



Law Council
OF AUSTRALIA

Office of the President

23 February 2024

Senator Nita Green
Chair, Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Senator Green

Response to Questions on Notice: Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023

This is a supplementary submission to the Law Council's submission on the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 (the **Bill**), following the Law Council's appearance before the Senate Legal and Constitutional Affairs Legislation Committee on 19 February 2024.

Two questions were taken on notice by witnesses appearing for the Law Council.

Regarding the definition of 'sensitive information' in the Bill

The first question taken on notice by the Law Council was prompted by the following line of enquiry from Senator Scarr:

Senator SCARR: Thank you. One particular area I would like to pursue is this definition of 'sensitive information'. Mr Vickery, you touched upon it in your answer. For the benefit of Hansard, I will read the definition:

sensitive information means information the disclosure of which would or might—
'or might'— [*sic*]

- (a) prejudice the security, defence or international relations of Australia; or
- (b) prejudice the investigation of, or the prosecution of a person for, an offence; or
- (c) endanger the life or safety of any person.

What stood out in particular to me was the inclusion of this phrase 'international relations'. I checked the UK Modern Slavery Act and it doesn't use that phrase. It simply refers to 'national security' and 'endangering a person'. Indeed, the explanatory memorandum prepared for the bill gives examples of 'engagement to a person'. I note, in the context of this definition of 'sensitive information', it's relevant in two respects. First, in relation to the preparation of the strategic plan. So under 20X(3) 'A strategic plan must not contain sensitive information.' So the effect of that would be the strategic plan must not contain information the disclosure of which would or might prejudice our international relations. And second, the annual report can contain sensitive information, but, if it does, then a second version of the annual report has to be prepared where that sensitive information is redacted so that it doesn't enter into the public sphere.

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

In the context of modern slavery, in the context in particular of forced labour, there's been a report issued by the United Nations human rights office in relation to the situation in the Xinjiang Uighur autonomous region in China. I also had a look at the UK department's last annual report—2021-22. For your own reference, if you go to paragraphs 3.2.2 and 5.3.3, there is specific mention to the issues occurring in Xinjiang.

To what extent do you think that this new institution, the Australian Anti-Slavery Commissioner, needs to be able to comment upon, include strategies, provide advice on, advocate in relation to issues of force[d] labour and modern slavery which are occurring offshore, whether it's in Xinjiang or it's somewhere else? To what extent do you think the commissioner should actually be able to comment on those issues—even if it means a foreign government would rather we didn't and will be agitated if we do? Mr Vickery?

Mr Vickery: Senator, this is not a matter which the Law Council has given consideration to, but I'm happy to take it on board and get back to you on this. I might have some personal views on this, but I don't have the Law Council view, as such, on it. I'd need to consult with others to be able to answer that question fully, but I agree it's a matter that should be looked at. Otherwise it is a bit of a question mark for the commissioner as to what might or might not be in their report.

The Law Council has not, in the limited time available, had an opportunity to consult widely on the definition of 'sensitive information' in the Bill. In principle, the Law Council supports limiting the Commissioner's independence and functions only to the extent strictly necessary in the circumstances, which is reflected in the recommendation in our original submission to strengthen the proposed section 20X.¹ We note that the restriction on sensitive information only applies to the Commissioner's strategic plans and published Annual Reports, rather than all publications by the office.

The Law Council is also mindful that the formulation in the proposed definition of 'sensitive information' (in clause 3 of the Bill) has been used in numerous other pieces of Commonwealth legislation, including the *Migration Act 1958* (Cth)²; the *Privacy Act 1988* (Cth)³; the *Evidence Act 1995* (Cth)⁴ and the *Biosecurity Act 2015* (Cth).⁵

The Law Council has commented on the potential overextension of the ambit of what may be considered national security concerns in relation to the concept of 'international relations' in recent submissions on the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).⁶ The Law Council (citing the Australian Law Reform Commission) noted that there is potential for such a provision to be used to restrain disclosures that merely cause embarrassment, rather than those that could actually have a damaging effect on national security.⁷

The prejudice to international relations aspect of this common provision does not appear to have been considered separately in any detail by the High Court. There is, however, *obiter* to the effect that Australia's international relations 'raises directly a matter more naturally reserved to the executive branch of government' and goes to the public interest.⁸

¹ See Law Council, *Submission to Senate Legal and Constitutional Affairs Legislation Committee on the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023*, 9 February 2024, [32]-[35].

² *Migration Act 1958* (Cth), ss 5, 375 and 437.

³ *Privacy Act 1988* (Cth), s 70(1).

⁴ *Evidence Act 1995* (Cth), s 130(4).

⁵ *Biosecurity Act 2015* (Cth) s 9 (definition of 'protected information'). NB this is not an exhaustive list.

⁶ See Law Council, *Submission to INSLM on the Review into the operation and effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004*, 26 June 2023, [19].

⁷ Law Council, *Review of Secrecy Provisions (Submission)*, 22 May 2023, [69]-[74].

⁸ *Alexander v Minister for Home Affairs* [2022] HCA 19, [336]. See further eg *National Archives of Australia v Fernandes* [2014] FCA 1501, [44].

In the context of the present Bill, it appears that the concern is about potential damage to Australia's political and/or trade relations from reports or allegations of slavery or slavery-like practices within the jurisdiction of political or trading partners. Paragraph 66 of the Explanatory Memorandum sheds no light on whether a departure from the 'standard' provision was considered in the context of this Bill. In particular, it is unclear whether the public interest in ensuring human rights are respected in the value chains of Australian business was weighed against the public interest in maintaining good trade and political relations. In the time available, the Law Council can only recommend that proper consideration be given to weighing these imperatives, so that the Commissioner's independence and functions are not unduly restricted by the definition of 'sensitive information' in the Bill.

Regarding investigative powers for the Commissioner

A further question on notice arose during this line of enquiry from Senator Shoebridge:

Senator SHOEBRIDGE: There are two words that come to my mind about why they may need compulsion powers, and they are Home Affairs. You can see why that might be needed. Could I ask about investigative powers. I don't think that's something that the Law Council expressly identified. One of the submissions that keeps coming is the capacity for an antislavery commissioner to have investigative powers that don't include criminal investigations but do include the capacity for at least an initial investigation if someone comes to them with a concern so that they can help direct people and resources and energy to either the department of the AFP. Did the Law Council grapple with that in your discussions?

Mr Vickery: We haven't specifically grappled with that. It's clearly something that could be considered, but it could be a very expensive exercise, I would imagine, at the end of the day if you go down that path.

Senator SHOEBRIDGE: Rather than prejudging the cost of it, on a public interest point of view, you create an antislavery commissioner, which victims and survivors of slavery will see being established. As a matter of public confidence, if they then go to the Anti-Slavery Commissioner and the Anti-Slavery Commissioner says, 'I'm sorry. I can't help you,' or 'Here's a brochure,' or 'Here's something on my website,' that's not good for public confidence is it?

Mr Vickery: No, it's not. There's no specific matter that we have looked at, so I don't have an official view on it, but it's one we can look at further.

Senator SHOEBRIDGE: I'd appreciate it if you can take it on notice.

In its original submission, the Law Council noted relevantly:

Proposed section 20C(2) would clarify that the Commissioner may not investigate, or resolve complaints concerning, individual instances or suspected instances of modern slavery. The Law Council observes that the absence of enforcement and investigative powers sets the Commissioner (and its NSW equivalent) apart from the UK's Independent Anti-Slavery Commissioner. This absence has produced mixed views among legal practitioners. Having regard to its previous positions, as set out above, the Law Council merely observes that a role involving investigation and complaints handling would require significant funding and specialist personnel. It would also require careful consideration of how best to implement educative and enforcement functions within the same office.⁹

As Mr Vickery noted, the Law Council has not dealt specifically with the question of a possible 'initial investigations' power for the Commissioner. However, it is worth emphasising (as

⁹ Law Council, Submission to the present inquiry (Submission 42), [28].

Mr Vickery did), that such a power would need to be accompanied by adequate resources, and that currently-allocated resources are unlikely to be sufficient.

The Law Council observes that there are already Commonwealth offices that are charged with overseeing aspects of compliance with the law, but that do not investigate complaints from the public. For example, the Independent National Security Legislation Monitor does not deal with complaints about the intelligence agencies, nor does the Aboriginal Land Commissioner investigate complaints from the public.

The ability of an officer such as the Commissioner to cooperate effectively with business on compliance with the *Modern Slavery Act 2018* (Cth) may be enhanced by separating out the investigative role. A Commissioner focussing on education and advice may be more likely to elicit frank disclosures about reporting difficulties than one who is likely to launch an investigation as a result of such disclosures.¹⁰ However, the effectiveness of the Commissioner should be reviewed after a suitable period, and if the office-holder believes some investigative powers would be beneficial at that time, the Law Council would be open to considering any relevant proposal.

Contact

If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Ms Leonie Campbell, General Manager, Policy on (02) 6276 3754 or at leonie.campbell@lawcouncil.au.

Yours sincerely



Greg McIntyre SC
President

¹⁰ On cooperative vs punitive approaches to regulation, see eg Shapiro and Rabinowitz, 'Punishment versus Cooperation in Regulatory Enforcement: A Case Study of the OSHA' (1997) 49 *Administrative Law Review* 713.