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Modern slavery and human trafficking

A comparative analysis of existing and emerging legislation in the United Kingdom, Australia, Hong Kong and Singapore



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Executive summary

In 2015, the United Kingdom passed the Modern Slavery Act, which contains a corporate reporting requirement aimed at increasing transparency around modern slavery and human trafficking in the operations and supply chains of large companies. Two years later, the governments of Australia and Hong Kong have announced their intention to introduce similar modern slavery reporting requirements, which largely mirror the UK Modern Slavery Act, but, arguably, go even further. This has raised the question of how corporates with operations or suppliers in the Asia Pacific region including Australia, Hong Kong and neighbouring Singapore, will be affected.

In light of these recent developments, we have set out

- A snapshot of the current landscape in Australia, Hong Kong and Singapore.
- A comparative analysis of the current and proposed modern slavery legislation in the United Kingdom, Australia, Hong Kong and Singapore.
- A summary of the challenges that corporate reporting provisions in modern slavery legislation have posed for corporates.
- Recommendations on overcoming these challenges.

Current landscape in Australia, Hong Kong and Singapore

There is no modern slavery legislation currently in force in Australia, Hong Kong or Singapore which specifically targets companies. However, a series of controversies concerning the use of forced labour¹, the findings of a 2013 Parliamentary Inquiry into slavery, and other international trends, such as the introduction of the UK Modern Slavery Act 2015 (the UK Act) spurred the Australian government to undertake a Parliamentary Inquiry to investigate the possibility of establishing modern slavery legislation similar

to the UK Act.² Six months after the establishment of the Parliamentary Inquiry, the Federal Attorney-General's Department began a lengthy consultation process into a proposed reporting requirement in relation to modern slavery in supply chains.³ Following the release of the Parliamentary Inquiry's final report on modern slavery, "Hidden in Plain Sight" (the Parliamentary Inquiry Report),⁴ in February 2018, the Assistant Minister for Home Affairs, Alex Hawke MP, announced that a Modern Slavery Bill will be introduced in the Australian Parliament in the first half of 2018. Almost immediately after this, a Modern Slavery Bill was introduced in the Upper House of the New South Wales (NSW) Parliament by Christian Democrats MLC Paul Green (the NSW Bill) as a private member's bill.⁵

Similar concerns regarding the lack of a proper legislative framework addressing modern slavery and human trafficking have been raised in Hong Kong. In this respect, Hong Kong is seen to be lagging behind its neighbours – Macau having approved an anti-human trafficking law in 2008 and mainland China having implemented steps to combat human trafficking under its 2013-2020 National Action Plan. On this basis, an anti-human trafficking concern group comprising NGOs and legal professionals has been urging the HKSAR government to take immediate steps to criminalise human trafficking in all forms. In response, Legislative Councillor Dennis Kwok, who represents the legal sector, recently presented a Modern Slavery Bill (the Hong Kong Bill) to the Chief Executive for consideration. The Hong Kong Bill is largely based on the UK Act with some modifications. The most notable of these is the inclusion of a civil cause of action against persons who have engaged in or knowingly benefited from human trafficking. If passed, this is likely to have a serious effect on how businesses address human rights issues in their operations and supply chains.

The main legislation targeting modern slavery in Singapore is the Prevention of Human Trafficking Act 2014 (PHTA). The PHTA criminalises forced labour, and sex and labour trafficking. However, unlike the UK Act or the proposed legislation in Australia or Hong Kong, the PHTA does not contain a reporting requirement for corporates.

¹ The findings of the Trafficking in Persons Report suggest that while traditionally the majority of human trafficking and slavery investigated in Australia have related to women subjected to sexual exploitation, there has been an increase in the number of referrals and investigations relating to other forms of labour exploitation especially in the agriculture, construction, hospitality and domestic services industry – and is now comparable with those subjected to sexual exploitation. See Australian Government "Trafficking in persons: the Australian Government Response July 1, 2015 – June 30, 2016" The Eighth Report of the Interdepartmental Committee on human trafficking and slavery (2016) p 23 <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-june-2016.pdf>. See also: <http://www.nortonrosefulbright.com/knowledge/publications/157741/food-for-thought-the-modern-slavery-acts-impact-in-fresh-food-retail-wholesale-and-agriculture>

² On February 15, 2017 the Attorney General referred an inquiry to the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade to investigate establishing a Modern Slavery Act in Australia https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery

³ On August 16, 2017, the Minister for Justice released a consultation paper on the Australian Government's proposed model for a Modern Slavery in Supply Chains Reporting Requirement see: <https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx>

⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Hidden in Plain Sight (2017). See also: <http://www.nortonrosefulbright.com/knowledge/publications/158694/parliamentary-inquiries-report-into-establishing-a-modern-slavery-act-tabled-in-parliament>

⁵ Modern Slavery Bill 2018 (NSW) introduced in the NSW Legislative Council on March 8, 2018 see <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3488>

It therefore remains to be seen whether Singapore will follow suit and present its own modern slavery bill as a response to the building international pressure.

Comparative analysis of the current and proposed modern slavery legislation

UK Modern Slavery Act 2015

Section 54 of the UK Act requires commercial organisations with a turnover of £36 million or more, which carry on part of their business in the UK to prepare a statement, outlining the steps they are taking to combat slavery and human trafficking in their own operations and their supply chains. The UK Act is supplemented by government guidance, which also encourages businesses not caught by the provision to report voluntarily. Although the government has been careful not to prescribe what an appropriate response to modern slavery looks like, it has stipulated that the modern slavery statement must set out the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in its business or supply chains, or that it is taking no such steps. It has also specified that organisations “should aim” to include information on the following in their statements

- The organisation’s structure, its business and its supply chains.
- Its policies in relation to slavery and human trafficking.
- Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.
- The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
- Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.
- The training and capacity building about slavery and human trafficking available to its staff.

The UK government has not clarified how enforcement of this provision would work, save that the Secretary of State can apply for an injunction to compel a company to publish a statement. According to the guidance, the principal enforcement mechanism will be the pressure applied by consumers, investors and NGOs where an organisation is perceived to have taken insufficient steps. The guidance states that the provision aims to create “a race to the

top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards”. This has catalysed a flurry of activity from corporates (implementing measures to tackle modern slavery and human trafficking to include in their statements) and NGOs (scrutinising corporates’ efforts). For example, various reports have been published commenting on the standard of modern slavery statements.

Australian Reporting Model 2018

At this stage, there is some uncertainty surrounding the Australian Reporting Model due to the divergence between the recommendations in the Parliamentary Inquiry Report, the NSW Bill and the model proposed by the Attorney-General’s Department’s public consultation paper in August 2017 (the Government’s Consultation Model).

Despite the uncertainty, it is anticipated that the Australian Reporting Model will be broadly similar to that required by the UK Act, but with some important differences. The Australian Reporting Model will likely impose a reporting requirement on organisations with an annual turnover of at least AUD50 up to 100 million (approx. £28 to 56 million). The exact turnover is yet to be announced. As with the UK Act, there will be provisions for corporates that do not meet the annual turnover requirement to opt into reporting.

The current Australian Model differs from the UK Act in three crucial ways.

Mandatory Criteria

First, the Australian Model is likely to make it mandatory for organisations to publish modern slavery statements that, as a minimum, include a set of criteria in relation to their operations and supply chains. The exact criteria are yet to be announced, but are expected to be similar, in substance, to the non-mandatory criteria in the UK.

Public Repository

Secondly, the Australian Model will likely include a free, publicly accessible central repository that will contain all the modern slavery statements published in compliance with the Australian Reporting Model. This will make it easier for the public and NGOs to compare how different corporates are meeting their reporting requirements (if at all). In comparison, the UK Act does not provide for such a repository. Under the UK Act, organisations are required to publish their modern slavery statement on their website or to provide a copy of the modern slavery statement to anyone who requests it, if the organisation does not have a website. The Business and Human Rights Resources Centre has voluntarily set up a central repository for modern slavery statements in the UK but this is not formally monitored by the government.

Punitive Measures

Thirdly, there is a risk that there will be penalties for corporates that do not comply with the reporting requirements. The introduction of penalties from the second reporting year onwards was recommended in the Parliamentary Inquiry Report.⁶ The NSW Bill goes even further by setting out penalties for failure to report as well as for publishing information that is false or misleading in a modern slavery report.⁷ The Government's Consultation Model steered clear from penalties, expressing the view that corporates that do not comply with the reporting requirement "may be subject to public criticism."

Hong Kong Bill 2017

The Hong Kong Bill also contains a corporate reporting obligation under section 189, which is nearly identical to section 54 of the UK Act. However, the Hong Kong Bill goes much further than the UK Act (or the Australian Bill) in that section 169 provides claimants with a civil cause of action in tort against any person (individual or company) who has: (a) committed one of the offences under the Hong Kong Bill against them; or (b) knowingly benefited, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of the Hong Kong Bill. This section is derived from §1595 of 18 U.S. Code Chapter 77 (Peonage, Slavery, and Trafficking in Persons).

Interestingly, although section 169(a) is designed for claimants who have themselves suffered at the hands of human traffickers, section 169(b), as drafted, does not currently specify what sort of claimant will be given standing, begging the question of whether, for example, an NGO can bring an action under section 169(b) unilaterally. Moreover, it remains open whether section 169(b) could extend liability to defendants who, for example, benefit financially from their subsidiaries' operations, but would not otherwise owe a duty of care to victims. This is particularly an issue for larger companies, which may be deemed to have the requisite "knowledge" under section 169(b) by virtue of carrying out due diligence in preparation for meeting their reporting obligations under section 189.

Although section 169 does not expressly stipulate the types of damages which victims of slavery and human trafficking can seek, in light of the application of the equivalent provision in the United States, it is expected that civil damages

under section 169 could cover both pecuniary and non-pecuniary loss such as emotional harm, pain and suffering, inconvenience, and mental anguish. Punitive damages may also be awarded to punish the defendants and deter future illegal conduct.

Singapore Prevention of Human Trafficking Act 2014

As stated above, the PHTA does not contain any reporting requirements for corporates. However, Singapore-incorporated companies are not completely immune from providing modern slavery statements as the UK Act also imposes a reporting requirement on foreign corporates that operate in the UK. Many Singapore-incorporated companies have therefore published modern slavery statements in accordance with the requirements of the UK Act even though Singapore law does not require them to do so.

In the future, it is likely that a greater number of Singapore corporates will have to publish modern slavery statements as a result of having operations in Hong Kong or Australia. The legislation in the UK and the proposed scheme in Australia and Hong Kong place an emphasis on a corporate's global supply chain. This will certainly include many Singapore-incorporated organisations. In addition, Singapore is located in the Asia Pacific region which accounts for more than half of the total number of victims of forced labour worldwide. Corporates, who are subject to the reporting requirements in other jurisdictions may therefore put pressure on the Singapore-incorporated organisations within their supply chain to issue modern slavery statements.

Although the Singapore PHTA criminalises the use of forced labour and the participation in human trafficking, no Singapore-incorporated company has been convicted under the PHTA. This begs the question of whether, in light of the developments in Australia and Hong Kong and pressure from stakeholders, Singapore will be next to adopt modern slavery legislation aimed at corporates.

Challenges for commercial organisations

The heightened focus on corporate transparency in relation to modern slavery and human trafficking has posed certain challenges for corporates – particularly those with sprawling global supply chains. According to a research project⁸ conducted by Norton Rose Fulbright in collaboration with the British Institute of International and Comparative Law (BIICL), the prevalent challenges for corporates include

⁶ See Recommendation 5.171 of the Parliamentary Report, *Hidden in Plain Sight* (December 2017). Additionally, the Inquiry recommends the phasing in of penalties after three years for companies who fail to "adequately report", see Recommendation 5.174.

⁷ The penalties proposed in the NSW Bill are over AUD1 million for failure to report, failure to publish the report, or publishing misleading or false information in a report see NSW Bill ss 22(2), (6), (7).

⁸ See <http://human-rights-due-diligence.nortonrosefulbright.online/>

- Determining “how far is far enough” when engaging in supply chain due diligence.
- Obtaining accurate and complete information on third parties or country-specific human rights risks.
- Securing internal buy-in to change the company’s focus from business risks to impacts for rights holders.
- Managing responsibility for impacts caused by third parties.

Recommendations for commercial organisations

Companies preparing to report under modern slavery legislation should take the time to consider how they can incorporate their reporting obligations into their wider strategy for addressing human rights issues arising from their business or supply chains. This will involve

- Mapping the business and supply chains.
- Addressing slavery and human trafficking in the company’s code of conduct and obtaining input from senior management and external experts.
- Setting up an internal governance structure on modern slavery and human rights at both the operational and leadership levels.
- Including modern slavery provisions in supplier contracts, and requiring suppliers to do the same with their subcontractors.
- Conducting specific modern slavery risk assessments across the company’s own operations and suppliers.
- Disclosing any risks identified, detailing mitigation plans and demonstrating that these findings inform a company’s business decisions.
- Providing tailored modern slavery training to employees and suppliers.
- Listing bespoke key performance indicators with which the company measures its effectiveness in ensuring that slavery and human trafficking is not taking place within its business or supply chain.

While modern slavery laws are not yet in force in Australia, Singapore or Hong Kong, preparations to comply with these laws are strongly recommended, especially for corporates that have complex supply chains, or which may operate in

high risk industries. Furthermore, even if a company is not directly obliged to comply with these reporting laws, the indirect application of these laws cannot be ignored. If a company were to supply to corporates which are obliged to report, it is likely that the supplier company will nonetheless be required by the corporates to disclose its modern slavery risks and take action. Therefore, it is critical to have a keen understanding of the risks involved so as to be ready for these impending laws.

Norton Rose Fulbright is a global law firm, with offices in more than 50 cities worldwide, including cities across Europe, the USA, Canada, Latin America, Asia Pacific, the Middle East and Central Asia. Norton Rose Fulbright has experience globally assisting clients with modern slavery risk management and reporting, as well as broader business and human rights advice. Norton Rose Fulbright worked closely with the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into a Modern Slavery Act providing regular pro bono assistance and participating in the public hearing held in Sydney on June 23, 2017.⁹ Norton Rose Fulbright also has been actively participating in the Attorney-General’s Department national consultation process to refine the Government’s proposed Modern Slavery in Supply Chains Reporting model.¹⁰

Norton Rose Fulbright is currently collaborating with BIICL on a further research project focusing on human rights issues in supply chains which will seek to provide recommendations to companies, including those subject to reporting obligations under modern slavery legislation.

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⁹ The submission is available for download at <http://www.aph.gov.au/DocumentStore.ashx?id=b07d5399-4925-474d-9370-04a002977a64&subId=510714>

¹⁰ The submission to the public consultation is available at <https://www.ag.gov.au/Consultations/Documents/modern-slavery-in-supply-chains-reporting-requirement/Norton-rose-fulbright.pdf>

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