



Law Council
OF AUSTRALIA

Strengthening the Modern Slavery Act

Attorney-General's Department

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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: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2025 are:

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

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council wishes to thank members of its Business and Human Rights Committee, the Victorian Bar, the Law Society of the Northern Territory, the Law Institute of Victoria, the Law Society of South Australia, and the Law Society of New South Wales for their input into this submission.

Introduction

1. The Law Council thanks the Attorney-General's Department for the opportunity to comment on proposed reforms to the *Modern Slavery Act 2018 (Cth)* (**MS Act**) outlined in its Consultation Paper of July 2025.¹
2. The Law Council, along with its Constituent Bodies and its Business and Human Rights Committee, has been a steadfast supporter of the MS Act. We supported the original passage of the MS Act in 2018² and have since engaged with the 2023 Review and the 2025 passage of the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Act 2024 (Cth)*,³ among other related processes.⁴
3. It is vital for the integrity and effectiveness of the modern slavery regime, including for the protection of people who are at risk of or have experienced modern slavery, that businesses accurately and meaningfully identify, address and report on modern slavery risks in their operations and supply chains or networks.
4. More specifically, in relation to the present consultation, we welcome the Government's commitment in the Consultation Paper to strengthening the MS Act to ensure that operations and supply chains/networks of goods and services provided to Australians are not tainted by modern slavery and like practices.⁵
5. The Law Council has supported the recommendations of the 2023 Statutory Review of the MS Act (**McMillan Review**),⁶ and is pleased that the Government is progressing towards implementing those recommendations. We acknowledge that many of the McMillan Review recommendations are significant and complex,⁷ and appreciate the Government's careful consideration of how best to implement them. In parallel with the present consultation, we also welcome the Government's ongoing work on the *Guidance for Reporting Entities* and technical aspects of the Modern Slavery Statements Register, in line with relevant recommendations of the McMillan Review.⁸
6. Although the Law Council generally welcomed the Government's official response to the McMillan Review,⁹ we would like to see more progress towards human rights due diligence requirements for business, including in relation to modern slavery.¹⁰ The Law Council understands that the present public consultation is 'Stream A', and that further targeted 'Stream B' consultations (including in relation to due diligence

¹ AGD, *Strengthening the Modern Slavery Act 2018 (Cth): Consultation Paper 2025*: <https://consultations.ag.gov.au/crime/modern-slavery-act>.

² Law Council, *Review of the Modern Slavery Act 2018* (Submission, 13 December 2022): <https://lawcouncil.au/resources/submissions/review-of-the-commonwealth-modern-slavery-act-2018>. See further Law Council, *Establishing a Modern Slavery Act in Australia* (Submission, 28 April 2017) <[PDF link](#)>.

³ Law Council, *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Submission, 9 February 2024): <https://lawcouncil.au/resources/submissions/modern-slavery-amendment-australian-anti-slavery-commissioner-bill-2023>.

⁴ See eg Law Council, *National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper* (Submission, 21 February 2020): <https://lawcouncil.au/resources/submissions/national-action-plan-to-combat-modern-slavery-2020-24-public-consultation-paper>.

⁵ AGD, *Strengthening the Modern Slavery Act 2018 (Cth): Consultation Paper 2025*: <https://consultations.ag.gov.au/crime/modern-slavery-act>, 4.

⁶ See Law Council, *Call to Parties 2025*: <https://lawcouncil.au/resources/publications/call-to-parties-2025>, 26.

⁷ Consultation Paper, 4.

⁸ Ibid.

⁹ AGD, *Australian Government response to the review of the Modern Slavery Act 2018 (Cth)*: <https://www.ag.gov.au/crime/publications/australian-government-response-review-report-modern-slavery-act-2018-cth>.

¹⁰ See McMillan Review Report: <https://www.ag.gov.au/crime/publications/report-statutory-review-modern-slavery-act-2018-cth>, Recommendation 11 (merely 'noted' in the official response).

and high-risk matters) are planned. We would be pleased to participate in any further consultations on strengthening the MS Act, including with respect to mandatory due diligence.

7. The Law Council also observes that the reporting regime established under the MS Act falls short of best practice in combating modern slavery. We recommend the adoption of principles and processes set out in the UN Guiding Principles on Business and Human Rights of 2011 (**UNGPs**),¹¹ the *Hidden in Plain Sight* Senate committee report of 2017¹² and the McMillan Review, to address the regime's flaws. In particular:
 - (a) The current regime is not mandatory for the majority of Australian businesses with international supply networks (only those with annual consolidated revenues of more than \$100,000,000). Even though the Government has not accepted Recommendation 4 of the McMillan review, lowering the revenue cap to \$50,000,000 would address this issue.
 - (b) At present, the regime does not require reporting entities to report on remediation processes or grievance mechanisms that they might have established in response to the identification of modern slavery concerns in their supply networks. Consideration should be given to how the reporting requirements could address these matters in line with Recommendation 8 of the McMillan Review.¹³
 - (c) The legislation does not currently impose any repercussions for failures by reporting entities to meet their reporting obligations. This should be the highest priority for reform, and could be addressed by a civil penalty regime as described in this submission.
8. The MS Act also eschews any civil right of action or compensation scheme for victim-survivors of modern slavery, both of which were recommended by the *Hidden in Plain Sight* report.¹⁴ Providing access to an effective remedy for modern slavery survivors is an international legal obligation. The right to an effective remedy is itself a human right that States have a duty to fulfil.¹⁵ Specifically in the context of modern slavery, the International Labour Organisation's 2014 *Protocol to the Forced Labour Convention 1930 (No 29)*, which Australia ratified in 2022, obliges States parties to provide protection and remedies, including compensation, to victim-

¹¹ UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹² Joint Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017): https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report.

¹³ UNGPs 21, 22, 29 and 31 are relevant in this context.

¹⁴ *Hidden in Plain Sight* report, Recommendations 2 and 25.

¹⁵ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 2.3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Article 14; Convention of the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) Article 2; Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) Article 6; and implicitly required in Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008; entry into force for Australia 16 August 2008). Article 4. See also Simmons, Burn and McLeod, 'Modern Slavery and Material Justice: The Case for Remedy and Reparation' (2022) 45(1) *University of NSW Law Journal* 148, available at <https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2022/04/Issue-451-Simmons-et-al.pdf>.

survivors of forced labour. Further attention should be given to fulfilling the right of victim-survivors of modern slavery to access an effective remedy.

9. We understand the present consultation is limited in its scope to addressing Recommendations 8, 9, 17, 18, 20 and 21 of the McMillan Review. The following section deals with each question in the Consultation Paper in turn.

Comments on Specific Consultation Questions

Part A – Mandatory Reporting Criteria

Question 1

Do you support the potential changes to the reporting criteria? Are any further changes needed to the reporting criteria?

10. The Law Council agrees that the mandatory reporting criteria outlined in section 16(1) of the MS Act should be refined and clarified. The current requirements, though drawn from the UNGPs,¹⁶ are limited such that it is possible for entities to submit technically compliant statements that do not:
 - (a) identify all entities within the corporate group and their operations and structure;
 - (b) undertake a comprehensive risk assessment (i.e. beyond simply identifying what risks exist);
 - (c) identify any actual modern slavery incidents or risks that have been faced by the entity in the reporting period;
 - (d) include specific actions as opposed to overall programs and policies;
 - (e) report on any assessment of its risk assessments, or
 - (f) report on the actual effectiveness of any measures undertaken to identify and address risk.
11. The 'options for change' set out on pages 15–16 of the Consultation Paper appear to constitute an effective way to implement Recommendation 8 of the McMillan Review, which addressed this issue.
12. The Law Council particularly supports inserting a separate criterion to require an entity to report on processes available to remediate modern slavery incidents, as merely describing risks (as per current criterion (c)) is insufficient.
13. The Law Council reiterates in this context that a key focus of these reforms should be a more comprehensive implementation of the UNGPs, which set out the most relevant international standards in this field. As stated in previous submissions, the integration of the UNGPs' concept of human rights due diligence into the MS Act would require companies to identify, prevent, mitigate, account and report on the risks to human rights created by their business practices.¹⁷
14. We acknowledge that it may not always be desirable for an entity to report publicly on actual, specific risks as, in some cases, this may pose a risk to the victim-survivor(s), who may experience further victimisation for having raised a complaint. Further, it is possible that disclosure of a risk, for example in relation to a supplier, could expose the reporting entity to a claim of reputational damage

¹⁶ Consultation Paper, 13.

¹⁷ See eg Law Council, *Review of the Modern Slavery Act 2018* (Submission to McMillan Review, 13 December 2022): <https://lawcouncil.au/resources/submissions/review-of-the-commonwealth-modern-slavery-act-2018>, 8.

from that supplier. We therefore suggest that confidentiality concerns could be addressed by introducing a mechanism for reporting entities to provide a confidential annexure to a modern slavery statement in limited circumstances: for example, where a law enforcement investigation is ongoing. It may also be appropriate in certain circumstances to describe the risk without identifying the entity. To avoid overreliance on this mechanism, which could undermine the intent and purpose of more robust reporting requirements, the legislative scheme should specify the limited circumstances in which a confidential annexure may be used.

15. In the absence of a specific due diligence requirement (which the Law Council understands will be addressed in separate consultations), the proposed consolidation of criteria (d) and (e) in section 16(1) would still better align the MS Act with the UNGPs.
16. In addition, the MS Act should provide that the reporting criteria apply not just to 'upstream' but also 'downstream' processes, consistent with the approach to the responsibilities of business to respect human rights as elaborated in the UNGPs, as well as the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*.¹⁸

Question 2

Do you support the matters the department proposes to include in delegated legislation (such as rules)? If not, what changes are needed?

17. The Law Council supports the use of delegated legislation to provide details of reporting criteria, as long as the MS Act makes clear that reporting those details is mandatory and provides the means of enforcement of the relevant requirements.
18. We acknowledge that flexibility may be required in adapting reporting requirements to evolving corporate practices. The way in which the involvement of corporations in modern slavery is regulated and addressed is still subject to significant debate, and an approach that can accommodate significant changes yet to occur would assist Australia to be able to adapt its laws to reflect global standards without the considerable difficulty of making further amendments to the primary legislation.
19. The commentary on page 18 of the Consultation Paper on the use of the term 'supply chains' rather than the more representative 'supply networks' suggests that relevant changes are proposed to be made to explanatory guidelines rather than the wording of the MS Act itself (or regulations). The Law Council's preferred position is that the language in the legislation be amended to bring it into line with contemporary terminology and the reality of modern business sourcing and operations.

¹⁸ McMillan Review Report, 61. 2023 edition of *OECD Guidelines* available at: https://www.oecd.org/en/publications/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990.html.

Question 3

Are there any challenges associated with including details about reporting criteria in delegated legislation? If so, what are they?

20. The MS Act would need to make clear that reference must be had to the regulations in determining the scope of an entity's reporting obligations.
21. We note in this context that visibility of delegated legislation (including the most up-to-date versions of delegated legislation) can be problematic compared with that of primary legislation. Businesses without relevant dedicated legal advice might use outdated versions of the regulations or even overlook them altogether.

Question 4

Should additional guidance be developed to assist reporting entities to comply with the proposed changes to the mandatory reporting criteria? If so, what topics should be addressed by new guidance?

22. Yes. In particular, providing examples of best practice would be helpful to medium-sized entities that do not have in-house counsel.
23. The McMillan Review proposed sector-specific guidance.¹⁹ It would be appropriate that additional guidance on the proposed changes be undertaken in a sector-specific fashion to ensure the greatest understanding in different sectors as to the effects of the changes.
24. Otherwise, in terms of content, the guidance should follow any changes made to the MS Act.

Question 5

Should a new criterion be added that requires entities to report on key actions or changes since their previous statement?

25. Yes. A focus on changes since any previous report would be more efficient for both reporting entities and officials who read the reports.
26. Evidence of continuous improvement is key to the success of the regime. Entities should be required to provide an update, in any given statement, on the forward-looking steps they outlined in their previous statements. Research has shown that previous commitments in statements are more likely than not to be overlooked in the following statement.²⁰
27. It would also benefit those who rely on the register in that it would facilitate assessment of whether risks have become less or greater, and what concrete actions an entity may be taking to address those risks.

¹⁹ McMillan Review Report, 60.

²⁰ Business and Human Rights Resource Centre, Submission to McMillan Review, 21 November 2022: https://www.business-humanrights.org/documents/38294/BHRRRC_Submission_MSA_Review_Nov_2022_final.pdf, 8.

Question 6

Should reporting entities be required to report information about grievance mechanisms? If so, what specific information about grievance mechanisms should entities be required to report on?

28. Yes. As a minimum, entities should be required to report whether they have a grievance mechanism in place and how it operates. Entities should also be required to report on the structure, resourcing and accessibility of the grievance mechanism(s), as well as whether they meet the criteria for effectiveness set out in UN Guiding Principle 31.²¹
29. As raised further below, all reporting requirements should exempt the entity from reporting details that would reveal the identity of the complainant/victim-survivor.

Question 7

Are there any sensitivities with requiring an entity to report on grievance mechanisms?

Please consider any sensitivities relating to quantitative or qualitative information about grievance mechanisms that might be captured.

30. From the corporate perspective, some grievances (especially those reported anonymously) may be false or exaggerated, and publicly reporting on these (and counting them in quantitative reporting) could adversely impact upon a reporting entity's reputation.
31. Reporting entities should have the opportunity to share qualitative information as needed to contextualise quantitative information about their grievance mechanisms. Both kinds of information should be able to be provided without revealing the identity of any complainant(s), unless those complainants specifically waive anonymity. The Government should give due consideration to the implications of requiring such information to be reported.

Question 8

Should reporting on remediation be a separate mandatory reporting criterion? If so, what specific information about remediation actions and processes should entities report on?

Notably, the Review explored requiring entities to report on the number of matters referred to law enforcement or other bodies, as well as to report on details of modern slavery incidents or actual risks.

32. The Law Council supports the original intent behind section 16(1)(d) of the MS Act, as discussed in the McMillan Review report.²² We expect that the appropriate legislative wording for a stronger requirement to report on 'due diligence and remediation processes' will be the subject of Stream B consultations.
33. We suggest that such reporting, with appropriate regard to UNGPs 19–24, could enhance accountability for harms caused.

²¹ 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* (2011): https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf, Principle 31.

²² McMillan Review report, 67.

Question 9

Are there any sensitivities with requiring an entity to report on remediation, noting information about remediation may include quantitative or qualitative information?

34. As indicated above, there are potential sensitivities involved in this kind of reporting, for both complainants and entities. The reporting requirements should be mindful of risks to complainants' rights (including in relation to personal safety), as well as to entities' reputations.
35. Clearly, care in drafting should be taken so that entities are not required to report on issues subject to legal proceedings or that would breach privacy rights.

Question 10

Are there any specific safeguards we should consider to protect workers in relation to reporting on grievance mechanisms and remediation?

36. Reporting should be required to be appropriately de-identified when referring to individual cases or incidents.
37. There should be a requirement to consider and protect against any retaliatory action.
38. There should also be culturally- and linguistically-appropriate communication and support for reporting, with the possibility of referral to independent support services, including legal assistance services.

Question 11

Do the proposed changes to the consultation criterion address the lack of clarity currently experienced by reporting entities?

39. Yes. Clarifying that consultation relates to the preparation of the statement should assist with understanding and current compliance gaps.
40. Any further potential for misunderstanding reporting obligations can be minimised by careful drafting of the complementary guidance materials. With this in mind, a specific reference to the *Guidance for Reporting Entities* should be incorporated into relevant sections of the MS Act.

Part B—Compliance and Enforcement Framework

41. The Law Council recognises the importance of a focus on education, particularly given the concept of 'continuous improvement' is central to contemporary modern slavery frameworks, which encourage businesses to commit to progressing the effectiveness of their systems to counter modern slavery risks in their operations and supply chains. We note that the Australian Government has published extensive materials that seek to guide organisations to meet the objectives of the MS Act.

42. However, we note findings from the McMillan Review that the rate of non-compliance with the reporting obligations under the MS Act is still high, even after multiple reporting cycles.²³ To ensure that the MS Act is effective, it is important that it is supported by a robust compliance framework. This compliance framework needs to be overseen by a well-resourced regulator with appropriate powers of investigation and enforcement. As noted in the Consultation Paper, this would send a strong message to reporting entities that any non-compliance is taken seriously and will be dealt with effectively.
43. To ensure consistency across regulatory frameworks, there is likely merit in aligning the regulator's new powers with those in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth). This is the purpose for which that Act was designed.

Question 12

To date, the regulator has not used its power to request remedial action or publish information regarding non-compliance, focusing instead on education. Would additional or enhanced guidance be sufficient to address current non-compliance?

44. Broadly speaking, while guidance can assist entities with compliance (and therefore improve compliance overall), enforcement mechanisms are needed for the reasons set out in the McMillan Review report.²⁴
45. It should be borne in mind that, while some non-compliance can be assessed objectively (for instance where the annual report is not provided or key elements are missing), an assessment of whether a report is sufficient in all areas can be subjective. Before enforcement measures are taken, careful reviews must be facilitated (with appropriate resourcing) and a review mechanism must be put in place, in accordance with administrative law principles.²⁵

Question 13

Will the use of these existing compliance powers be sufficient to address current non-compliance?

46. It is difficult to know whether existing powers to request remedial action could address the existing non-compliance issue, since these powers (as acknowledged in the previous question) have not been exercised. There is also some doubt as to whether they could be exercised effectively without additional funding for the regulator.
47. In any event, Professor McMillan concluded in his review that complementary enforcement mechanisms are necessary:²⁶

It is incongruous that the Modern Slavery Act imposes a reporting duty as regards a matter of fundamental global human rights importance but contains no robust procedure to ensure that duty is performed. The experience to date in Australia has not borne out the promise that

²³ McMillan Review Report, 25-26 (citing Government's own figures). Cf improvements mentioned in Monash Business School, *Modern Slavery Disclosure Quality Ratings: ASX100 Companies Update—FY2023 Modern Slavery Statements* (Report, November 2024): https://www.monash.edu/_data/assets/pdf_file/0006/3820542/MSD-ASX100-FY2023.pdf.

²⁴ McMillan Review Report, Recommendation 20 and related discussion.

²⁵ Relevant Administrative Review Council guidance is available at: <https://www.ag.gov.au/legal-system/administrative-law/arc/administrative-review-council-publications>.

²⁶ McMillan Review Report, Recommendation 20 and related discussion on p 88.

good faith and the fear of adverse publicity are enough to ensure that statements will be submitted by all entities that are required to do so.

48. The Law Council accepts this conclusion. Moreover, the Government agreed in principle with the relevant review recommendation (Recommendation 20),²⁷ and the majority of those who provided input to this submission concurred that meaningful penalties for failures to comply with the MS Act are required.²⁸

Question 14

Should the existing compliance powers be amended? If so, how?

49. See response to Question 16.

Question 15

Under section 16A of the Modern Slavery Act, the regulator can request an entity provide an explanation for the failure to comply with reporting requirements. Would broader information gathering powers be more effective to address non-compliance?

50. The Law Council supports broader information-gathering powers, provided the regulator is adequately resourced to undertake this function. It is our understanding that, at present, neither delegates of the Ministerial powers in section 16A of the MS Act, nor the Australian Anti-Slavery Slavery Commissioner, are adequately resourced for such a role.

Question 16

Should additional regulatory tools be introduced into the Modern Slavery Act to penalise non-compliance?

51. For instances of non-reporting, as well as clear cases of grossly inadequate reporting, additional regulatory tools and penalties are required.

Question 17

If yes, which of the following additional regulatory tools should be introduced to respond proportionately to non-compliance?

- a) *Infringement notices*
- b) *Enforceable undertakings*
- c) *Redacting a statement*
- d) *Other [please specify]*

52. All three tools should be available to the regulator.
53. A non-compliant entity could be issued a warning in the first instance, with a reasonable timeframe for rectification.
54. Apart from enforceable undertakings and orders for redaction, the regulator could also be empowered to amend the register to indicate a statement is non-compliant, and to initiate proceedings to place certain restrictions on an entity's ability to trade and/or contract, as appropriate.

²⁷ *Australian Government Response to the review report of the MS Act*, 14.

²⁸ This includes input from the Victorian Bar, Law Society of South Australia, Law Society of NSW and Law Society NT.

Question 18

Should civil penalties be introduced into the Modern Slavery Act?

55. Yes, for breaches of objective statutory requirements.

Question 19

If yes, which of the following civil penalties should be introduced into the Modern Slavery Act?

- a) *Failure to submit a modern slavery statement*
- b) *Providing false or misleading information*
- c) *Failure to comply with a request for remedial action*

56. The Law Council supports penalties for all the above examples of non-compliance, provided that an appropriate transition period and warning mechanism are put in place (see further our responses to Questions 17 and 24).

Question 20

Should any defences, such as mistake of fact, be considered for any proposed civil penalties?

57. Yes, such a defence should be considered. Reference could be made to section 95 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

58. It may also be helpful to align the defences with those included in section 733 of the *Corporations Act 2001* (Cth) in the context of disclosure documents, including reasonable reliance, withdrawal of consent and lack of awareness of new circumstances.

Question 21

What key considerations should be taken into account when considering the maximum penalty units for any penalty provisions?

59. Careful consideration should be given to the reasonableness of any explanation provided for non-compliance, so the decision-maker involved may form a view on the genuineness of the entity's compliance efforts.

60. The maximum penalty for breaches of the Act might be determined with reference to the higher of (i) a proportion of a non-compliant entity's revenue and (ii) a set figure. While penalties should be proportionate, noting that entities have revenues of over \$100m per annum, the maximum should be set at a level sufficient to deter the relevant behaviour.

61. Reference should also be had in this context to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,²⁹ as well as to the report of the Australian Law Reform Commission's 2003 inquiry *Principled*

²⁹ AGD, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 24 May 2024: <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>.

Regulation: Federal Civil and Administrative Penalties in Australia (Part B in particular).³⁰

62. The nature and structure of maximum penalties set out in comparable penalty regimes such as the Australian Consumer Law (**ACL**) may provide useful guidance when determining appropriate penalties. We note that such a review ought not to restrict itself to other reporting regimes given the objective of the MS Act to eradicate modern slavery from supply chains/networks. Indeed, there are grounds for applying significant maximum penalties noting: (i) modern slavery often has a financial benefit for the entity engaged in exploitation; (ii) there is potential for modern slavery to taint the products and services supplied to consumers; and (iii) the heinous nature of modern slavery.
63. Repeat offenders should be subject to more stringent penalties.
64. The imposition of a civil penalty regime would provide an important potential mechanism for providing redress and/or support to victim-survivors of modern slavery. Some civil penalty regimes specifically permit payment of a penalty to be directed to identified persons or organisations. We refer, by way of example, to section 546(3) of the *Fair Work Act 2009* (Cth), which permits the Federal Court, the Federal Circuit Court or an eligible State or Territory court to order a pecuniary penalty or part thereof to be paid to the Commonwealth, a particular organisation or a particular person. In the context of the MS Act, civil penalties imposed could assist in funding the regulator and/or the Australian Anti-Slavery Commissioner. In cases where the victim-survivor is identified, redress could also be made directly by means of an appropriate order.

Question 22

If additional regulatory tools are introduced, who should carry out these new functions:

- a) *The current regulator who has an existing support and advisory role*
 - b) *An independent section or body*
 - c) *Other [please specify]*
65. The current regulator (a delegate of the Minister) may be able to deal with less serious offences, but an independent entity (whether situated in the AGD, Anti-Slavery Commissioner's office or elsewhere) may be required to handle serious breaches. Such an independent body could also deal with cases in which the reporting party disagrees with a delegate's initial assessment of non-compliance, or mandated remedies.
 66. Whichever body carries out the functions, its officers should possess critical attributes for effective regulation including independence, impartiality, subject-matter expertise and sufficient resourcing.
 67. The regulator could learn from the experiences of existing independent bodies such as AUSTRAC, the ACCC or ASIC in exercising comparable functions.

³⁰ ALRC, *ALRC Report 95*: <https://www.alrc.gov.au/publication/principled-regulation-federal-civil-and-administrative-penalties-in-australia-alrc-report-95>.

Question 23

For the regulator to effectively identify, investigate and litigate alleged non-compliance, the regulator will require:

- a) *Access to relevant information and data to identify regulated entities*
 - b) *Sufficient powers and access to relevant information to identify false or misleading information*
 - c) *Sufficient funding for investigation and litigation costs*
 - d) *Other [please specify]*
68. The additional powers and resources specified above will be required to deal with non-compliance investigations. A considerable increase in the resourcing of the regulator, as well as the cost of establishing an independent reviewing body for contested cases, should be factored into the planned reforms.
69. There will be a need to maintain confidentiality of each matter until final adjudication on the non-compliance. There will also be the need to be cognisant of victim-survivor privacy, which may require de-identification work.
70. The regulator will need staff with sufficient understanding of the complex situations in which modern slavery arises, the potential for it to be hidden in plain sight, and the multiple ways in which it may be uncovered and addressed.

Question 24

Are there any other subsidiary issues to be considered?

71. We recommend that there be a reasonable transition period to ensure that reporting entities are provided with sufficient notice that the MS Act has adopted a stricter regulatory approach.
72. Relatedly, it is important to ensure that the broader reforms are properly communicated to reporting entities in advance of their commencement.
73. In addition to the civil penalties canvassed in Question 19, additional sanctions could be imposed in appropriate circumstances, including:
- (a) exclusion from eligibility for Commonwealth grants, tenders and procurement rounds, and
 - (b) public listing as a non-compliant entity.

Part C—Joint Reporting

Question 25

Are there any additional difficulties encountered with joint reporting under the Modern Slavery Act?

74. The challenges identified in the Consultation Paper are, to the best of our knowledge, the principal ones.³¹ The Law Council agrees with the Government's statement that:

*... should a penalty framework or new regulatory powers be introduced, for these to operate effectively there will need to be clear accountability for a statement and designation of who any compliance and enforcement action would apply to.*³²

75. We note further that the entities reporting under the MS Act are often part of multinational groups that must also report in other jurisdictions. If group reporting were adopted, it is not necessarily the case that the highest entity (parent entity) within a consolidated corporate group would be subject to Australian jurisdiction, or that non-compliance under the MS Act would be enforceable against that entity. This should be taken into account in the design of a compliance regime.

Question 26

Does corporate group reporting adequately resolve challenges experienced by reporting entities with the current joint reporting model?

76. We suggest that replacing the joint reporting under section 14 of the MS Act with a corporate group reporting model, whereby corporate entities are required to report on behalf their corporate group, would assist in resolving some of the challenges currently experienced by reporting entities. These include separate identification requirements for each relevant subsidiary within a group structure; reporting requirements for entities that do not produce anything or employ staff; and requirements around dormant entities within a complex group structure. Importantly, we also support the corporate group reporting model, as it may produce more accurate and meaningful supply chain/network mapping within multinational corporations.

Question 27

Are there any new challenges that may result from replacing the current joint reporting process with a corporate group reporting model (with exemptions)?

77. There may be implementation challenges depending on the extent of transparency required—see further our response to Question 29.

³¹ Consultation Paper, 31-32.

³² Consultation Paper, 31.

Question 28

Should a corporate group reporting model be adopted, do the proposed exemptions (via application to the regulator) for subsidiary and nominee reporting entities provide appropriate and sufficient accommodations for different business structures?

78. We understand that the proposed exemptions to the corporate group reporting model for nominee or subsidiary reporting entities would be determined following an application to the regulator. However, we are concerned that, if multiple exemptions are granted, this could detract from the goal of effective supply chain/network mapping. Further, the proposed civil penalties regarding non-compliance would presumably be directed to the subsidiary (as the non-compliant entity), which could detract from the overall deterrence effect. Therefore, we suggest that there should be firm guidance around the circumstances in which an exemption is appropriate.

Question 29

Should a corporate group reporting model be adopted, should any additional exemptions be considered to alter the default reporting arrangements of corporate group reporting?

79. The MS Act should be considered in the context of reporting requirements under other legislation directed at corporate group transparency. Any amendments should be drafted in a manner that is consistent with or complements those other requirements.

Question 30

Are there alternative mechanisms to improve or amend the current joint reporting processes?

80. The Law Council does not have an alternative proposal for joint/group reporting.

Part D—Voluntary Reporting

Question 31

Are any changes needed to the proposal to amend notification requirements for voluntary entities?

81. The Law Council has not identified any such changes that are needed.

Question 32

Should the requirement for voluntary reporting entities to notify the Minister of their intention to voluntarily report be removed altogether?

82. The Law Council supports the proposal to simplify the reporting process for voluntary reporting entities in the manner outlined in the Consultation Paper. This would still require an entity to provide notice to the Minister if they wish to comply voluntarily with the requirements of the Act, but would provide further flexibility by allowing such entities to revoke their reporting status at any time.

Question 33

Are any changes needed to what potential new regulatory powers should apply to voluntary reporting entities?

83. We agree with the proposal set out in the Consultation Paper that any new regulatory powers to be applied to a voluntary reporting entity be limited to information-gathering powers.
84. One possible exception to this could be for entities that use their Modern Slavery Statements to make false or misleading claims that assist them to gain an advantage in the market. The Government should consider whether such claims might be subject to the civil penalty regime.

Question 34

Should the regulator be provided a new power to revoke an entity's status as a voluntary reporter (for example, to manage non-compliant voluntary statements)?

85. While there may be circumstances in which it is appropriate for the regulator to revoke an entity's status as a voluntary reporter to maintain the integrity of the scheme, we suggest an emphasis on education and other less punitive remedies in the first instance to encourage wider commitment across small and medium-sized businesses to understand and conduct their operations in line with the objectives of the MS Act.
86. In certain cases, the regulator may also need to be able to remove non-compliant statements from the register—or marking them as non-compliant, as discussed above, may suffice.

Question 35

Will voluntary reporting entities use guidance designed to support small and medium-sized entities to engage with modern slavery risks in operations and supply chains and support compliance with the Modern Slavery Act? What topics should the guidance address and what form should it take?

87. It would be useful to provide a template for voluntary reporting entities or to include in the MS Act Guidance a model voluntary reporting statement, given the lesser resources available to voluntary reporting entities (by definition).

Part E—Notification requirements to cease as a reporting entity

Question 36

Are any changes needed to the proposal to amend the notification requirements to cease as a reporting entity?

88. The Law Council generally supports the proposal set out at page 36 of the Consultation Paper under the heading ‘Options for change’ (subject to our response to Question 37).

Question 37

Are any changes needed to the proposed requirement for an entity to provide notification they will cease as a reporting entity within 6 months following the end of the reporting period?

89. For reporting entities whose gross revenue sit around the minimum reporting threshold each year, they may not be aware whether they will exceed the reporting threshold until well after the financial year ends and all accounts are finalised. The six-month notification period should therefore be removed, and reporting entities should instead be required to advise that they will cease to be a reporting entity within six weeks of their annual revenue being determined.