).

[36] Law Council of Australia, *Discussion Paper: Corporate Criminal Responsibility* (Submission to the Australian Law Reform Commission, 31 January 2020) 36.

[37] Law Council of Australia, *Deferred Prosecution Agreement Scheme Code of Practice* (Submission to the Attorney-General's Department, 12 July 2018) 1-2.

56. The ultimate decision to offer a DPA should remain a prosecutorial discretion having regard to clearly established criteria. This would require coordinated involvement from all relevant regulators, including the Commonwealth Director of Public Prosecutions, the Australian Federal Police, the Australian Securities and Investments Commission (ASIC), the Australian Transaction Reports and Analysis Centre and the Australian Taxation Office,[38] as well as the Office of the Anti-Slavery Commissioner.

57. As referred to above, consideration could be given to the UK model, which incorporates judicial approval and oversight.[39] Since its introduction in 2014, the UK system has illustrated the advantages from a regulatory enforcement perspective that can be achieved through the principled application of such a scheme.[40] The Department may wish to look to the *Crimes and Courts Act 2013* (UK) for guidance in this regard.[41] To comply with Chapter 3 of the Australian Constitution, it should be noted that a *persona designata* may be substituted for a judge.

58. Ultimately, the effectiveness of a DPA scheme in this context will likely depend on the development of clear guidance regarding its practical operation, including approvals processes, eligibility criteria, ongoing compliance obligations and monitoring mechanisms. Its clear and transparent operation will also support public confidence in the integrity of the regime.[42] The Law Council also acknowledges that the introduction of a proactive mandatory human rights due diligence requirement would also likely reduce the desirability or necessity of a DPA scheme.

## Question 5—Civil remedies

59. The Law Council supports the Department's consideration of enhancements to civil remedies for victim-survivors of modern slavery. As stated in our September 2025 submission to the Department, providing access to an effective remedy is an international legal obligation,[43] yet one which is not available for victim-survivors of modern slavery under the MS Act. The McMillan Report itself found that while the MS Act has led to an increased understanding by business and government entities of modern slavery risks, "there is no hard evidence that the Modern Slavery Act in its early years has yet caused meaningful change for people living in conditions of

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38 Law Council of Australia, *Deferred Prosecution Agreement Scheme Code of Practice* (Submission to the Attorney-General's Department, 12 July 2018) 2.

39 Business Law Section of the Law Council of Australia, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Submission to the Attorney-General's Department, March 2016) 5.

40 Law Council of Australia, *Deferred Prosecution Agreement Scheme Code of Practice* (Submission to the Attorney-General's Department, 12 July 2018) 1.

41 Business Law Section of the Law Council of Australia, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Submission to the Attorney-General's Department, March 2016) 4.

42 Law Council of Australia, *Deferred Prosecution Agreement Scheme Code of Practice* (Submission to the Attorney-General's Department, 12 July 2018) 2.

43 Law Council of Australia, *Strengthening the Modern Slavery Act* (Submission to the Attorney-General's Department, 8 September 2025), para [8]

modern slavery".[44] The Law Council emphasises that remedies should be accessible, effective and victim-centric.[45]

60. It is possible that a criminal offence will assist victim-survivors by providing a strong incentive to business to ensure that modern slavery is not occurring in supply chains. However, its impact on victim-survivors in accessing justice may be limited in some respects: including because many instances of modern slavery occur not at the level of direct, tier-one suppliers but deeper in the supply chain and outside Australia making the offence difficult to successfully investigate and prosecute; and because even if the offence was made out, this would not guarantee any form of compensation for the victim-survivor.

61. Members of the legal profession have identified a lacuna between modern slavery and the existing forms of civil redress, as most forms of modern slavery do not easily fit within available torts. Victim-survivors are unable to bring a civil action based on modern slavery unless they are able to "fit" the conduct to torts such as negligence or trespass to the person. Neither human trafficking nor forced labour are, per se, actionable torts. At present, claimants must seek to claim for redress by way of pleading and proving multiple causes of action, thereby increasing the complexity and costs of such litigation.

62. The Department should consider the introduction of civil remedies for specific torts of slavery, servitude and forced or compulsory labour; and human trafficking. Consideration could also be given to legislation akin to the *Trafficking Victims Protection Act* (US) (**TVPA**),[46] which provides much greater access to justice than that currently available in Australia. The TVPA authorises victim survivors of human trafficking or forced labour to bring a civil action against whomever "knowingly benefits, financially or by receiving anything of value, from participation in a venture which that person knew or should have known" was engaged in peonage, forced labour, involuntary servitude, unlawful conduct with respect to documents, and human trafficking.

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44 Professor John McMillan AO, *Report of the statutory review of the Modern Slavery Act 2018 (Cth)* (Report, May 2023) 8.

45 See also Law Council of Australia and Anti-Slavery Australia, *Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (Report, 2017).

46 18 USC § 1595.

# About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes 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 its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.