Consultation on Modern Slavery and Worker Exploitation

A Legislative Response to Modern Slavery and Worker Exploitation

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Question 1. What do you think the key policy objectives should be (see, for example, our proposed objectives on page 26)? Which of these objectives do you think are most important?

Bring New Zealand on par with legislative developments in other jurisdictions by creating legal obligations that proactively address labour exploitation, taking into account the lessons learnt from the introduction of legislation in other jurisdictions, similar to the one being proposed in New Zealand.

Increase responsibility among New Zealand companies and other organisations that would be required to report under the proposed Act for labour exploitation in operations and supply chains, acknowledging that the buying power and market influence of organisations can be used as a tool that can supplement the civil and criminal law enforcement.

Increasing awareness and attention to the prevention of labour exploitation by emphasising the multitude of factors that contribute to the risk of modern slavery. Ongoing successful enforcement of the proposed Act depends on interventions that change the behaviours among New Zealand companies and other organisations that result in violations, such as procurement practices that are only focused on price or outsourcing and subcontracting without any form of oversight.

Focusing on remediation for harm arising out of an organisation's activities, and the need for a victim – survivor centred approach with protects victims – survivors and does not blindly seek prosecution if they have committed offences because of being exploited.

Create a level playing field for businesses, with respect to efforts to address labour exploitation, and ensure that those entities seeking to do right are not penalised for their efforts, above and beyond those of less scrupulous operators.

A public reporting requirement yields important information both about leading practices amongst companies in addressing human rights harms and also where gaps in efforts persist.

There is growing demand amongst different stakeholder groups for public information on companies' human rights efforts, including amongst investors.

Question 2. Do you think that enough action is currently taken in New Zealand to address modern slavery and worker exploitation across operations and supply chains?

☐ Yes, the status quo is satisfactory

X No, more action is needed

☐ I do not know

Please explain why you think enough action is, or is not, taken in New Zealand. If applicable, please explain what changes you think are needed.

At present, modern slavery and other abuses that occur at the intersection of business and human rights are predominantly addressed by a host of non-binding standards that guide the conduct of non-state actors. This applies to New Zealand as well as to other countries. Prominent examples of current instruments are codes of conduct, self-reported audits and other voluntary standards that businesses have adopted or signed up to, with the intention of ensuring that human rights are not violated because of their actions.

In recent years there has been a growing recognition among policy makers, civil society organisations, academics, and sections of the business community that corporate voluntarism is not sufficient in and of itself to address worker exploitation. This has led to the introduction of legal instruments such as the Modern Slavery Act in the UK (2015) and in Australia (2018). By introducing its own Modern Slavery Act, New Zealand would join a growing number of jurisdictions that seek to bolster the role of the state in seeking to prevent and remediate human rights infringements through commercial enterprise.

Question 3. Do you think that New Zealand's legislation should be amended to better address modern slavery and/or worker exploitation across operations and supply chains?

☐ Yes, New Zealand's current legislation is sufficient (but non-legislative changes may be needed)

X No, legislative changes are needed

☐ Other Please explain why you think New Zealand's current legislation is or is not sufficient

The current legal framework in New Zealand does not enforce a requirement for supply chain transparency, as is the case in Australia and the United Kingdom following the introduction of a Modern Slavery Act in those jurisdictions. New Zealand should consider introducing legislation that imposes an obligation onto companies to increase supply chain transparency concerning human rights risks, which in turn should inform corporate actions to address these risks. Since the Modern Slavery Act in the UK and in Australia have been in existence for several years, there is an opportunity to learn from those experiences.

For example, a plethora of research has been published about the limited impact of the disclosure requirements imposed onto companies as a result of the Modern Slavery Act in the UK and in Australia including a recent report *Paper Promises*. Increasingly, other jurisdictions are considering or implementing human rights due diligence laws (or human rights and environment due diligence laws), which are now considered to be the 'gold standard'. As such, supplementing disclosure requirements with due diligence requirement would build on the UK and Australian experience rather than emulating them.

There is a legal precedent in New Zealand to stop the importation of goods produced by means of forced labour in the form of The Customs and Excise Act 2018 / Customs Import Prohibition (Goods Produced by Prison Labor) Order 2019, which is a legal instrument that prohibits the importation of items made or produced entirely or partially with prison labour. The United States Customs and Border Protection issues "Withhold Release Orders" when the

agency has evidence that goods are produced by means of forced labour. In Australia, the Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020, which amends the Customs Act 1901 to prohibit the importation into Australia of goods from Xinjiang province in the People's Republic of China as well as goods from other parts of China that are produced by using forced labour, was introduced in Parliament but did not come into effect.

It is recommended that New Zealand amend its Customs and Excise Act 2018 / Customs Import Prohibition (Goods Produced by Prison Labor) Order 2019, to include goods produced by forced labour and to give the customs authority to withhold importation of goods when there is reasonable evidence that such goods have been produced by means of forced labour.

Question 3A. If applicable, which type of broad approach to new supply chain legislation would you most support?

☐ Disclosure-based (either general or prescribed)

☐ Due diligence-based

X Graduated approach incorporating both disclosure and broader due diligence (proposed)

☐ Other Please explain why you prefer that approach

As explained in the response to question 2, human rights due diligence is a key aspect of the international, regional and national debates about corporate accountability for human rights abuses. In the rapidly developing area of business and human rights, the notion of *prevention* is key, and relates to the prevention of the activities of businesses around the world from causing, contributing to or being linked to adverse human rights impacts. Prevention is a key aspect of human rights due diligence and working in tandem with increased transparency, can be a useful framework for addressing human rights abuses.

Question 4. Do you agree that all entities should have to take reasonable and proportionate action if they become aware of modern slavery in their international operations and supply chains, and/or modern slavery or worker exploitation in their domestic operations and supply chains?

X Yes

☐ No

If you answered yes, please explain why. If you answered no, please explain why not.

The buying power and market influence of entities can be used as a tool that can supplement civil and criminal law enforcement. It is reasonable to assume that "larger" entities, in terms of annual revenue, not only have more buying power and market influence compared to "smaller" entities, but also have a larger social footprint through the scale of their operations and supply chains. While all entities therefore must take reasonable and proportionate action if they become aware of modern slavery in their operations and supply chains, "larger" entities can reasonably be expected to devote more attention and resources given their comparatively bigger social footprint. The expectation articulated in the UN Guiding Principles on Business and Human Rights that business enterprises should respect human rights applies to all entities, regardless of their size (UNGP14).

Question 5. What action(s) do you think would be reasonable and proportionate?

Providing transparency about potential modern slavery risks in operations and supply chains should be a baseline requirement. This requirement has been central to the many existing forms of transparency legislation that has been introduced in various jurisdictions. However, these disclosure-based requirements have resulted in a mixed performance by reporting entities

New Zealand should also be informed by the due diligence laws being introduced in Europe. For New Zealand to learn from the experience in other jurisdictions, it should consider the limited impact of existing transparency legislation while looking to developments in Europe, where there is an increased emphasis on due diligence.

This approach adds to the disclosure-based requirement, in that companies must also report on actions they have taken in response to risks and the progress of these actions. Such actions should be proportional to an entity's size and relative to the potential for severe human rights impacts because of, the industry it is in, and the risks-profile of business activities. For entities with a greater annual revenue and social footprint, it can reasonably be expected that additional attention and resources are devoted to due diligence.

In addition to this, New Zealand should draw inspiration from the Corporate Duty of Vigilance Law introduced in France in 2017, which makes entities liable for adverse human rights and environmental impacts which an effectively implemented due diligence plan would have prevented. This would provide additional incentive for entities to comply and creates an accountability mechanism in instances where harm to individuals and communities could have been avoided.

Question 6. Do you agree that small and medium-sized entities should have a responsibility to undertake due diligence to prevent and mitigate modern slavery and worker exploitation in domestic operations and supply chains for New Zealand entities they have significant control or influence over?

X Yes

☐ No

If you answered yes, please explain why. If you answered no, please explain why not.

The sourcing of goods and services from domestic and overseas suppliers has become a hallmark of the modern economy. A potential consequence of this development is that entities can quickly lose oversight over working conditions as the number of tiers in the supply chain increase. Larger entities are more likely to have extended and complex supply chains that can span multiple jurisdictions and borders. Compounding the problem further is that sub-contracting arrangements may be initiated by small and medium size organisations who typically may not be the focus on legislations which have a higher threshold for reporting.

This does not mean, however, that small and medium-sized entities should not be held responsible for worker exploitation in domestic supply chains. Similar to large entities at the apex of supply chains, small and medium-sized entities can also act as “price-makers” for suppliers of goods and services. Any entity therefore - small, medium or large - that acts as a price-maker should ensure that they do not create cost-pressures that ultimately lead to non-compliance among “price-taking” suppliers.

Question 6A. What actions or measures do you think could be reasonable and proportionate for small and medium-sized entities to meet domestic due diligence obligations? Do you think those actions would be reasonable and appropriate generally, or in specific contexts?

Small and medium-sized entities can reasonably be expected to:

- Identify modern slavery risks in their operations and supply chains, on the basis of risks factors such as risk profile of the industry, the regions in which they are active, and the kinds of goods and services that they procure;
- Take steps, proportionate to their buyer-power and market influence, to mitigate these risks, and periodically report against the progress that is being made

Question 7. Do you agree that 'medium' and 'large'-sized entities should be required to annually report on the due diligence they are undertaking to address modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains?

X Yes

☐ No

If you answered yes, please explain why. If you answered no, please explain why not.

International legislative developments show that it is no longer an option for entities to procure goods and services solely on the basis of cost, without further scrutiny concerning the circumstances in which goods are produced or services are provided. At time of writing, 81 reporting entities under the Australian Modern Slavery Act are headquartered in New Zealand (https://modernslaveryregister.gov.au/statements/) and although less easily quantifiable, several New Zealand companies are also required to report under the UK Modern Slavery Act (see, e.g.: https://puresouth.co.uk/assets/uploads/files/Modern-Slavery-Policy-December-2020.pdf). Given the strong trade links between Australia and New Zealand, Australian purchasers will already be engaging with their New Zealand suppliers in complying with the Australian Modern Slavery Act. Therefore, New Zealand businesses are already becoming familiar with this legislative trend and the need to examine modern slavery risks.

The United States Department of Labor's *List of Goods Produced by Child Labor or Forced Labor,* which contains goods produced by child labour or forced labour, provides a good illustration. As of June 23, 2021, the list comprises 156 goods from 77 countries. The broad range of goods and countries included on the list clearly exemplifies the modern slavery risks associated with a considerable number of commodities, and hence the risk that companies are may be connected to modern slavery through their supply chains.

Consequently, medium and large entities, especially those sourcing across borders, should undertake due diligence. However, although domestic supply chains on New Zealand shores have a comparatively minimal risk of being tainted by modern slavery, there are not entirely free of risk. For example, domestic industries with a low-barrier of entry for workers, characterised by low wages and high cost-pressure created by price-makers, with a sizeable cohort of temporary visa holders, have a significant risk profile. Medium and large entities should therefore also be required to apply due diligence when they are active in, or source from, industries with a high-risk profile.

Question 7A. What information should be compulsory for entities to provide in their annual disclosures?

- A profile of the entity's workforce in its operations, broken down by age, gender, type of contract and visa-status;
- A supplier overview, which details goods and services sourced, and from what geographical location, with emphasis on high risks goods, services and locations;
- A comprehensive risk assessment of the entity's operations and supply chains;
- If a due diligence law is adopted, annual disclosures should include the due diligence measures adopted. The French Act provides as follows regarding due diligence measures: 'to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls... as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship'.
- An overview of steps that were taken to address these risks, including a progress report and an overview of follow-up actions;
- A grievance mechanism to allow workers and third parties to anonymously and confidentially report workplace abuse;
- A remediation plan that details the entity's actions in instances where labour exploitation (or other human rights abuses depending on the scope of the Act) is uncovered, including what steps are taken to ensure the well-being of the individual or group that is impacted;
- Specific analysis of how impacts on children, women, migrant workers, people with disabilities, and Indigenous peoples have been considered by the reporting entity;
- A detailed case study of process and procedures followed for sourcing from a high-risk country including a candid disclosure of breaches identified in the supply chain;
- Any modern slavery and risk management frameworks that the organisation has developed and comments on its efficacy.

Question 8. Do you agree that 'large'-sized entities should be required to meet due diligence obligations to prevent and mitigate modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains?

X Yes

☐ No

If you answered yes, please explain why. If you answered no, please explain why not.

The international legislative developments show that it is no longer an option for entities to procure good and services solely based on cost. Once every two years, the US Department of Labor produces its *List of Goods Produced by Child Labor or Forced Labor,* which contains goods produced by child labour or forced labour. As of June 23, 2021, the list comprises 156 goods from 77 countries. Given the range of goods and countries included on the list, large entities sourcing across borders, should undertake due diligence.

While *domestic* supply chains on New Zealand shores have a comparatively lower risk of being tainted by modern slavery, they are not entirely free of risk. For example, domestic industries such as fruit production with a low-barrier of entry for workers, characterised by low wages and high cost-pressure created by price-makers, with a sizeable cohort of temporary visa holders, have a significant risk profile. Large entities should therefore also be required to apply due diligence when they are active in, or source from, industries with a high-risk profile.

Large entities are more likely to have extended and complex supply chains that can span multiple jurisdictions and borders. Large entities have a great amount of buying power and market influence act as "price-makers" for suppliers of goods and services. Given their influence, large entities should ensure they do not create cost-pressures that lead to non-compliance among "price-taking" suppliers.

Inclusion of worker exploitation is important as modern slavery is well established as a spectrum or continuum, with exploitation being on that continuum.

Question 8A. What actions or measures do you think could be appropriate for large entities to meet domestic and international due diligence obligations? Do you think those actions would be reasonable and proportionate generally, or in specific contexts?

Large entities can reasonably be expected to:

- Identify modern slavery risks in their operations and supply chains, based on risks factors such as risk profile of the industry, the regions in which they are active, and the kinds of goods and services that they procure;
- Take steps, proportionate to their buyer-power and market influence, to mitigate these risks, and periodically report against the progress that is being made;
- Be liable for adverse impacts which an effectively implemented due diligence plan would have prevented.

Question 9. How far across an entity's operations and supply chains should expectations to undertake due diligence apply?

We support a 'progressive realisation' approach to the implementation of the proposed law to allow reporting entities time to adapt and develop policies, procedures and systems. For example, in initial reporting period(s), first tier suppliers could be in scope, with further tiers of the supply chain added in subsequent reporting periods. There is also strong rationale for a risk-based approach to this incremental implementation, whereby a percentage – (for example) of high-risk suppliers are targeted initially and additional scope is added based on identified risks, rather than a particular tier of the supply chain.

Question 9A. What could reasonable due diligence activity look like at different supply chain tiers, and how could this be defined or reflected in the legislation?

The design of the legislation will depend on what is in scope but it is likely that the Act would include high level provisions that are accompanied by regulations that are more granular and detailed. Other jurisdictions (Australia, UK) have accompanied the Act with guidance for reporting entities which has been found to be helpful.

Other due diligence laws have included up to three tiers of the supply chain. For example, the French Droit de Vigilance includes companies that are directly and indirectly controlled, with no limits to the chain of control, over which a company exercises a decision-making power, whether they are direct subsidiaries [filles], second tier subsidiaries [petites-filles], or third tier subsidiaries [arrières-petites-filles], etc. (S. Schiller, Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre: JCP E 2017, 1193, § 5). Other models, such as the recent German Supply Chain Due Diligence Act applies primarily to direct suppliers only. For indirect suppliers, companies only have to carry out a risk analysis if they have "proven knowledge" of human rights violations. The International Federation for Human Rights describes this model as 'regrettable, since it is well known that most human rights violations occur at the beginning of the supply chain'. We agree that a full value chain, or at least a system prioritised based on risk is preferable to a system differentiated by 'tiers'.

Research by the European Financial Reporting Advisory Group ('Final Report Proposals for a Relevant and Dynamic EU Sustainability Reporting Standard Setting', February 2021) on the development of the EU Sustainability Directive highlights the importance of 'full value chain' sustainability reporting - not constrained to matters only within the reporting entity's control. They note that the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises also envisage companies' responsibility to prevent harm to people and the environment not only based 'control' or 'influence' over an activity but linked to risk (or actual) adverse human rights or environmental impact directly linked to operations, products or services - or through business relationships (including value chain). The focus then shifts to what can reasonably be done to mitigate the impact, using 'leverage'

to effect change. Priority then is given to impacts based on assessing gravity, scope and options for remedy.

In terms of useful Australian due diligence models, one example is the Illegal Logging Prohibition Act of 2012 from Australia which incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber had not been illegally logged. If an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/ or heavy fines; however, the criminal penalties do not apply to non-compliance with the due diligence requirements. The regulations attached to the Act provide clear guidance as to what will constitute compliance with the due diligence requirements.

The *Illegal Logging Prohibition Amendment Regulation* 2012 provides that: step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country-specific guideline (once they are prescribed); step 3 is risk assessment (section 13); and, step 4 is risk mitigation (section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act* 2012 (Cth) as timber 'harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested' (Section 7).

While narrowly targeted on a single sector, the Act has both an environmental and human rights focus as the impacts of illegally logged timber can be widespread.

Question 10. Are there any types of entities that should not be included in this legislation? If so, please specify and explain why they should not be included.

No, although a differentiated and proportionate obligations on different sizes of reporting entities is reasonable, as proposed in a previous question.

Question 11. Do you agree that ‘medium’ and ‘large’ entities should be defined based on revenue?

☐ Yes

☐ No

☐ Other

Please explain your view

No specific comment here, please see response to Question 13.

Question 12. What do you think the revenue threshold for defining a medium-sized entity should be? Please specify what you think the amount should be and explain why.

No specific comment here, please see response to Question 13.

Question 13. What do you think the revenue threshold for defining a large-sized entity should be? Please specify what you think the amount should be and explain why.

There are a number of models that can be adopted here. The UK and Australia use a turnover threshold (£36 million or more and$100 million or more respectively). The French Act applies to businesses with at least 5,000 employees itself and in its subsidiaries whose registered office is located within French territory; or at least 10,000 employees itself and in its subsidiaries whose registered office is located within French territory or abroad. The proposed EU Directive uses a hybrid of these:

- Group 1: all EU limited liability companies of substantial size and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide).
- Group 2: Other limited liability companies operating in defined high impact sectors, which do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of EUR 40 million worldwide and more. For these companies, rules will start to apply 2 years later than for group 1.

The thresholds (monetary or employee numbers) may indicate the size of the business and its ability to undertake risk assessment and comply with the requirements of the Acts but they do not tell us anything about the risks inherent in the nature of the business. The proposed EU model is cognisant of risk in Group 2 - 'defined high impact sectors'. In terms of effectiveness, we argue that for a law that is primarily risk focused, it is valid to prioritise businesses in higher risk sectors - if there is to be any differentiation or threshold approach used.

Question 14. How could the proposals and/or the implementation of the proposals better reflect Kaupapa Māori and Te Tiriti o Waitangi principles?

Indigenous peoples in New Zealand are best placed to comment on the relevant principles; however, it is worth noting that there is scope to improve on existing modern slavery and due diligence laws with regard to Indigenous peoples. Although Indigenous peoples globally are often disproportionately negatively impacted by business activities, specific consideration of Indigenous communities is absent from the Australian Modern Slavery Act and associated guidance. There are useful resources such as the Briefing Paper of the Indigenous Peoples Rights International (IPRI) on Indigenous Peoples, Human Rights and Business Activities. (https://iprights.org/images/resources/downloadables/BRIEFING%20BHR%20apr22%20Final.pdf)

Question 15. Are you aware of any disproportionate impacts (positive or negative) this legislation could have on Māori entities? Please explain what impacts may apply, if any.

Not an area we are able to comment upon.

Question 16. Are you aware of any disproportionate impacts (positive or negative) this legislation could have on Māori individuals? Please explain what impacts may apply, if any.

Not an area we are able to comment upon.

Question 17. What types of non-compliance should lead to enforcement action?

Given the proposed staggered approach, which requires less onerous actions from smaller entities and places additional obligations onto larger entities, it is reasonable to expect that entities in each category comply with all requirements articulated by the Act.

At the very least entities can be expected to demonstrate "technical" compliance, meaning that they provide publicly available evidence that all requirements have been met. Failure to demonstrate technical compliance should lead to enforcement action.

Non-compliance for omission of basic reporting data can be minimised through use of an online submissions portal whereby incomplete reports cannot be submitted. See McGaughey (2021 https://www.tandfonline.com/doi/abs/10.1080/1323238X.2021.1962788)

However, as entities should be encouraged to go beyond mere technical compliance, there is a need to scrutinise the degree of "substantial" compliance. This means that the actions by entities should be scrutinised in terms of quality. Entities that display technical compliance but do so in a way that is not meaningful (I.e a "box-ticking exercise") should be subject to enforcement action.Due diligence obligations can also offer additional options for 'enforcement' by communities and civil society (see French Droit de Vigilance).

Question 18. Do you think there should be different offences and tools to deal with non-compliance with different obligations (such as for disclosure versus due diligence)? Should these differ depending on the size of the entity (or other factors, such as whether an entity is run by volunteers)?

Refer to response in previous question.

Question 19. What comparable legislation do you think we should consider in developing the penalties framework for this legislation?

As discussed elsewhere: French Droit de Vigilance and proposed EU Sustainability Directive. The Dutch Child Labour Law has a compelling penalties framework, which includes an initial (relatively small) fine but more serious penalties for future non-compliance, including criminal sanctions. See: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#:~:text=In%20cases%20of%20repetition%20within,of%20up%20to%20%E2%82%AC83%2C000.

Question 20. What responsibilities, if any, should members of the governing body of the entity (such as the directors and board of a company) be personally liable for?

Directors have a general duty to act in the best interests of the company. While this may be construed narrowly, this expectation (in some jurisdictions) is broadening out from duty to shareholders alone to also include acting in the best interest of other stakeholders (for example, employees, workers, community members). Arguably, to act in best interests of company could require directors to oversee effective and comprehensive due diligence to uncover potential human rights risks to stakeholders including community members. A progressive proposal may reflect this by including director liability where due diligence is inadequate.

The proposal should aim to ensure that the directors' duties to act in the best interest of the company are substantive, not symbolic and may requires directors to ensure that appropriate human rights due diligence processes are in place, and that the directors provide full oversight and advice to the management of the company about them. This approach may need to align with reforms to company law to ensure directors' duties are consistent with an approach to corporate governance that prioritises and acknowledges human rights risk management as part of broader corporate sustainability governance.

Question 21. Should victims onshore and offshore have the ability to bring a civil claim against an entity that has failed to meet its responsibility? If so, please explain why. If not, please explain why not.

Yes, refer to response to Q22, in particular regarding the French example.

Question 22. Should entities be required to remedy any harm they have caused or contributed to, where there is a clear link between their actions and the harm? If so, how should this link be demonstrated and what types of remediation would be appropriate?

Yes. Remedy is an essential component of the business and human rights agenda and a cornerstone of the UNGPs' 'Protect, Respect, Remedy' framework. In other jurisdictions, particularly those with reporting rather than due diligence laws, such as Australia, addressing the question of remedy has been identified as one of the gaps in current practice among reporting entities (McGaughey, 2021). This is an area that requires both legislative provisions and strong supports for reporting entities. It forms part of our current research project and we would be happy to share our findings later. Consideration of remedy for the New Zealand legislation should be based on the UNGPs which state (at 25):

'Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.'

Due diligence laws such as the French Droit de Vigilance contain obligations for remedy and have associated enforcement mechanisms. For example, the first case tested under the law is against oil company Total and the plaintiffs argue that the vigilance plan published by Total is inadequate because it does not reference its Ugandan project and violates the French law. The court may consider options including: financial penalties; review of the vigilance plan; acknowledgement of the impact of its oil activities on local communities and the environment; and an order to take urgent action to prevent further human rights violations or environmental damage. (https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/)

Question 23. Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society?

X Yes (an independent oversight mechanism is required)

☐ No (oversight can be provided by Government and civil society)

☐ Other Please explain your view

An independent oversight mechanism is required. Although Government and civil society have an important role to play in ensuring that entities are compliant with the Act, a well-resourced and independent body would be able to work with Government and civil society to ensure compliance with the Act.

Question 23A. If independent oversight is required, what functions should the oversight mechanism perform?

- Evaluate the functioning of the Act, and make suggestions for its improvement over time.
- Oversee compliance of the Act.
- Serve as an advocate for the Modern Slavery Act in the business community

Question 24. Do you think a central register for disclosure statements should be established? If so, please explain why. If not, please explain why not.

X Yes

☐ No

This improves transparency and forms part of the 'regulation' of the Act. In Australia, the repository has been a useful tool for researchers and is used by reporting entities looking for examples. This was originally missing in the UK model and has subsequently been introduced.

Do you have any other comments or suggestions?

Standing and access: A central repository for modern slavery statements should be free, independent and publicly accessible. Its primary function should be to facilitate scrutiny of statements and, ideally, compliance with legislation by companies. We recommend a repository being government-operated as this will establish it as the official and legitimate location for accessing statements. Companies should be required by the Government to submit their annual statements to the repository. Companies would benefit from knowing where, and with whom, to file their statement. Other stakeholders would benefit from having a central location to access statements. Having annual statements held in a central repository would enable stakeholders to track progress over time.

Historical statements: As consecutive years' statements of reporting entities are uploaded onto a repository, we recommend retaining an ability to search and access past statements of any given entity. Noting any intended iterative approach of a Modern Slavery Act, in terms of achieving improvements in business responses to modern slavery and labour exploitation, it is important that past statements can be accessed, and content compared, to assess changes over time.

Legislative compliance: Based on our collective experience, which includes as operator of the Modern Slavery Registry in the UK and as users of the Australian Government's Modern Slavery Statements Register, we suggest establishing some form of compliance scoring, or

pass/ fail system. In this way, repository users can readily identify whether a reporting entity is meeting its reporting obligations under the MSA and businesses will be encouraged to engage meaningfully with the law.

Usability: The repository should be a resource that is useful across different stakeholder groups. To be effective, it will require functionality that allows users to search and collate statements according to a user's specifications, such as by company name, country of headquarters, sector/ industry, revenue-band and stock exchange (if applicable). It could also provide access to additional resources such as guidance, analysis or commentary published by the Government and civil society. To determine which functionality and features would be most useful for stakeholders, the Government may wish to consider collaborating in the design of the repository with external experts. For the central repository to operate effectively, a list of the companies required to comply with the reporting provision is critical. Compliance can be more effectively monitored, and companies held to account, if there is clarity on which entities are required to report. The repository should have an advanced search function to enable effective search and scrutiny of statements. The Australian repository has been refined over time and contains some useful search functionality.

We recommend that any repository for modern slavery statements would meet the following criteria:

- free, open and publicly accessible
- reliably and consistently funded by the Government
- continuously updated
- historical to facilitate year-on-year progress to be tracked
- single, central location
- user-friendly
- downloadable
- easily searchable to facilitate analysis and comparison
- well-publicised

Question 25. What support services, products or other guidance do you think are most needed? What would be of greatest benefit to you?

Guidance and awareness-raising:

Accompanying statutory Guidance should be prepared in consultation with external stakeholders including from business, the investor community, trade unions and civil society.

The guidance should be clear, comprehensive and detailed. It should explain how to comply with the reporting and due diligence requirements. It should also reflect existing corporate responsibilities under the UN Guiding Principles on Business and Human Rights (and Interpretive Guide).

We further recommend that the guidance is launched and publicised ahead of enactment. The introduction of any new law to address labour exploitation should also be supported by a public awareness campaign. A successful public campaign would increase engagement by businesses, investors and consumers with the new requirements. Such a campaign should aim to raise awareness amongst both business and the wider community about the new legislative requirement as well as, more broadly, the human rights risks associated with supply chain sourcing.

A public conference to raise awareness amongst reporting entities about new legislative requirements is also recommended to ensure uptake and compliance with any new law.
In Australia, there is some evidence that additional training and professional development would have benefitted reporting entities (McGaughey, 2021: https://www.tandfonline.com/doi/abs/10.1080/1323238X.2021.1962788).

Question 26. What do you consider would be needed from the regulator to support the adoption of good operational and supply chain practice, and compliance with the proposed responsibilities?

- Maintain the central register for modern slavery disclosure statements
- Produce guidelines that assist entities in complying with the Act
- Monitor compliance and quality of reporting and actions taken by entities
- Monitoring of compliance and quality of reporting
- Advocacy and awareness-raising

Question 27. Do you consider a phase-in time is needed for this legislation? If so, do you consider the phase-in should apply to the responsibilities or application of penalties, or both? Do you consider a different phase-in period should apply in relation to domestic responsibilities compared to internationally-focused responsibilities?

We anticipate little phase-in time as we note that there is extensive international experience available now, and as discussed above, some New Zealand companies already report under comparable laws.

However, a graduated penalties system may be considered – low penalties for initial non-compliance, followed by more serious penalties for repeated breaches. (See Dutch Child Labour Law, discussed here: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#:~:text=In%20cases%20of%20repetition%20within,of%20up%20to%20%E2%82%AC83%2C000)

Question 28. What additional monitoring, evaluations and review mechanisms are needed, if any, to support this legislation?

A periodical review of the Act and parliamentary reporting on its functioning. In addition, in Australia, support for academic and civil society research in this area was identified as a gap and as such was supported under the National Action Plan to Combat Modern Slavery (NAP). This has been important to develop networks and robust research to inform evidence-based policy.