



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Addressing modern slavery and worker exploitation in supply chains: agreement to release public consultation document	Date to be published	14 April 2022

List of documents that have been proactively released

Date	Title	Author
9 March 2022	<i>Addressing modern slavery and worker exploitation in supply chains: agreement to release public consultation document</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
9 March 2022	<i>Cabinet Economic Development Committee Minute of Decision: Addressing modern slavery and worker exploitation in supply chains: agreement to release public consultation document</i>	<i>Cabinet Office</i>
4 March 2021	<i>Addressing modern slavery in international supply chains</i>	<i>MBIE</i>
4 August 2021	<i>Addressing Modern Slavery in Supply Chains: High-Level Legislative Options</i>	<i>MBIE</i>
1 October 2021	<i>Addressing Modern Slavery in Supply Chains: Further Decisions for Public Consultation</i>	<i>MBIE</i>
1 October 2021	<i>Addressing Modern Slavery in Supply Chains: Further Decisions for Public Consultation Annex Five: Literature review on the impact and effectiveness of modern slavery legislation</i>	<i>MBIE</i>
27 October 2021	<i>Further advice on the relationship between the duty to prevent employment standards breaches and modern slavery legislation</i>	<i>MBIE</i>
20 December 2021	<i>Modern slavery and worker exploitation draft discussion document and Cabinet paper</i>	<i>MBIE</i>

Information redacted**YES / ~~NO~~**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of privacy of natural persons, free and frank expression of opinions, international relations, and confidential advice to government.



BRIEFING

Addressing modern slavery in international supply chains

Date:	4 March 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1964

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree the scope and proposed policy objectives	11 March 2021

Information for Minister(s)		
	Action sought	Deadline
Hon Nanaia Mahuta Minister of Foreign Affairs	For information only	
Hon Damien O'Connor Minister for Trade and Export Growth	For information only	
Hon Kris Faafoi Minister for Immigration	For information only	
Hon David Clark Minister for Commerce and Consumer Affairs	For information only	

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	Privacy of natural persons	✓
Rebekah Hood	Principal Policy Advisor		Privacy of natural persons	
Paramita Turner	Senior Policy Advisor	Privacy of natural persons		

The following departments/agencies have been consulted
Ministry of Foreign Affairs and Trade and Customs.

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Addressing modern slavery in international supply chains

Date:	4 March 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1964

Purpose

To seek your agreement on the scope and proposed policy objectives for further work on options to address modern slavery in international supply chains.

Executive summary

In November 2020, you directed officials to investigate whether we are adequately protecting workers in New Zealand and elsewhere from modern slavery, including through the work on the Plan of Action against Forced Labour, People Trafficking and Slavery and investigating the options for addressing slavery through international supply chains.

This work also responds to the commitment in Labour's 2020 Manifesto to "[explore] the implementation of modern slavery legislation in New Zealand to eliminate exploitation in supply chains".

Modern slavery is a significant problem that is found in every country. While there are significant methodological challenges in attempting to estimate its scale, current estimates from the International Labour Organization (ILO) suggest there are over 40 million victims of slavery around the world (comprising 25 million victims of forced labour, including sexual exploitation, and 15 million victims of forced marriage). We know that modern slavery is also occurring in New Zealand, though our current information based on prosecutions is unlikely to reflect the full spectrum of people who are trafficked or exploited in New Zealand.

New Zealand is delivering a robust framework for addressing exploitation domestically (including through recent changes arising from the Migrant Exploitation Review), but it does not effectively address modern slavery in international supply chains where slavery is found most often. While New Zealand is actively engaged on these issues in bilateral and multilateral fora, there is an opportunity to take further action to address modern slavery in international supply chains.

We recommend that further assessment of potential options to address modern slavery in international supply chains be guided by the following policy objectives:

1. Maintain and enhance our international reputation
2. Reduce the prevalence of modern slavery internationally
3. Raise awareness of modern slavery, and drive behavioural and cultural change
4. Support New Zealand's domestic framework in preventing exploitation, protecting victims, and enforcing the law.

A wide range of approaches have been taken by other countries to address modern slavery in supply chains. These approaches range from light touch to more intensive, and can include (for example) specific awareness-raising initiatives, mandatory supply chain reporting obligations through legislation, import bans on goods made with forced labour, and overseas development assistance.

Recommended actions

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that the 2020 Labour Manifesto included a commitment to “*exploring the implementation of modern slavery legislation in New Zealand to eliminate exploitation in supply chains*”.
Noted
- b **Note** that New Zealand has a robust framework for addressing modern slavery domestically, and this is being enhanced through further work including the legislative, policy and operational changes arising from the Migrant Exploitation Review and the Plan of Action against Forced Labour, People Trafficking and Slavery.
Noted
- c **Note** that there are gaps in our approach to addressing modern slavery in international supply chains, for which our current response is primarily through intergovernmental engagement.
Noted
- d **Agree** the policy objectives to guide further work should be to:
- i. Maintain and enhance our international reputation
 - ii. Reduce the prevalence of modern slavery internationally
 - iii. Raise awareness of modern slavery, and drive behavioural and cultural change
 - iv. Support New Zealand’s domestic framework in preventing exploitation, protecting victims, and enforcing the law.
- Agree / Disagree*
- e **Agree** to officials undertaking work to investigate legislative and non-legislative options for addressing modern slavery within international supply chains, and assess the appropriateness and effectiveness of these options within a New Zealand context.
Agree / Disagree
- f **Agree** that officials undertake this assessment and provide advice to you on options to address modern slavery in international supply chains by May 2021.
Agree / Disagree
- g **Note** that you are meeting with officials on the 10 March to discuss this briefing.
Noted

Nita Zodgekar
Manager, International Labour Policy
Labour, Science & Enterprise, MBIE

..... / /

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. Worker exploitation and modern slavery practices take many forms. They can range from breaches of minimum employment standards to more controlling/coercive criminal behaviour. At the most extreme end of the spectrum, they can include subjecting persons to debt-bondage, serfdom, forced labour, forced marriage, exploitative child labour, human trafficking and other slavery-like practices. Collectively, these practices have become known as “[modern] slavery” in international fora.
2. In November 2020, you directed officials to investigate whether we are adequately protecting workers in New Zealand and elsewhere from modern slavery, including:
 - a. finalising and implementing the national Plan of Action against Forced Labour, People Trafficking and Slavery;
 - b. expanding our knowledge base/evidence on the scale of the modern slavery and forced labour issue in New Zealand; and developing our understanding of different approaches or mechanisms for addressing modern slavery within supply chains
 - c. providing advice on the legislative and non-legislative options with regards to addressing modern slavery within international supply chains [briefing 2021-1137 refers].
3. In relation to (a), Cabinet agreed the new Plan of Action against Forced Labour, People Trafficking and Slavery (‘Plan of Action’) in December 2020 [DEV-20-MIN-0178 refers] and you will be launching it on 16 March 2021. This paper provides further information and advice on (b) and (c).
4. This work responds to the commitment in Labour’s 2020 Manifesto to “[*explore*] the implementation of modern slavery legislation in New Zealand to eliminate exploitation in supply chains”. It also responds to the Government’s agreement, as part of New Zealand’s 2019 Universal Periodic Review, to “consider introducing legislation requiring businesses to report publicly on transparency in supply chains”. This action is reflected in the Plan of Action.
5. For the purpose of this work we are defining supply chain transparency as taking steps to understand the risks and instances of slavery within the global supply chains of the businesses trading within New Zealand. How we do this and what other actions are required as part of this work (for example audits; reporting; steps taken to mitigate risks; or any actions to address the risks) will form part of future advice to you.

Modern slavery is a significant problem that is found in every country

6. There are significant methodological challenges in attempting to accurately measure the extent of slavery and worker exploitation. The hidden nature of this activity, and the difficulties of accessing victims, makes data collection difficult.
7. The most used data set for understanding the prevalence of slavery at a country-level is the Global Slavery Index (GSI) developed by the Walk Free Foundation. This is an internationally recognised estimation that provides national estimates of modern slavery using a mixture of survey data and predictive modelling based on risk factors. On this basis, the GSI has estimated that there are approximately 3,000 victims of slavery in New Zealand.
8. In 2018, the GSI estimated that internationally there are over 40 million victims of slavery, comprising 25 million victims of forced labour and 15 million victims of forced marriage. 70 per cent of these victims are women and girls. Slavery was found to be most prevalent in

Africa, followed closely by Asia and the Pacific region. The Walk Free Foundation considers that these estimates are conservative, given the gaps in data in key regions.

9. A victim of slavery can face physical and emotional harm that can last for the rest of their lives. This human suffering is hard to quantify or summarise, but can range from initial health costs linked to physical or sexual violence through to mental health and wellbeing concerns.
10. The costs, whilst mostly felt in the domestic labour market that survivors are a part of, can nevertheless contribute to wider economic impacts felt across the globe. Modern slavery can include the denial of economic agency, which impacts international and domestic economies. This can include significant impacts on productivity, which are felt throughout global supply chains.
11. Current estimates on the extent and nature of these hidden crimes in New Zealand are derived from overseas experience, and do not align with New Zealand's experience to date. Most of the 51 trafficking victims identified in New Zealand to date have been migrant men who were trafficked for the purpose of labour exploitation. This is unlikely to reflect the full spectrum of people who are exploited in New Zealand, as the hidden nature of these crimes means that vulnerable people are less likely, or able, to seek help or report their experience.
12. Independent research commissioned by MBIE identified that exploited temporary migrant workers suffer both physical and psychological harm, and that harm also affects their families. Key types of exploitation identified in the research included the under-payment or non-payment of wages; non-compliance by employers with employment agreements; the non-payment of taxes; and denial of annual holidays and holiday pay. Some workers experienced controlling and coercive behaviours, such as surveillance while working, control of their accommodation and movement, intimidation, and threats related to their immigration status.
13. Increasing awareness of the scale of the problem has helped draw attention to it, including the role that businesses play in driving forced labour through international supply chains. Global dialogue has increased in recent years as governments, businesses and non-governmental organisations drive global efforts to tackle what is a global issue (for example through the Bali Process¹). This has led to greater awareness and also pressure for New Zealand to take further action against modern slavery in international supply chains.

New Zealand is developing a robust framework for addressing exploitation, and this is being further strengthened

14. New Zealand's domestic legal framework criminalises the range of practices often associated with modern slavery. This includes specific criminal provisions against slavery, dealing in persons under 18 (including for sexual exploitation or forced labour), trafficking in persons (including for sexual exploitation or forced labour), and the exploitation of unlawful employees and temporary migrant workers. Immigration New Zealand and Police are directly responsible for enforcement, and coordinate and cooperate as appropriate to address these forms of offending.
15. The Plan of Action against Forced Labour, People Trafficking and Slavery includes an action to consider amending the *Crimes Act 1961* to strengthen provisions for the criminalisation of trafficking in those under 18 years.
16. New Zealand's existing framework will be further supported by the changes arising from the Migrant Exploitation Review, which the Government initiated in 2018. In July 2020, Cabinet

¹ The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ("Bali Process"), of which New Zealand is a member, was established in 2012 is a forum for policy dialogue, information sharing and practical cooperation to help the region address these challenges.

agreed to invest \$50 million over four years to support a wide-ranging set of legislative, policy and operational changes identified through the review and tested in public consultation.

17. Many of those changes to address migrant exploitation are currently being developed or implemented, and it will be some time before evaluations are undertaken. The overall work programme is still ongoing, and includes providing further advice on the new duty to prevent employment standard breaches [briefing 2021-2383 refers].
18. Changes to New Zealand Government Procurement have also been undertaken in recent years to support domestic and international efforts to reduce exploitation:
 - a. In 2018, the Governments of Australia, Canada, New Zealand, United Kingdom and the United States jointly launched the *Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains*. These principles were focused on governments taking steps to prevent and address human trafficking in government procurement practice; encouraging the private sector to take similar action; and encouraging governments to advance responsible recruitment policies and practices.
 - b. Government Procurement Rule 19 was introduced in 2019 and requires that for designated contracts², agencies must require their suppliers to ensure and demonstrate that they, and their domestic supply chain, comply with all relevant employment standards and health and safety requirements. They must also conduct sufficient monitoring to ensure the commitments made for ensuring good working conditions are delivered and reported on. This is in accordance with the United Nations Guiding Principles on Business and Human Rights.

19. Free and frank opinions

20. New Zealand is also contributing to a variety of Overseas Development Initiatives to support work addressing slavery and exploitation. International relations

Through our development assistance programme, New Zealand funded a number of anti-trafficking and related exploitation projects for vulnerable communities in Fiji, Indonesia, Mexico and South Africa for 2018-2019. MFAT has also entered into a NZD \$8.2 million Negotiated Partnership programme with Tearfund for 2021-2026 to bring Tearfund's community-based livelihoods work together with their anti-trafficking and exploitation work programme. The programme will be focused in the Solomon Islands, Fiji, Vanuatu, Myanmar, and Sri Lanka.

But there are gaps in our approach to addressing modern slavery in international supply chains

21. While New Zealand's domestic framework provides for a comprehensive approach to addressing exploitation in New Zealand, it does not effectively address modern slavery in international supply chains where slavery is found most often.

² The designated contract areas for this priority outcome area are cleaning services, security services, and forestry contracts in relation to employment standards, and all contracts with a particular focus on forestry contracts and construction contracts in relation to health and safety.

22. Currently, New Zealand's engagement on these issues is primarily driven through bilateral and multilateral engagement. This includes:
 - a. Promoting the inclusion of labour chapters in Free Trade Agreements which place obligations on parties in relation to the ILO's Fundamental Principles and Rights at Work (including the elimination of all forms of forced or compulsory labour).
 - b. Engagement in multilateral fora, such as the:
 - i. Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ("Bali Process"), which brings together governments from across Asia-Pacific to strengthen cooperation against these practices. This includes active participation in the Bali Process Government and Business Forum, which enables engagement between governments and the private sector to combat human trafficking and related exploitation.
 - ii. Pacific Island Forum Fisheries Agency and the Western and Central Pacific Fisheries Commission (WCPFC). In the WCPFC, New Zealand is leading work to improve labour standards on fishing vessels through the development of legally binding measures.
23. New Zealand also has an ongoing presence in a range of countries which involves supporting both those countries and New Zealand to address exploitation and forced labour. This includes:
 - a. Sharing information on forced labour, people trafficking and slavery through the Pacific Island Development Community (PIDC)
 - b. Providing support through immigration liaison officer positions in South-East Asia
 - c. Developing capacity building modules on trafficking in persons, forced labour and slavery to Pacific Island partners as part of the Hakili Matagi Immigration Core Elements Curriculum
 - d. Offshore presentations that support the disruption and prosecution of forced labour, people trafficking and slavery (through channels such as the Bali Process, Fiji Police and Immigration workshops, the Samoan Police awareness programme, offshore INZ Risk and Verification Manager training).
24. While these engagements are not specifically focused on preventing modern slavery in supply chains, reducing forced labour and trafficking within the Pacific and South-East Asia regions can assist in protecting the integrity of goods and services supplied to New Zealand enterprises.
25. Addressing this issue further may contribute to sustaining the social licence for New Zealand trade policy and is consistent with New Zealand's long-held active approach to human rights issues. The Government has accepted the Trade for All advisory board's recommendation to review legislation to ensure forced labour is adequately addressed.
26. During the development of the Plan of Action, a targeted public consultation was carried out with key stakeholders including across civil society and business. The majority of respondents (28 out of 37) to the consultation commented specifically on Action 16, to *"Consider introducing legislation requiring businesses to report publicly on transparency in supply chains, to help eliminate practices of modern slavery"*. All who commented were in favour of this action, and most submitters also recommended that it be treated as a major priority.
27. In addition, there has been a significant rise in news coverage and public interest on modern slavery issues. You have been lobbied, as have officials, regarding the potential for modern

slavery legislation in New Zealand. This has included a call by the Walk Free Foundation for New Zealand to conduct an official inquiry into the need for legislation, as Australia did in 2017.

28. The Ministry of Foreign Affairs and Trade (MFAT) have also been approached by civil society groups such as the Business and Human Rights Resource Centre, encouraging the Government to support work throughout the Pacific and in our own development programme procurement processes, to promote compliance with the UN Guiding Principles on Business and Human Rights.
29. The Walk Free Foundation (which produces the Global Slavery Index) ranked New Zealand 52nd out of 183 countries assessed based on their responses to modern slavery³. One of Walk Free's criticisms of New Zealand was the lack of response to international supply chains and the impact of New Zealand businesses in this context.

Market failures suggest the need for further government intervention

30. Modern slavery presents a significant social and financial cost to victims and their communities. It also presents a competitive disadvantage for businesses that conduct trade fairly, and is a barrier to productive, inclusive and sustainable economic growth.
31. There is also an increasing societal expectation for transparency in supply chains, including on the prevalence of modern slavery within them, which may have future trade implications.
32. Furthermore, there is an opportunity for New Zealand to take a leadership role with government support for actions that address modern slavery. The need for a more level-playing field based on minimum standards of business practice, in combination with the public good outcomes that could be achieved by such practice, suggests that government intervention may be warranted in this case. Proposed policy objectives and potential interventions are discussed in more detail below.

We propose four policy objectives to guide further work to address modern slavery in international supply chains

33. We recommend that the following policy objectives guide the next stages of this work:
 1. Maintain and enhance our international reputation
 2. Reduce the prevalence of modern slavery internationally
 3. Raise awareness of modern slavery, and drive behavioural and cultural change
 4. Support New Zealand's domestic framework in preventing exploitation, protecting victims, and enforcing the law.
34. These objectives will inform further work on policy options for addressing modern slavery within international supply chains. Any assessment will also include consideration of the cost-effectiveness of each intervention.

Objective 1. Maintain and enhance our international reputation

35. As a small nation lacking significant economic and strategic power, New Zealand is dependent on strong international connections and the rules-based multilateral system. It is through these connections that New Zealand influences relevant agendas and it is recognised as a strong advocate of international law, sustainable development, and human rights. Our reputational strength lies in our observance of international standards and

³ Walk Free Initiative: Measurement, Action, Freedom, June 2019

commitment to universal human rights and it is vital that this is retained. In relation to modern slavery, we do this primarily through relationships at fora such as the ILO and the Bali Process where there is an increasing focus on the issues of modern slavery and what members are doing to address them.

36. A significant number of our closest world economies have adopted legislation aimed at addressing modern slavery in international supply chains (see Annex Two). For example, three of our 'Five Eyes' partners (Australia, Canada, and the UK) have taken or started to take legislative action requiring businesses to publicly report on their supply chain practices. The UK and Australia brought in modern slavery legislation in 2016 and 2018 respectively, and Canada is currently taking legislation through Parliament. In the United States, California was one of the first in the world to introduce this type of legislation (in 2012). Early in 2021, responding to reports of forced labour in the Xinjiang region of China, the UK and Canada announced additional initiatives addressing forced labour in international supply chains, further strengthening their existing modern slavery measures.
 37. Other key international partners, such as many of the EU Member States and near EU countries, have either implemented or are in the process of implementing supply chain transparency legislation as well. The majority of these approaches require businesses to report on slavery within their supply chains in some form. The approaches are summarised in Annex Two.
 38. Given these international developments, it is likely that the question of what New Zealand is doing to address modern slavery in international supply chains will continue to be asked.
- International relations**

Objective 2. Reduce the prevalence of modern slavery internationally

39. New Zealand needs to take action alongside our global partners to address and reduce slavery, as it will take a collective global effort of like-minded countries to reduce slavery around the world.
40. Supply chains have become more complex and larger in size over the last few decades, as economies around the world have opened to international trade. Multinational businesses account for the majority of international trade but even small local businesses are now trading across the world. These developments, together with sometimes weaker responses in other nations, mean that tackling modern slavery will take a collective global effort.
41. These risks are exacerbated by the economic and social impacts of COVID-19. The ILO has noted that COVID-19 is disproportionately affecting women, while the UN Office on Drugs and Crime has indicated that criminals are adjusting their business models to the 'new normal', especially through the use of modern communications technologies.

Objective 3. Raise awareness of modern slavery, and drive behavioural and cultural change

42. Government action to address modern slavery in supply chains can only be done successfully when it is in partnership with businesses and consumers. Consumers are increasingly aware of slavery and other ethical issues but there is evidence⁴ to suggest that most, whilst being against these practices, are not aware of the scale at which it occurs domestically and within the supply chains of the products they buy.

⁴ For example, a poll conducted by the University of Hull, United Kingdom in 2017 found that whilst 75% of those interviewed were aware that slavery took place, only 8% had any idea of its scale.

43. We expect that businesses do not want slavery to exist within their supply chains, including for the purpose of avoiding legal and reputational risks. There may also be a financial business case for eradicating slavery within supply chains, as well as a moral one. A report by the CORE Coalition⁵ discussed the benefits to businesses as ranging from improved risk assessment and investor relations, through to increased staff retention and improved relationships with consumers in an increasingly ethically conscious market. Conversely, Sports Direct (a large UK based business) lost 11 per cent from its share price in the wake of serious allegations of how workers were treated.

Objective 4. Support New Zealand's domestic framework in preventing exploitation, protecting victims, and enforcing the law

44. Taking action on slavery in international supply chains should work in partnership with the domestic framework already established, the changes taking place following the Migrant Exploitation Review and the actions agencies have committed to through the Plan of Action.
45. Measures to address modern slavery in supply chains can help to increase the publicity of these practices domestically. An independent review of the UK Modern Slavery Act suggests it has helped increase awareness of modern slavery and led to an increase in reporting to the police. The number of live police investigations into modern slavery in the UK increased from 188 in December 2016, to 1,640 in May 2020. In addition, in 2019 there was a 67 per cent increase in offences identified compared to 2018, resulting in a 17 per cent increase in prosecutions and 27 per cent increase in convictions for modern slavery-related crimes.
46. There may also be parallels between the new duty to prevent employment standards breaches currently under development [briefing 2021-2383 refers] and the supply chain management and transparency obligations that are typical to modern slavery legislation. The new duty to prevent employment standards breaches will apply to lead firms' domestic supply chains, and not their international supply chains (as in modern slavery legislation). However, the responsible business conduct it will incentivise may complement any international supply chain reporting and management obligations that could be included in a Modern Slavery Act in New Zealand, were such legislation to be introduced.

There are a range of possible interventions to address modern slavery in supply chains

47. There are various approaches taken by other countries globally, which New Zealand is not currently doing, to address the issue of modern slavery in supply chains. These approaches range from light touch to more intensive, and include the following:
- Supply chain transparency through mandatory reporting and other due diligence obligations (through legislation)
 - Awareness campaigns with consumers and businesses, including providing best practice guides
 - Creating a new office as a watchdog over businesses
 - Facilitating business leadership
48. These approaches are discussed below and summarised in Annex Two.
49. There are limited evaluations available for these approaches, as many have either been recently adopted or are under development. However, initial evaluations are starting to

⁵ CORE is a UK civil society coalition on corporate accountability.

emerge for those approaches which have been in place for a longer period of time, which are discussed below.

International approaches to addressing modern slavery in supply chains

Supply chain transparency through mandatory reporting and other due diligence obligations (legislation)

50. Supply chain legislation has been introduced in other countries requiring large businesses to report publicly on slavery within their international supply chains, including the steps they are taking to address any problems. This does not seek to enforce the labour laws of each country in foreign jurisdictions, but rather supports international laws and agreed standards. There are various forms and approaches that these interventions have taken.
51. The legislation takes many different forms in each jurisdiction. Jurisdictions vary in terms of the size of businesses they target and the related support (eg independent commissioners and toolkits). There are also differences in the level of duty placed on organisations. Some require public statements of efforts to identify slavery; others have a requirement to thoroughly audit supply chains; and some (such as the EU) go further by placing a duty of care liability to prevent and protect workers in supply chains from exploitation.
52. Supply chain transparency legislation seeks to raise awareness domestically and internationally of these issues. It drives modern slavery into the public and business domain to contribute to the eradication of these practices through consumer choice and business relationships. Further, it intends to raise awareness that this activity can also occur domestically, and by creating more public responsibility and awareness, lead to an increase in prosecutions.
53. The UK was one of the first countries to implement a Modern Slavery Act (MSA) in 2016 with supply chain reporting requirements, although the US state of California had brought in similar legislation in 2012. Since the UK, other countries have followed suit including the EU Member States and Australia, and Canada is considering adopting a similar approach.
54. This approach has been supported in the UK and Australia by the development of a public repository of reports, and establishment of units to support good business practice.
55. Financial penalties for non-compliance have been a controversial component of this approach. The UK MSA now includes a financial penalty if businesses do not comply with the requirements of the statements, following an independent review of its law. Australia will be reviewing whether penalties should be introduced as part of a forthcoming statutory review of the legislation.
56. This approach varies in terms of which businesses are targeted. This is usually decided through specifying a threshold based on revenue or number of employees.
57. There is a question of how many New Zealand businesses trading internationally are already reporting in other countries as a result of their legislation. However, more work needs to be done to understand this number further. This must be done in conjunction with assessing the requirements of each one of these approaches and any gaps which may exist; as well as how they meet the policy objectives outlined above.
58. There are limited evaluations for the legislative approach as many are still new. However, an independent review of the UK approach suggested it had helped increase awareness of modern slavery and led to an increase in reporting to the police. This has in turn resulted in

an increase in the number of prosecutions and convictions. There is also evidence⁶ that voluntary initiatives do not on their own, drive compliance.

Awareness campaigns with consumers and businesses, including providing 'best practice guides'

59. Examples of this type of initiative include Walk Free Foundation's Business and Investor Toolkit, the UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises and New Zealand's own work on Procurement Principles and ethical and sustainable work practices through Employment New Zealand.
60. These awareness campaigns contain a range of information and guidelines which include:
 - a. Advice on why businesses should care about slavery in their supply chains and generally from both a moral and business perspective
 - b. Tools to use to take action such as listing firms who can help with auditing supply chains
 - c. Links to other examples of best practice and resources from other businesses and international organisations.
61. These initiatives could benefit from being more cost effective to implement and designed to harness action from businesses which want to independently take action for commercial reasons, and also to reinforce their own values.
62. However, as discussed in paragraph 58 above, evidence⁷ suggests that these voluntary initiatives alone will not drive wholesale change in this area. It therefore does not directly target those who are not already motivated to take action in this space.

Creating a new office as a watchdog over businesses

63. In Canada, the role of Ombudsperson for Responsible Enterprise was established in 2018 and mandated to investigate allegations of human rights abuses linked to Canadian corporate activity abroad. The Ombudsperson undertakes collaborative and independent fact-finding, makes recommendations, monitors implementation of those recommendations, and reports publicly throughout the process.
64. In the UK, an Anti-Slavery Commissioner role has also been established through legislation as part of the modern slavery response. Its role includes advocating for victims and the elimination of these practices, and holding the government to account.
65. There are limited evaluations of the effectiveness of this approach but more analysis will be completed over the coming weeks. It is also worth noting that the UK Anti-Slavery Commissioner is part of its legislation and compliments its mandatory reporting. Canada is implementing similar legislation as well.

Facilitating business leadership

66. There is an opportunity to facilitate business leadership to drive the adoption of practices to address modern slavery in supply chains. A key barrier is the lack of coordination across businesses, meaning there can be little visibility over how actions are implemented in practice.
67. The Government currently leverages procurement to drive good employment practices in the domestic supply chains of contracted businesses (particularly in the cleaning, security and forestry sectors). However, more could be done to facilitate best-practice information sharing

⁶ United Nations: Report of the working group on the issue of human rights and transnational corporations and other business enterprises, 16 July 2018 (A/73/163)

⁷ United Nations: Report of the working group on the issue of human rights and transnational corporations and other business enterprises, 16 July 2018 (A/73/163)

to support efforts to improve these practices across international supply chains. This could follow from approaches that have been undertaken to promote environmental sustainability, such as the organising of fora and engagement with key business groups, while involving others including unions and NGOs.

Other considerations in combatting modern slavery in supply chains

68. This work on supply chain transparency is specifically focused on ensuring that businesses are taking action to address modern slavery in their own supply chains. Actions can also be taken to address modern slavery outside of a supply chain transparency approach. These interventions include directly stopping the flow of goods made as a result of slavery, or tackling the root causes of such practices (including through overseas development assistance). They are therefore primarily foreign policy and trade issues and any further work would need to be prepared through those portfolios.

Placing import bans on goods made with forced labour

69. The US has prohibited the import of any products produced wholly or in part by forced labour. Canada is considering the introduction of legislation which would enable it to similarly ban the import of goods produced with forced labour. Some countries have implemented bans on specific products and regions associated with allegations of forced labour. For example, the US issued a Withhold Release Order against cotton products and tomato products produced in Xinjiang in January 2021. The Australian Senate is currently considering a Bill that would prohibit importation of all goods from Xinjiang region and other regions in China using forced labour.
70. In New Zealand, two previous Bills proposing to ban foreign slave labour goods (in 2009 and 2016) failed to progress, due to difficulties in defining slavery or forced labour and the ability to enforce such a ban. There is currently no feasible way to assess the exact origin of goods and the conditions under which they were produced.
71. More work would need to be undertaken to understand if this approach could be re-worked to make it a feasible option for New Zealand. This would include consideration of how well it has worked in other jurisdictions

Confidential advice to Government

Addressing controls on the export of goods to prevent their diversion towards forced labour

72. Another consideration in combatting forced labour in international supply chains is addressing whether measures could be adopted to ensure goods exported overseas are not used as inputs to products produced by forced labour, or are not diverted towards repression, arbitrary detention or forced labour, for example security equipment.
73. Under New Zealand's current export controls regime, exports which may be used (directly or indirectly) for a military, paramilitary, militia or police purpose require an export permit. There is, however, limited scope for exploring if export controls could be widened to more effectively control for goods which could contribute to forced labour. This would involve legislative change to the definition of 'military' to 'security' which could then encompass other internal security organisations.

Targeting overseas development assistance initiatives

74. Practices associated with modern slavery can be addressed through programmes such as those led by the ILO and the International Organization for Migration (IOM), which can be reliant on external funding including from governments and businesses.
75. As summarised earlier, New Zealand currently contributes to a range of overseas aid projects which are working towards reducing the instances of slavery globally. These range from partnerships with Tearfund to work with their anti-trafficking and exploitation projects

International relations

76. The impact of overseas development assistance initiatives can vary based on the nature of the intervention and other contextual factors.

Next steps

77. If you agree, officials will provide you with an assessment of policy options to address modern slavery in supply chains by May 2021. This analysis will include an assessment against the policy objectives you agree to and how these approaches would translate into the New Zealand context.
78. Following this, we will provide you with further advice to agree our response to the manifesto commitment and seek Cabinet approval.
79. An indicative timeline for the next stages of this work is as follows:

Milestone	Timing
Advice on the assessment of policy options for New Zealand	May 2021
Final agreement of options to test in public consultation	July 2021
Cabinet paper and draft public consultation document submitted for approval	Late 2021

Annexes

Annex One: Approaches to addressing modern slavery in New Zealand

Annex Two: Summary of the approaches taken by other countries/jurisdictions

Annex One: Approaches to addressing modern slavery in New Zealand

"[Modern slavery] refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power."

ILO & Walk Free Foundation (WFF), 2017

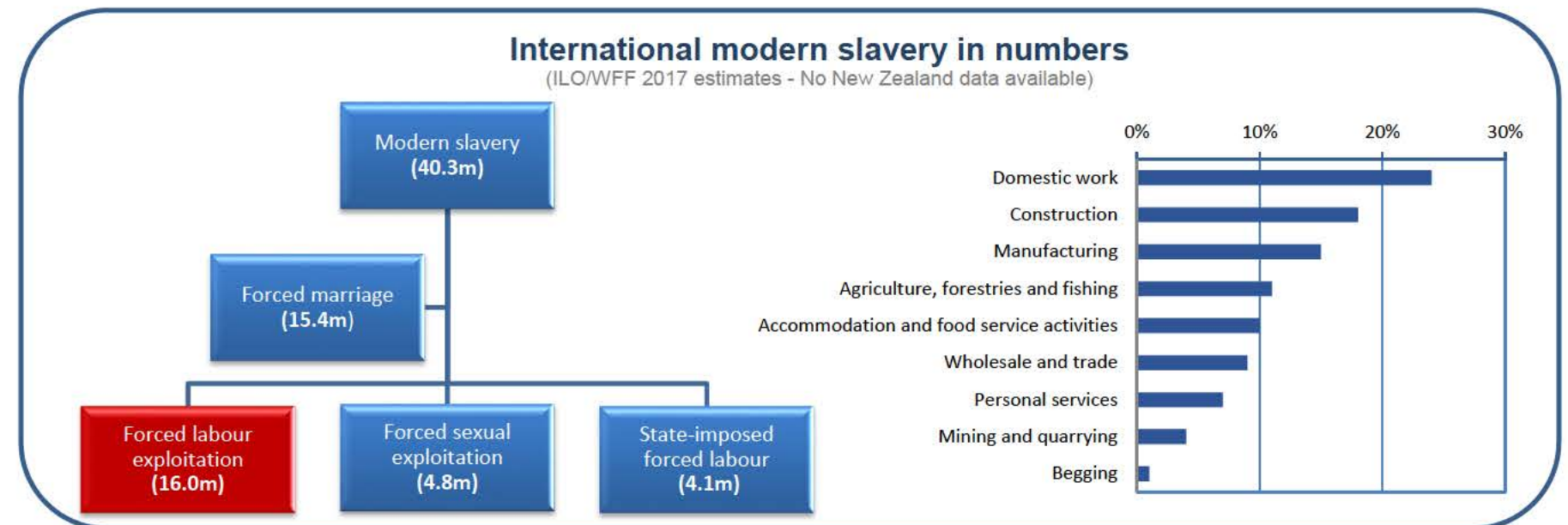
① Modern Slavery is a serious global issue which affects New Zealand

- 40.3 million victims of modern slavery in the world
[ILO/WFF survey-based estimate]
- 3,000 victims of modern slavery in New Zealand
[WFF survey-based estimate]

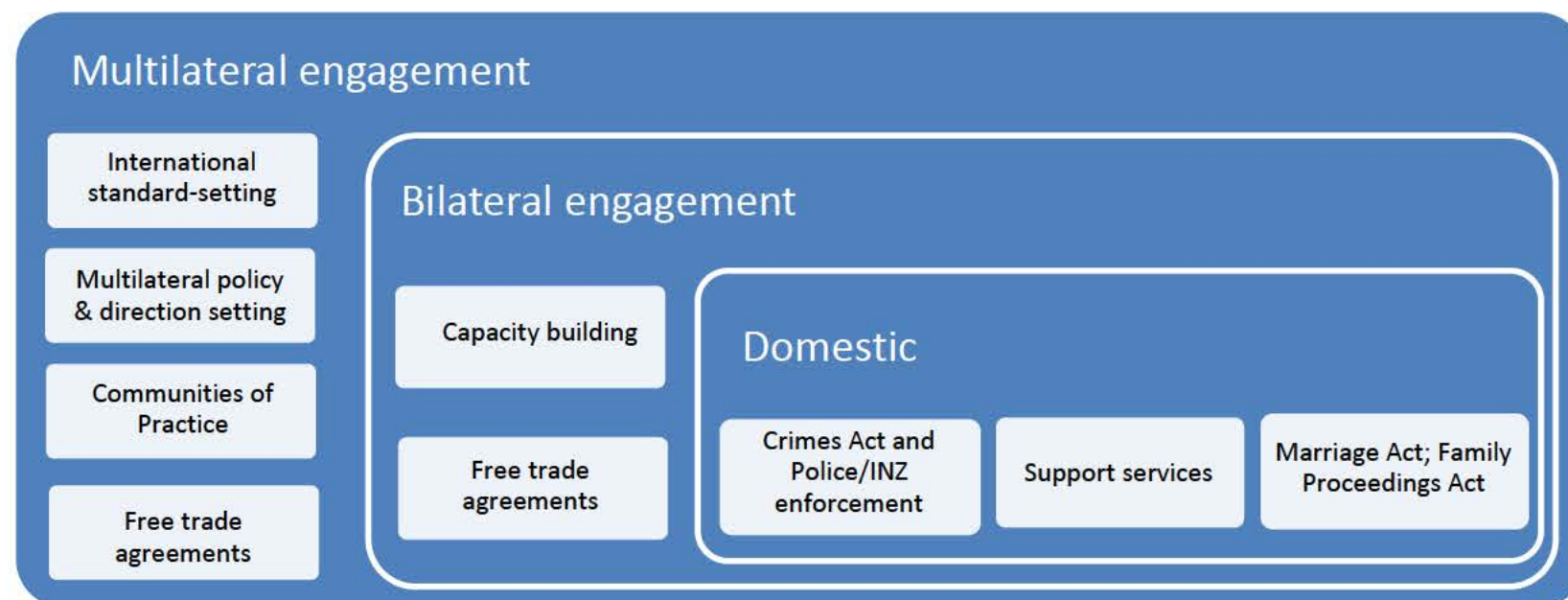
Modern slavery presents a significant social and financial cost to victims and their communities. It also presents a competitive disadvantage for businesses that conduct trade fairly, and is a barrier to productive, inclusive and sustainable economic growth.

There is an increasing societal expectation for transparency in supply chains, including on modern slavery, which may have future trade implications.

There is an opportunity to take a leadership role with Government support for actions that address modern slavery.



② New Zealand's current approach to addressing modern slavery is multi-layered...



③ ...and there are changes underway



④ But these won't fully address the international supply chain issue and we recommend that we undertake more work to strengthen our approach

We recommend four objectives to govern this work

- Maintain and enhance our international reputation
- Reduce the prevalence of modern slavery internationally
- Raise awareness of modern slavery, and drive behavioural and cultural change
- Support New Zealand's domestic framework in preventing exploitation, protecting victims, and enforcing the law

We propose to investigate a range of possible options including:

- Supply chain transparency through mandatory reporting by New Zealand businesses
- Awareness campaigns with consumers and businesses, including providing best practice guides
- Creating a new office as a watchdog over businesses
- Facilitating business leadership

Annex Two: Summary of the approaches taken by other countries/jurisdictions

COUNTRY	Approach Summary
Australia	<p>The Commonwealth Modern Slavery Act 2018</p> <ul style="list-style-type: none"> Requires publication of modern slavery statements which includes areas such as the structure of supply chains and the risks of slavery within them; actions taken to address slavery tasks and due diligence actions; and measurements of success. Covers all entities trading in Australia who have an annual revenue of AUD \$100 million. It also covers the Australian Government Places accountability at the Board level but no penalties for non-compliance Mandates a public register of all the statements Toolkits and guidance documents were also created to support businesses to comply with the Act <p>Import Bans The Australian Senate is currently considering a Bill that would prohibit importation of all goods from Xinjiang region and other regions in China using forced labour</p>
Australia (NSW)	<p>Modern Slavery Act NSW (not yet enacted)</p> <ul style="list-style-type: none"> Adds in the establishment of an Independent Anti-Slavery Commissioner Other key differences to the federal bill are: <ul style="list-style-type: none"> Lowers the threshold of businesses required to comply to those with annual revenue of AUD \$50 million and above Penalties for failure to prepare a statement, failing to make it publically available and/or providing false or misleading information
United Kingdom	<p>Modern Slavery Act 2015</p> <ul style="list-style-type: none"> The legislation includes an Independent Anti-Slavery Commissioner which primarily focuses on the domestic slavery issues A new role of a Government International Envoy on modern slavery Requires organisations to report annually on the steps, if any, taken to ensure that modern slavery is not taking place in their organisation and supply chains (or to state that no steps have been taken): <ul style="list-style-type: none"> Targets companies with an annual turnover of GBP £36 million Covers both commercial organisation and government departments The statements will now be published in a publically available website Places accountability at the Board level Enforcement will now be through a Single Enforcement Body which is currently being consulted on (this is likely to include financial penalties) There are also government guidelines and templates on what the reports should contain <p>Modern Slavery Innovation Fund A GBP £11 million fund launched in 2016 to support projects tackling modern slavery around the world. The fund was aimed at tackling the root causes of modern slavery, strengthen efforts to combat slavery and reduce vulnerability. Ten projects were funded in the first round which were a mixture of research and intervention projects.</p>
France	<p>Corporate Duty of Vigilance Law 2017</p> <p>In 2017, France became the first country to adopt a law on 'duty of care' or due diligence. This legislation establishes a criminal relationship between the parent company of a multinational corporation and its subsidiaries and subcontractors in the event of human or environmental rights violations.</p> <p>It targets companies which employ at least 5,000 employees (based in France); or, at least 10,000 employees (based outside France).</p> <p>It requires them to implement a 'vigilance' plan which must include:</p> <ul style="list-style-type: none"> a risk mapping that identifies, analyses and prioritises action; regular evaluation procedures for the situation of subsidiaries, subcontractors or suppliers with whom an established commercial relationship has been maintained; appropriate actions to mitigate risks or prevent serious harm; a mechanism for alerting and collecting reports relating to the existing or potential risks; and a system for monitoring the measures implemented and evaluating their effectiveness. <p>The vigilance plan and implementation reports must be made public and included in the management report of the company.</p>
USA	<p>California: Transparency in Supply Chains Act 2012</p> <ul style="list-style-type: none"> Requires companies to disclose the extent of their efforts with regards to supply chain transparency over five years; however, a company can disclose that they take no action in any of the areas. Targets companies with annual worldwide gross receipts over USD \$100 million. Covers retail sellers or manufacturers doing business in the State of California (identified via their California state tax returns). There are no penalties prescribed for non-compliance. However, the Attorney-General may file a civil action for injunctive relief.

	Import Bans The US has prohibited the import of any products produced wholly or in part by forced labour. For example, they have issued an order against cotton products and tomato products produced in Xinjiang in January 2021.
Canada	Modern Slavery Act Bill S-216 (no date - yet to be enacted) <ul style="list-style-type: none"> Amends the Customs Tariff Requires publication of modern slavery statements by the business Mandates ministerial responsibility for a public repository of these statements Targets companies with either over \$20 million in total assets, over \$40 million in revenue or at least 250 employees who produce, sell or import goods in Canada or controls an entity that does one of those The Bill provides for fines and far-reaching investigative powers in the event of non-compliance. The Minister may order any reasonable measures to bring the entity into compliance and any entity found guilty of an offence is liable to a fine of up to \$250,000 per offence. There is also director, officer and agent liability if they are involved in the business' avoidance of requirements. Canadian Ombudsperson Investigates allegations of human rights abuses linked to Canadian corporate activity abroad. Undertakes independent fact-finding, makes recommendations, and monitors implementation of recommendations, and reports publicly. Import Ban Canada has prohibited the import of any products produced wholly or in part by forced labour
European Union (27 Member States)	Directive 2014/95/EU (Non-Financial Reporting Directive) Now adopted by all 27 Member States <ul style="list-style-type: none"> A non-financial statement which must include an "understanding of the company's approach regarding respect for human rights..." Covers business with either a balance sheet total of more than €20 million, or have a net turnover of more than €40 million Also, Public Interest Entities with more than 500 employees (that belong to at least one of the EU's Member States) The directive leaves penalties to Member States to decide as they implement. Thus there is a variance (e.g. Germany has a fine for failing to comply, which can range from €50,000 to €10 million). New human rights duty of care legislation with regards to international supply chains [draft legislation] The EU Legal Affairs Committee has voted to approve draft legislation for a new human rights due diligence law that requires companies to comply with human rights and environmental standards within their value chains. The draft legislation requires: <ul style="list-style-type: none"> Companies be held accountable and liable when they harm or contribute to harming - human rights, the environment and good governance Due diligence requiring companies to identify, address and remedy their impact on human rights and the environment throughout their value chain Rules should apply to all companies operating in EU internal market, including those from outside the EU Business to be fined for causing harm or contributing to it, unless they can prove that they have acted in line with due diligence obligations and taken measures to prevent such harm. Legal support for victims of corporations in third countries Ban on import of products linked to severe human rights violations such as forced or child labour
Germany	Human Rights Due Diligence legislation In addition to implementing the EU Directive detailed above, an agreement has been reached on mandatory human rights due diligence legislation that will introduce fines for companies procuring parts or materials abroad from suppliers who fail to meet minimum human rights and environmental standards. <ul style="list-style-type: none"> Financial penalties will be implemented and the current suggestion is for this to be up to 10% turnover of the company The entities covered are still to be confirmed but draft legislation states that it applies to companies with more than 3,000 employees from 2023, and smaller companies, with more than 1,000 staff, the year after.
Switzerland	The Swiss Parliament's Indirect Counter-Proposal <ul style="list-style-type: none"> Requires businesses to publish a report on 'child labour' within the business chain Targets businesses with an annual revenue of at least 40 million (or 20 million in total assets) and Public Interest Entities with at least 500 employees and 40 million/20 million in revenue or assets respectively Includes a fine of up to 100,000 CHF on any company violating the UN Guidelines on business and human rights. Also includes criminal sanctions for non-compliance or false statements.
Netherlands	Child Labour Due Diligence Law <ul style="list-style-type: none"> Requires companies to exercise due diligence; determining whether there is a reasonable suspicion of child labour in their supply chain. If so, the company must develop an action plan and statement of progress There is no financial threshold as it requires all companies that sell or supply goods or services to Dutch consumers (regardless of company's base location or size) Includes a EUR €4,100 fine for failing to comply with legislation. For repeated offending within 5 years, non-compliance is punished under the Economic Offences Act (up to 4 years' imprisonment, community service, or a fine of up to EUR €83,000).



BRIEFING

Addressing Modern Slavery in Supply Chains: High-Level Legislative Options

Date:	4 August 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-0132

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Indicate your preferred approach to test in public consultation.	13 August 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	Privacy of natural persons	✓
Paramita Turner	Senior Policy Advisor	Privacy of natural persons		

The following departments/agencies have been consulted
Ministry for the Environment; Ministry of Foreign Affairs and Trade; New Zealand Customs Service

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Addressing Modern Slavery in Supply Chains: High-Level Legislative Options

Date:	4 August 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-0132

Purpose

To seek your agreement to possible legislative options to address modern slavery in supply chains, for testing in public consultation.

Executive summary

You previously directed officials to undertake work to assess the range of legislative options to address modern slavery in supply chains. You have agreed that the policy objectives will include: reducing modern slavery; enhancing New Zealand's international reputation; raising awareness and driving behavioural and cultural change; and supporting New Zealand's domestic framework.

This work programme is being undertaken in consultation with a multi-stakeholder Modern Slavery Leadership Advisory Group (MS LAG). We are now seeking your direction on the broad options to be tested in public consultation. This will inform subsequent advice to you seeking further decisions ahead of drafting the public consultation document.

Following your decisions as part of this briefing, we propose to provide you a further briefing in October 2021 seeking your agreement to content for public consultation and decisions relating to enforcement. We propose to then provide you a draft Cabinet paper and public consultation material to take to Cabinet in late 2021, leading into public consultation beginning in early 2022.

This briefing focuses on corporate responsibility-related legislation to address modern slavery in supply chains, and the relative merits of different approaches. Confidential advice to Government

International approaches to corporate responsibility-related modern slavery legislation can be broadly categorised into 'disclosure' and 'due diligence'. Disclosure-based approaches require entities to publish the steps they are taking, while due diligence approaches require entities to undertake particular substantive actions (in addition to disclosure) to address modern slavery.

Evidence suggests that a 'general disclosure' approach, giving entities broad flexibility in determining the content of their disclosures and having limited enforcement tools, has not been effective in changing behaviours. More prescriptive forms of disclosure-based legislation have therefore been adopted or proposed in recent years, mandating certain elements that modern slavery statements must cover and having related penalties for non-compliance.

Due diligence approaches have also been introduced in several jurisdictions in recent years. These approaches could be more effective at changing behaviours as they place more direct responsibilities on organisations. They hold organisations more directly to account for taking substantive and effective action to address modern slavery in their supply chains. However, it is currently too early to tell through evaluative data whether this approach is more effective than disclosure alone.

Internationally, both disclosure and due diligence approaches have generally drawn from the United Nations *Guiding Principles on Business and Human Rights*, and we recommend they also form the basis for modern slavery legislation in New Zealand. The Guiding Principles call for

businesses to carry out human rights due diligence, which includes identifying their impacts, taking appropriate action, tracking the effectiveness of their responses, and communicating how their impacts are being addressed.

We consider that, to best meet the policy objectives, modern slavery legislation should be broad-ranging in the types of entities it covers. It should include, for example, government entities and charitable entities (that meet any relevant materiality thresholds). Materiality can be measured in different ways, including most commonly through revenue and asset thresholds (which are also used in other regulatory regimes within New Zealand). It might also arise, however, based on particular risk profiles.

We consider the Australian threshold (AUD \$100 million in revenue) would be too high for the New Zealand context. Rather, the appropriate materiality levels could vary based on what requirements are set and how many entities could be captured. We assume broadly that in the New Zealand context a 'higher threshold' could be defined in terms of a revenue threshold anywhere above \$50 million, while a 'lower threshold' could be defined anywhere between \$10 million and \$50 million. In addition, there could be other financial or 'risk' thresholds that might trigger coverage of particular enterprises.

The options for considering who the regulated parties should be and what they should be required to do can be grouped into three broad (but highly simplified) categories, which are not mutually exclusive for the purpose of public consultation:

- Disclosure (capturing either fewer or more entities through threshold levels or targeting)
- Due diligence (capturing either fewer or more entities through threshold levels or targeting)
- Graduated approach (capturing a range of entities and incorporating both disclosure and due diligence, with lower thresholds for disclosure and higher thresholds for due diligence).

We consider that a due diligence approach is likely to be more effective than disclosure in achieving the agreed policy objectives, but would likely also have comparatively higher costs for the regulated parties (as well as the regulator). Given the degree of uncertainty underlying these assumptions, we recommend testing these views in public consultation.

The MS LAG has proposed a graduated approach which would include both disclosure and due diligence obligations, and we recommend that public consultation be based around this option. Under this approach, obligations would potentially apply to a wide range of entities but the particular obligations for individual entities would be proportionate to factors such as their risk and size. We consider this option may best meet the policy objectives for this work, which is fundamentally to address harm and risk from modern slavery globally, and would inform our understanding of both disclosure and due diligence approaches.

Irrespective of the option proposed for public consultation, there are a range of further decisions that will need to be made to help inform the public consultation and legislative design (including in relation to accountabilities, penalties and enforcement). These will also influence public perceptions of the legislation and its effective implementation. Legislation in any form will be a significant change for New Zealand, and will need to be supported by effective communications and guidance for regulated entities. There will be implementation and compliance costs for the regulated parties as well as the regulator, regardless of the policy choices that are made.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that the key high-level regulatory design questions for corporate responsibility-related modern slavery legislation are:
- i. What obligations will be placed on the regulated parties
 - ii. Who the regulated parties should be (i.e. what thresholds should apply)
 - iii. How the obligations should be enforced [to be explored in a further briefing to be provided in October].
- Noted*
- b **Note** that the obligations placed on entities through modern slavery legislation take a wide range of forms, but can be broadly categorised into disclosure and due diligence-based approaches.
- Noted*
- c **Agree** to consult on each of the following options for corporate responsibility-related modern slavery legislation:
- i. Option 1: Disclosure-based approach
- Yes / No*
- ii. Option 2: Due diligence approach
- Yes / No*
- iii. Option 3: Graduated approach combining both disclosure and due diligence, but applying obligations to entities based on factors such as their size, risk and influence (approach proposed by the Modern Slavery Leadership Advisory Group).
- Yes / No*
- d **Note** that MBIE's recommendation is for the graduated approach to be proposed as the preferred option in public consultation.
- Noted*
- e **Agree** that modern slavery legislation in New Zealand should be based broadly on the United Nations *Guiding Principles on Business and Human Rights* and intend for the regulated parties to (whether through disclosure or due diligence obligations):
- i. Undertake modern slavery risk assessments across their global operations and supply chains (including those of any of their subsidiaries) to identify potential risks
 - ii. Undertake action (as is reasonable and appropriate) to address any risks
 - iii. Monitor and evaluate the effectiveness of the actions they take
 - iv. Be transparent about the risks they identify, the actions they are taking and how they are monitoring and evaluating those actions.
- Agree / Disagree*
- f **Agree** that no entities should be excluded from the scope of this legislation based solely on their type or sector (such that government entities and charitable entities will fall in scope).
- Agree / Disagree*

- g **Agree** that any disclosures should take a prescriptive (rather than general) approach, requiring entities to publish modern slavery statements that cover specified matters including those in recommendation (e).

Agree / Disagree

- h **Agree** that the provision of penalties for failures to meet obligations should be tested in public consultation, with further advice to be provided to you in October on what types of non-compliance could be penalised and the level of any associated penalty.

Agree / Disagree

Confidential advice to Government

Noted

- j **Agree** to meet with officials to discuss the matters raised in this briefing.

Agree / Disagree

- k **Agree** to forward copies of this briefing to the Minister of Foreign Affairs, Minister for Trade and Export Growth, Minister for Economic and Regional Development, Minister of Immigration, and the Minister of Commerce and Consumer Affairs.

Agree / Disagree

Nita Zodgekar
Manager, International Labour Policy
Labour, Science & Enterprise, MBIE

..... / /

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. You previously directed officials to undertake work to investigate legislative and non-legislative options for addressing modern slavery in supply chains [briefing 2021-1964 refers]. This work meets the Government's commitments set out in Labour's 2020 Manifesto, New Zealand's 2019 Universal Periodic Review, and the *Plan of Action against Forced Labour, People Trafficking and Slavery*. It also responds to the Trade for All Advisory Board's recommendation to assess whether New Zealand's settings to address modern slavery are sufficient, given international trends.
2. At your meeting with officials on 10 March 2021, you indicated you wanted to progress work on new legislation to address modern slavery in supply chains and wanted options on the design of that legislation. Legislative options include corporate responsibility-based legislation (commonly referred to as 'Modern Slavery Acts' internationally and in New Zealand media), Confidential advice to Government [REDACTED]
3. This briefing focuses on corporate responsibility-related legislation. Confidential advice to Government [REDACTED]
4. You have agreed that the scope of the work should remain focused on addressing the problem of modern slavery in supply chains, rather than wider human rights or sustainability issues [briefing 2021-3010 refers]. You have also previously agreed that the objectives for this work are to:
 - a. Reduce the prevalence of modern slavery internationally
 - b. Maintain and enhance our international reputation
 - c. Raise awareness of modern slavery, and drive behavioural and cultural change
 - d. Support New Zealand's domestic framework in preventing exploitation, protecting victims, and enforcing the law [briefing 2021-1964 refers].
5. This paper notes the high-level initial policy decisions required to progress this work on potential supply chain legislation, and seeks your direction for options to be tested in public consultation. This will inform our next briefing to you, which will seek further decisions from you ahead of seeking Cabinet's agreement to public consultation. A summary of the range of choices that will need to be made is attached as **Annex One**.

This work programme is being informed by a multi-stakeholder Leadership Advisory Group, and has received support from the Trade for All Implementation Fund

6. This work is being supported by advice from a Modern Slavery Leadership Advisory Group ('MS LAG'), comprised of external stakeholders from a range of sectors and chaired by Rob Fyfe [briefing 2021-3373 refers]. You spoke to the MS LAG at its inaugural meeting on 18 June 2021, and the views expressed by its members have informed this paper. Broadly, the MS LAG is highly supportive of this work and considers everyone (from large businesses through to consumers) has an important role to play in addressing modern slavery. A high-level reflection of the key points discussed is attached as **Annex Two**, and the MS LAG's suggestion for a graduated approach to legislation is reflected from paragraph 45.
7. The Trade for All Implementation fund was used to commission two pieces of analysis that have also informed our work to date, and will continue to inform subsequent policy development. The first piece of analysis involved research into the impact and effectiveness of modern slavery legislation across different jurisdictions, and was undertaken by MartinJenkins. The second piece involved the development of a data model to estimate the

number of New Zealand entities that could be captured under different thresholds, and an assessment of the number of New Zealand businesses already reporting under international supply chain transparency legislation. This second project was undertaken by Ernst & Young.

There are a broad range of choices to be made regarding what entities should be required to do

8. Modern slavery-related legislation internationally takes a wide range of forms, from non-prescriptive reporting obligations (as currently in the UK) to the mandatory creation and implementation of human rights action plans (as with the French 'duty of vigilance'). It also captures a wide range of entities – from those earning over £36 million (approx. NZD \$71 million) in annual turnover in the UK, to those with over 5,000 or 10,000 employees in France (numbers respectively applicable in relation to domestic and foreign-headquartered firms). In an alternative model, the Netherlands have adopted legislation requiring due diligence on child labour which applies to any company that sells or supplies goods or services to Dutch consumers.

The nature of legislative modern slavery obligations can vary from disclosure through to a duty-based approach

9. The United Nations *Guiding Principles on Business and Human Rights* (UNGPs) call on businesses to undertake human rights due diligence. This is described as including “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”
10. The UNGP’s general notions of risk identification, action, evaluation and communication are common themes across modern slavery legislation around the world. However, the mechanisms to achieve them differ. These are indicated in broad terms in Figure 1:

Figure 1. High-level mechanisms to promote or compel the use of actions to address modern slavery, in increasing degree of obligations (indicative)



Note: European (regional and country-level) approaches generally relate to human rights more broadly (and in conjunction with environmental issues), whereas non-European approaches generally focus on modern slavery more specifically.

¹ Switzerland has adopted a disclosure model that includes further due diligence obligations for enterprises trading in conflict minerals or goods and services produced with a founded suspicion of child labour.

² The Netherlands has adopted due diligence requirements in relation to child labour. It is currently considering broader due diligence requirements in relation to human rights, labour rights and the environment (collectively).

Disclosure-based approaches require entities to specify the actions they are taking

11. The **'general disclosure' approach** requires entities to publish a statement outlining what they are doing to address modern slavery. However, it provides flexibility in the content of

this reporting and could (as in the UK) permit the submission of a statement indicating the entity is doing nothing. The UK has indicated that it will be moving towards an approach that requires reporting on prescribed matters, similar to Australia.

12. The '**prescribed disclosure**' approach can require entities to publish statements that (among other matters):
 - a. describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls
 - b. describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes
 - c. describe how the reporting entity assesses the effectiveness of such actions.

Due diligence approaches require entities to take actions beyond transparency and disclosure

13. **Due diligence approaches** move a step further than transparency and disclosure by requiring that regulated entities undertake particular actions, in addition to reporting on the actions they are (or are not) undertaking. The particular actions can vary but broadly align with the due diligence actions set out in the UNGPs. Under this approach, an entity that fails to meet their obligations could potentially be subject to penalties and the provision of remedies to identified victims of modern slavery. The European Union is currently considering legislation of this nature, under which the burden of proof would rest with the entity (rather than a victim) – requiring them to prove that they did not contribute to alleged human rights abuse by discharging their due diligence obligation.
14. The proposed 'duty to prevent employment standards breaches' amendment to the *Employment Relations Act 2000* falls within this category of response [briefing 2021-3794 refers]. It will require duty holders to, at a minimum, identify and assess the risk of employment standards breaches in the parts of their domestic supply chain that they have significant control or influence over. Where a risk is identified, duty holders will be required to take appropriate steps to address and manage the risk. Cabinet has previously agreed that for failing to meet the duty, a person will be liable for penalties and the payment of arrears to employees (if both the employer and any other person involved in the breach are unable to pay).

We recommend that the disclosures or due diligence required be based broadly on the UN Guiding Principles on Business and Human Rights (UNGPs)

15. We consider that modern slavery legislation should intend for the regulated parties to, at a high-level, act in a way that is consistent with the corporate responsibilities set out in the UNGPs. The UNGPs provide a global framework setting out the duty of States to protect human rights, the corporate responsibility to respect human rights, and the role of States and corporations in providing access to remedy. Drawing from the UNGP framework would be consistent with international settings, under which both disclosure and due diligence approaches have drawn from the UNGPs, and would provide a consistent framework for businesses.
16. The UNGPs can be incorporated into modern slavery legislation irrespective of it adopts a disclosure or due diligence mechanism. The intention would be for entities to:
 - a. undertake modern slavery risk assessments across their global operations and supply chains (including those of any of its subsidiaries) to identify potential risks
 - b. undertake action (as is reasonable and appropriate) to address any risks
 - c. monitor and evaluate the effectiveness of the actions they take

- d. be transparent about the risks they identify, the actions they are taking and how they are monitoring and evaluating those actions.
17. At a more granular level, the specific requirements set out in legislation and/or guidance could comprise a wide range of potential activities. These could be substantially similar to the measures entities may adopt to meet the proposed duty to prevent employment standards breaches by New Zealand employers. A high-level requirement to 'take action' could, for example, include or be supported by requirements such as:
- a. developing a policy statement setting out the entity's responsibilities and expectations of suppliers
 - b. surveying and auditing (at appropriate intervals) of suppliers for compliance with minimum standards
 - c. providing education and training to relevant suppliers and workers
 - d. establishing or participating in effective grievance mechanisms (enabling those affected by the entity's operations to raise concerns)
 - e. looking into any issues as they arise and working with suppliers to resolve them, or escalating to an appropriate regulator if necessary
 - f. providing for or cooperating in remediation, where they have caused or contributed to adverse impacts
 - g. tracking the effectiveness of the entity's response based on appropriate qualitative and quantitative indicators, and based on feedback from internal and external sources (including affected stakeholders).
18. The extent to which these obligations are feasible and appropriate will depend on factors including the resources of the entity and the nature of its operations and supply chains. Potentially, less prescriptive legislation could be broader-ranging while legislation that is more prescriptive could look to target those entities with more resources and/or higher risk.

Based on the available evidence, we do not recommend adopting a 'general disclosure' approach

19. We do not recommend adopting a 'general disclosure' approach to modern slavery legislation, as the available evidence suggests this has not been effective. While ground-breaking when it was first introduced, more proactive approaches have since been adopted internationally and accepted as the norm.

Evidence suggests that general disclosure approaches to date have not led to effective change

20. Current evidence suggests that general disclosure approaches to addressing modern slavery in supply chains have not had a substantial effect in incentivising companies to make detailed and accurate disclosures about their supply chains, much less act on improving them.¹ It further suggests that general transparency provisions have not led to a critical mass of behaviour change across businesses, investors and consumers – though there are some

¹ *Impact and effectiveness of modern slavery legislation*. MartinJenkins (analysis commissioned by MBIE). See for example: Aronowitz, A. A. (2019). Regulating business involvement in labor exploitation and human trafficking. *Journal of Labor and Society*, 22(1), 145–164. <https://doi.org/10.1111/wusa.12372>; Birkey, R. N., Guidry, R. P., Islam, M. A., & Patten, D. M. (2018). Mandated social disclosure: An analysis of the response to the California Transparency in Supply Chains Act of 2010. *Journal of Business Ethics*, 152(3), 827–841. <https://doi.org/10.1007/s10551-016-3364-7>; Dean, O., & Marshall, S. (2020). A race to the middle of the pack: an analysis of slavery and human trafficking statements submitted by Australian banks under the UK Modern Slavery Act. *Australian Journal of Human Rights*, 26(1), 46–73. <https://doi.org/10.1080/1323238X.2020.1712515>.

indications that good social responsibility performance can provide a competitive advantage to firms seeking investment.

21. While disclosure-based approaches aim to leverage consumer behaviour, international studies suggest there remains low consumer awareness and understanding of modern slavery in supply chains. Even where there is awareness and understanding, consumers can be either reluctant or constrained in their actions because of price. It is possible that this could differ in the New Zealand context. You recently received a petition with 37,000 signatures calling for a Modern Slavery Act, and half of consumers report that “knowing that a business treats its workers fairly affects my decision on where to purchase products / services” always or most of the time.²
22. To better achieve the desired outcome of reducing modern slavery, researchers and non-governmental organisations internationally have suggested that disclosure-based approaches must also provide: a public repository for accessing statements; lower reporting thresholds (to capture more entities); mandatory due diligence measures; institutional oversight and enforcement functions; and legal inducements and/or penalties.³

International jurisdictions are moving towards more prescriptive types of modern slavery legislation

23. International developments show that some jurisdictions are shifting towards increasing levels of prescription within their legislative frameworks. While remaining within a disclosure-based framework, the UK has introduced a central repository for statements and announced its intention to adopt a more prescriptive disclosure model that includes penalties for non-compliance. This is in response to the findings of an independent review of the UK legislation, which found that “a lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor-quality statements and the estimated lack of compliance from over a third of eligible firms.” This more prescriptive disclosure-based framework has already been adopted in Australia, and similar legislation is currently under consideration by the Parliament of Canada.
24. Meanwhile, due diligence models have been adopted (e.g. in Germany, France and Norway) or are currently under development and consideration across a range of jurisdictions within Europe (including by the EU). Due diligence-based approaches have been promoted as a more effective means of driving change. However, as these approaches are still new, there is little evaluative evidence currently available to determine their effectiveness.

² Based on findings from the *New Zealand Consumer Survey 2020*. Note this is an increase from 48 per cent in the 2018 Survey and from 43% in the 2016 Survey.

³ *Impact and effectiveness of modern slavery legislation*. MartinJenkins (analysis commissioned by MBIE). See for example: Chambers, R., & Vastardis, A. Y. (2021). Human rights disclosure and due diligence laws: The role of regulatory oversight in ensuring corporate accountability. *Chicago Journal of International Law*, 21(2), 323–366. <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/4/>; Fellows, J., & Chong, M. D. (2020). Australia's Modern Slavery Act: Challenges for a post-COVID world? *Alternative Law Journal*, 45(3), 209–214. <https://doi.org/10.1177/1037969X20956410>; Ford, J., & Nolan, J. (2020). Regulating transparency on human rights and modern slavery in corporate supply chains: the discrepancy between human rights due diligence and the social audit. *Australian Journal of Human Rights*, 26(1), 27–45. <https://doi.org/10.1080/1323238X.2020.1761633>.

There are a number of options for determining who should be regulated

The regulated parties could be determined based on type or size, and broad-ranging or more targeted approaches could be undertaken

25. Choices about who the regulated parties should be can be framed around three primary questions (which must be thought of in conjunction with regard to what the regulated parties will be required to do):
- What types of organisation should be subject to the obligations?
 - What type(s) of threshold should apply?
 - What should be the threshold level(s)?

We consider that legislation should be broad ranging in the types of entities it covers and should include, for example, government entities and charitable entities that meet the relevant thresholds

26. Internationally, modern slavery legislation has typically targeted all types of commercial activity, including commercial activity undertaken by charitable entities. However, government entities have been excluded in a number of cases despite the significant expenditure typically associated with government procurement. The UK has announced proposed law changes that will include government entities in the scope of its disclosure requirements, while Australia's requirements apply to federal departments (but not State or local government authorities).
27. We do not consider that the scope of any modern slavery legislation should be limited to for-profit companies. Rather, it should be broad ranging without distinction based on the type of entity. The problem is linked to global supply chains, and most entities will therefore have some exposure to modern slavery. Government procurement, in particular, accounts for an estimated \$51.5 billion in spending (approximately 20 per cent of New Zealand's Gross Domestic Product) and is a significant lever for driving change. We consider that other factors, such as an entity's size or the sectors it operates in, are more relevant for the purpose of determining whether an entity should be required to meet modern slavery obligations.

International legislation generally targets large entities, though size is measured in different ways

28. International approaches to modern slavery (and broader human rights) legislation tend to target larger entities through 'bright-line' thresholds. This is typically determined based on revenue, asset and employee thresholds (whether as standalone thresholds or in combination).
29. As indicated in Table 1 and Table 2 below, revenue thresholds have been used in all disclosure-based forms of legislation, whether alone or in combination with other thresholds. In due diligence frameworks, a combination of thresholds has been the standard approach to determine materiality, with 'sole' measures being adopted based on employee numbers (rather than revenue).

Table 1. Thresholds used in disclosure-based legislation by international jurisdiction (approximate NZD value)

Jurisdiction	Revenue	Assets	Employees
Canada* (any two of the three criteria)	CA \$40m (\$45m)	CA \$20m (\$22m)	250

Jurisdiction	Revenue	Assets	Employees
Switzerland (transparency with due diligence on conflict minerals and child labour) (any two of the three criteria)	CHF 40m (\$62m)	CHF 20m (\$31m)	500
European Union (existing transparency directive) (any two of the three criteria)	€40m (\$68m)	€20m (\$34m)	500
United Kingdom	£36m (\$70m)		
Australia	AU \$100m (\$106m)		
California ⁴	US \$100m (\$144m)		

* The Canadian Modern Slavery Bill passed its Second Reading in March 2021 and is currently under active consideration by its Standing Senate Committee on Banking, Trade and Commerce.

Table 2. Thresholds used in due diligence-based legislation by international jurisdiction (approximate NZD value)

Jurisdiction	Revenue	Assets	Employees	Other
Norway (any two of the three criteria)	NOK 70m (\$12m)	NOK 35m (\$6m)	50 ('man-years')	
Netherlands (in relation to child labour)				All Dutch companies, and foreign companies that sell or supply goods or services to Dutch consumers.
Netherlands* (any two of the three criteria)	€40m (\$68m)	€20m (\$34m)	250	
European Union* (proposed directive) (any two of the three criteria)	€40m (\$68m)	€20m (\$34m)	250	All 'large undertakings', and publicly listed and high-risk (to be defined) small and medium-sized undertakings.
Belgium* (any two of the three criteria)	€50m (\$84m)	€43m (\$73m)	250	
Germany			3,000; reducing to 1,000 from 2024	
France			5,000, or 10,000 with overseas head office	

* Marks jurisdictions where the relevant law is currently under active development and/or consideration, and has not yet been adopted.

30. While none of these materiality thresholds directly connect to supply chain activity, they serve as proxies for identifying the entities that are likely to have the most substantive supply chains. They also reflect a general view that the largest entities will have the greatest ability to implement the required measures, and the power to influence practices across supply chains.

⁴ Note that Californian legislation on modern slavery in supply chains is a matter of Californian state law and is separate from actions taken by the United States Federal Government on this issue.

Revenue and asset-based thresholds are 'bright-line' tests that are already used in existing New Zealand regulatory frameworks, though a principles or risk-based test could also be considered

31. Employee-based thresholds are not currently used in New Zealand regulatory frameworks, but revenue and asset thresholds are currently used in other regulatory frameworks as measures of size. For example, under the *Companies Act 1993* all large overseas companies and some large New Zealand companies which meet various total revenue or asset thresholds must file annual audited financial statements. These measures can provide a relatively straight-forward means for regulated entities to determine whether or not they fall in scope of the legislation, while consistency across regulatory systems could help to support regulatory enforcement.
32. A principles or risk based materiality test could be applied in relation to modern slavery legislation and could, for example, place obligations (or more obligations) in relation to supply chains with a higher risk of modern slavery. Such a measure could be more targeted towards areas with higher risk, but would be more ambiguous and require greater support to administer. It could also risk drawing attention to a limited set of sectors or goods when the problem is widespread (albeit to varying degrees across sectors and goods). Further work would be required to develop procedures for the determination of high-risk sectors or goods, including the level and/or type of involvement required to trigger the threshold, should this type of test be preferred.
33. Another approach could involve targeting importers with total annual imports above a certain specified value. This would target goods and services at the border and accordingly be internationally focused, with modern slavery in a domestic supply chain context addressed through other New Zealand law (including the proposed duty to prevent). This approach would allow for a focus on a specific group of entities which may be more easily identified by the regulator, and avoid issues with overlapping duties (e.g. where an importer and retailer are required to take similar actions in relation to the same supply chain). Further work would be required to determine how this could work in practice, what impact it could have, and how it may be perceived by stakeholders.

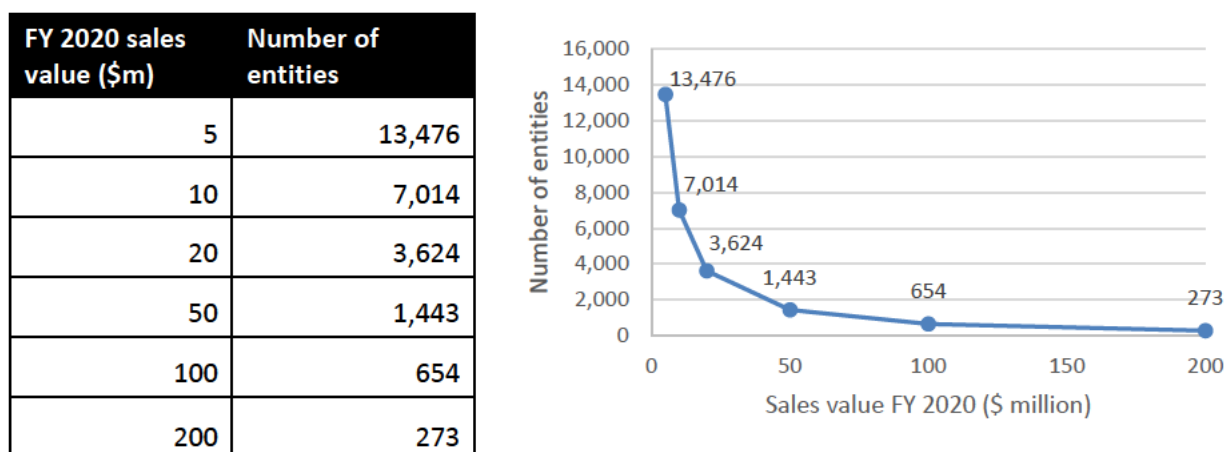
We consider that the Australian threshold would be too high in the New Zealand context

34. We do not recommend Australia's \$100 million revenue threshold for the New Zealand context under a disclosure-based approach. Entities with this level of revenue are likely to also be carrying on business in Australia, and therefore subject to the Australian reporting legislation.
35. Australia previously estimated that up to 3,000 entities would be required to prepare annual modern slavery statements under its \$100 million revenue threshold (standalone). As of July 2021, around 2,000 mandatory and 250 voluntary modern slavery statements had been lodged covering over 4,400 entities. The Australian Modern Slavery Register shows 35 entities have identified themselves as being headquartered in New Zealand, though this does not capture entities based outside of New Zealand which trade significantly within New Zealand (such as ANZ, Lion, Michael Hill, Westpac, and Woolworths).

The number of entities captured by different thresholds could vary substantially depending on the type and level of materiality considered

36. Statistics New Zealand's provisional Annual Enterprise Survey data for the 2020 financial year suggests an exponential increase in the number of entities as the sales value is reduced. For example, 3,390 entities had sales of between \$10 million and \$20 million, in comparison to 2,181 entities with sales in the much broader range of \$20 million and \$50 million.

Figure 2. Number of entities in New Zealand by Financial Year (FY) 2020 sales values



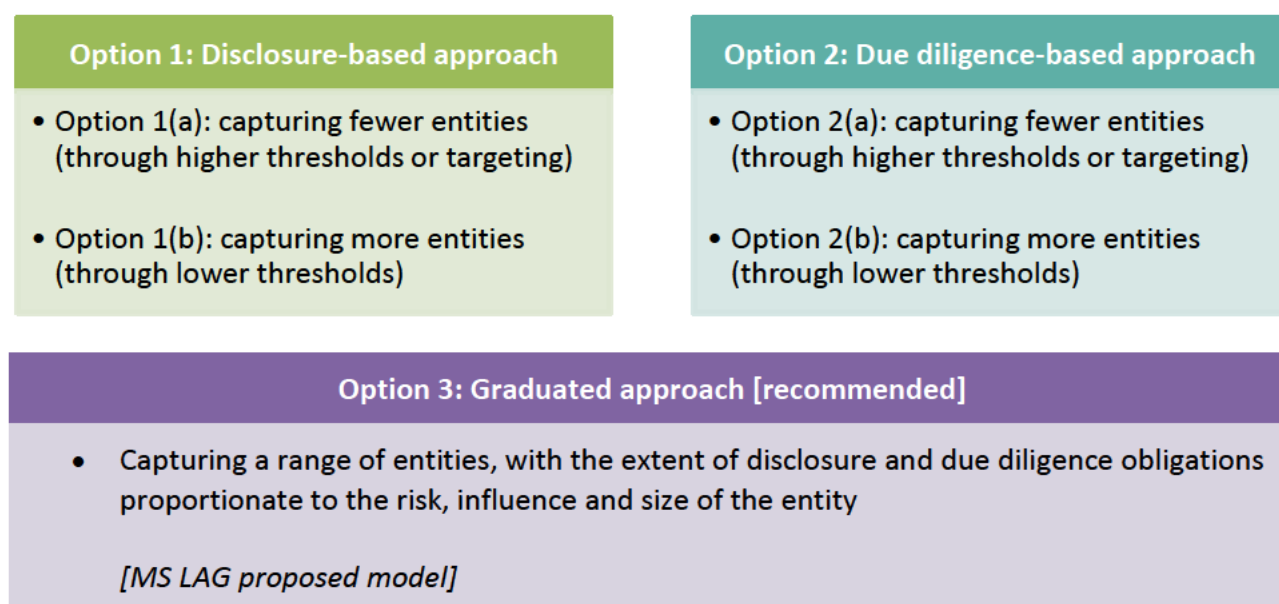
Source: Statistics New Zealand Annual Enterprise Survey: 2020 financial year (provisional)

37. Our understanding of the impact of different thresholds will also be informed by analysis undertaken by EY based on company-level measures, which takes into account company subsidiaries. Internationally, while obligations are applied to individual entities, parent companies are generally able to prepare group statements on behalf of their subsidiaries.

The options for testing in public consultation can be grouped into three broad categories

38. The options for considering who the regulated parties should be and what they should be required to do can be grouped into three broad categories, which are not mutually exclusive for public consultation purposes:

Figure 3. Broad options that could be tested in public consultation (not mutually exclusive)



39. We note that this framing provides a highly simplified way of expressing the various options, and is intended to support discussion on your preferred approach. Within each option are a broad range of further design decisions to be made, including for example the type and amount of any threshold. We assume broadly that a 'higher threshold' could be defined in terms of a revenue threshold anywhere above \$50 million, while a 'lower threshold' could be defined anywhere between \$10 million and \$50 million.

40. Underpinning all of the options are further decisions that will need to be made relating to enforcement, which could have a significant impact on outcomes irrespective of the features of any preferred option. The level at which a penalty is set and how it is enforced, for example, could affect how any option is perceived and implemented. We consider that any regulatory regime will need to be supported by robust enforcement which should include penalties for failures to meet obligations. However, further work will need to be undertaken to consider what types of non-compliance should be penalised and the appropriate level of any associated penalty.

A due diligence approach is likely to be more effective than disclosure in achieving the policy objectives, but we recommend testing this view in public consultation

41. We consider that a due diligence-based approach is likely to be more effective in achieving the agreed policy objectives (noted in paragraph 4). While there is currently little empirical evidence available to support one approach over another, we consider that a due diligence approach would better meet the policy objectives for this work compared to disclosure as it would: provide a more direct means of ensuring that appropriate action is taken to address modern slavery in supply chains; be more responsive to changes in best practice over time; and reflect the approach currently being considered and adopted by a range of jurisdictions across Europe.
42. Whereas disclosure-based approaches are intended to leverage consumer (and other stakeholder) sentiment to encourage behavioural change, due diligence approaches entail concrete actions that more directly change behaviours. Due diligence obligations provide a clearer signal that action is expected to be taken – but can still provide substantial room for the regulated parties to determine what specific actions would be appropriate based on their individual circumstances. We assume that, under either approach, capturing more entities by adopting lower thresholds would be more effective.
43. We assume that, attached to the stronger mechanism provided under a due diligence approach, there would also be a comparatively higher cost for the regulated parties (as well as the regulator).
44. We intend to explore these cost-benefit assumptions further with the MS LAG. Given the degree of uncertainty underlying our assumptions, we also recommend testing these views in public consultation. **Free and frank opinions**

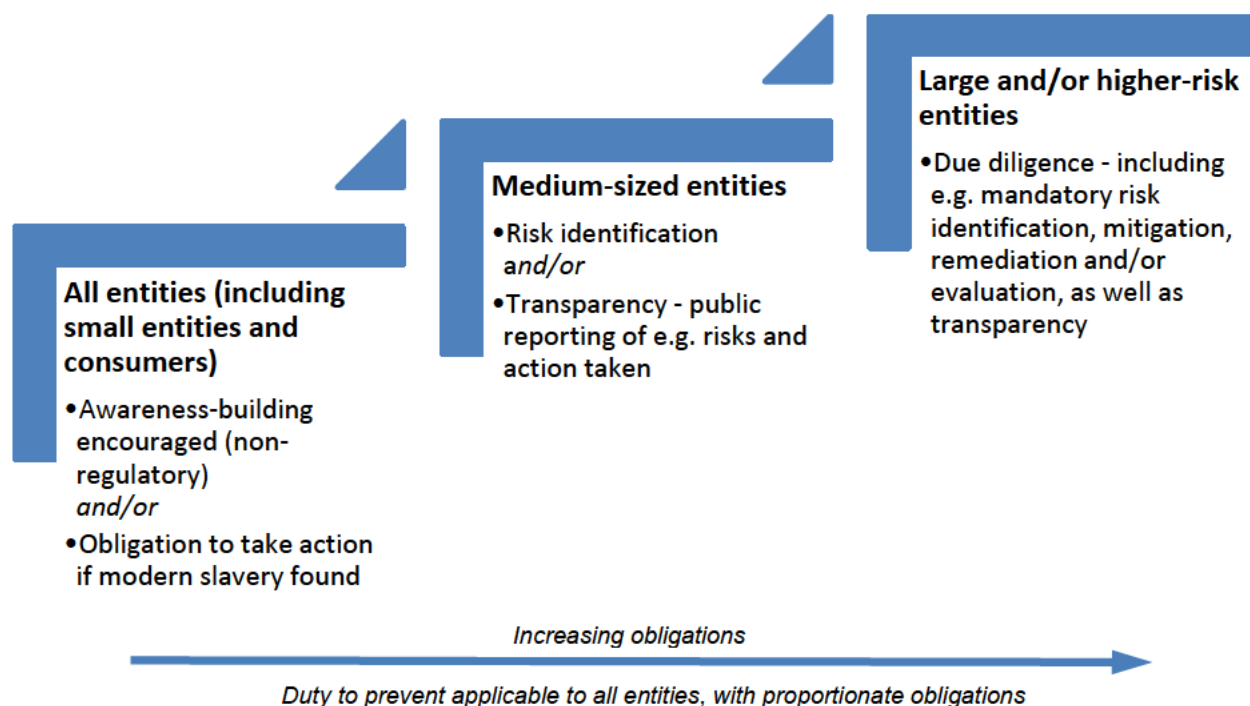
Currently, we understand that the impact of different measures does not appear to be effectively evaluated (whether at an entity or broader level) and the impact, as well as cost, of various measures may vary significantly based on an entity's individual circumstances.

The MS LAG has suggested the adoption of a graduated approach providing broad but proportionate coverage

45. At its initial meeting, the MS LAG discussion suggested that:
- a. Legislation should have wide-ranging impact, including coverage of (for example) small to medium enterprises and consumers
 - b. Coverage should be comprehensive but proportionate to factors such as risk, influence and size.
46. A graduated approach to modern slavery legislation could provide a means to achieve significant reach, while limiting the most onerous obligations to those entities with the greatest resources and/or risk. Obligations targeted at larger entities alone will likely flow through to smaller entities, but the extent to which this occurs will vary depending on the particular steps taken by those larger entities. Meanwhile, obligations placed on smaller and medium sized entities could support a wider acceptance and promotion of measures to

address modern slavery in supply chains. Figure 4 below provides an indicative illustration of what a graduated approach could look like.

Figure 4. Indicative example of graduated approach to modern slavery obligations



47. In the New Zealand context, enterprises of all sizes will be required to meet obligations under the 'duty to prevent' where they have significant influence or control over an employer. This will include taking appropriate due diligence activity, though the specific activities will be proportionate to the risk as well as the entity's size and resources. While modern slavery legislation could apply across supply chains generally (encompassing both domestic and international supply chains), the duty to prevent will apply only in relation to New Zealand employers.

We recommend publicly consulting on all three options, with the 'graduated approach' proposed as the preferred option

48. We consider that the graduated approach suggested by the MS LAG could form the basis of a legislative regime that most effectively reduces modern slavery and promotes widespread behavioural change. We consider that this approach may best meet the overall policy objectives for this work by applying widespread but proportionate obligations.
49. Consultation based around this approach would also help inform our cost-benefit assumptions and understanding of both the disclosure and due diligence approaches, and ultimately inform whether any of the three high-level options should be adopted. As with the disclosure and due diligence options, further work and consultation would be required to understand what obligations could be feasible and appropriate for entities at particular thresholds.

The framing of legislation, communications and enforcement will be critical to driving behavioural and cultural change

50. The MS LAG saw the key objective of this work as being to build enduring behavioural change across society. They considered legislation should be framed positively and based around New Zealand values to the extent possible, and that it should aim to embed good practices across all types and sizes of entity. They noted that legislation would need to be supported by a significant and compelling communication campaign including tools and guidelines, as well as effective enforcement mechanisms.

51. Legislative design can affect perceptions and behaviours both directly and indirectly. Whichever legislative approach is taken, a range of non-legislative options will also need to be implemented to effectively achieve the policy objectives. Although due diligence approaches require (rather than make transparent) certain actions, their requirements can be (and internationally have been) set at a level that provides room for entities to adopt particular practices that are appropriate for their circumstances. Legislation could also be designed so as to introduce new or alternative obligations over time – whether directly through (for example) obligations or thresholds that come into force at different time periods, or indirectly through (for example) statutory review mechanisms.
52. The nature and level of any penalty will also likely affect perceptions and behaviours. An extremely high penalty, for example, could lead to significant behavioural changes. However, this would run the risk of those behaviours being oriented towards risk-aversion rather than modern slavery reduction, which could be detrimental to achieving the overall objectives.

53. Free and frank opinions

54. An approach that brings the identification of modern slavery in supply chains to light and promotes full transparency of the risks and challenges that entities experience will likely be beneficial in the long-run. Free and frank opinions

Entities will likely need substantive guidance and support to implement practices that effectively identify and address risks. Confidential advice to Government

Public consultation can be used to explore the feasibility of a range of options, or to test more specific proposals in detail

55. Public consultation could be used to test different approaches, and could be broadly based around exploring a wide set of options or more narrowly focussed around a specific set of proposals. Higher-level or more narrowly focussed approaches, or both, could also be applied to individual questions depending on what is proposed. For example, we could test at a high-level how information could be made more accessible while also testing whether a central repository for modern slavery statements should be introduced.
56. We are currently working towards a timeline under which Cabinet could consider a draft public consultation document by the end of this year.

Further advice will be provided to you on outstanding issues such as enforcement, Confidential advice to Government

57. Irrespective of your choices on the options raised in this briefing, there are a range of further decisions that will need to be made to help inform the public consultation and legislative design. These include more detailed design considerations including on who would fall in scope (e.g. would foreign-based entities that export to New Zealand be included), how supply chains are defined, and how far the obligation should stretch (e.g. would a retail entity be required to take action in relation to the extraction of raw materials used in its products).
58. We consider that the provision of penalties for failures to meet obligations should be tested in public consultation. Current evidence suggests that legal requirements are a stronger driver for behavioural change than reputational impact and adverse publicity alone. Penalising non-compliance can also reinforce any adverse publicity directly associated with poor practice. A range of further enforcement-related decisions will also need to be made. These include consideration of (among other matters) what types of non-compliance should be penalised

and in what way, and what level any penalties should be set at. We will provide further advice to you on these matters in October 2021.

59. There are also further questions regarding whether enforcement could be undertaken by an existing regulator, or if a new regulator with new functions should be established. Notably, there will be implementation and compliance costs for the regulated parties as well as the regulator, regardless of the policy choices that are made.

A wider systems view is also required to address modern slavery

Confidential advice to Government

61. Non-legislative measures will also require consideration in due course, including:
- a. awareness-raising among the community as well as regulated entities
 - b. tools and mechanisms to support best practice approaches to address modern slavery in supply chains
 - c. how domestic and international partnerships could be developed and leveraged
 - d. overseas development assistance.

Confidential advice to Government

Next steps

64. Further advice will be provided based on the direction you wish this work to progress, including your intentions for public consultation. We are working towards the following timeframes:

Upcoming activity	Date
Meeting with officials to discuss this briefing	10 August
Second Modern Slavery Leadership Advisory Group meeting (to be held online), to discuss thresholds	18 August
Briefing seeking your agreement to proposed content for public consultation, including further information and decisions relating to enforcement	Early October

Draft Cabinet paper and public consultation document prepared	November
Cabinet consideration of public consultation document	November / December
Public consultation commences	Early 2022

Annexes

Annex One: Policy design options on corporate responsibility legislation to address modern slavery

Annex Two: High-level key points from the first meeting of the Modern Slavery Leadership Advisory Group

Annex One: Policy design options on corporate responsibility legislation to address modern slavery

Policy design options on corporate responsibility legislation to address modern slavery

There are three broadly-defined approaches to corporate responsibility-related modern slavery legislation: Disclosure; due diligence; and a graduated approach incorporating both disclosure and due diligence.

We propose that public consultation be based on a graduated approach as the preferred option, while including the alternative options.

We consider this approach may best meet the policy objectives for this work, and would inform our understanding of both disclosure and due diligence approaches.

Figure. Broad options that could be tested in public consultation (not mutually exclusive)

Option 1: Disclosure-based approach	Option 2: Due diligence-based approach
<ul style="list-style-type: none"> Option 1(a): capturing fewer entities (through higher thresholds or targeting) Option 1(b): capturing more entities (through lower thresholds) 	<ul style="list-style-type: none"> Option 2(a): capturing fewer entities (through higher thresholds or targeting) Option 2(b): capturing more entities (through lower thresholds)
Option 3: Graduated approach [recommended]	
<ul style="list-style-type: none"> Capturing a range of entities, with the extent of disclosure and due diligence obligations proportionate to the risk, influence and size of the entity <p>[MS LAG proposed model]</p>	

The general obligations associated with each broadly-defined approach are as follows:

Criteria	Option 1: Disclosure		Option 2: Due diligence	
	Option 3: Graduated approach (obligations proportionate to size and risk) [recommended]			
Disclosure obligation	<i>Published statement with suggested reporting content [not recommended]</i>	Published statement with prescribed reporting content (e.g. in relation to risks, actions, and evaluation)		
Obligation to take action (other than disclosure)	<i>Nil</i>	<i>Nil</i>	High-level actions e.g. undertaking appropriate steps to identify risk, mitigate risk and evaluate success (more specific recommendations may be provided in guidance)	Prescribed actions e.g. audit of supply chain, provision of grievance/'whistle-blower' mechanisms, and/or consultation with specified groups
Trigger for penalty or other enforcement action	<i>No penalty [not recommended]</i>	Failure to prepare satisfactory statement	Failure to satisfactorily meet obligation	Failure to take specified action
Expected benefits	<ul style="list-style-type: none">Enhances transparency in supply chain practices and accountabilityPromotes a 'race to the top' in the development of effective practice to address modern slavery.Responds to expectations of stakeholders including consumers, businesses and foreign governments.		<ul style="list-style-type: none">Likely to be more effective as it requires that direct action be taken.Approach may be seen more favourably by stakeholders.Would be aligned with changes introduced or under consideration in jurisdictions across Europe, which may support or promote trade particularly in those markets.	
Expected costs / risks	<ul style="list-style-type: none">Direct financial cost associated with preparing disclosures (Australia estimated \$21,950 per reporting entity), as well as indirect costs relating to steps taken to address modern slavery.Costs associated with establishing the regulator and supporting ongoing enforcement (including guidance and support services).Low rates of compliance and poor quality statements (associated with current UK model).Indirect means of driving action, with a risk of 'whitewashing' in the disclosures of steps taken.		<ul style="list-style-type: none">Likely higher financial cost on entities compared to disclosure alone. Particular cost may vary depending on size, risk and influence of the entity, and costs may also flow down their supply chains.Higher cost associated with regulatory enforcement, which is likely to be more complex e.g. if enforcement relates to the rigour and legitimacy of actions taken internationally.	
International examples	<i>UK (current)</i>	<i>Australia, UK (proposed)</i>	<i>Netherlands (child labour)</i>	<i>France, Germany</i>

The options for determining which thresholds should apply, if one or more ‘bright-line’ tests are to be adopted, will affect the legislation’s overall impact and are broad:

Threshold type		Higher thresholds (capturing fewer entities)			→		Lower thresholds (capturing more entities)		
Financial thresholds (converted to NZD for ease of comparison)	Turnover / revenue	California: \$100m (NZD \$144m) [not recommended]	Australia: \$100m (NZD \$106m) [not recommended]	UK: £36m (NZD \$70m)	EU and Switzerland: €40m and CHF 40m (NZD \$62-68m)	New South Wales, Australia: \$50m (NZD \$53m)	Canada proposed: \$40m (NZD \$45m)	Norway: NOK 70m (NZD \$12m)	No threshold (Netherlands child labour)
	Total assets	EU and Switzerland: €20m and CHF 20m (NZD \$31-34m)			Canada proposed: \$20m (NZD \$22m)		Norway: NOK 35m (NZD \$6m)		
Employee thresholds		5,000, or 10,000 for entities with overseas head office (France)	3,000 (Germany, reducing to 1,000 employees from 2023)	500 (EU disclosure directive – in combination with financial thresholds)	250 (Canada proposed and EU proposed due diligence – in combination with financial thresholds)		50 FTEs (Norway – in combination with financial thresholds)		

Revenue, asset and employee thresholds all serve as proxies for size and resources, and provide clear figures for identifying which entities fall in scope of the obligations. Revenue and asset information is already collected for financial reporting purposes, and thresholds based on these measures are used in existing New Zealand regulatory frameworks to identify large entities. Employee thresholds are not currently used in New Zealand frameworks. This information may be more difficult to track, as reporting on employee numbers is not required under existing regulatory regimes.

A principles or risk-based test could be applied separately, or in addition to, any bright-line test. This could be based on a range of factors such as an entity’s risk of modern slavery in its supply chains, or targeted at importers with total annual imports above a specified value.

There are a broad range of further design decisions, particularly relating to enforcement, which will need to be considered ahead of public consultation. These include the following (indicative) options:

Policy decision	Lighter (indicative)		→		Stronger (indicative)	
Definition / extent of supply chain	Immediate suppliers only		Designated number of 'tiers' in supply chain		Full supply chain (including through to extraction of raw materials)	
Penalties	Ministerial pressure to comply / naming and shaming (Australia)	Injunction by court requiring compliance (California, UK)	Fine for lack of statement, or inadequate statement (Canada proposed)	Fine for lack of action and/or deliberate omission (Netherlands child labour)	Fine for breach of care (France)	Criminal offence (including potential imprisonment) for sustained or serious failures (Netherlands child labour)
Fine levels (converted into NZD for ease of comparison)	\$7,400 (Netherlands: €4,350 [for failing to submit a statement])	\$157,000 (Switzerland: CHF 100,000; or CHF 50,000 for acting negligently)		\$278,000 (Canada proposed: \$250,000)		\$1.5 million or up to 10% of the annual turnover of the company (Netherlands child labour: €870,000 [for failing to take due care with reasonable grounds to suspect child labour])
Remediation obligations	No obligations (All jurisdictions with disclosure-based legislation)		Civil claim brought by victim, who must demonstrate personal harm and connection to the entity's failure to meet its obligations (France)		Civil claim with burden of proof on the entity to demonstrate it undertook reasonable due diligence (EU proposed)	
Accountability for disclosure / obligation	Entity (itself) (France)			Principal Governing Body e.g. Board of Directors / Trustees (Australia, UK)		
Frequency of reporting / disclosure obligation	One-off statement (Netherlands child labour)			Annual statements (Australia, UK)		
Publication / availability of disclosure	In an entity's annual financial reports or alongside other annual filings (France)		On the entity's website or publicly available in hard copy as a standalone document (California, UK)		In a government-run central repository of statements (Australia, UK)	
Enforcement agency	Integration into existing regulator		Creation of new unit within an agency (Australia, UK)		Creation of independent Commissioner office, in addition to agency-level changes (UK)	
Commissioner roles (if established)	Provides a voice for victims		Reports on progress and success of legislation and/or other approaches		Reports on business actions on human rights, and holds them and government to account	
Frequency of reporting / disclosure obligation	One-off statement (Netherlands child labour)			Annual reports on implementation undertaken by a department and/or independent Commissioner (Australia, UK)		
Mechanisms to review legislation	No specified review / ad hoc		Statutory review after five years (Netherlands child labour)		Statutory review after three years, on designated issues (Australia)	

Annex Two: High-level key points from the first meeting of the Modern Slavery Leadership Advisory Group

Modern Slavery Leadership Advisory Group – what should the response to modern slavery within supply chains be?

This document is a high-level reflection of the key points from the ‘who’ and ‘what’ discussion from 18 June meeting of the Modern Slavery Leadership Advisory Group. It does not represent MBIE’s views and is designed to reflect your feedback and thoughts on the overall approach to the legislation.

The legislation should be framed in a positive, ambitious and action orientated way...

It should also have a wide-ranging impact; including on workers, consumers and businesses as well as contributing to New Zealand’s reputation. The legislation should be framed in a positive way (Freedom Act, Care in Trade Act etc.) but it has to be clear in its intended aims which may also impact on what the legislation itself is actually called. The ultimate success will be about building an enduring change in culture and behaviour in both businesses and consumers, where they see this work as adding to their competitive advantage rather than impeding it. This will require a holistic approach as well as a significant and compelling communication campaign.

The scope should be limited to addressing modern slavery in supply chains...

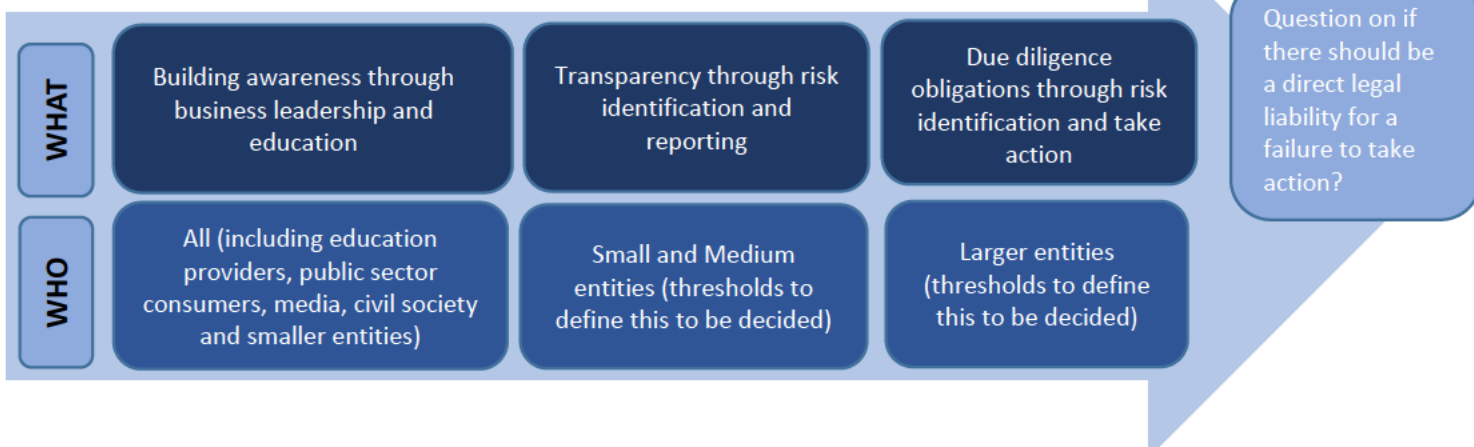
Whilst there are links to wider Human Rights and environmental issues, it was agreed that this work should initially focus on addressing slavery in the production and provision of goods and services.

The legislation should be comprehensive and proportionate...

Comprehensive coverage which is proportionate to level of risk, influence and size of the business. The whole approach looks at both personal and corporate accountability. It should be a graduated approach that aims to establish good practice at the early stage of company formation rather than trying to retrofit good practice when a company reaches a certain size. The challenge is how to do this in a way such that the burden on smaller companies is manageable. Penalties and consequences for a failure to take action should be included from the start. A review of the legislation should also be agreed to allow for flexibility and any required amendments following implementation.

Who: Should focus on anyone who can have an impact on the issue including SME’s, not-for-profit and government.

What: Due diligence should form part of the response as this is where other jurisdictions are now focussing – rather than transparency on its own. The focus needs to be what is workable for each “who” with a proportional approach which is centred on a positive duty to act rather than just reactive reporting. Due diligence would allow companies to take a risk-based approach that would entail a prioritisation of those risks. The legislation needs to have the flexibility and room for companies to mature; being respectful to gestation and types of business models. The group discussion suggested a model that took into account a scaled approach which automatically takes into account proportionality:



Co-operation between government, consumers, civil society and business is essential and could include:

Sharing of best practices; templates; learning from leaders; utilising NGO expertise; and supporting consumer choice. A library of tools, guidelines and templates needs to be created and launched at the same time as the legislation to simplify it for businesses and support the transition. It is also important that consumers and the media are part of the education and change in this space (both in terms of spending habits and 'naming and shaming' businesses). Otherwise businesses will find it difficult to take positive action against slavery as well as balance the need to make a profit.

Co-operation is also important with regards to designing, implementing and evaluating any legislation. This can be in the form of the public consultation but also targeted workshops or focus groups.

There are lessons which can be learnt from others...

The Australian approach was discussed most in the room as Walk Free had been a part of the development of that legislation. However, we should continue to look at other jurisdictions as well, including those who take a due diligence approach. With regards to the lessons learnt from Australia, the key things to learn were the inclusion of some elements from the beginning like penalties for non-compliance and an independent modern slavery commissioner. In addition, that it should not be a solely reporting requirement but a positive duty to act; perhaps also including a duty of vigilance and a duty to remedy. This duty should apply to everybody, not just large companies by virtue of a bright-line test.

There are links to the domestic duty to prevent employment standards breaches which need to be considered...

There is a need to ensure that the domestic duty to prevent work and any legislation on supply chains aligns with any potential modern slavery legislation to avoid additional burden to the business, civil society (in terms of monitoring) and obstacles in securing the buy-in, in particular from the private sector.

There are some potential areas for future conversation:

1. What should the thresholds of each level of response be and/or how you define them – i.e. who does due diligence and who does transparency and is this decided through turnover or by another means?
2. What penalties should apply and should there be remedies?



BRIEFING

Addressing Modern Slavery in Supply Chains: Further Decisions for Public Consultation

Date:	1 October 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1038

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the proposed questions and content for public consultation on potential legislation to address modern slavery in supply chains.	8 October 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	Privacy of natural persons	✓
Paramita Turner	Senior Policy Advisor	Privacy of natural persons		

The following departments/agencies have been consulted
Ministry of Foreign Affairs and Trade, New Zealand Customs Service

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Addressing Modern Slavery in Supply Chains: Further Decisions for Public Consultation

Date:	1 October 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1038

Purpose

This briefing seeks further decisions from you to guide the development of a discussion document for public consultation on proposed modern slavery legislation.

Executive summary

You have agreed to consult the public on modern slavery legislation with a graduated approach as the preferred option [briefing 2122-0132 refers]. This approach places increasing due diligence obligations on entities based on their size, risk and/or influence. You have agreed that these obligations be framed around the *United Nations Guiding Principles on Business and Human Rights*.

This briefing seeks further decisions to guide the development of a discussion document for public consultation. It also provides further advice on matters raised in our previous briefing and your subsequent meeting with officials. Our views have been informed by analysis of the available research and literature, and by the Modern Slavery Leadership Advisory Group (MS LAG).

We propose that the discussion document be structured around the following themes (provided in further detail in **Annex One**):

1. what obligations will apply
2. who will be covered
3. how the legislation will work.

We propose that the primary focus of the consultation should be to inform the legislative design around 'what obligations will apply' and 'who will be covered', and we recommend testing more detailed proposals on these issues. As key additional questions to what you have agreed previously, we propose testing:

- A requirement for all entities (including small entities of any size) to take appropriate action if modern slavery is found in their supply chain. This could involve the entity reporting the case to the appropriate authority, working with their supplier to address risks, and/or changing suppliers.
- Definitions for 'medium' and 'large' sized entities based on a range of indicatively proposed revenue thresholds, with suggested starting points of either \$10m, \$20m or \$30 million for defining medium and \$50m or \$60 million for defining large entities. 'Medium' sized entities would be required to provide annual disclosures on the due diligence they have undertaken, while large entities would be required to directly undertake due diligence (in addition to providing annual disclosures).
- That legislative obligations should apply across the full supply chain of regulated entities, while noting that reasonableness and proportionality would be built into the obligations.

We propose consulting with generally more high-level and open questions relating to ‘how the legislation will work’. These will include questions on:

- how the penalty framework should be designed
- whether the legislation should be supported by an independent body (such as a commissioner or ombudsperson) and what functions they should have
- what support may be needed for stakeholders
- the design of a central repository for modern slavery statements.

The connections will need to be made clear between this work and the duty to prevent breaches of employment standards by third parties with significant control or influence over an employer (‘duty to prevent’). It is possible the Select Committee will be considering the duty to prevent legislation at the same time as we are undertaking public consultation on the modern slavery legislation, and risks of perceived duplication and associated compliance burden will need to be managed. To address these risks we will develop clear and joined-up key messages for the two pieces of work that clearly describe their similarities and differences, and we will present them as part of one overall phased government plan.

We recommend undertaking a substantive public consultation taking place over a three month period beginning from mid to late January 2022. This would include face-to-face consultation with key stakeholders, as well as an online submissions process. This would reflect the substantive questions being asked and the broad range of perspectives we wish to seek.

Following your decisions in this briefing, officials will provide you with a draft discussion document and Cabinet paper by the end of November 2021 for Cabinet’s consideration by the end of 2021. There will be budget implications associated with the policy decisions to be made following public consultation (including, for example, the development of a central repository of statements and toolkits). We will provide you with indicative costs in our next briefing to you, noting that costs could vary considerably depending on how the legislation or supporting structure is designed.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that you have agreed to publicly consult on a 'graduated approach' to modern slavery legislation, applying disclosure and other due diligence obligations for entities based on factors such as their size, risk and influence [briefing 2122-0132 refers].

Noted
- b **Note** that you have agreed this legislation should be based broadly on the United Nations *Guiding Principles on Business and Human Rights*, and intend for entities to take action to identify risks, address those risks, evaluate the effectiveness of their actions, and be transparent about implementation.

Noted
- c **Agree** that the discussion document be based around the key themes of: what obligations will apply; who will be covered; and how the legislation will work (see **Annex One**).

Agree / Disagree
- d **Note** that the Modern Slavery Leadership Advisory Group has suggested introducing a requirement applicable to small entities to take appropriate action if modern slavery is found in their supply chain, and to establish an independent body (such as a commissioner) to support the overall response to modern slavery (see **Annex Two** and **Annex Three** for high-level reflections from their previous two meetings).

Noted
- e **Agree** to consult the public on a requirement for all entities, including small entities of any size, to take appropriate action if modern slavery is found in their supply chain.

Agree / Disagree
- f **Agree** to consult on potential revenue thresholds for defining medium and large entities, based on an expressed indicative view that:
 - i. medium-sized entities should be defined as exceeding a revenue level of either \$10m, \$20m or \$30 million
 - ii. large-sized entities should be defined as exceeding a revenue level of either \$50 or \$60 million.

Agree / Disagree
- g **Agree** to consult on a proposal that legislative obligations will apply across the full range of the supply chain, though specific actions expected of entities would depend on what is reasonable based on their size and risk.

Agree / Disagree
- h **Agree** that generally open questions be raised relating to 'how the obligations will work', including high-level questions relating to the penalties framework, the creation of an independent body to support the overall response to modern slavery, the support needed by stakeholders, and the design of a central repository for statements.

Agree / Disagree
- i **Agree** that MBIE officials share an initial copy of the draft discussion document with the Modern Slavery Leadership Advisory Group for discussion at their next meeting, scheduled for 21 October 2021.

Agree / Disagree

- j **Agree** to continue to progress the modern slavery work and duty to prevent legislation on separate timelines.
Agree / Disagree
- k **Note** that to manage the relationship between modern slavery and the duty to prevent we will develop joined-up key messages which emphasise the alignment between the proposals (see **Annex Four** for an indicative comparison table), and make it clear that there will not be unnecessary duplication or compliance costs put on businesses.
Noted
- l **Agree** that public consultation on the proposed modern slavery legislation should be undertaken substantively over a period of three months, and include targeted engagement with key stakeholders.
Agree / Disagree
- m **Agree** to forward copies of this briefing to the Minister of Foreign Affairs, Minister for Trade and Export Growth, Minister for Economic and Regional Development, Minister of Immigration, and the Minister of Commerce and Consumer Affairs.
Agree / Disagree
- n **Indicate** if you wish to meet with officials to discuss the matters raised in this briefing.
Yes / No

Privacy of natural persons

Nita Zodgekar
Manager, International Labour Policy
Labour, Science & Enterprise, MBIE

01 / 10 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. In August 2021, you agreed to publicly consult on modern slavery legislation based on a graduated approach as the preferred option [briefing 2122-0132 refers]. Under this approach, disclosure and other due diligence obligations would apply based on an entity's size, risk and influence. You also agreed that modern slavery legislation should be based broadly on the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), requiring entities to: undertake risk identification; take action to address those risks; monitor and evaluate the effectiveness of those actions; and to be transparent about each of those steps.
2. This briefing seeks further decisions to guide the development of a discussion document for public consultation. It also provides further advice on matters raised in the August briefing and your subsequent meeting with officials, including:
 - a. opportunities for incorporating positive framing into the communications and legislative design
 - b. relationships with the proposed duty on third parties to prevent breaches of employment standards by employers they have significant control or influence over ('duty to prevent')
 - c. potential revenue threshold levels, as a way of defining entity size, to test in public consultation
 - d. how far down the supply chain of an entity the legislation should apply
 - e. further information on options for penalties to be raised in public consultation.
3. Our views have been informed by analysis of the available research and literature, including through independent analysis commissioned by MBIE (see **Annex Five**), and from the views expressed by the Modern Slavery Leadership Advisory Group (MS LAG).

The Modern Slavery Leadership Advisory Group continues to inform our policy development

4. Since its initial meeting in June 2021, the MS LAG has met twice to discuss:
 - a. thresholds and tests for determining who should fall in scope of obligations, and what obligations should apply for small entities (August 2021)
 - b. enforcement and institutional support mechanisms, and connections with the duty to prevent (September 2021).
5. Summaries of these discussions are attached as **Annexes Two** and **Three**. The MS LAG's views are also reflected in our advice in this briefing.

We recommend that the consultation focus on what obligations will apply and who will be covered, while seeking views on how it will work

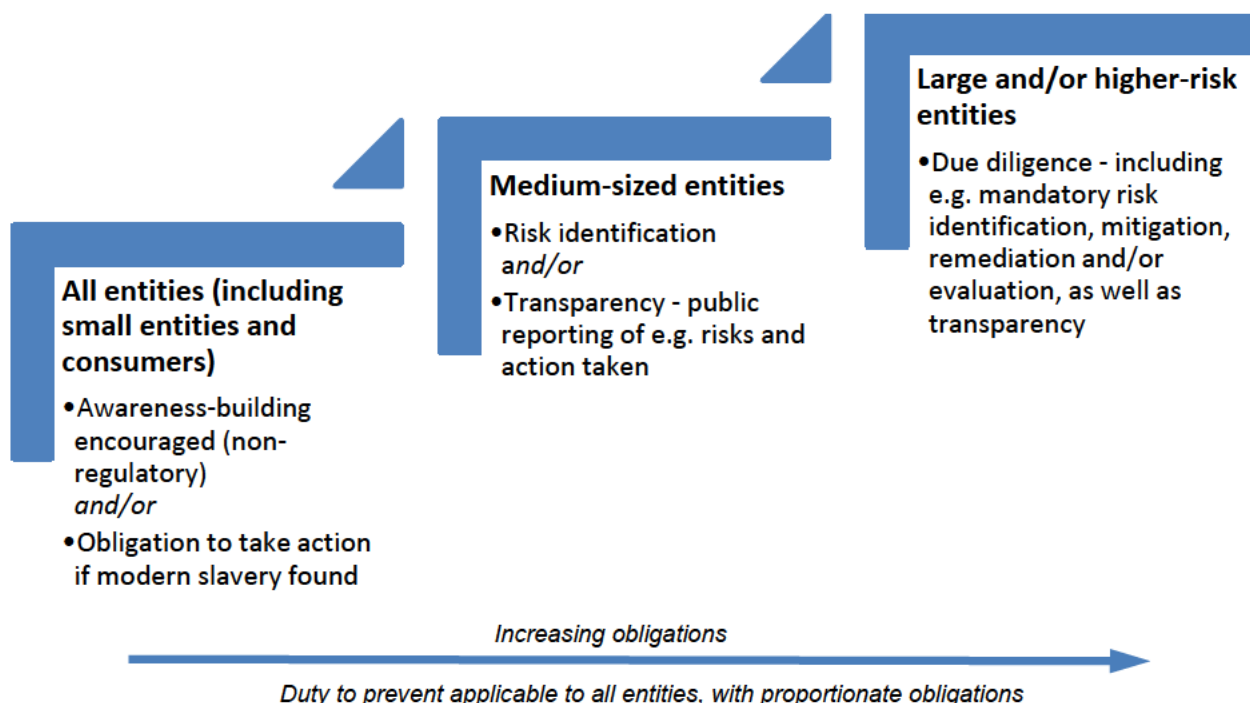
6. We propose that the discussion document be structured around three key themes (provided in more detail in **Annex One**):
 - a. What obligations will apply – including the broad proposed legislative approaches (disclosure, due diligence or the preferred graduated approach), and specific obligations for different groups.
 - b. Who will be covered – including on the types of entity to fall in scope of the legislation, and the appropriate threshold type(s) and levels.

- c. How the legislation will work – including how non-compliance should be penalised, whether the legislation should be supported by an independent office (and what its functions could be), the design of a central repository for modern slavery statements, and support services for stakeholders.
7. We propose that the primary focus of the consultation would be on the ‘what’ and ‘who’ sections, which would include more detailed proposals for what we think the legislation should provide. The ‘how’ section would include generally more high-level and open questions at this stage, as these components will be informed substantively by considerations of what obligations will apply and who they will apply to.
8. An introductory section would provide our assessment of the problem definition and the policy objectives for this work, including how these are framed. This would provide an initial opportunity to incorporate the positive framing previously suggested by the MS LAG, which would then be incorporated throughout the remainder of the discussion document. The discussion document could potentially also be titled so as to promote sustainability and freedom in supply chains, as opposed to being compliance-focused and ‘against’ modern slavery.

We propose that the ‘what obligations will apply’ and ‘who will be covered’ sections be based on specific proposals

9. You previously agreed to publicly consult on a graduated approach to modern slavery legislation as the preferred option, as indicated in the figure below [briefing 2122-0132 refers]:

Figure 1. Previously indicated example of graduated approach to modern slavery obligations



10. We consider that public consultation could best be used to inform:
 - a. What obligations will apply – seeking views on different approaches to modern slavery legislation (disclosure, due diligence or the preferred graduated approach), and on the potential impact and appropriateness of our proposed obligations for different groups.

- b. Who will be covered – seeking views on the types of entity to fall in scope of the legislation, and on the appropriate threshold type(s) and levels for defining the groups that will be subject to graduated obligations.
- 11. The public consultation will help to inform our understanding of the impact that different options could have on the regulated entities as well as victims and consumers.

The Leadership Advisory Group has recommended broad-ranging regulatory obligations covering entities of all sizes

- 12. Rather than framing disclosure and due diligence as separate measures, the MS LAG suggested framing the obligations under a single due diligence umbrella so that it would be easier for the public to understand. 'Due diligence' for medium-sized entities would mean making disclosures, while for large entities it would include more direct due diligence obligations. We propose adopting this framing in the discussion document.
- 13. The MS LAG suggested that due diligence obligations should apply broadly to entities, including small entities (except for those with no connection to supply chains). Some members considered that entities of all sizes should have a regulatory obligation to take action if modern slavery is found in their supply chain, and to lodge an annual statement declaring they are taking due care.
- 14. The MS LAG also suggested taking a broad view of what a 'medium-sized' entity could look like. They generally supported the use of a revenue-based threshold for determining 'medium' and 'large' entities, but considered that this should be set at a relatively low level (though they did not form a consensus view on a specific amount).

Broad-ranging obligations can be introduced consistent with the UN Guiding Principles on Business and Human Rights

- 15. You previously agreed that modern slavery legislation in New Zealand should be based broadly on the UNGPs and intend for the regulated parties to:
 - a. undertake modern slavery risk assessments across their global operations and supply chains (including those of any of its subsidiaries) to identify potential risks
 - b. undertake action (as is reasonable and appropriate) to address any risks
 - c. monitor and evaluate the effectiveness of the actions they take
 - d. be transparent about the risks they identify, the actions they are taking and how they are monitoring and evaluating those actions.
- 16. Disclosure obligations, applicable to both medium and large entities, would reflect the transparency requirement in (d) above. This would be consistent with the disclosure obligations under Australia's Modern Slavery Act, which requires entities to (among other matters):
 - a. describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls
 - b. describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes
 - c. describe how the reporting entity assesses the effectiveness of such actions
 - d. describe the process of consultation with any entities that the reporting entity owns or controls.

17. In addition to disclosure, large entities would be obligated to directly meet due diligence obligations. While the desired outcomes will be the same as for disclosure-alone, their enforcement will vary. Whereas medium-sized entities could be penalised for failing to meet disclosure obligations, large entities could be penalised for failing to adequately: identify and assess risks in their supply chains; take action to address those risks; or evaluate the effectiveness of their actions. In practice, we anticipate that entities which fully meet Australia's modern slavery expectations, in line with both its legislation and official guidance, will likely also meet these due diligence obligations.

We recommend testing a further requirement for entities of all sizes (including small entities) to take appropriate action if modern slavery is found in their supply chain

18. For small (as well as medium and large) entities, we propose testing with the public whether the legislation should include a requirement to take appropriate action if entities become aware of modern slavery in their supply chain. Taking action in such a case could involve the entity reporting the case to the appropriate authority, working with their supplier to address risks, and/or changing suppliers.
19. We consider this approach could provide for broad-ranging legislation which, if accompanied by appropriate support materials, could help to foster culture change. This would be consistent with the positive framing of the discussion document.

20. **Free and frank opinions**

21. We do not propose explicitly consulting on an option that would require entities to lodge annual statements declaring they are taking due care, as some members of the MS LAG suggested. Instead, we propose asking broader questions on what would be reasonable for small entities (in particular) to do. The lodging of an annual statement could be provided as a non-exhaustive example alongside other options, such as completion of an information and education module on supply chains.

We propose that legislative obligations should apply across the full supply chain, though the action to be taken could vary depending on individual factors

22. International jurisdictions are typically silent regarding the number of supply chains tiers their legislation applies to, though this can be covered by guidance. The UK, for example, advises that entities "should also engage their lower tier suppliers where possible" while Australian guidance suggests "You need to consider modern slavery risks that may be present anywhere in the global and domestic operations and supply chains... This includes risks that may be present deep in supply chains".

23. The UNGPs similarly take into account the full network of business relationships a business has across its value chain. However, the UNGPs recognise that addressing impacts in these cases can be more complex compared to cases where the impacts are under the direct control of the entity, and suggest that:

"Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences."

24. We propose that New Zealand should adopt a similar approach to determining how far down a supply chain obligations should extend. In principle, this would mean that obligations

should apply across the entire supply chain of an entity. However, the nature of any obligations in relation to particular tiers of the entity's supply chain would depend on factors including the risk of modern slavery being present and the entity's ability to mitigate that risk.

Reasonableness and proportionality would need to be built into the design of due diligence obligations

25. Consistent with the UNGPs and the duty to prevent, the appropriate due diligence action for entities would vary based on their size and the nature of their risks. The UNGPs recognise that:

"The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character."

26. This provides a considerable element of judgment for individual entities which will need to be informed by substantive guidance and toolkits. We propose also raising high-level questions regarding what support may be required for regulated entities.

We recommend consulting on the scope of coverage using revenue-based thresholds to define medium and large entities

27. The MS LAG recommended clearly defining who the regulated entities will be, including how any foreign entities may be covered. You previously agreed that no entities should be excluded from the scope of this legislation based solely on their type or sector, meaning that government and charitable entities (among other types) would fall in scope of the legislation provided they met a revenue (or similar) threshold.
28. Should you agree to publicly consult on an option where small entities are required to take appropriate action if modern slavery is found in their supply chains, we propose that this should remain broad-ranging but exclude individual consumers.

We recommend consulting on proposed revenue thresholds based on a range of options to define entity size

29. In considering revenue thresholds for public consultation, the MS LAG suggested proposing the lowest reasonable figure possible. We do not currently have a strong sense of what obligations would be reasonable for entities based on their revenue, which would be informed by the public consultation. However, we note that the development of guidance and toolkits could mitigate the financial and other costs for business. For example, the development of templates supported by clear guidance could help to facilitate the disclosure process. The MS LAG saw this as critical to implementation, and considered that supporting toolkits should be developed in parallel with the legislation so as to be available immediately when the legislation comes into force.
30. Rather than consulting based on a single figure for defining 'medium' and 'large', we recommend consulting based on a proposed range of figures. We propose consulting on a threshold for 'medium' that could start at either \$10m, \$20m or \$30 million, and for 'large' that could start at \$50 or \$60 million (consistent with our previous advice to you [briefing 2122-0132 refers]). This approach would provide submitters an indication of what the government considers appropriate revenue thresholds could be, while also inviting views from submitters on what they consider the thresholds should be (whether or not that falls within the ranges provided). An indication of how this could be visualised is provided in Table 1 below.

Table 1. Indicative revenue levels for 'medium' and 'large' entities

Revenue level (\$m)	0	10	20	30	40	50	60	70	80	90	100+
Medium											
Large											

Note: Red squares mark indicative revenue threshold starting points. 'Small' would include any entity below the 'medium' revenue threshold level.

31. In defining revenue, we propose testing a view that this should be determined based on an entity's consolidated annual revenue. This would take into account the revenue of any of the entity's subsidiaries (including those based offshore and any offshore revenue), but not those of any parent of the entity (provided the parent entity does not itself trade in New Zealand). This approach would be consistent with those used internationally, which also generally exclude entities based offshore that trade insignificantly or incidentally within the relevant jurisdiction.
32. Specifying a level of trade within New Zealand could help to clarify which entities should fall in scope, and prevent attempts to 'opt out' of obligations amongst entities whose revenues are primarily earned offshore but still trade materially within New Zealand. As a comparator, Californian disclosure legislation applies to entities whose Californian sales exceed the lower of \$500,000 (subject to annual inflation adjustments) or 25 per cent of the entity's total sales (alongside a broader \$100 million revenue threshold).

The combination of questions on obligations and who they will apply to is intended to inform the development of proportionate and effective legislation

33. The questions for public consultation on what obligations will apply and who they will apply to are intended to inform the design of a graduated approach to modern slavery legislation that is proportionate and effective. The indicative requirements and who they would apply to, based on the information and advice provided above, could look as follows:

Table 2. Indicative overview of potential requirements and enforcement approach

Entity size (revenue-based)			'Due diligence' requirement	Enforcement
Large (from \$50m-60m)	Medium (from \$10m-30m)	Small	<ul style="list-style-type: none"> Appropriate action if modern slavery found 	<ul style="list-style-type: none"> Investigation into presence or awareness of modern slavery, and response of entity
			<ul style="list-style-type: none"> Annual disclosures on due diligence activity undertaken (risk identification, actions taken, evaluation of actions) 	<ul style="list-style-type: none"> Check for lodgement of statement, and presence of content on the matters prescribed Check for accuracy of content
			<ul style="list-style-type: none"> Direct due diligence requirements: <ul style="list-style-type: none"> Risk identification Action to address risk Evaluation of actions 	<ul style="list-style-type: none"> Investigation into due diligence processes

We propose that questions on how the legislation would work should be based on more openly-pitched questions

34. We consider that generally more high-level and openly-pitched questions would best inform our views on how the legislation would work at this stage. For example, questions could ask stakeholders what support services they think would be useful and what features they think a central repository for modern slavery statements should have, rather than testing particular proposed services or features. We consider that public consultation could best be used to inform the development of policy or broader thinking on:
- i. penalties and remediation
 - ii. the establishment and functions of an independent body (such as a commissioner or ombudsman) to support the overall response to modern slavery
 - iii. support services for stakeholders, particularly the regulated entities
 - iv. the design of a central repository for modern slavery statements
 - v. monitoring and evaluation arrangements.

The MS LAG has suggested that penalties should reflect the seriousness of the problem and stakeholders should be supported as much as possible

35. The MS LAG has suggested that penalties should reflect the seriousness of the problem. They considered that options to enable this could include taking into account aggravating or mitigating factors, and providing for defences from liability where reasonable steps have been taken.
36. The MS LAG also suggested that an independent commissioner (or similar role) will be integral to the success of modern slavery legislation. They have discussed its potential functions as including victim referral services, as well as supporting and empowering businesses to improve their practices.
37. The MS LAG considered a central repository was essential, and that this could be leveraged to provide a central resource including tools and best practice examples. They considered that the supporting toolkits and resources should be developed alongside the legislation and be completed at the same time the legislation comes into force.

We propose that questions on penalties be open-ended, and do not seek views on the level of any penalties

38. You previously agreed that the provision of penalties for failures to meet obligations should be tested in public consultation [briefing 2122-0132 refers]. We do not propose seeking public views on the level of any penalties, as these should be determined in a manner consistent with New Zealand's existing offence and penalty framework. Instead, the public consultation could be used to seek views on whether:
- a. there should be different penalties for non-compliance with different obligations (i.e. taking action if modern slavery found, disclosure, or direct due diligence obligations)
 - b. the penalty framework should take into account aggravating and mitigating factors, and what those factors should be
 - c. penalties should differ based on the size of the entity (including whether small entities should be subject to a penalty)
 - d. penalties should be imposed exclusively by the regulator, or if individuals (onshore and offshore) should also have the ability to bring a claim.

39. Internationally, financial penalties vary substantially. For disclosure-based approaches, Australia and the UK do not provide for any financial penalties while Canada's proposed regime would provide a penalty of approximately NZD 279,000. Penalties under the Netherlands' child labour due diligence regime range from a fine of approximately NZD 7,200 for failing to submit a statement (declaring that they have investigated risks of child labour), up to NZD 1.45 million or 10 per cent of the annual turnover of the company for failing to take due care where there are reasonable grounds to suspect child labour. The Netherlands' law also includes criminal offences for sustained or serious failures to comply.

We propose testing whether and how an independent body could help to support the implementation of any legislation and better address modern slavery

40. We propose testing in public consultation whether and how an independent body could support the implementation of any legislation to address modern slavery in supply chains, as well as support a wider response to addressing modern slavery. By being independent of government they can reach stakeholders who may otherwise be reluctant to seek support because, for example, they are a victim with fear or distrust of government or a regulated entity that does not want to risk being penalised for non-compliance. However, the effectiveness of an independent body would largely depend on its functions and powers. Feedback from public consultation could inform our understanding of what functions are seen as necessary to address modern slavery, and in turn where those functions should sit.
41. Various jurisdictions have established independent bodies to support the delivery of their modern slavery or broader human rights regimes. The New South Wales legislation, which was passed in 2018 but has not yet come into force, will also establish an Anti-Slavery Commissioner. Where such roles have been established, the Commissioner or Ombudsman's remits have been to address modern slavery and/or human trafficking as a whole, rather than being limited to any corporate social responsibility-related legislation the jurisdiction has in place. Table 3 below summarises some of the roles and functions of independent bodies established overseas:

Table 3. Examples of independent bodies established to address modern slavery

Country	Role	Relevant functions
Canada	Canadian Ombudsperson for Responsible Enterprise (CORE)	Looking into complaints about possible human rights abuses when they happen in Canadian companies that work outside Canada in the garment, mining, in the oil and gas sectors.
Finland	Ombudsman for Minorities	Monitoring action against human trafficking in Finland, human trafficking more broadly, compliance with international obligations, and the effectiveness of national legislation.
Netherlands	National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children	Reporting on the nature and extent of human trafficking and sexual violence against children in the Netherlands and the effects of government policies.
United Kingdom	Independent Anti-Slavery Commissioner	Encouraging good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences, as well as in the identification of victims.

42. The MS LAG and other stakeholders we have engaged with (e.g. the Chartered Institute of Procurement and Supply) have also suggested that the success of any legislation will be partly dependent on the communications campaign and awareness raising of both

consumers and organisations. One of the key roles of commissioners or ombudsmen internationally is to promote the aims of the legislation and raise the profile of the work.

Confidential advice to Government

45. In order to support any further investigation of the need for, and design of, any such independent commissioner or ombudsman, we propose that general questions be asked regarding whether there is a need for such a role to be established and, if so, what role that person or organisation should play. This could include questions around its remit and its role within the context of government.

We also propose that there be questions to understand what support stakeholders would need to help implement the legislation

46. Conversations we have had with the MS LAG and other stakeholders (e.g. Retail NZ and Fonterra) suggest that support mechanisms will be essential, and should be launched at the same time as any legislation. So far, particular suggestions have included: best practice templates of reports or audits; directories of organisations who can support businesses to implement the requirements of any legislation; and guidelines from the government.
47. We therefore suggest that the consultation includes questions on what types of support entities see as necessary to help meet the requirements, and achieve the desired outcomes, of any legislation.

We propose that questions be asked on how a central repository should be designed

48. Internationally, central repositories for modern slavery statements have been seen as essential to support disclosure legislation (see analysis in **Annex Five**). The MS LAG has similarly suggested a central repository would be an integral component of New Zealand legislation, and could additionally be used to provide a central resource including tools and best practice examples to guide businesses. We propose consulting on the basis that a central repository will be introduced alongside the legislation, and to seek views on the functions and design of the central repository.

The connections between this work and the duty to prevent will need to be made clear in public consultation and engagement

49. While there are some differences between the duty to prevent and the proposed graduated approach to address modern slavery in supply chains, there are also significant similarities.

Fundamentally both pieces of work are about improving labour conditions through new obligations on entities to undertake due diligence in their supply chains.

50. The duty to prevent is domestically focused and aims to prevent breaches of New Zealand employment standards. The modern slavery legislation will apply more broadly, including internationally, but would be focused on preventing more serious exploitation. We expect that a significant number of entities, including most large businesses, would hold due diligence obligations under both regimes. The table in **Annex Four** shows the key differences and similarities between the two approaches.
51. The two changes are currently on different timelines. The duty to prevent legislation is expected to be introduced in early 2022. We are aiming to consult on modern slavery legislation in early 2022 and get final Cabinet decisions later in 2022 (with legislation potentially being introduced from 2023). However, it is possible that we will be in Select Committee for the duty to prevent at the same time as we undertake public consultation on the modern slavery legislation.

We propose managing risks through clear communications, rather than by incorporating the duty to prevent into the modern slavery work

52. Free and frank opinions

53. To address these risks, we will develop clear and joined-up key messages for the two pieces of work that clearly describe the similarities and also the differences. These should emphasise that the changes represent a phased approach to introducing due diligence obligations, starting domestically over supply chains that they have control or influence over before expanding out to international supply chains. Both regimes should be framed positively.
54. We will also ensure that the obligations on companies that are covered by both regimes are the same or similar. For example, businesses should be able to discharge their duties under both regimes by undertaking the same due diligence steps in relation to their supply chains. We also expect that the information and education support that is put in place would cover both regimes.
55. Deferring the duty to prevent implementation and further policy work and incorporating it in a single policy project and piece of legislation is an alternative option. This would enable all of the potential cross-over and duplication to be addressed at the same time and a single coherent piece of legislation be drafted that could incorporate the best of both proposals. However, we do not recommend this as Cabinet has already agreed to the duty to prevent while the progress and the shape of the modern slavery legislation is still uncertain. This option could be reassessed in the future as the modern slavery work progresses.

Next steps

56. Following your decisions in this briefing, officials will provide you with a draft discussion document and Cabinet paper by the end of November 2021 for Cabinet's consideration by the end of 2021. This work will continue to be informed by the MS LAG. We propose sharing an initial copy of the draft discussion document with the MS LAG to support their next discussion, currently scheduled for 21 October 2021.

We propose undertaking a substantive public consultation covering the first quarter of 2022

57. If Cabinet considers and agrees to the discussion document in late 2021, we would recommend that public consultation begin from mid to late January 2022 and conclude in April. This would maximise our opportunities to engage with stakeholders following the Christmas and New Year holiday period, and avoid the risk of the consultation losing momentum over that time. We will provide you with key messages, and supporting questions and answers, ahead of the public consultation.
58. We propose that this be a substantive consultation including face-to-face consultations with key stakeholders, as well as an online submissions process. This would reflect the combination of high-level and detailed questions being asked, and the broad range of perspectives we wish to seek.

We will provide further advice on potential budget implications in our next briefing to you

59. There will be budget implications attached to a range of decisions that will need to be made. Costs will be associated with, for example:
- a. resourcing enforcement activity, including:
 - i. providing information and education services
 - ii. developing toolkits and other guidance materials
 - iii. compliance activity
 - iv. creating a new regulator or a new unit within an existing regulator, and developing good regulatory practice.
 - b. creating and maintaining a central repository for modern slavery statements.
 - c. creating and maintaining an independent body to support the implementation of the legislation.
60. The costs attached to each could vary considerably depending on how the legislation or supporting structure is designed. Those options will also be informed by public consultation. We will provide you with indicative costs in our next briefing to you alongside the draft discussion document and Cabinet paper.

Annexes

Annex One: Indicative outline of questions for public consultation

Annex Two: Modern Slavery Leadership Advisory Group meeting reflections – 18 August 2021

Annex Three: Modern Slavery Leadership Advisory Group meeting reflections – 23 September 2021

Annex Four: Duty to prevent and modern slavery indicative comparison

Annex Five: Literature review on the impact and effectiveness of modern slavery legislation

Annex One: Indicative outline of questions for public consultation

Theme	Issue	Type / nature of question(s)
What obligations will apply	Approaches to addressing modern slavery	Seeking higher-level views on whether a legislative or non-regulatory approach, or both, should be adopted. This could take into account a range of potential options (e.g. introducing import bans and/or increasing business support services), and also provide an opportunity to gather views on the problem definition and objectives.
	Legislative options	Seeking views on whether supply chain legislation should take a disclosure, due diligence or graduated approach (combining both with different thresholds), noting the graduated approach is preferred.
	Due diligence obligations for different groups	Seeking views on specific obligations and their feasibility/reasonableness for different types of regulated entity, with obligations for: <ul style="list-style-type: none"> • Smaller entities – to take action if modern slavery found. • Medium entities – to disclose the due diligence taken, based on prescribed criteria (aligned with due diligence requirements for larger entities). • Larger entities – to undertake due diligence, including risk identification, action to address risk (including remediation and redress), and evaluation of actions taken.
Who will be covered	Types of entity	Testing our view that any obligations should be broadly applicable to entities (including government and charitable entities), provided they meet the thresholds below.
	Threshold type	Seeking views on whether a revenue-based threshold is most appropriate and whether alternative measures should be considered instead of, or in addition to, revenue (e.g. through other proxies for size, or using risk-based approaches).
	Threshold level	Seeking views on the proposed levels at which additional obligations apply.
How the legislation will work	Penalties and remediation	Seeking views on how non-compliance should be penalised, including aggravating and mitigating factors, and whether penalties should be imposed exclusively by the regulator or if individuals (onshore and offshore) should also have the ability to bring a claim.
	Independent body (such as a commissioner or ombudsman)	High-level, seeking views on whether legislation should be supported by an independent body, and the potential functions and powers attached to this role.

	Support services for stakeholders	High-level, seeking views on what support may be needed for regulated entities and broader stakeholders.
	Repository of statements	Seeking views on the design and functions of a central repository for modern slavery statements.
	Monitoring and evaluation	High-level, seeking views on how the legislation should be monitored and evaluated.

Annex Two: Modern Slavery Leadership Advisory Group meeting reflections – 18 August 2021

Modern Slavery Leadership Advisory Group (MS LAG) meeting reflections – 18 August 2021

This document is a high-level reflection of the key points raised in the Leadership Advisory Group meeting of 18 August 2021. It does not represent MBIE's views and is designed to reflect your feedback and thoughts on the overall approach to the legislation.

This meeting was intended to build on the previous discussion, in which a graduated approach to modern slavery legislation had been proposed. In particular, more detailed feedback was sought regarding potential thresholds for the graduations and potential obligations for small entities.

What thresholds or tests should determine the level of obligations? Where should these be set?

A revenue threshold type was generally supported, as it provided a simple measure that served as a reasonable proxy for size. Consideration was given as to whether a principles or risk-based approach could work. However, members noted there were benefits in having clear and simple measures whereas risk-based approaches would be complex, and could inadvertently draw the focus away from encouraging widespread good practice.

One member suggested there should be a focus on importers, rather than a revenue threshold. They observed that modern slavery in supply chains was not necessarily linked with larger companies, and that some of the larger companies have the best systems in place to mitigate this risk. Another suggestion was to provide some flexibility for the regulator to enable more entities to be brought in scope if required. There was a question, warranting further analysis, around how many entities these approaches could cover and what the profiles of importers looked like.

Free and frank opinions

They also saw it as advantageous to cover as wide a range of entities as possible and feasible. The Group therefore suggested more broadly that, for public consultation, a relatively low threshold amount could be proposed from the outset. Particular suggested revenue levels included \$5 million for the 'medium' bracket, and \$20 million or \$50 million for the 'large' bracket.

What is reasonable to expect small entities to do?

The Group discussed how the obligations for all entities are framed more broadly, with the suggestion that all entities should be required to undertake 'due diligence' (rather than introducing disclosure, for instance, as a separate concept). The specific due diligence obligations, including disclosure, could then be defined for individual groups and entities based on factors such as their size. Some members suggested that all entities should have a regulatory obligation to take action if modern slavery is found in their supply chain, and to lodge a statement declaring they are taking due care.

There are a range of further issues that will need to be considered

Further issues were raised by the Group which will be considered as the policy work is undertaken, and may also be revisited at future Group meetings:

Non-negotiables or critical factors should be identified by the Group

The Group suggested that **non-negotiables or critical factors** should be identified which, from the Group's perspective, **should not get watered down** as legislation is developed. Potential factors

NOT GOVERNMENT POLICY

raised at this meeting included: targeting importers of goods; addressing the behaviours of New Zealand companies and in relation to New Zealand workers; and providing for a central and public repository of statements.

The scope of the legislation should be broad and clear

The Group noted the need to ensure a focus on **both domestic and international supply chains**, as well as further consideration and clarification of the linkages between this work and the proposed 'Duty to Prevent'. It was also suggested that obligations should apply across the full supply chain, as modern slavery is more likely to be found in deeper tiers.

The need to be clear in how we **define and communicate what we mean by 'entities' and 'modern slavery'** was also raised. More specific detail will need to be developed on which entities should fall in or out of scope of the legislation, and on what practices our definition of modern slavery includes.

Thirdly, the Group discussed the need to consider **connections** between this work, which is focussed on modern slavery in supply chains, and **broader human rights and environmental issues**. It was noted that modern slavery was often linked to human rights and environmental violations, and the connections across these areas would likely be raised in public consultation.

There is a need to frame the legislation and overall approach positively and as an opportunity

It was noted that existing models of **'corporate responsibility' had not worked**, and that this language had been ineffective at changing corporate behaviour particularly in supply chains. Transparency was seen as a threat, and this led to ongoing poor practice. While legislation should create obligations and accountability, it should also be framed as an opportunity for entities to provide greater benefit to all of their stakeholders. Rather than including or excluding certain types of entities, everyone would be included under this approach.

The United Nations Guiding Principles (UNGPs) were supported as the underpinning framework for the actions that entities will be required to undertake. It was noted that we should not lose sight of the fact that this is a journey, and it was worth making the UNGPs a central part of the overall policy process. Group members were invited to share information on exemplar New Zealand businesses, to improve our understanding of what best practice could look like.

Any disclosure obligations should be prescriptive

The Australian approach of prescribing seven mandatory reporting criteria appears to work well, though the effectiveness of the legislation is currently subject to a statutory review. Particular consideration should also be given to introducing an explicit requirement for entities to **report on the impact** of any actions they take. This would promote the adoption of higher-impact practices, and could also support wider efforts to measure the overall impact of the legislative approach.

The legislative design should be victim-centric, and alignment with international settings should be considered

It was suggested that **processes for victims** (including those outside of New Zealand) should be made as simple as possible, noting for example that the proposed European Union Directive would place the onus on entities to demonstrate they had met their obligations. As part of this, work will need to be done to ensure that both entities and the public have confidence in the regulator.

NOT GOVERNMENT POLICY

Further, we should consider how this legislation could align with international settings including in the Pacific region, which imports significantly from New Zealand.

A public repository of statements will be critical for effective implementation

The Group discussed the need for a public repository of statements as a critical supporting structure, while noting there also needs to be a detailed discussion around **what the repository could look like and do**.

Supporting toolkits and guidance will need to be developed in parallel with the legislation

The Group noted that **supporting toolkits and guidance for entities** will need to be developed in parallel with the legislation, and launched alongside it. This will ensure we minimise the perceived workload associated with the introduction of the legislation, particularly for small businesses.

Public consultation will provide a necessary means of testing impact

The Group supported a longer period for public consultation. Several suggestions were made including on its timing and on the undertaking of **targeted consultations** with different groups to identify the impact this legislation could have on them.

Next steps

MBIE indicated that its intent was to arrange for a face-to-face meeting in Auckland in late September, subject to any Alert Level restrictions. This would enable further input from the Group ahead of a subsequent briefing to be provided to the Minister for Workplace Relations and Safety by early October.

Annex Three: Modern Slavery Leadership Advisory Group meeting reflections – 23 September 2021

Modern Slavery Leadership Advisory Group (MS LAG) meeting reflections – 23 September 2021

1. This document is a high-level reflection of the key points raised in the Leadership Advisory Group meeting of 23 September 2021. It does not represent MBIE's views and is designed to reflect your feedback and thoughts on the overall approach to the legislation. This meeting focused on the presentation of issues for public consultation and communicating the relationship between the work underway on the duty to prevent and modern slavery.

Enforcement and Institutional Support Mechanisms

Issues to be explored in public consultation

2. The Group was generally supportive of the high-level approach set out by MBIE in the background information for the meeting. There were also a range of more detailed suggestions on what could be included in the consultation document, and suggestions about how to support the public to engage constructively.

The Group discussed options to ensure penalties reflect the seriousness of the issue, encourage redress and support good practices

3. The Group agreed that there did not need to be consultation on the level of penalties and that consultation should instead focus on ensuring penalties reflect the seriousness of the breach and the size/ability of the entity to address the harm. One way of doing this would be to include aggravating and mitigating factors based on the mens rea or past behaviour of the entity. For example, entities that are repeat offenders or deliberately misleading could receive harsher penalties.
4. There could also be a defence where the entity had taken reasonable steps to address modern slavery in their supply chains. This would reflect that the aim is not to penalise businesses for finding modern slavery, because we want business to proactively look for issues in their supply chains without having to worry about being penalised – penalties should apply to those who fail to take action.
5. There was a discussion about whether the entity or the directors should be liable for any breach and a suggestion that this issue could be consulted on. The benefits of making directors liable would include more direct engagement and responsibility from directors. On the other hand, this could act as a disincentive for individuals considering director roles.
6. Another suggestion was that the focus should not be entirely on enforcement and penalties. Where possible, the aim should be to 'make good' the harm caused.

A central repository was considered key to empowering businesses to improve their practices

7. The group supported establishing a central repository as a key component of the regime and did not consider that this should be a specific question for consultation. The repository could include the following dimensions: tools to support entities (particularly smaller entities) to meet their obligations, best practice examples of statements and approaches that businesses can use, and a guide to the reference material and support services available for entities to draw on.
8. There were a number of suggestions that could help make the repository more effective:
 - a. ensure that the repository is established when the new duties come into force,

- b. align the obligations with similar obligations in workplace health and safety and ACC, and
- c. to make the expectations for entities clear, failing to meet the reporting requirements could be a strict liability offence.

There are a number of roles that a commissioner could take in support of modern slavery legislation

- 9. The group considered that establishing a commissioner role could be integral to the success of the modern slavery legislation and help make it about empowering entities rather than compliance. The exact role of the commissioner could be consulted on, and we could draw on the examples from the UK, Australia and Canada. Some functions that the Commissioner could have include: referring victims to support services, advocating for victims (in terms of policy settings rather than taking up individual cases), supporting law and policy reforms, providing support and guidance to entities seeking to improve their practices, and conducting research on best practices.
- 10. As with other aspects of the modern slavery proposals, it was suggested that the commissioner's role should be framed positively as empowering entities to improve their practices. Notably, if the commissioner is focused on ensuring compliance with the rules, entities may be less inclined to report issues or seek help.
- 11. Regarding the support for victims, a commissioner could help address victims' reluctance to seek help from authorities. This issue arises because many victims are migrants and are worried that they may face negative consequences if they seek help from authorities, such as the police, or that they may be further harmed by the offending entity.
- 12. It was noted that the commissioner may duplicate some of the functions of the OECD National Contact Point, and that there needs to be coordination between these two functions to ensure their roles are complementary.

Supporting the public to engage constructively in the consultation process

- 13. Given that the details of the modern slavery legislation are likely to be complex, the Group suggested a number of approaches to help the public engage constructively.
 - a. allowing the public to engage through multiple platforms,
 - b. keeping the number of questions limited and focused, and
 - c. use language which is meaningful to all stakeholders (for example, redress for victims and obligations for businesses)
- 14. Additionally, many businesses and interested parties will not have engaged with the modern slavery discussion and may be alarmed by the discussion document if they are not expecting it or have not been supported to engage with it. This risk can be mitigated by providing supporting materials to help show that this is not just a new obligation but that it will be aimed at empowering businesses.

The relationship between the duty to prevent, measures to address migrant exploitation and modern slavery

- 15. The migrant exploitation and duty to prevent work programmes are further along than the modern slavery policy work. They provide important context for the modern slavery work

because they are addressing interrelated issues. As policy decisions have already been finalised for the migrant exploitation and duty to prevent work, and the modern slavery public consultation will not reopen these decisions.

16. The Group made a number of suggestions for communicating the modern slavery proposals in a way that will mitigate any risks relating to communicating and aligning obligations, and to build on the benefits of implementing the duty to prevent. It will be important that any modern slavery legislation builds on the duty to prevent measures.
17. The group suggested publishing materials that help the public clearly differentiate the scope of the two different pieces of work. Some of the key distinctions that could be drawn out in the materials, depending on the details of the proposals, include:
 - a. the different entities that will have to comply with the new obligations,
 - b. the harms that are being addressed (breaches of employment law and modern slavery)
 - c. the thresholds for a breach.
18. In communicating these differences, it may be best not to focus on the legislation, which will be too technical for some of the public to engage with. Instead, there should be a clear story set out about the aims of each proposal. It was also highlighted that we need to see the same positive framing context around both pieces of legislation.

Annex Four: Duty to prevent and modern slavery indicative comparison

Issue	Duty to Prevent (based on current Cabinet and Ministerial decisions)	Modern Slavery (based on MS LAG preferred option to be consulted on)
Regulated parties?	<p>New Zealand based, third parties (entities or individuals) have that have significant influence or control over an employer. If:</p> <ol style="list-style-type: none"> They are the employer's parent or holding company; or have contractual control, whether direct or indirect, over the employer's business affairs; or are in a position to influence employment matters in their supply chain because: <ol style="list-style-type: none"> the third party is able to set conditions which control market access; or employers are economically dependent on the third party. <p>This definition will likely cover most large companies but also a significant number of small and medium entities, particularly where there are vertically integrated supply chains and franchise type arrangements.</p>	<p>Entities conducting business in NZ. We have proposed a graduated approach based primarily on revenue thresholds:</p> <ul style="list-style-type: none"> small entities would have light touch obligations centred around education and awareness and an overarching obligation to take some action if they identify MS medium sized entities (above approx. \$20m annual revenue) required to undertake disclosure larger entities (above approx. \$50 annual revenue) required to do full due diligence and disclosure
Obligations	<p>To take reasonable steps to prevent breaches of employment standards, by:</p> <ol style="list-style-type: none"> Duty holders must identify and assess the risk of employment standards breaches by employers that they have significant control or influence over in their corporate group or supply chain. where a risk of employment standards breaches is identified, duty holders must consider measures that they could implement to address and manage it, and assess whether the measures are reasonable in the circumstances of their business, and proportionate to the risk of employment standards breaches. if the measures are reasonable in the circumstances and proportionate to the risk, duty holders must implement them. 	<p>The due diligence and disclosure obligations would be based on the UN Guiding Principles. These are:</p> <ol style="list-style-type: none"> undertake modern slavery risk assessments across their global operations and supply chains (including those of any of its subsidiaries) to identify potential risks undertake action (as is reasonable and appropriate) to address any risks monitor and evaluate the effectiveness of the actions they take be transparent about the risks they identify, the actions they are taking and how they are monitoring and evaluating those actions.
Jurisdiction	Will only apply to domestic supply chains and contractual	Domestic and international. The obligations will apply to New Zealand

	relationships/networks where the entities have significant influence or control. The duty apply to a New Zealand entity with respect to their New Zealand employers only.	entities with respect to their supply chains both domestically and internationally. Supply chains will be defined broadly but the expectation would be that firms would only need to do what is reasonable in terms of their ability to identify and influence more distant suppliers.
What harm is being prevented?	Beaches of New Zealand employment standards (i.e. minimum standards in the Employment Relations Act, Holidays Act, Minimum Wages Act, Wages Protection Act etc), as well as modern slavery like labour conditions	Modern slavery is an umbrella term covering the international legal concepts of forced labour, human trafficking, slavery, forced marriage and other slavery and slavery-like practices (such as the worst forms of child labour). In a New Zealand context, that would include the following crimes such as, slavery, people trafficking, child forced labour and sexual exploitation and coerced marriage.

Annex Five: Literature review on the impact and effectiveness of modern slavery legislation

DOCUMENT PUBLISHED SEPARATELY



BRIEFING

Further advice on the relationship between the duty to prevent employment standards breaches and modern slavery legislation

Date:	27 October 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1445

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree that that the duty to prevent and modern slavery legislative processes be combined and the proposals be included in the upcoming consultation document	1 November 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	Privacy of natural persons	✓
Sam Foley	Principal Policy Advisor	Privacy of natural persons	N/A	

The following departments/agencies have been consulted

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Further advice on the relationship between the duty to prevent employment standards breaches and modern slavery legislation

Date:	27 October 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1445

Purpose

At your request, this briefing provides further advice on whether the duty to prevent employment standards breaches and modern slavery legislation should be run through two separate legislative processes, or whether the two processes should be brought together.

Recommended action

The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

- a **Note** that as part of your recent discussion with officials on your work programme priorities, you indicated that to address resourcing constraints, the duty to prevent legislation could be delayed and split from the rest of the migrant exploitation proposals
Noted
- b **Agree** to defer the introduction of the duty to prevent legislation and combine it with the modern slavery legislative process
Agree / Discuss
- c **Agree** that the consultation document on modern slavery in supply chains will cover both the duty to prevent and modern slavery proposals as one comprehensive package.
Agree / Discuss

Nita Zodgekar
Manager, International Labour Policy
MBIE
27 / 10 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety
..... / /

Context

The Duty to Prevent and modern slavery legislation will impose similar obligations on entities

1. In March 2020, as part of a set of changes to address migrant exploitation, Cabinet agreed to amend the Employment Relations Act 2000 (ERA) to introduce a new duty on third parties to take reasonable steps to prevent employment standards breaches (duty to prevent). You have subsequently made further policy decisions on 'who' the duty would apply to and 'what' they will be required to do. Legislation introducing this, and the other migrant exploitation proposals, was expected to be introduced in early 2022.
2. You are also progressing work to investigate legislation to address modern slavery in supply chains. We are expecting to seek Cabinet's agreement in December 2021 to begin public consultation on proposals in early 2022. Decisions on final legislative proposals would be sought in late 2022, followed by the introduction of legislation in 2023.
3. As these two pieces of work have progressed, it has become clear that they will impose similar obligations on some of the same businesses and entities. Fundamentally both pieces of work are about improving labour conditions through new obligations on entities to undertake due diligence in their supply chains. **Annex One** sets out the similarities and differences. We provided some initial advice on how we would manage the relationship between the two pieces of work on 1 October 2021 [briefing 2122-1038 refers].
4. That advice recommended developing joined up key messages which make it clear that there will not be unnecessary duplication or compliance costs put on entities. The key messages would emphasise that the changes represent a phased approach to introducing due diligence obligations; starting domestically over supply chains that entities have control or influence over before expanding out to international supply chains. We indicated that as an alternative option you could defer the duty to prevent legislation and incorporate it within the modern slavery work.

As part of your quarterly work programme discussion, you indicated that the duty to prevent could be deferred

Confidential advice to Government



Confidential advice to Government

8. We therefore seek your formal confirmation that you wish to defer the duty to prevent legislation. If you agree, we would be expecting to introduce the rest of the migrant exploitation legislative changes in early 2022. If it were to progress as its own legislative amendment, the duty to prevent legislation could be introduced in late 2022 or early 2023, once the first tranche of migrant exploitation proposals have been progressed. This would mean that the timelines for the duty to prevent and modern slavery legislative processes would be close together.
9. At the officials' meeting on 18 October 2021, these issues were discussed and you requested further advice on whether the duty to prevent and modern slavery legislation should be run through two separate legislative processes, or whether the two processes should be brought together.

We recommend that the duty to prevent and modern slavery legislation legislative processes be combined

Combining the proposals would result in more coherent and joined up legislation

10. Combining the proposals would enable the potential cross-over and duplication to be addressed at the same time, and a single coherent piece of supply chains legislation be drafted that could incorporate the best of both sets of proposals. Fundamentally both pieces of work are about improving labour conditions through new obligations on entities to undertake due diligence in their supply chains.
11. We expect that most large entities and a significant number of smaller and medium entities would have due diligence obligations under both proposed regimes. The types of actions businesses would need to take would be largely the same. These include, supply chain mapping and risk assessment as well as taking reasonable and proportionate actions to address any risks and assess the impacts of their actions.
12. There are some differences in scope and approach between the proposals. For example, the duty to prevent is domestically focused and aims to prevent breaches of New Zealand employment standards. The modern slavery legislation would apply more broadly, including internationally, but is focused on preventing more serious exploitation.
13. Joining the proposals will enable these differences to be considered, and any duplications to be addressed. We think that there are good reasons to make the level of harm that entities need to manage in their domestic supply chains different (i.e. compliance with New Zealand laws including minimum employment breaches, exploitation, slavery etc.) to their international supply chains (internationally agreed standards). It would be difficult to apply New Zealand minimum employment standards and laws internationally. There are also good reasons for requiring higher-levels of due diligence for smaller entities domestically where they have significant control or influence.
14. We think this overall approach is likely to be supported by the Modern Slavery Leadership Advisory Group. While most other countries' modern slavery regimes apply equally to domestic and international supply chains, no other countries that we are aware of have imposed different or higher standards in relation to domestic supply chains. However, the Fair Work Act in Australia does impose some obligations on holding companies and franchises.

It would reduce the risk that businesses perceive the changes as adding unnecessary compliance and duplication

15. While the development and investigation of modern slavery legislation has been well communicated and is generally supported by a broad range of stakeholders, the development of the duty to prevent is less well known or understood. The duty to prevent was included in the public consultation on migrant exploitation in late 2019. However, the proposal that was consulted on was relatively high-level compared to what was eventually agreed by Cabinet.

Free and frank opinions

17. Consulting on both proposals as a coherent package and inviting further comment on the duty to prevent elements would mitigate these risks. Stakeholders would be able to submit on the whole package rather than feeling like one part has already been decided.

Combining the proposals would be a more efficient use of resources

18. Combining the legislative processes would be a more efficient use of resources. It would be difficult for MBIE and other agencies to resource three separate legislative processes covering the migrant exploitation, duty to prevent, and modern slavery changes within a short period of time. It would also be a more efficient use of Ministerial and Select Committee time as the duty to prevent and modern slavery proposals will create similar obligations and could be introduced within a relatively short space of time. There are likely to be a similar group of interested and affected stakeholders.

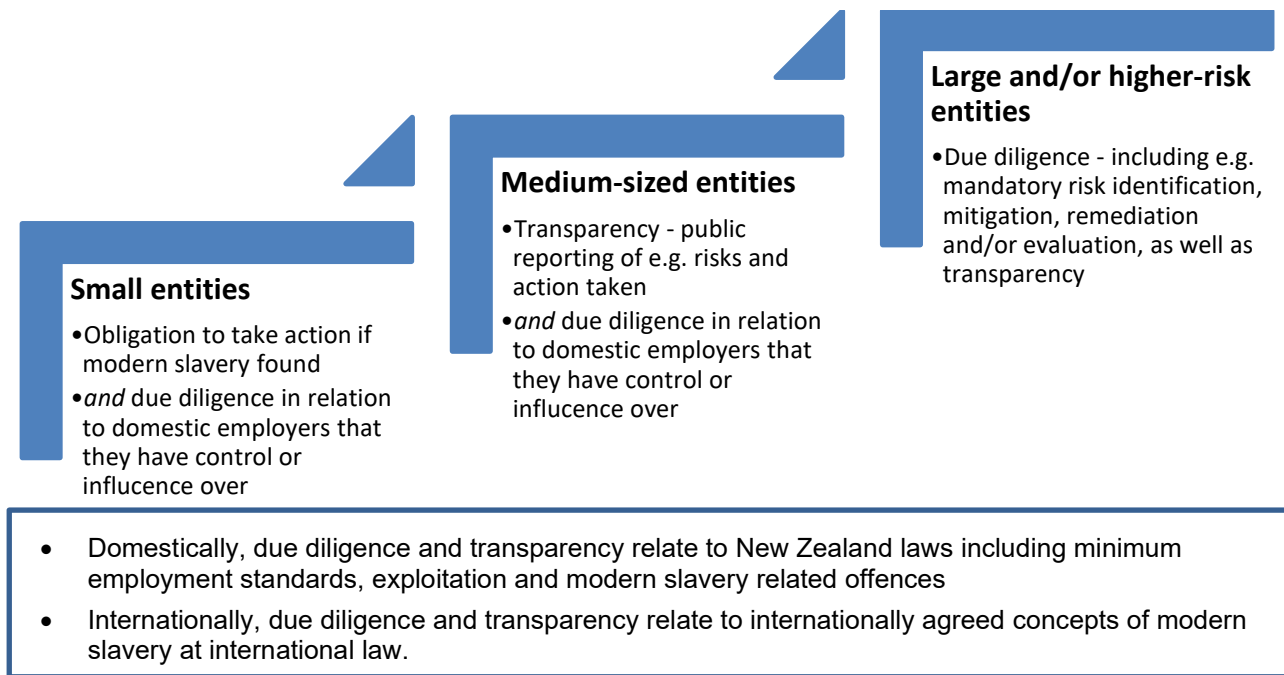
While there are risks we think these are manageable

Free and frank opinions

The consultation document would cover both duty to prevent and modern slavery as one comprehensive package

21. If you agree to combine the two projects together and progress them as one legislative process, we propose to present them as one coherent package of changes in the consultation document. This would mean that we would be inviting feedback on both proposals. Figure 1 outlines, at a high-level, what a combined proposal for modern slavery could look like, incorporating the duty to prevent.

Figure 1. Graduated approach to address modern slavery and worker exploitation



22. This is a relatively high-level conceptual model. More work is required to assess the full implications of combining the proposals. We will provide you with a more detailed articulation of this approach in the draft consultation document, which may have some implications for the timing of the document. Public consultation will test the assumptions and implications of the approach.
23. We expect that more work will need to be done following the consultation to consider:
- **How the offences and penalties frameworks should be aligned?** It may make sense, for example, to have lower penalties for not taking action to address employment standards breaches than for not taking action to address slavery.
 - **What the approach to enforcement and the role of the regulator and/or independent oversight should be?** Bringing in employment standards will likely mean that the expertise of the Labour Inspectorate will become more relevant to the regime.
24. These issues already need to be considered in more detail as part of the modern slavery work next year. Feedback from consultation will provide some insights into these questions.

Next steps

25. Officials are available to discuss the recommendations in this paper and the implications for your policy work programme.
26. Based on our original timelines, we were expecting that the migrant exploitation legislation, including the duty to prevent, could be introduced by June 2022, depending on PCO and MBIE's legal capacity. With regards to the modern slavery work, we are aiming to provide the first draft of the Cabinet paper and consultation document on modern slavery to you in November for Cabinet's consideration by the end of 2021 with public consultation starting in February 2022. Final decisions would be sought by the end of 2022, with legislation potentially being introduced in 2023.
27. If you decide to include the duty to prevent in the modern slavery consultation document, we will need to make changes to the current draft consultation document. This could cause

some delays in our original timeframes for Cabinet decisions this year. However, if Cabinet consideration is delayed until early February 2022 we still expect that it would be possible to start public consultation in February 2022. The December and January period would be used to finalise the design work on the consultation document, prepare any collateral materials and communications messages, and plan the announcements. We also expect that splitting the duty to prevent from the rest of the migrant exploitation proposals would enable us to introduce the migrant exploitation legislation earlier in 2022.

Table 1: Indicative timeframes

Original timeframes	Possible new timeframes
Dec 2021 – Cabinet decisions on modern slavery consultation	Feb 2022 - Cabinet decisions on modern slavery consultation
Feb 2022 – modern slavery consultation begins	Feb 2022 – modern slavery consultation begins
June 2022 -Worker Exploitation Bill introduced	Mar 2022 – Worker Exploitation Bill introduced
Dec 2022 – Final Cabinet decisions on modern slavery proposals	Dec 2022 – Final Cabinet decisions on modern slavery proposals
Mid 2023 – modern slavery legislation introduced	Mid 2023 – modern slavery legislation introduced

Annex One: Duty to prevent and modern slavery indicative comparison

Issue	Duty to Prevent (based on current Cabinet and Ministerial decisions)	Modern Slavery (preferred option to be consulted on)
Regulated parties	<p>New Zealand based, third parties (entities or individuals) that have significant influence or control over an employer. If:</p> <ul style="list-style-type: none"> a. they are the employer's parent or holding company; or b. have contractual control, whether direct or indirect, over the employer's business affairs; or c. are in a position to influence employment matters in their supply chain because: <ul style="list-style-type: none"> i. the third party is able to set conditions which control market access; or ii. employers are economically dependent on the third party. <p>This definition will likely cover most large companies but also a significant number of small and medium entities, particularly where there are vertically integrated supply chains and franchise type arrangements.</p>	<p>Entities conducting business in New Zealand. We have proposed a graduated approach based primarily on revenue thresholds:</p> <ul style="list-style-type: none"> • small entities would have light touch obligations centred around education and awareness and an overarching obligation to take some action if they identify modern slavery • medium sized entities (above approx. \$20m annual revenue) required to undertake disclosure • larger entities (above approx. \$50 annual revenue) required to do full due diligence and disclosure.
Obligations	<p>To take reasonable steps to prevent breaches of employment standards, by:</p> <ul style="list-style-type: none"> a. duty holders must identify and assess the risk of employment standards breaches by employers that they have significant control or influence over in their corporate group or supply chain. b. where a risk of employment standards breaches is identified, duty holders must consider measures that they could implement to address and manage it, and assess whether the measures are reasonable in the circumstances of their business, and proportionate to the risk of employment standards breaches. c. if the measures are reasonable in the circumstances and proportionate to the risk, duty holders must implement them. 	<p>The due diligence and disclosure obligations would be based on the UN Guiding Principles on Business and Human Rights. These are:</p> <ul style="list-style-type: none"> a. undertake modern slavery risk assessments across their global operations and supply chains (including those of any of its subsidiaries) to identify potential risks b. undertake action (as is reasonable and appropriate) to address any risks c. monitor and evaluate the effectiveness of the actions they take d. be transparent about the risks they identify, the actions they are taking and how they are monitoring and evaluating those actions.

Jurisdiction	Will only apply to domestic supply chains and contractual relationships/networks where the entities have significant influence or control. The duty apply to a New Zealand entity with respect to their New Zealand employers only.	Domestic and international. The obligations will apply to New Zealand entities with respect to their supply chains both domestically and internationally. Supply chains will be defined broadly but the expectation would be that firms would only need to do what is reasonable in terms of their ability to identify and influence more distant suppliers.
What harm is being prevented?	Breaches of New Zealand employment standards (i.e. minimum standards in the <i>Employment Relations Act 2000</i> , <i>Holidays Act 2003</i> , <i>Minimum Wages Act 1983</i> , <i>Wages Protection Act 1983</i> etc), as well as modern slavery like labour conditions.	Modern slavery is an umbrella term covering the international legal concepts of forced labour, human trafficking, slavery, forced marriage, and other slavery and slavery-like practices (such as the worst forms of child labour). In a New Zealand context, that would include the following crimes such as, slavery, people trafficking, child forced labour and sexual exploitation, and coerced marriage.



BRIEFING

Modern slavery and worker exploitation draft discussion document and Cabinet paper

Date:	20 December 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1910

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the combined proposal for the duty to prevent and modern slavery legislation Provide feedback on the draft modern slavery and worker exploitation discussion document and Cabinet paper	4 February 2022

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	Privacy of natural persons	✓
Shay Duckworth	Senior Policy Advisor, International Labour Policy	Privacy of natural persons		

The following departments/agencies have been consulted
Ministry of Foreign Affairs, Department of the Prime Minister and Cabinet, Treasury, Te Puni Kōkiri, Oranga Tamariki—Ministry for children, Ministry of Justice, Ministry for Ethnic Communities, New Zealand Police, Department of Corrections, Ministry for Women, WorkSafe, Ministry of Transport, New Zealand Trade and Enterprise, Ministry of Health, Department of Internal Affairs, Ministry of Social Development, Ministry for Pacific Peoples, Waka Kotahi, Kāinga Ora, Ministry of Education.

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Modern slavery and worker exploitation draft discussion document and Cabinet paper

Date:	20 December 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-1910

Purpose

This briefing seeks your:

- feedback on the draft Cabinet Paper (**Annex One**) and discussion document on proposals to address Modern Slavery and Worker Exploitation (**Annex Two**) and
- agreement to the proposed approach to combine the duty for third parties to prevent employment standards breaches with the proposals to address modern slavery in supply chains.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that the proposed approach to combine the duty to prevent employment standards breaches and the work to address modern slavery in supply chains, keeps the fundamental aspects of the two pieces of work whilst reducing duplication and unnecessary compliance

Noted

- b **Agree** that entities should be required to address employment standards breaches in their domestic supply chains and operations, in addition to the requirement to address modern slavery that you previously agreed to, and with the same graduated set of obligations that you had previously agreed to

Agree / Disagree

- c **Note** that you previously agreed that third parties should hold a duty to take reasonable steps to prevent employment standards breaches where they:

1. are the employer's parent or holding company; or
2. have contractual control, whether direct or indirect, over the employer's business affairs; or
3. are in a position to influence employment matters in their supply chain because:
 - i. the third party is able to set conditions which control market access; or
 - ii. employers are economically dependent on the third party

Noted

- d **Note** that you agreed to test a threshold of \$50-60million annual revenue for determining which obligations apply to large entities under the modern slavery proposal, and that there are unlikely to be many entities with less than \$50m who would be able to set market access or result in economic dependence

Noted

- e **Agree** to remove the duplication of the duty to prevent and modern slavery thresholds by requiring all large entities (with more than \$50m annual revenue) to prevent, mitigate and remediate employment breaches in their operations and supply chains, instead of using the previously agreed significant influence or control threshold (in recommendation c(3) above)

Agree / Disagree

- f **Provide feedback** on the draft Modern Slavery and Worker Exploitation Cabinet paper and discussion document attached as Annexes One and Two by 4 February.

Feedback provided

Sam Foley
Acting Manager, International Labour Policy
Labour, Science and Enterprise, MBIE

..... / /

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

You directed officials to develop a consultation document on modern slavery legislation options

1. In November 2020, you directed officials to undertake work to investigate legislative and non-legislative options for addressing modern slavery in supply chains [briefing 2021-1964 refers]. This work meets the Government's commitments set out in Labour's 2020 Manifesto, New Zealand's 2019 Universal Periodic Review, and the *Plan of Action against Forced Labour, People Trafficking and Slavery*.
2. You agreed to consult on a proposal with a graduated set of obligations including disclosure and due diligence, applying obligations to entities based on factors such as their size, risk, and influence [briefing 2122-0132 refers].

You directed officials to combine the modern slavery and duty to prevent projects

3. In March 2020, Cabinet agreed to introduce a duty for persons with significant control or influence over an employer to take reasonable steps to ensure the employer is compliant with employment standards (the duty to prevent) [DEV-20-MIN-0034 refers]. This work was being progressed alongside other changes in the Migrant Worker Protection Bill.
4. On 1 November 2021, you agreed to combine the duty to prevent and modern slavery legislative processes and that both proposals be included in a single consultation document [briefing 2122-1445 refers]. We advised that this approach is preferable given that both pieces of work are about improving labour conditions through new obligations on entities to undertake due diligence in their supply chains. Also, a single coherent bill can be drafted that incorporates the best of both sets of proposals.

This work programme is being undertaken in consultation with a multi-stakeholder Modern Slavery Leadership Advisory Group

5. The Modern Slavery Leadership Advisory Group (MS LAG) is chaired by Rob Fyfe and comprised of external stakeholders from a range of sectors, academics, unions and NGOs.
6. We tested an initial draft of the discussion document with the MS LAG and a summary of the proposals, and the MS LAG was supportive of the combined proposal. Reflections from this discussion are included at Annex Three. The key points were that:

Free and frank opinions

- b. There was a lot of support in the group for framing the discussion document positively to encourage people to see the benefits of taking action and to avoid putting submitters on the defensive.
 - c. They recommended provide examples of practical impacts because the proposals are technical and the obligations could be open to interpretation.
7. On 16 December, the MS LAG met to discuss the approach to stakeholder engagement. They suggested that a broad group of stakeholders should be engaged, and the materials should be designed to support stakeholders who may not normally engage with the government on policy issues, such as migrant workers and low-wage workers. Some of the suggestions included:
 - a. translating a summary of the proposals,
 - b. seeking feedback through social media,
 - c. providing ways for vulnerable groups to provide verbal feedback
 - d. working in partnership with the groups that support victims, such as NGOs.

Government agencies were largely supportive of the proposals

8. We consulted widely across government agencies with relevant policy responsibilities and large government procurers who would be impacted by the proposals. Consulted agencies include the Ministry of Foreign Affairs, Department of the Prime Minister and Cabinet, Treasury, Te Puni Kōkiri, Oranga Tamariki—Ministry for children, Ministry of Justice, Ministry for Ethnic Communities, New Zealand Police, Department of Corrections, Ministry for Women, WorkSafe, Ministry of Transport, New Zealand Trade and Enterprise, Ministry of Health, Department of Internal Affairs, Ministry of Social Development, Ministry for Pacific Peoples, Waka Kotahi, Kāinga Ora, Ministry of Education.
9. Notably, there were no suggestions to change the proposed obligations, but some agencies suggested adding additional details in the discussion document to clarify the extent of the obligations. A lot of the feedback related to implementation of the proposals, particularly that significant support and guidance will be required for entities to meet the obligations and improve their practices.

Approach to the discussion document

The discussion document details the issue and rationale for introducing legislation in depth

10. This will be the first time that many stakeholders have considered the issue of modern slavery and worker exploitation in supply chains in detail, and the discussion document has been designed to educate stakeholders on the issues and how the proposal relates to measures taken overseas. We have added more detail to the policy objectives in the discussion document to make them more accessible for stakeholders and to incorporate the duty to prevent. The objectives are to:
 - a. reduce modern slavery and prevent worker exploitation in New Zealand and elsewhere, helping to build practices based on fairness and respect
 - b. support consumers to make more informed choices in relation to modern slavery and worker exploitation risks associated with goods and services
 - c. drive culture and behaviour changes in entities which lead to more responsible and sustainable practices
 - d. level the playing field for entities which act responsibly across their operations and supply chains
 - e. enhance New Zealand's international reputation as a country that supports human rights and transparency.
11. Officials will also develop a range of summary materials and online resources to support a stakeholder engagement in the consultation process

The modern slavery and duty to prevent proposals are presented as a comprehensive package to help stakeholders understand to the overall approach

12. You agreed to consult on a proposal with the following features [briefing 2122-0132 refers]:
 - a. a graduated set of obligations including both disclosure and due diligence, applying obligations to entities based on factors such as their size, risk, and influence
 - b. no entities should be excluded from the scope of this legislation based solely on their type or sector (such that government entities and charitable entities will fall in scope)
 - c. any disclosures should take a prescriptive (rather than general) approach, requiring entities to publish modern slavery statements that cover specified matters
 - d. proposals should be based broadly on the United Nations *Guiding Principles on Business and Human Rights* (UNGPs).

13. Basing the proposals on the UNGPs requires that regulated parties identify potential risks, undertake action (as is reasonable and appropriate) to address any risks, monitor and evaluate the effectiveness of the actions they take, and be transparent about their actions.
14. You previously agreed to consult on definitions for medium and large entities based on a range of revenue figures, from \$20 to \$30 million for medium and \$50 to \$60 million for large. The consultation will seek views on where the appropriate revenue figure should lie, which is important because it determines the obligations that apply to different sized entities.
15. For simplicity, we propose to consult based on defining 'medium'-sized entities as having revenue above \$20 million, and large as having revenue above \$50 million, rather than a proposed range. Submitters would still have flexibility to suggest the revenue level they consider to be appropriate; however, this approach would make our public communications clearer.
16. The changes to align the two work programmes are presented in the draft discussion and summarised at a high-level overleaf.

Table 1. High-level summary of proposed responsibilities

	Small (<\$20m)	Medium (\$20m+)	Large (\$50m+)
1. Take reasonable and proportionate action if they become aware of: <ul style="list-style-type: none"> modern slavery in their international operations and supply chains, or exploitation (including modern slavery and breaches of employment standards) in their domestic operations and supply chains. 	✓	✓	✓
2. Undertake due diligence to prevent, mitigate and remediate exploitation by New Zealand entities they have significant control or influence over . [^]	✓	✓	✓
3. Disclose the steps they are taking to address: <ul style="list-style-type: none"> modern slavery in their international operations and supply chains, and exploitation (including modern slavery and breaches of employment standards) in their domestic operations and supply chains. 		✓	✓
4. Undertake due diligence to prevent, mitigate and remediate* modern slavery in their international operations and supply chains and exploitation in their domestic operations and supply chains.			✓

[^] Small and medium-sized entities would be considered to have significant control or influence over another New Zealand entity where they: are the entity's parent or holding company; or have contractual control, whether direct or indirect, over the entity's affairs (including over corporate, operational or employment matters).

[†] For large entities, due diligence responsibilities would apply across their full domestic operations and supply chains. This would include any New Zealand entity they have significant control or influence over.

The questions in the discussion document mainly focus on the proposed obligations and scope

17. We have made more specific proposals regarding what the obligations will be and who they will apply to, while asking higher-level questions regarding how the obligations will work (including the role of a central register and independent oversight body). This is in line with the approach you agreed to previously [briefing 2122-1038 refers].
18. The MS LAG has previously discussed the role of a central register for annual statements and of independent oversight. Some members have expressed a strong view that both elements are a necessary part of the legislation, and essential both to support compliance with the legislation and to achieve the overall outcomes sought. We propose asking more open-ended questions on both these elements, including a question on whether they are needed and how they should be designed. Confidential advice to Government

Combining the Modern Slavery and Duty to Prevent proposals

We recommend requiring entities to address employment standards breaches in their domestic supply chains and operations

19. We are seeking your agreement to a set of changes to both the duty to prevent and modern slavery proposals which help make them a more coherent package. In preparing these changes, we have aimed to keep the fundamental aspects of the two pieces of work whilst reducing duplication and unnecessary compliance. The updated proposal creates a single set of obligations relating to domestic and international supply chains and operations.
20. The main factor that would determine the steps a regulated entity would need to take is whether their supplier or operation is in New Zealand or overseas. If the operations or supplier is in New Zealand, the harm that regulated entities needs to address is breaches to New Zealand's employment standards, and if the operations or supplier is overseas, the relevant harm is modern slavery.
21. This is an expansion of the modern slavery proposals that you previously agreed to, which would only have required entities to address modern slavery in their domestic supply chains and operations, not breaches of employment standards. The steps that need to be taken would depend on the size of the entity:
 - a. **all entities** must take reasonable and proportionate **action if they become aware** of modern slavery and breaches of employment standards
 - b. **medium entities** must also **disclose the steps they are taking** to address modern slavery and breaches of employment standards
 - c. **large entities** must also **undertake due diligence** to prevent, mitigate and remediate modern slavery and breaches of employment standards.
22. This approach will help address more harm and is appropriate given that regulated entities will generally have a greater ability to identify and influence practices in New Zealand. Entities will also be able to work with domestic regulators more effectively to take action, for example, they can directly report any breaches of employment standards to the labour inspector.

We recommend aligning the duty to prevent thresholds with the modern slavery thresholds

23. Previously, you decided that third parties would be required to take reasonable steps to prevent employment standards breaches where they:
 - a. are the employer's parent or holding company; or
 - b. have contractual control, whether direct or indirect, over the employer's business affairs; or
 - c. are in a position to influence employment matters in their supply chain because:
 - i. the third party is able to set conditions which control market access; or
 - ii. employers are economically dependent on the third party.
24. Replacing some of the thresholds for determining whether the duty to prevent obligations apply will help align this work with the thresholds from modern slavery work.
25. We propose replacing paragraph 18(c) above with the requirement for third parties to prevent, mitigate and remediate worker exploitation in operations and supply chains if the third party has more than \$50m revenue. This revenue threshold is unlikely to significantly alter the type or number of relationships within scope. It would capture most entities that have the ability to set conditions which control market access and economically dependent relationships. Most of the remaining economic dependent relationships will likely be captured by the other threshold of contractual control, whether direct or indirect, over the entity's affairs (including over corporate, operational or employment matters).
26. Further detail is provided in the 'what responsibilities and obligations will apply' section on page 35 of the discussion document.
27. We sought the MS LAG's feedback on this approach, and members supported combining the proposed modern slavery and duty to prevent legislation in this way. They considered this streamlined approach would help stakeholders to understand how the two sets of proposals relate to each other.
28. They considered engagement with wider stakeholders would be critical, and suggested including the use of case studies, targeted stakeholder meetings and use of different media (such as video explainers) to support that engagement. One member observed that the 'simpler' disclosure-based regimes introduced in Australia and the UK also had a degree of confusion, and suggested that is an ongoing process rather than as something that necessarily needs to be achieved at the start.

Next steps

29. The table below sets out the timeframes for the remaining work, subject to your agreement. We expect the discussion document will be ready for Cabinet to consider in March 2022, and then public consultation could take place over April – May 2022. Officials are working through indicative costings for the proposals for inclusion in the Cabinet paper and will provide you with an update in February.

Date	Action
8 February	Updated draft provided for your feedback
9-23 February	Consultation with your Ministerial colleagues.
Mid-February	Modern Slavery Leadership Advisory Group meeting
9 March	Cabinet Development Committee consider the draft modern slavery and worker exploitation discussion document
March	Prepare materials and online resources to support public consultation
Week of 28 March	Launch of public consultation
April - May	Public consultation
By December 2022	Final Cabinet decisions on modern slavery proposals
Mid-2023	Modern slavery legislation introduced

Annexes

Annex One: Draft Cabinet paper

Annex Two: Draft Modern Slavery and Worker Exploitation discussion document

Annex Three: Modern Slavery Leadership Advisory Group meeting reflections – 21 October 2021

Annex One: Draft Cabinet paper

Attached as a separate Document

DOCUMENT PUBLISHED SEPARATELY

Annex Two: Draft Modern Slavery and Exploitation Discussion document

Attached as a separate document.

DOCUMENT PUBLISHED SEPARATELY

Annex Three: Modern Slavery Leadership Advisory Group meeting reflections – 21 October 2021

Attached as a separate document.

Modern Slavery Leadership Advisory Group (MS LAG) meeting reflections – 21 October 2021

1. This document is a high-level reflection of the key points raised in the Leadership Advisory Group meeting of 21 October 2021. It does not represent MBIE's views and is designed to reflect your feedback and thoughts on the overall approach to the legislation. This meeting focused on an early draft of the discussion document and whether the document includes the right types of questions and the information required to help submitters engage with the questions.
2. The MS LAG does not vote on resolutions or require a consensus to be reached at any point of its discussions. As such, the views presented in this document are not necessarily the views of all members but they reflect views that were raised in the meeting by members of the MS LAG.

The threshold may be too high to support meaningful change for most businesses

3. Many MS LAG members were disappointed with the proposed \$20m threshold for imposing transparency requirements on medium sized entities because this would capture about 1% of businesses. The concern is that the vast majority of entities would only have to meet the minimum obligations proposed, which are reactive in nature.
4. The current proposal would require entities to take action if modern slavery is found in their supply chain, but it would not require the entity to actively look for and assess risks. It was suggested that if the threshold for transparency requirement is set at \$20m or higher, a more stringent obligation could be imposed on entities below the threshold.
5. An alternate view was that the higher thresholds may be appropriate to start with if this is considered as the first step on a journey with businesses and stronger obligations will be put in place in the future. This would be easier on businesses which are facing additional challenges in the current environment. Larger businesses are likely to have more capacity to take steps now, and starting with them could help ensure that it is successful from the beginning.
6. It was suggested that a question is asked in the discussion document about how long it will take businesses to prepare to meet the new obligations. This would help inform decisions about whether some obligations should be gradually introduced.
7. On a more technical point, it was also noted that it would provide more certainty to businesses if the thresholds are based on previous years' income, so they know what their obligations are before end of the year.

The discussion document should be framed positively to give submitters something they can get behind

8. There was a lot of support in the group for framing the discussion document positively to encourage people to see the benefits of taking action and to avoid putting submitters on the defensive. **Free and frank opinions**

[Redacted text block]

9. Suggestions for helping to frame the obligations positively include:
 - a. Including values based questions to help submitters understand how the proposals fit with their values. For example, do you think that New Zealand needs to take

further action to address modern slavery in supply chains, and do you want to see more transparency about the supply chains of products you buy?

- b. Including policy objectives and value statements based on New Zealand's values rather than focusing on overseas examples.
- c. Setting out the roles that communities and civil society can play, so they can see themselves as helping to make positive change.
- d. Making it clear that businesses will not be penalised for proactively looking for issues in their supply chains and that penalties would only apply to those who fail to take action.
- e. Noting the links to COVID-19, such as helping address the higher level of uncertainty in their supply chains and support recovery.

The practical impacts of the proposals will need to be set out clearly

- 10. The group noted that the due diligence obligations are particularly challenging to understand without clear definitions and practical examples. The proposal discussed was that entities:
 - a. undertake modern slavery risk assessments across their global operations and supply chains (including those of any subsidiaries) to identify potential risks, and
 - b. undertake action as is reasonable and appropriate to address any risks.
- 11. It was noted that the terms 'reasonable and appropriate' are open to interpretation, and it that businesses are unlikely to understand what is being asked of them without further clarification. To help submitters engage with the proposals, it was suggested that the language could be simplified, more diagrams could be included, as well as case studies and examples. There are already case studies and tools available to draw on, such as the UN Human Rights Self-Assessment Tool.
- 12. The requirement to undertake global operation risk assessments will mean different things to stakeholders from different sectors. Examples of compliant behaviour would help clarify this as well. In particular, it may not be feasible for some sectors to provide an in-depth assessment beyond tier 2 of their supply chain.

The questions should be structured in a way that is easy to engage with and encourages comprehensive responses

- 13. Some members noted that there is a risk that using yes or no questions could result in misleading views about the nature of the issue and the proposals. It was suggested that the document start with values-based questions to help submitters understand how the issue relates to their values, and then using more open ended questions to test support for each proposal.