

Office of the
NSW Anti-slavery
Commissioner

Submission to the inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 [Provisions]

Dr James Cockayne
NSW Anti-slavery Commissioner

22 January 2024



Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky. We acknowledge their ongoing stewardship and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes, self-determination and for real freedom.

Submission to the inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 [Provisions] : Dr James Cockayne

Published by Office of the NSW Anti-slavery Commissioner

<https://dcj.nsw.gov.au/justice/anti-slavery-commissioner.html>

First published: January 2024

Not legal advice

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Submission to the inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023

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Recommendations

1. Amend section 20C(1) of the Bill so that section 20C(1)(d) reads:
(d) to identify and provide assistance and support for victims of modern slavery, including by providing information in relation to government and non-government resources, programs and services
And section 20C(1)(e) reads:
(e) to engage with people with lived experience of modern slavery to advise on the discharge of the Commissioner's functions, the effectiveness of measures intended to address modern slavery and the implementation of this Act.
2. Ensure survivors are directly consulted, with due safeguards, in the review of this Bill. I stand ready to assist this process if useful.
3. Consider amending the Bill to mandate that the staff of the Australian Anti-Slavery Commissioner ('Australian ASC') must include at least one person with lived experience of modern slavery.
4. Consider whether it is appropriate to amend the Bill to empower the Australian ASC to undertake inquiries into, or to provide conciliation or other dispute resolution services to address the handling of modern slavery cases in specific circumstances; or to empower the Australian ASC to make referrals activating the jurisdiction of specified civil or administrative investigative or dispute resolution mechanisms, such as the Australian Human Rights Commissions, Australian National Contact Point or Commonwealth Ombudsman.
5. Consider whether the Bill should be amended to give the Australian ASC a clear role in ensuring the development, implementation of, and respect for professional standards in the anti-slavery sector across Australia.
6. Consider amending section 20W to ensure information sharing with the Australian ASC is carried out in conformity with common law and statutory rights and privileges notably relating to legal professional privilege, privacy and health data.
7. Consider amending the Bill to give the Australian ASC responsibility for reporting annually to Parliament on national progress against the National Action Plan to Combat Modern Slavery, similar to the role given to the Australian Domestic, Family and Sexual Violence Commissioner under the First National Action Plan 2023-2027, under the National Action Plan to End Violence against Women and Children 2022-2032.
8. Amend the Bill to give the Australian ASC a function to cooperate with State and Territory governments, agencies, bodies and office holders to promote effective responses to and prevention of modern slavery, in alignment with the National Action Plan to Combat Modern Slavery 2020-2025, and any subsequent National Action Plan or equivalent strategy addressing modern slavery adopted by the Commonwealth government.
9. Amend the Bill to add a new section 20Z to the Cth Act, entitled "Other reports by the Commissioner", equipping the Commissioner to issue own-initiative reports to Parliament. This could be modelled on section 19(4) of the NSW Act.
10. Amend the Bill to provide for the creation of a joint standing committee on modern slavery in the Commonwealth Parliament. This could be modelled on Division 4 of the NSW Act.

About this submission

1. The Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 ('the Bill') closely tracks, in many parts, the provisions of the New South Wales *Modern Slavery Act 2018* (NSW) ('NSW Act') that created the role of New South Wales Anti-slavery Commissioner ('NSW ASC'). Professor Jennifer Burn AM provided distinguished service as the Interim NSW ASC in 2019-2020, while the NSW Act was still in gestation. I was appointed as the first ongoing NSW ASC with a five-year term commencing on 1 August 2022.
2. This submission offers to the Senate Standing Committees on Legal and Constitutional Affairs my views on the Bill, drawing on my 18 months as NSW ASC. The role of NSW ASC is the first and currently only such role in Australia, and only the second such role in the world (after the United Kingdom).
3. In the 18 months since my appointment, I have:
 - adopted a Strategic Plan 2023-2026 after wide consultation across NSW, including with the relevant Minister
 - worked across NSW government and local councils to develop a new framework for public procurement, comprising modern slavery due diligence guidance, risk identification tool, model contract clauses, model tender clauses and reporting tools, which are now being implemented by over 400 public entities in NSW with combined annual procurement worth over AUD 42 billion
 - hired a Lived Experience Practice Lead, with experience of modern slavery, and provided support and assistance to around 50 survivors of modern slavery, engaging more than 100 others
 - engaged with business leaders on issues ranging from the fiduciary duties of directors as they relate to modern slavery risks, to the role of farmers in addressing risks to temporary migrant workers, to a new initiative with the Clean Energy Council addressing modern slavery risks in renewable energy value-chains
 - conducted visits to communities around New South Wales
 - highlighted the ongoing impacts in First Nations communities of practices that would today qualify as modern slavery
 - and built the Office of the NSW Anti-slavery Commissioner.

More details are available in my Annual Report for FY 2022/2023, *Foundations for Growth*.

4. I hope that my reflections in this submission may offer valuable insights about how the role envisaged in the Bill may play out in practice in the Australian environment, where it shows strengths, and where there may be opportunities to further strengthen the Bill.

Overview

5. I strongly welcome the Bill and the proposed creation of an office of Australian Anti-Slavery Commissioner ('Australian ASC').
6. As the Attorney-General, the Hon. Mark Dreyfus KC, said in his second reading speech, the creation of an Australian ASC "promises to be a landmark reform in Australia's response to modern slavery" (Hansard, 30 November 2023, p. 8924). The Australian ASC role as established in the Bill will complement Australia's response to modern slavery by working with other actors in the Australian anti-slavery ecosystem to raise the national profile of the issue of modern slavery. It will play an important role in driving effective business compliance with the *Modern Slavery Act 2018* (Cth) ('Cth Act'). It will also provide an important mechanism for victims and survivors, business and civil society to engage on issues and strategies to

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address modern slavery and help drive awareness raising and mobilize issue-based coalitions across the country to drive more effective response.

7. Yet there are also limitations to the role as envisaged. The role is explicitly envisaged as a “complement” to existing capabilities, which it is described as “enhancing”; it is not given a role to drive action across the country, except through quiet diplomacy to business, public education and awareness-raising, and advocacy for continuous improvements in practice by Commonwealth agencies. The Australian ASC is explicitly precluded from carrying out any kind of investigation, complaint handling, dispute resolution or professional standards oversight role. This makes this role notably weaker in its dealings with business than some other recent, successful federal Commissioner roles, such as the e-safety Commissioner - even though both roles are expected to tackle, in different ways, online aspects of human trafficking and child sexual exploitation. And it does not specifically equip the Australian ASC to activate other existing Commonwealth mechanisms that do have such investigative and complaints handling powers, such as the Australian Human Rights Commission, the Australian National Contact Point, or the Commonwealth Ombudsman. The Australian ASC is described in the Bill and accompanying materials as independent but relies entirely on the government of the day for resourcing, and, unlike the situation in NSW, has no standing parliamentary committee with which to engage on policy or, indeed, resourcing issues.
8. Perhaps most importantly, it is unclear whether the Australian ASC role, as envisaged, will be perceived as adequate by one particularly key constituency: people with lived experience of modern slavery. To my knowledge, people with lived experience of modern slavery have not been formally or directly consulted during the development of the Bill, to this point. And while the Bill contains important commitments to empower the Australian ASC to *engage with* victims of modern slavery, the accompanying legislative materials make clear the expectation that the Australian ASC will speak “on behalf of” victims – rather than working to create safe, trauma-informed opportunities for them to speak *for themselves*.
9. In this day and age, we would not develop complex legislation on victims of child sexual abuse, domestic and family violence, or disability services without direct engagement with people with lived experience. Why should such a landmark reform of Australia’s modern slavery response proceed without hearing directly from survivors of modern slavery?
10. Modern slavery involves the theft of people’s agency, the denial of their self-determination. Our responses to modern slavery should not repeat, even by accident, that denial of voice, agency and self-determination. Instead, our responses should themselves *enhance* survivor voice, agency and self-determination, for example by providing dedicated, appropriately designed and safe-guarded opportunities for people with lived experience to interact directly with policymakers and legislators.
11. For a long time, anti-slavery responses in Australia have prioritised the need to safeguard survivors *over* their right to be heard. There is no question that we need to take exceptional care in organising opportunities for policymakers and lawmakers to hear from survivors of trauma and victims of crime, such as modern slavery, or we risk setting up encounters that may retraumatise some victims. But, with due preparation and appreciation of good practice, it is entirely feasible to safely provide these opportunities for policymakers and lawmakers to benefit from the lived experience expertise of survivors. Indeed, I and my Lived Experience Practice Lead (herself a survivor of modern slavery, and a full-time employee in my team) recently advised the NSW Modern Slavery Committee on ways to safely organise such engagement. In its December 2023 Report following a review of the NSW Act, the NSW Modern Slavery Committee chose precisely to take more time to engage with people with lived experience in order to benefit from their expertise in considering how the NSW Act could be strengthened. I stand ready to assist the Standing Committee should it care to consider such an approach in this process.
12. Notwithstanding this concern, I anticipate strong collaboration between myself and any Australian ASC established through this Bill. I recently recommended to the NSW Modern

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Slavery Committee that the *Modern Slavery Act 2018* (NSW) ('NSW Act') be amended to make such cooperation a statutory function of the role I currently occupy. Close cooperation between all levels of Australian government will be critical to successful nation-wide action. The Australian ASC should play a key role in mobilizing such action across levels of government – though, as I explain further below, this may require amendment of the Bill to strengthen their powers to engage with State and Territory level actors, in particular; and clarification of where the Australian ASC sits in relation to existing anti-slavery mechanisms in Australia, notably the National Roundtable and the National Action Plan to Combat Modern Slavery 2020-2025.

13. Rather than simply being seen as a “complement” to existing arrangements, I encourage the Committee to consider the opportunity for the Australian ASC to bring new urgency to Australia’s response to modern slavery, mobilizing cross-governmental initiatives and cross-sectoral, issued-based action coalitions. While Commonwealth government agencies and non-government service providers are doing important, painstaking work, there is an ongoing and shocking gap between the estimated caseload of modern slavery cases in Australia (estimated at between 1,300 and 1,900 (2019 estimate by the Australian Institute of Criminology) and 41,000 (2023 estimate by Walk Free)) and reported cases – which remain stubbornly around 300 per year across the whole country. An Anti-slavery Commissioner should not only play a key role in promoting “continuous improvement in policy and practice” (section 20C(1)(k)) to close this gap but should be equipped to help mobilize robust collaborative action across the country to address this ongoing human rights challenge within our borders.
14. Supporting survivors to speak for themselves will not only drive greater awareness of the issues they face but help mobilize concerted cross-sectoral action to address this all-too hidden problem. This has been the pattern with other areas of social mobilization to address abuse and trauma in Australia in recent decades, from child abuse to sexual harassment in the workplace: there is no reason why we should expect the pattern in the anti-slavery sector to be different.
15. The creation of an Australian ASC offers an opportunity to create a role with responsibility for helping to mobilize action coalitions across the Australian federation, and to engage directly with survivors to bring them safely into the heart of that action. Yet, as I explain further below, the danger is that the functions and powers reflected in the Bill risk leaving the Commissioner as a somewhat marginal figure with limited ability to influence action by their target audiences.
16. As the Explanatory Memorandum to the Bill makes clear, the Commissioner is currently envisaged as a “complement [to] the work undertaken across the Australian Government”, rather than a driver of that work. Given the visibility of the role, and the expectations that are likely to attach to it from business and civil society, as well as survivors, it may be worth revisiting this assumption, and considering ways to increase the ability of the Commissioner to drive collaborative action within the existing anti-slavery system.

Engaging people with lived experience

17. One of the notable differences between the functions of the NSW ASC and the proposed Australian ASC is that the latter is explicitly given a function: “to engage with, and promote engagement with, victims of modern slavery to inform measures for addressing modern slavery” (draft Bill, section 20C(1)(e)). This is to be welcomed.
18. The provision appears to reflect a growing recognition in Australian anti-slavery circles of the central role that people with lived experience can and must play to ensure that anti-slavery responses are fit for purpose. If survivors are not allowed to self-determine their path to recovery, our efforts to “assist and support” them risk repeating the denial of agency inherent in the experience of slavery. I have, in fact, recently advocated for changes to the

NSW Act precisely to centre people with lived experience more actively in the implementation of the NSW Act. And I have sought to demonstrate the feasibility of this approach, by hiring a person with lived experience into my team, full-time; and ensuring that one fifth of my inaugural Advisory Panel has declared lived experience.

19. Having signalled (in section 20C(1)(e)), a level of ambition for the role the Commissioner can play in promoting effective engagement with survivors, there are several aspects of the Bill that arguably risk making it difficult for the Australian ASC to achieve that identified goal. For example, the Explanatory Memorandum explains that “Through direct engagement with victims, the Commissioner may advocate *on behalf of* victims for improvements to the range of policies and services available to address and respond to modern slavery.” (para. 18, emphasis added) Rather than advocate ‘on behalf of’ victims, why would the Commissioner not be mandated to promote the ability of victims to advocate *for themselves*? As the submission by Fair Futures to this Committee Inquiry makes clear, survivors of modern slavery are more than capable of powerfully articulating their own opinions. Good allies do not speak for survivors: they use their powers and capabilities to help them speak for themselves, and to reclaim the self-determination and agency which was stolen from them during the experience of modern slavery. Indeed, analogous roles recently created, such as that of Australian Domestic, Family and Sexual Violence Commissioner, work specifically to “amplify” survivor voices.
20. Speaking from the position of NSW ASC, it is notable how the Bill, which in many respects very closely tracks the arrangements for the NSW ASC, seems to reflect deliberate choices to *narrow* the scope of action for the Australian ASC to engage with, assist and support survivors, compared to what is possible for the NSW ASC.
21. Section 20A of the Bill includes the statement that: “The Commissioner has functions relating to ... supporting victims of modern slavery.” But the substance of the functions, set out in section 20C, seems to narrow this conception of “supporting victims” of modern slavery, to:
 - providing them information
 - referring them to others for support, and
 - advocating to Commonwealth government to achieve better outcomes for victim-survivors at a general level (i.e. policy engagement).
22. ‘Support’ thus does not include support in individual cases. Draft section 20C(2) spells out that the Australian ASC is not envisaged as a dispute resolution mechanism: “To avoid doubt, the Commissioner may not investigate, or resolve complaints concerning, individual instances or suspected instances of modern slavery.” The Explanatory Memorandum for the Bill also notes that (para. 18): “While the Commissioner may provide information to victims they are not expected to advocate on behalf of individual circumstances.”
23. The NSW *Modern Slavery Act 2018* (NSW) similarly makes clear that the NSW ASC does “not generally have the function of investigating or dealing directly with the complaints or concerns of individual cases” (section 10(1) NSW Act). However, the NSW ASC is also given the functions “to provide assistance and support for victims of modern slavery”, and “to encourage collaborative action to combat modern slavery” (sections 3(b), (f) of the NSW Act). And “Government agencies of the State and persons and bodies that provide services to, or advocate for, victims of modern slavery in the State” have a “duty of cooperation” with the NSW ASC in the exercise of the Commissioner’s functions (section 14 of the NSW Act).
24. This arguably puts the NSW ASC in a different, more proactive orientation than the Australian ASC will be able to adopt, when survivors come forward for help. This has potentially significant implications for the ‘social licence’ of the role of Australian ASC, amongst victims of modern slavery.
25. A key lesson from the NSW experience is that whatever the legislated specifics and limitations of an anti-slavery commissioner’s functions, victims and survivors are likely to

perceive the commissioner as having a role and responsibility to assist them and will directly approach the commissioner for assistance and support *in their individual case*. From the perspective of a member of the public, an “Australian Anti-slavery Commissioner” would appear an obvious place to go for assistance and support. It may be frustrating for them to learn that while the Australian ASC is interested in survivors helping the Australian ASC achieve policy improvements, the Australian ASC is not able to provide assistance and support, except by referring the survivor off to a third party for assistance. To some survivors, this may even appear somewhat redolent of their earlier experience of exploitation – all take (we want your input into our policy processes), no give (we won’t give you support or assistance in return). Whether that perception is reasonable in the circumstances is beside the point: the danger is that a narrative of impotence emerges around the role in the survivor community, encouraging their disengagement, and making it difficult for the Commissioner to effectively engage with this community, even to encourage their involvement in policy and programming processes as envisaged by draft section 20C(1)(e).

26. Frustration is likely to be double for those survivors that have, in fact, already approached the very organisations to which the Commissioner might otherwise refer them, and not received the support and assistance they need or desire. In my experience in NSW, a commissioner is often perceived as a last resort. If the commissioner is unable to unlock assistance and support for a victim, whether because of legislative restrictions (as envisaged in the Bill) or because of an absence of resourcing for staff to engage effectively and in a trauma-informed and dignity-promoting way, the legitimacy and credibility of the Commissioner’s mandate amongst survivor cohorts risks rapid decline. This could impede the Australian ASC’s ability to discharge other functions, for example by making it difficult for the Commissioner to facilitate effective engagement between business and government with victim-survivors. This will be important in several other areas of their work, such as promotion of effective corporate due diligence under the Act.
27. While the provisions of the NSW Act do not empower the NSW ASC to take on an individual case resolution or advocacy role, they do equip the NSW to engage effectively with relevant government agencies and non-government service providers where a victim-survivor comes forward for my support or assistance, in particular through the duty of cooperation provided under section 14 of the NSW Act, in combination with my specific functional mandates to provide support and assistance to encourage collaborative action (section 3). This allows the NSW ASC to enter a constructive dialogue with relevant actors to understand what efforts at support and assistance have already been provided to the individual in question, and encourage collaboration to develop proposals for effective referrals, support and assistance. In practice, it can take several rounds of correspondence and enquiry between my Office, government and non-government service-providers, and survivors to establish this fact base and identify suitable referral, support and assistance.
28. It has proven critical to my ability to perform this role that I am effectively equipped by the underlying legislation to provide this limited *accompaniment* role to survivors in this process. Given the traumatising nature of a modern slavery victim’s exploitation – and, unfortunately, the sometimes-traumatizing nature of their subsequent encounters with government agencies and service providers, however well-meaning – this process needs to be undertaken slowly, carefully, with attention to trauma-informed and dignity-promoting practices, and above all in a way that promotes the survivor’s own agency.
29. Yet the draft Bill may not ensure that an Australian ASC has the appropriate skills and training to effectively engage victim-survivors. There is a notable absence from the list of “appropriate qualifications, knowledge or experience” identified in section 20L(2) of the draft Bill. Quite appropriately, that section stipulates that the Minister must be satisfied that the person to be appointed as Australian ASC has appropriate qualifications, knowledge or experience in one of three areas (i) human rights issues relating to business practices; (ii) regulation; or (iii) public policy relating to modern slavery or related forms of human exploitation. What is missing from this list, however, is any stipulation that the Commissioner

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– or someone in their staff – must have qualifications, knowledge or experience in trauma-informed engagement with, or provision of support or assistance to, survivors of modern slavery or other serious offences.

30. Given the emphasis placed elsewhere in the Bill on the engagement that the Commissioner will have with victim-survivors, this absence is notable. It makes clear that skills in such engagement are not a prerequisite to appointment to the role, which tends to suggest that such engagement is seen as a secondary consideration – while effective business action on human rights, effective regulation and public policy development are seen as primary considerations. Again, this risks sending a signal to survivors that addressing their needs is not a true driver of this legislative action, while engagement with business is.
31. It is also notable that, to my knowledge, people with lived experience of modern slavery were not consulted in the development of this draft Bill. It seems peculiar to establish a national role ostensibly committed to addressing the needs of a vulnerable population without directly asking that vulnerable population what role they would like such an office to play.
32. While existing draft section 20C(1)(e) makes it a function of the Australian ASC “to engage with, and promote engagement with, victims of modern slavery to inform measures for addressing modern slavery”, it is unclear why it should be entirely at the discretion of the Commissioner as to when and how to achieve this. This risks, once again, reducing the voice and agency of survivors in shaping Australian anti-slavery efforts. An alternative approach would be to amend this provision, and the Bill, to provide for the Commissioner to take responsibility for the organisation of the existing Survivor Advisory Council – potentially operating in cooperation with relevant service-providers, or, alternatively to establish their own Lived Experience Advisory Panel.
33. Likewise, it is also unclear why the matters on which the Australian ASC should engage with survivors should be limited to “measures for addressing modern slavery”. This may risk excluding them from having voice on the discharge by the Australian ASC of their functions, or the effectiveness of existing measures and the Act itself.
34. The Committee may wish to consider whether the Bill should specifically mandate the Australian ASC to include lived experience of modern slavery in their staff. We have done this in the Office of the NSW Anti-slavery Commissioner with salutary effect. It has accelerated our ability to engage effectively with survivor communities, brought focus and realism to our work, and helped us engage rapidly with international best practice. I believe that our experience has also had a demonstrable, positive effect on the local anti-slavery sector’s understanding of how anti-slavery work can itself facilitate recovery, healing and the reclamation of agency, given the right safeguards and supports.

Recommendations:

- Amend section 20C of the Bill so that section 20C(1)(d) reads:
(d) to identify and provide assistance and support for victims of modern slavery, including by providing information in relation to government and non-government resources, programs and services
And 20C(1)(e) of the Bill reads:
(e) to engage with people with lived experience of modern slavery to advise on the discharge of the Commissioner’s functions, the effectiveness of measures intended to address modern slavery and the implementation of this Act.
- Ensure survivors are directly consulted, with due safeguards, in the review of this Bill. I stand ready to assist this process if useful.
- Consider amending the Bill to mandate that the staff of the Commissioner must include at least one person with lived experience of modern slavery.

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Engaging Commonwealth agencies

35. Under section 14 of the NSW Act,

Government agencies of the State and persons and bodies that provide services to, or advocate for, victims of modern slavery in the State must work in co-operation with the Commissioner in the exercise of the Commissioner's functions.

36. In contrast, under section 20W of the draft Bill, the Australian ASC “may request” certain information from government agencies (but not non-government service providers), and those agencies must “so far as is reasonably practicable” comply with the request. The recourse of the Commissioner, where covered agencies do not cooperate, is uncertain.

37. This appears to be a deliberate policy and drafting choice, giving the Australian ASC limited ability to require cooperation from Commonwealth agencies, inquire into their conduct or practices, or suggest remedial measures. The Explanatory Memorandum explains that

The Commissioner would not have investigative or coercive powers that would enable them to compel others to provide information needed to investigate individual complaints or allegations. The investigation of individual cases, or suspected cases, is performed by Australia's law enforcement agencies. The Commissioner would work with government agencies to support and enhance existing initiatives while also progressing new initiatives to address modern slavery. (EM, para. 12)

38. And again, later: “[The] Commissioner may not investigate, or resolve complaints concerning individual instances or suspected instances of modern slavery. Law enforcement agencies conduct these activities.” (EM, para. 19)

39. This is a very narrow conception of ‘investigative’ power, and a curious characterisation of the role of law enforcement agencies. There are numerous Commonwealth statutory officers that undertake investigations or inquiries of an administrative nature, without wielding *criminal* law enforcement or judicial power, including various Commissioners, inspectors-general and ombudspeople. There is no reason why an Australian ASC could not be equipped with appropriate civil or administrative inquiry powers to allow them to investigate and resolve complaints in specific situations involving modern slavery, without any disturbing of existing law enforcement or policing arrangements in individual criminal matters.

40. Indeed, one reason why it may not be necessary to give the Australian ASC such powers could be that they could in fact choose to refer people to relevant existing Commonwealth investigative or decision-making bodies outside ‘law enforcement’, such as the Australian Human Rights Commission, the Australian National Contact Point, or the Commonwealth Ombudsman. But the bald statement that “the investigation of individual cases, or suspect cases, is performed by Australia’s law enforcement agencies” risks closing off possibilities for legislative deliberation on how an Australian ASC role might best be structured and empowered to achieve the Bill’s public policy goals, and whether additional non-criminal inquiry powers should be legislated for the Australian ASC, before those options have even been considered.

41. What is more, it misstates the true situation. Law enforcement agencies in Australia do *not* investigate or resolve non-criminal complaints brought, for example, by survivors of modern slavery about poor service provision by government agencies or non-government service providers or even, tragically, additional abuse occasionally experienced during so-called healing and recovery processes.

42. Sadly, this is not a purely hypothetical concern. During my 18 months as NSW Anti-slavery Commissioner, I have heard directly from numerous survivors about how their attempts to seek assistance and support from purveyors of assistance and support have placed them in harm’s way and at risk of further abuse of power and exploitation. I have heard of a pro bono lawyer assisting a victim of sexual servitude who then propositioned that victim. I have seen non-government service providers retaliate against clients (survivors) who dared to critique

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their services to third parties. I have seen victims who were attempting to escape exploitation who were forced back into that situation when government agencies proved too slow, unresponsive and ill equipped to offer basic assistance such as crisis accommodation. I have encountered NGOs raising funds for 'anti-trafficking' activities who are unable or unwilling to provide any details, even at an aggregated and non-identifiable level, of the beneficiary populations they are purportedly serving. And I have seen some signs that there are entities in this space raising significant sums on the basis that it will go to "assist victims of trafficking", with no oversight of how those funds are in fact being spent.

43. What has also become apparent in my time as NSW ASC is that there is a huge variation in the quality of services being provided in this sector – but no accountability mechanism to call out underperformance or dodgy practice, and thereby to protect the truly professional outfits. Actors in the sector have reflected to me that the sector in some ways resembles the relatively unregulated child protection space in decades past. There is a lack of enforced sector-wide agreed performance standards, quality controls or safeguards. The larger, more established service providers and other professional organisations on the smaller side do much to assist survivors, but there is no real barrier to anyone setting up shop as an 'anti-slavery' organisation and raising funds on that basis, without any specific training or expertise. Dodgy providers are not accountable to demonstrate their compliance with agreed sector-wide standards, even where they exist such as guidelines issued by the National Roundtable. And survivors are in no position to 'shop around'.
44. As the voices of survivors contained in the Fair Futures submission make clear, these are not abstract concerns, but ones that have a significant impact on survivors. When they are struggling to find effective support and assistance, they do not always feel they have someone who can help them find their way out of the labyrinth. This drives the issue further from view. Some survivors are likely to look to an Australian Anti-slavery Commissioner to play this last-resort remediation role; there is no evidence that they will turn to law enforcement authorities to do so. Law enforcement is simply not mandated to deal with complaints that might arise in this space, around underperformance, poor case management, bad advice to survivors, or abuse of power.
45. At the same time, any effort to equip the Anti-slavery Commissioner to engage in inquiry or oversight activities relating to how individual cases are handled, or to promote compliance with sectoral standards of care, will need to take considerable care to protect the safety of the space in which professional, properly equipped service providers engage with survivors. Survivors need to have assurance, for example, of confidentiality in their dealings with legal service providers, psychological and healthcare service providers.
46. For this reason, it may also be worth considering whether section 20W of the Bill should be amended to clarify inter-operability with common law rights and privileges, such as legal professional privilege, and privacy and health data rules. The Explanatory Memorandum indicates that the Commissioner and the agency in question must comply with the *Privacy Act 1988*, but it may be worth clarifying this, and other relevant protections, in section 20W itself.
47. Additionally, it may also be worth considering the role of the Australian ASC in encouraging effective implementation of the National Action Plan to Combat Modern Slavery 2020-2025. At present the Bill envisages simply that the Australian ASC will "advocate to the Commonwealth Government on matters relating to modern slavery, including for continuous improvement in policy and practice". This falls far short of the oversight role given to the Australian Domestic, Family and Sexual Violence Commissioner under the First National Action Plan 2023-2027, under the National Action Plan to End Violence against Women and Children 2022-2032. That Commissioner is empowered to report annually to Parliament on (national) progress against that Plan.
48. The Standing Committee could therefore consider whether the Australian ASC should be given a role in promoting not only the Cth Act, but also the National Action Plan to Combat Modern Slavery – and reporting on progress in its implementation, annually to Parliament.

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This would clarify the relationship between the Australian ASC and the existing National Action Plan and would also likely increase the Australian ASC's ability to drive forward national, cross-sectoral collaboration and build issues-based action coalitions.

Recommendations:

- Consider whether it is appropriate to amend the Bill to empower the Australian ASC to undertake inquiries into, or to provide conciliation or other dispute resolution services to address the handling of modern slavery cases in specific circumstances; or to empower the Australian ASC to make referrals activating the jurisdiction of specified civil or administrative investigative or dispute resolution mechanisms, such as the Australian Human Rights Commissions, Australian National Contact Point or Commonwealth Ombudsman.
- Consider whether the Bill should be amended to give the Australian ASC a clear role in ensuring the development, implementation of, and respect for professional standards in the anti-slavery sector across Australia.
- Consider amending section 20W to ensure information sharing with the Australian ASC is carried out in conformity with common law and statutory rights and privileges notable relating to legal professional privilege, privacy and health data.
- Consider amending the Bill to give the Australian ASC responsibility for reporting annually to Parliament on national progress against the National Action Plan to Combat Modern Slavery.

Engaging State and Territory entities

49. Despite its name, the Australian ASC as envisaged in the Bill will have a limited role in mobilising truly national anti-slavery efforts. The role's national reach is considerable in terms of business engagement, engagement with civil society, awareness raising with the general public, and cooperation with research actors. But the Australian ASC will have a limited role in shaping the activities of State, Territory and local governments in responding to modern slavery – and, as discussed, a limited role in shaping Commonwealth government agency behaviour.
50. There are several obvious reasons for the role's limited engagement with State and Territory entities. The first is presumably Constitutional. A Commonwealth officer has limited scope to direct or compel other levels of government. This does not, however, prevent them from engaging and consulting with such actors, as the Explanatory Memorandum notes (para. 60). Another factor may be that Australia's response to anti-slavery has historically been Commonwealth government led (responding initially to the Commonwealth's responsibilities for implementation of the Palermo Protocol), through engagement with civil society (notably through the National Roundtable), and more recently through engagement in business. State and Territory governments have simply not been major players in the story.
51. But the creation of a new 'independent pillar' in the Australian anti-slavery system arguably offers an opportunity to think differently – and to produce different outcomes.
52. There is good reason to do so. The absence of State and Territory, and indeed local governments, from Australia's national anti-slavery response has arguably meant the omission of stakeholders that are in the box seat to identify victims of modern slavery – for example healthcare service providers, law enforcement, schools, and local community support services – and to provide support services that survivors need – legal aid, healthcare and, critically, housing. These services are provided primarily at State and Territory level, with some involvement of local government. The Commonwealth's role in financing those activities is significant, but in direct frontline service provision is relatively small.
53. The result of this historical pattern is that anti-slavery sector in Australia is largely dependent on a relatively small pool of Commonwealth grants and charitable funding – i.e. it is not integrated into state budget thinking – and implementation of the National Action Plan

relies on Commonwealth government leadership, with no significant participation from State and Territory service-providing agencies. Anti-slavery responses have not been integrated into mainstream service provision by State and Territory governments, and they are under no pressure from the Commonwealth to do so. Access to Commonwealth financial support to the States and Territories, even in defined areas such as health, has not been made conditional in any substantial way with alignment of State and Territory activities with the National Action Plan to Combat Modern Slavery 2020-2025. And State and Territory organisations are not members of, or routinely invited to, the National Roundtable process.

54. This stands in obvious contrast to the approach taken around issues such as domestic and family violence, child abuse and exploitation, or coercive control. In those cases, notwithstanding Constitutional considerations and State and Territory equities, the federal government has driven collaborative processes to rally federal support around shared policy approaches and implementation initiatives, and to track and report on national progress.
55. In this sense, the role of the Australian ASC is arguably narrower than that of the NSW ASC. I have powers to require cooperation from a range of NSW government agencies who come directly in contact with, and provide services to, survivors. On this basis, for example, my team is currently in the process of standing up a collaborative initiative, *It's Healthy to Fight Modern Slavery*, mobilizing a community of action across public and private healthcare organisations in NSW to strengthen identification, screening, diagnostic, treatment, referral and data management arrangements.
56. In contrast, the Australian ASC has only the power to “consult and liaise with ... State and Territory governments, agencies, bodies and office holders on matters relating to modern slavery” (section 20C(1)(i)). This seems to forego the opportunity to mandate the Australian ASC a clearer active role, embedded within a national cooperative framework established in consultation with State and Territory governments, to coordinate action to implement the National Action Plan.
57. Thus, where the creation of an Australian ASC offers an opportunity to create a role with responsibility for helping to mobilize coalitions for action across the Australian federation, the functions and powers reflected in the Bill risk leaving the Commissioner as a somewhat marginal figure with limited ability to influence outcomes at the State and Territory level. Given that only one state has a counterpart for the Australian ASC to cooperate with – NSW – this risks leaving the Australian ASC unable to influence how most States and Territories deploy housing, healthcare, law enforcement or other resources to combat modern slavery.

Recommendation:

- Amend the Bill to give the Australian ASC a function to cooperate with State and Territory governments, agencies, bodies and office holders to promote effective responses to and prevention of modern slavery, in alignment with the National Action Plan to Combat Modern Slavery 2020-2025, and any subsequent National Action Plan or equivalent strategy addressing modern slavery adopted by the Commonwealth government.

Engaging Parliament

58. Finally, I believe it is important for the Standing Committee to consider the limited opportunity that the Australian ASC will have, despite their stated independence from the Executive, to engage with the Commonwealth Parliament, and how that may shape the impact achieved through the role.
59. Under the Bill as drafted, the Australian ASC’s primary opportunity to engage Commonwealth Parliament will be through their annual report which, under draft section 20Y, the Minister must table in each House of Parliament. This is similar to the arrangement in NSW under the NSW Act, but with two key omissions that significantly reduce the scope for Commissioner-Parliamentary dialogue, when compared to NSW.

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60. First, the Bill does not contemplate the Australian ASC making own-initiative reports to Parliament, as the NSW Act empowers the NSW ASC to do. (See section 19(4) of the Act.)
61. Second, unlike the NSW Act, the Bill does not establish a standing joint select committee on modern slavery in Parliament. This is, in my estimation, a significant omission.
62. The NSW Modern Slavery Committee, chaired by a non-government member, turns what would otherwise, in NSW, be a dialogue between an independent Commissioner and a Minister on whom the Commissioner depends for resourcing, with once-a-year engagement between the Australian ASC and Parliament, into a trilateral public policy conversation between an independent expert (the Commissioner), the Government, and the Parliament. What is more, as a standing committee, the NSW Modern Slavery Committee creates a small but important constituency of parliamentarians whose success is tied in an important way to forward progress (as they see it) on modern slavery issues. This allows me, as NSW ASC, to develop a public policy dialogue with the Parliament that is rapidly developing nuance and sophistication and beginning to break the general problem of ‘modern slavery’ down into more specific public policy puzzles that Parliament may wish to engage with in different ways – from public procurement due diligence, to effective support for modern slavery survivors, to housing issues. And the fact that this dialogue is occurring through a committee helps to ensure a sense of agency and ownership across diverse political parties, which I believe is helping to sustain the strong cross-party support for anti-slavery action we enjoy in NSW – and which is mirrored at the federal level.
63. Since the Australian ASC is given the function (in section 20C(1)(k) of the draft Bill) “to advocate to the Commonwealth Government on matters relating to modern slavery, including for continuous improvement in policy and practice”, it seems clear the Bill seeks to harness the Australian ASC’s expertise and independence to drive policy innovation. Providing for direct engagement by the Commissioner to the Parliament would enhance the likelihood of this outcome. And establishing a standing joint select committee of Parliament would ensure the Australian ASC has an ongoing docking point in Parliament with whom to engage in effective public policy learning and development.

Recommendations:

- Amend the Bill to add a new section 20Z to the Cth Act, entitled “Other reports by the Commissioner”, equipping the Commissioner to issue own-initiative reports to Parliament. This could be modelled on section 19(4) of the NSW Act.
 - Amend the Bill to provide for the creation of a joint standing committee on modern slavery in the Parliament. This could be modelled on Division 4 of the NSW Act.
64. I appreciate the opportunity to provide this submission to the Inquiry. I applaud the Government for introducing this Bill, and commend the Committee for its consideration of ways to enhance the Bill.
 65. Please do not hesitate to contact me if I may be of any further assistance to the Committee in this process.

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NSW Anti-slavery Commissioner

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