MODERN SLAVERY AMENDMENT BILL 2021

First Reading

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Don Harwin.

Second Reading Speech

The Hon. DON HARWIN (Special Minister of State, and Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts) (14:45): I move:

That this bill be now read a second time.

In June 2018 the Modern Slavery Act 2018 was passed by the Parliament after being introduced as a private member's bill by Mr Paul Green, a former member of this place. The Act followed the report of the Select Committee on Human Trafficking in New South Wales and a parliamentary working group on modern slavery. The Act is well intentioned, and I commend the members of this place who played a part in the development of the Act. Unfortunately, the Act presently does not achieve all those intentions due to several technical legal deficiencies. As a private member's bill, the Act was not developed with full access to the Government's resources and expertise, such as the benefit of expert legal advice and advice from operational agencies. The Government is introducing this bill to resolve those deficiencies and to allow the Act to commence on 1 January 2022.

The process for addressing the deficiencies of the Act has been longstanding and transparent. The Government provided a draft exposure bill, the Modern Slavery Amendment Bill 2019, to the Legislative Council Standing Committee on Social Issues as part of its inquiry into the Modern Slavery Act 2018. The committee consulted with a range of stakeholders, invited submissions from members of the public and carefully considered the Government's draft exposure bill. The committee subsequently released report No. 56, titled *Modern Slavery Act 2018 and Associated Matters*, in March 2020, which made 17 recommendations. I note at the outset that the Government has amended the draft exposure bill to implement many of the committee's recommendations. The bill will commence the Act on 1 January 2022, ensure the intended operation of certain provisions in the Act are effective, improve the operation of the Act, enhance protections for the Anti-slavery Commissioner, reduce regulatory burden on businesses in New South Wales, reduce legal risks posed by the Act and ensure that victims of modern slavery can receive recognition payments.

Importantly, the bill will preserve and enhance many of the important features of the Act, including the establishment of Australia's first substantive Anti-slavery Commissioner to raise awareness and provide education about modern slavery, and ensure that the procurement of goods and services by government agencies are not the product of modern slavery; risk-based audits of the procurement of government agencies, the making of procurement guidelines to ensure that goods and services procured by and for government agencies are not the product of modern slavery, and a public register identifying any government agencies failing to comply with these new requirements; the introduction of tough new offences to crack down on the production and distribution of child abuse material, and new offences in New South Wales prohibiting slavery, servitude, child forced labour, and child forced marriage; access to financial support, counselling and recognition payments for victims of modern slavery; and the establishment of a joint parliamentary committee on modern slavery. The joint parliamentary committee and the Anti-slavery Commissioner will guide future policy development in this area, building on the bedrock establish by the Act.

I will now describe the bill in detail. All items are contained in schedule 1 to the bill. Recommendation one of the committee's report was that the New South Wales Government proceed to introduce amendments to the Act, taking into consideration the comments and recommendations of the committee's report, with the aim of the Act commencing on or before 1 January 2021. As members would be aware, the Government's priorities and resources shifted immediately before the committee's report was published in March 2020 to responding to the COVID-19 pandemic.

Item [1] of the bill will commence the Act on 1 January 2022. This will enable sufficient time to recruit and establish the office of the Anti-slavery Commissioner and enable agencies to identify and implement operational changes in anticipation of commencement. This includes new procedures for modern slavery risk audits, the drafting of NSW Procurement Board directions, and changes to NSW Police Force and court IT systems to accommodate new conditions on apprehended violence orders related to forced marriages. Importantly, the amendment offers members, operational agencies and relevant stakeholders certainty about the date of the commencement of the Act.

The bill proposes technical and drafting amendments to ensure that the intended operation of certain provisions in the Act are effective. All these changes were brought to the committee's attention during its review of the bill and were supported in full. Item [7] amends the definition of "modern slavery offence" to overcome potential ambiguity and ensure that the intended extraterritorial application of the Act for what constitutes a modern slavery offence is in fact achieved. The amendment will confirm that a modern slavery offence includes conduct occurring outside of New South Wales and Australia, which, if it occurred in New South Wales, would be an offence, even though it might not be an offence in the place in which it occurred.

Item [17] replaces section 14 (1) relating to cooperation between the Anti-slavery Commissioner and agencies. Currently section 14 (1) of the Act requires the commissioner and government or non-government agencies to cooperate with each other. The drafting of the proposed new section 14 (1) clarifies that government and relevant non-government agencies are required to cooperate with the commissioner and not each other in the exercise of the commissioner's functions. Further, the very broad term "non-government agency" is replaced with the more specific "bodies that provide services to, or advocate for, victims of modern slavery". This ensures that only relevant non-government bodies are captured by the provision and subject to the obligation to cooperate with the commissioner.

Currently section 16 of the Act provides that a person does not incur any liability, including liability for breaching any duty of confidentiality, for information provided in good faith in accordance with the Act. However, the duty of agencies to disclose information that is likely to be of assistance to the commissioner in the exercise of the commissioner's functions in section 14 is expressed to be subject to any duty of confidentiality imposed by law. Consequently, any disclosure that breached a duty of confidentiality would not be in accordance with the Act and would not receive the benefit of the protection in section 16. Item [18] omits the words "subject to any duty of confidentiality imposed by law" from section 14 (2) to resolve the ambiguity between the two sections.

Items [53] to [56] will amend the Act's uncommenced amendments to the Victims Rights and Support Act to include an "act of modern slavery" to give effect to the intent of making victims support generally available to victims of acts of modern slavery committed in New South Wales. This is consistent with the requirement that, to be eligible for victims support under the victims support Act, the act of violence must have occurred in New South Wales. This was recently confirmed in *DRJ v Commissioner of Victims Rights (No 2)*, from which the High Court declined to grant special leave to appeal.

Item [57] is a consequential amendment that clarifies that a single act that is both an act of violence and an act of modern slavery is only eligible for support once under the Victims Support Scheme. This ensures the scheme does not enable double recovery in relation to the same act. The amendment will not affect eligibility for support where a person has been the victim of separate acts of violence and modern slavery. Item [60] omits a redundant amendment to the victims support Act. This is because, after the Act was passed, the victims support Act was amended so that the definitions in section 58 no longer define "series of related acts" by reference to section 19 (4).

The bill proposes the insertion of new provisions to enhance and clarify protections for the commissioner, the commissioner's staff, and people or entities who provide information to the commissioner. Item [21] proposes replacing section 16 of the Act. The new section 16 would ensure that a person who provides information to the commissioner in compliance or purported compliance in good faith with a requirement under the Act is protected from criminal or civil liability apart from under the Act. New section 16A protects the commissioner or a person acting under the direction of the commissioner from personal liability for acts done in good faith for the purpose of exercising a function under the Act. The liability attaches instead to the Crown. These new sections, along with the redrafted section 14, will work together to require agencies and relevant bodies to disclose information to the commissioner that is likely to be of assistance to the commissioner and ensure that neither the agency nor the commissioner are liable for complying with that requirement.

Item [49] will insert a new clause 35 into schedule 1 to the Defamation Act to provide the Anti-slavery Commissioner and their staff with a defence of absolute privilege in defamation proceedings. The proposed amendment is a standard provision to protect certain public officials and their staff from liability where matters are published in their capacity as a public official. Once again, I note for the benefit of the House that these changes in relation to the Anti-slavery Commissioner were flagged with the Standing Committee on Social Issues when the Government shared its consultation draft and the committee supported the proposed amendments.

I turn now to the amendments to improve the operation of the Act. Items [4] and [9] will amend the definition of "government agency" in the Act. Currently, the definition of "government agency" in section 5 of the Act includes State-owned corporations and Corporations Act companies that have a shareholding Minister. New South Wales Government policy generally is to treat State-owned corporations the same as commercial organisations and to put them on as level a playing field as possible with their private sector equivalents. It is therefore proposed to omit those two entities from the definition of "government agency". Capturing corporations under the Corporations Act with a shareholding Minister would result in a potentially very broad scope, with the potential to cover proprietary limited corporate trustees of self-managed superannuation funds or publicly traded companies that Ministers may be shareholders of. Such corporations should not be considered to be a "government agency" for the purposes of being subject to government sector procurement arrangements, including in relation to modern slavery.

A new section 5 (3) is proposed to clarify what is a government agency—namely, that a government agency does not include a public or local authority constituted by an Act of another jurisdiction. Currently section 20 of the Act provides for the reporting of information obtained while exercising the commissioner's functions for the purposes of a report about a child or young person at risk of significant harm under the Children and Young Persons (Care and Protection) Act. The amendment in item [23] will additionally provide for the reporting of information by the commissioner to the NSW Police Force that might be of material assistance in securing the apprehension or prosecution of an offender for a child abuse offence consistent with the obligation in section 316A of the Crimes Act.

Item [34] proposes to insert a new section 35 providing for information-sharing arrangements between the Commissioner of Police and the Anti-slavery Commissioner. The new information-sharing arrangement was requested by the NSW Police Force to assist in the implementation of Act. The new section provides for the provision of information regarding modern slavery and victims of modern slavery from the Commissioner of Police to the Anti-slavery Commissioner on request or in accordance with an arrangement. The Commissioner of Police is not required to provide information to the Anti-slavery Commissioner in certain circumstances, including, for example, where the Commissioner of Police reasonably believes that providing information would prejudice an investigation or endanger a person's life or physical safety. These amendments were also already included in the consultation draft that was provided to the Social Issues Committee and subsequently supported by the committee.

Item [35] proposes a resolution to what appears to be an unintended consequence of the Act's application to the Human Tissue Act. Currently, the Act makes the offence of prohibited trading in tissue in section 32 of the Human Tissue Act a modern slavery offence. Although the offence in the Human Tissue Act does not generally have extraterritorial effect, because modern slavery offences under the Act have extraterritorial effect, conduct that is legitimate and legal in a foreign jurisdiction could be modern slavery under the Act. For example, sourcing blood products from the United States would be a modern slavery offence under the current Act because donors are generally paid for blood and plasma donations in that jurisdiction. The amendment will address this issue and implement recommendation 14 of the committee's report, by limiting a modern slavery offence under section 32 to where the tissue being traded is an organ. The amendment proposed ensures that the abhorrent practices involved in illegal organ trading rightly continue to be identified as modern slavery, however will not inadvertently capture the supply of blood products for jurisdictions that allow payment of donors.

On commencement, schedule 4 to the Act will amend the Crimes Act to introduce new offences. One of those amendments is the creation of a new aggravated offence of using a child for the production of child abuse material punishable by 20 years' imprisonment. Item [38] proposes minor amendments to enable the new aggravated offence to better align with existing offences in the Crimes Act and implements the Government's response to recommendation 13 of the committee. The amendments proposed by this bill will reorder the aggravating circumstances in the new section 91G (3A) to mirror the order of aggravating circumstances in sections 66C (5) and 66DE (2) of the Crimes Act, and insert the words "by means of an offensive weapon or instrument" in relation to the aggravating factor where an alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby. This amendment will ensure that the new aggravating factor is consistent with the aggravating factors for other existing child sexual offences in sections 66C (5) (b) and 66DE (2) (b) of the Crimes Act.

Schedule 4 to the Act will also amend the Crimes Act to create a new offence of child forced marriage, in section 93AC of the Crimes Act. Schedule 5.3 to the Act will amend the Crimes (Domestic and Personal Violence) Act to enable child victims of forced marriage to apply for apprehended domestic violence orders or apprehended personal violence orders if they experience coercion or threats to enter a forced marriage. The proposed amendments in items [43] to [47] will expand the un-commenced references to the child forced marriage offence in section 93AC of the Crimes Act. This will reference counterpart offences and definitions in the Commonwealth Criminal Code to ensure that all victims of forced marriages can apply for the protection of apprehended domestic violence orders or apprehended personal violence orders.

Items [50] and [51] amend the Act's un-commenced amendments to the Public Finance and Audit Act to clarify the Auditor-General's audit and advice powers. The effect of the amendments is that local councils will not be subject to the Auditor-General's audit functions in relation to modern slavery. While local councils will be a government agency for the purposes of the Modern Slavery Act and will therefore be subject to the Anti-slavery Commissioner's function, they will not be subject to the Procurement Board direction. This is because Procurement Board directions do not apply to local councils. As a result of local councils not having to comply with a relevant Procurement Board direction, the Government does not consider that it is appropriate to make local councils subject to the audit functions of the Auditor-General.

I now move to the amendments to reduce the regulatory burden on New South Wales businesses by repealing the provisions in the Act relating to the supply chains of non-government organisations. The Commonwealth Modern Slavery Act 2018 commenced on 1 January 2019, following the passage of the New South Wales Act. The Commonwealth Act requires entities based or operating in Australia that have an annual consolidated revenue of at least $100 million to report each financial year on the risks of modern slavery in their operations and supply chains. The reporting entity must give a modern slavery statement within six months after the end of the financial year, providing information including the structure, operations and supply chains of the reporting entity; the risks of modern slavery practices in the operations and supply chains of the reporting entity; and actions taken by the reporting entity, including due diligence and remediation processes, in response to those risks.

These reports are published and publicly available for viewing on the Australian Government's Modern Slavery register. The Commonwealth Minister may name and shame entities on the register that fail to comply with reporting obligations under the Commonwealth Act. It is vital that the Commonwealth and New South Wales reporting schemes provide a clear and consistent regulatory framework for Australian businesses. This bill proposes to repeal section 24 of the New South Wales Act, which is the section that provides for the regulation of non-government organisations' supply chains, to remove the regulatory burden on the New South Wales private sector and businesses of complying with two schemes. Consequential amendments to other sections are also proposed.

Commercial organisations in New South Wales with a consolidated revenue of at least $100 million in a financial year will continue to be subject to the Commonwealth's scheme. Commercial organisations in New South Wales with a total annual turnover of $50 million or more, but less than $100 million, will no longer be required to report but can voluntarily report under the Commonwealth's scheme. I expect that the Anti-slavery Commissioner will take an active role in advocating for commercial organisations in New South Wales with an annual turnover between $50 million and $100 million to voluntarily report under the Commonwealth's scheme. The New South Wales Anti-slavery Commissioner will continue to maintain a public register identifying any government agency failing to comply with directions of the NSW Procurement Board concerning procurement of goods and services that are the product of modern slavery. Item [29] will enable the making of regulations requiring a government agency to provide information to the commissioner to be included on the register and will provide for the manner and form of information that is to be provided to the commissioner.

It is appropriate that the Commonwealth's scheme cover the field on regulating the supply chains of commercial organisations. The Commonwealth has legislative power in relation to corporations, trade and commerce and external affairs. There is little public benefit in implementing a New South Wales scheme that largely duplicates and overlaps the Commonwealth's scheme—only more red tape for business. The New South Wales Modern Slavery Act passed Parliament on 21 June 2018, before the Commonwealth bill was introduced in the following week, on 28 June 2018. Now that the Commonwealth has acted in this space, section 24 of the Act should be repealed.

I should note that the New South Wales Government has urged the Commonwealth to revisit the reporting threshold, with the New South Wales Government's express preference of harmonising the threshold at $50 million. In a letter dated 30 November 2020, the assistant Minister responsible for the Commonwealth Modern Slavery Act, the Hon. Jason Wood, advised me that he would ask Commonwealth and New South Wales Government representatives to "consider the scope" for harmonisation.

In a subsequent meeting of 9 March 2021, the Minister advised me that changes to the reporting threshold were unlikely ahead of a statutory review to commence in 2022 but that issue would likely be canvassed in the review. In all the circumstances, I felt it was the best course to proceed with the New South Wales Modern Slavery Act in the form I have introduced today.

I seek leave to table correspondence that I received from the Hon. Jason Wood, MP, Federal Assistant Minister for Customs, Community Safety and Multicultural Affairs, concerning the implementation of the Modern Slavery Act 2018, which I referred to in my remarks.

Leave granted.

Document tabled.

The Hon. DON HARWIN: I also note that the Anti-slavery Commissioner will still assist small- and medium-sized enterprises to identify modern slavery within their supply chains and to assist them in remediating and monitoring identified risks. The bill proposes three amendments to reduce legal risks in the Act. Item [32] would repeal the part of the Act that enables the making of "modern slavery risk orders". A consequential amendment is in item [8]. A "modern slavery risk order" is an order made by a court under section 29 of the Act to prohibit a person convicted of certain modern slavery offences from engaging in prescribed conduct, to reduce the risk that a person will engage in conduct constituting modern slavery. The orders fit poorly into the existing criminal justice frameworks and are the most problematic aspect of the Act. Significant legal and operational issues arise under the orders. Of particular concern is the ability of a court to make a modern slavery risk order of its own initiative, which is a significant departure from the ordinary exercise of judicial power. This may impair the institutional integrity of New South Wales courts to a sufficient degree to give rise to a risk of constitutional invalidity.

As an alternative to achieve the intent of the orders, the bill proposes amendments in item [48] to the Crimes (High Risk Offenders) Act so that offenders convicted of sexual servitude offences, a form of modern slavery, are able to be subject to post-sentence detention and supervision orders. The High Risk Offenders Scheme first commenced in New South Wales in 2006 and is an effective, well-understood scheme to manage the risk of, and rehabilitate, high risk offenders. Under the scheme, the Supreme Court can make an extended supervision order [ESO] if satisfied to a high degree of probability that an offender poses an unacceptable risk of committing another serious offence if not kept under supervision under the order. ESOs may require offenders to comply with a wide range of conditions including participating in treatment and rehabilitation programs, not engaging in specified conduct or classes of conduct and not engaging in specified employment or classes of employment. The existing scheme is well suited to reducing the risk of sexual servitude offenders reoffending.

Schedule 4 to the Act will, on commencement, amend the Crimes Act to introduce a new offence in section 93AB prohibiting slavery, servitude and child forced labour. Item [40] amends the uncommenced offence to limit its territorial operation to within New South Wales, to avoid legal risks arising from an inconsistency with the requirement in the equivalent Commonwealth offence, under which the Commonwealth Attorney-General must consent to any prosecution in relation to matters where all of the physical elements of the offence occurred outside Australia.

The Act, on commencement, will also insert a new offence prohibiting child forced marriage, section 93AC, into the Crimes Act. The proposed amendment to section 93AC in items [41] and [42] will align the definition of "forced marriage" with the counterpart offence in the Commonwealth Criminal Code, including by ensuring that where both partners to a forced marriage are victims—for example, both are children who have been coerced into the marriage—neither is guilty of the offence of procuring a forced marriage. These amendments were brought to the attention of the Standing Committee on Social Issues during its review and I note they were supported by the committee.

I now move to the amendments to enable the victims of modern slavery to access recognition payments under the Victims Support Act. This amendment implements recommendation 15 of the committee's report. Recognition payments form an important part of the victim support package and are intended to recognise the trauma suffered by a victim due to the act of violence. Items [58] and [59] will amend schedule 5.7 to make the categories of recognition payment available for victims of an act of modern slavery the same those available for victims of an act of violence. Before I conclude, I acknowledge the strong advocacy of the many organisations and individuals that work so hard to bring modern slavery to an end. I also acknowledge the origins of these important reforms in the committee processes of this place. I thank honourable members, and these stakeholders, for their patience in this process to resolve technical deficiencies and commence the Act. I commend the bill to the House.

Debate adjourned.