



Law Council
OF AUSTRALIA

Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Foreign Corrupt Practices Committee of its Business Law Section and its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (**the Bill**).
2. Schedule 1 of the Bill would amend the offence of bribery of a foreign public official and introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate. Schedule 2 of the Bill would implement a Commonwealth Deferred Prosecution Agreement (**DPA**) scheme.
3. The Law Council supports legislation and other measures that effectively address foreign bribery and corruption. Such measures assist in ensuring the integrity and transparency of international business contracts and preventing the exploitation of vulnerable economies and people. This is consistent with Australia's obligations under international conventions and the Law Council's participation in the G20 Anti-Corruption Working Group and Action Plan.
4. Subject to the issues raised in this submission being addressed, the Law Council supports the:
 - proposed new foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). In particular, the concept of 'improper influence' should be replaced with dishonesty. In the alternative, if 'not legitimately due' is changed to 'improperly influence', then, in the Law Council's view, the fault element of the offence should be dishonesty; and
 - proposed amendments to the *Director of Public Prosecutions Act 1983* (Cth) (**DPP Act**) to create a statutory framework for a DPA scheme for certain Commonwealth offences. In particular, a new subsection should be inserted to make it clear that the terms of a DPA (a) do not affect a corporation's entitlement to exercise legal professional privilege in respect of material to which the privilege applies; and (b) do not contain a formal admission of criminal liability. The Privacy Commissioner should be consulted on the privacy implications of proposed section 17K (disclosure of information) and any issues raised by the Privacy Commissioner should be addressed prior to the provision's enactment.
5. The Law Council recommends that the proposed new corporate offence of failing to prevent foreign bribery be reconsidered given a number of problematic features of the offence. In the event that it is to proceed, absolute liability should not apply to the corporation and the legal burden of proof on the defendant should be reduced to an evidential burden. In addition, the definition of an 'associate' should be reconsidered in a manner more consistent with the *Bribery Act 2010* (UK) (**UK Bribery Act**). The guidance under proposed section 70.5B of the Criminal Code should be developed through a public consultation process.
6. The Law Council recommends that further consideration be given to removing the requirement of influencing a foreign public official 'in their official capacity'. Expanding the definition along the lines of the UK Bribery Act formulation may be a more effective solution.

Preliminary comments

7. The Law Council makes the following general comments.
8. The Explanatory Memorandum explains the rationale behind the Bill as follows:

The Bill contains measures to address challenges associating with detecting and addressing serious corporate crime. The opaque and sophisticated nature of serious corporate crime can make it difficult to identify and relatively easy to conceal. Investigations into corporate misconduct can be hampered by the need to process large amounts of complex data and conduct lengthy negotiations over claims of legal professional privilege. Evidence may be held overseas and therefore require investigators to engage with mutual assistance processes. Court proceedings can be long and expensive, particularly against well-resourced corporate defendants.¹

9. At a practical level, parties seeking to comply diligently with foreign bribery obligations face significant hurdles in seeking to identify their legal obligations and appropriately document their compliance with those obligations. The Law Council thus suggests that any amendments to Australia's foreign bribery regime should, to the greatest extent possible, be consistent with the position in other major trading nations such as the United States and the United Kingdom (UK). This would ensure that there is a consistent overlap of obligations.
10. The Law Council previously provided a submission on the Exposure Draft Crimes Legislation Amendment Bill 2017 (**the Exposure Draft**) and on the *Improving Enforcement Options for Serious Corporate Crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia Public Consultation Paper* released in March 2017 (**the Consultation Paper**).² These previous submissions are at Annexure 1 and Annexure 2 respectively.
11. The Law Council welcomes a number of features of the proposed foreign bribery offences and the removal of the proposed recklessness offence for reasons outlined in Annexure 1. The Law Council is also broadly supportive of the structure of the DPA Scheme which is similar to that proposed in the Consultation Paper for reasons outlined in Annexure 2.
12. Specific comments in relation to the Bill are set out below. The Law Council reiterates much of the substance of its previous submissions, noting that a number of its concerns about aspects of the Exposure Draft or the DPA scheme have not been addressed.

Amendments relating to foreign bribery

'Improperly influencing' a foreign public official

13. While the Law Council has previously opposed the introduction of the concept 'improperly influence', proposed paragraph 70.2(1)(b) of the Bill retains this phrase. The Law Council maintains its view that the meaning of 'improperly influencing' a

¹ Explanatory Memorandum to the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 [2].

² Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (March 2017) <<https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>>.

public official is uncertain and will create considerable difficulties as to how the courts, as the trier of fact and law, may interpret the term. Proposed subsection 70.2A provides a list of mandatory factors that the court must disregard in determining whether influence is improper. A non-exhaustive list of matters that the court may have regard to is then set out in proposed subsection 70.2A(3). This includes proposed paragraph 70.2A(3)(f) which includes whether the benefit was provided, or the offer or promise to provide the benefit was made 'dishonestly'. However, the court must still ultimately determine the question without any statutory definition as what may amount to 'improper influence'.

14. Accordingly, the Law Council considers that introducing this novel and undefined concept will serve only to create more uncertainty and unnecessary complexity in the foreign bribery offence.
15. The issues created by the legislation are particularly relevant when businesses operate in jurisdictions with significantly different cultural and legal responses to conduct which would be seen as improper in the Australian environment.
16. Absent statements from courts to clarify the concepts, which will not be available for several years and only after concluded prosecutions, effective advice and proper management of business dealings will be made more difficult and costly. The proposed subsection 70.5B (guidance on preventing bribery of foreign officials) is noted but the value of that section depends on the quality and timeliness of this material.
17. In contrast, the concept of 'dishonesty' is well-established and understood in Australian criminal law. The definition in Chapter 7 of the Criminal Code encompasses both a subjective and objective test, which would permit a trier of facts to make well-informed decisions with respect to the factual circumstances surrounding allegations of foreign bribery. Moreover, the concept of 'dishonesty' already applies to a range of other criminal offences, including the domestic bribery provisions in Division 141 of the Criminal Code. Accordingly, introducing this concept in relation to the foreign bribery offence would serve to harmonise the language of the bribery offences in the Criminal Code and provide greater certainty as to the operation of the provisions. If the change is made from 'not legitimately due' to 'improperly influence', then the fault element should be dishonesty.
18. The Law Council notes that even with the dishonesty test there may be the potential for inconsistencies to arise both in relation to the objective and subjective test, in terms of considering different local customs and traditions in a foreign country when compared with Australia.

New corporate offence of failing to prevent foreign bribery

19. A number of organisations including the Law Council raised concerns about the proposed new corporate offence of failing to prevent foreign bribery in the Exposure Draft. These concerns have not been addressed in the current Bill.
20. The Law Council recognises that the introduction of a new corporate offence of failing to prevent bribery seeks to provide an incentive for companies to prevent foreign bribery that arises in relation to their subsidiaries, employees, agents and contractors. The Law Council supports regulation in this area.
21. The Law Council notes the following issues of concern in relation to the proposed new corporate offence of 'failing to prevent' foreign bribery:

- The proposed offence requires that an associate commits an offence against section 70.2 (**the primary offence**). If the primary offence in section 70.2 of the Criminal Code works properly after reform, it is not clear why the proposed corporate offence is necessary, particularly given the availability of ancillary offences. The proposed corporate offence should only be considered if deficiencies with the operation of the primary offence and any possible civil penalty provision are identified.
- The implications for prosecution and enforcement of the primary offence in section 70.2 of the Criminal Code – it is important to consider how the introduction of a new corporate offence is likely to interact with the primary offence and the other proposed amendments (including the final form DPA scheme), and the anticipated implications for prosecutions of individuals and companies under the primary offence.
- The offence proposes a reversal of the onus of proof where a legal burden is placed on the defendant to show that it has adequate procedures in place to prevent foreign bribery. The rule of law requires that the defendant should only bear the onus of establishing a matter where that matter is particularly within the defendant's knowledge and not available to the State or the prosecution.³ Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.⁴ If the offence is to proceed, the legal burden should be removed. If this is not to be accepted, the reversal of onus of proof should be reduced from a legal burden to an evidential burden. This would be a serious offence and the standard method of proof of beyond reasonable doubt should be imposed on the prosecution.
- Clarification is needed regarding the standard of proof required to establish different elements of the offence (noting the fault and default fault aspects of the operation of the Criminal Code), and any 'adequate procedures' defence. These are important aspects of the proposed offence which warrant express discussion and consideration of the likely practical implications for prosecutions and possible defendants.
- The definition of 'associate': The proposed definition extends to persons who 'otherwise perform services for and on behalf of the other person'. This represents a very different approach to legal liability compared to the current corporate criminal responsibility provisions under the Criminal Code. The Law Council also notes that the proposed definition differs from the approach taken in the UK Bribery Act to the definition of 'associated person'.
- Absolute liability is proposed to apply to paragraph 70.5A(1)(c). The primary offence does not require that the associate does so for the profit or gain of the first person (the body corporate charged with the failing to prevent offence). Therefore, the circumstance of the associate doing so for the profit or gain of the first person is likely to be a contested matter. Further, proposed subsection 70.5A would allow a body corporate to be convicted because of the commission by the associate of a primary offence even if the associate has not been convicted of that offence. If the associate is not convicted of the offence, absolute liability should not apply to the corporation because *mens rea* will need

³ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) Principle 3, 3.
<<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>

⁴ Ibid.

to be proved on the part of the associate under paragraph 70.5A(1)(c); it is not clear how this could be proved.

- In the event that the offence proceeds, detailed guidance would need to be developed as to what constitutes an effective compliance program, and the steps that should be taken to properly implement such a program.⁵ The guidance under proposed section 70.5B of the Criminal Code should be developed through a public consultation process. In this regard, alignment between international standards in this area would be important to ensure effective compliance for those operating across jurisdictions. An adequate opportunity for review and consultation on any proposed guidelines prior to publication and to the introduction of any new corporate offence for 'failing to prevent' foreign bribery would be critical.

22. The Law Council acknowledges that there was a minority view expressed by some members of its Foreign Corrupt Practices Committee of the Business Law Section that supported the creation of a failing to prevent foreign bribery offence.

Removing requirement of influencing foreign official 'in their official capacity'

23. The Law Council recommends that further consideration be given to removing the requirement of influencing a foreign public official 'in their official capacity'.
24. The Law Council recognises that foreign public officials can be bribed to act outside their official duty to secure a business or an advantage, and that the proposed amendment would remove the limitation imposed by the concept of 'in their official capacity'. However, widening the definition of the foreign public official's capacity along the lines of the formulation in subsection 6(4) of the UK Bribery Act may be preferable to the omission currently proposed.
25. Subsection 6(4) of the UK Bribery Act provides that references to influencing a foreign public official in their capacity as a foreign public official includes any omission to exercise those functions and any use of the foreign public official's position as such an official, even if not within their authority. This wide definition permits prosecution without needing evidence of fact from the jurisdiction concerned as to the precise scope of the official's duties. As this need for evidence of fact is invariably one of the difficulties in establishing the foreign bribery offence under the current law in the Criminal Code, expanding the definition along the lines of the UK Bribery Act formulation may be a more effective solution.

Deferred Prosecution Agreement Scheme

26. Schedule 2 of the Bill would implement a Commonwealth DPA Scheme. The proposed scheme in the Bill appears to be largely based on the model discussed in the Consultation Paper.⁶
27. On 8 December 2017 the CDPP and AFP created *Best Practice Guidelines on Self-Reporting of Foreign Bribery and Related Offending by Corporations* (**Best Practice**

⁵ Detailed guidelines have been developed in the UK, US and more recently, in France.

⁶ Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (March 2017) <<https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>>.

Guidelines). The Best Practice Guidelines are a positive starting point to enable companies to understand how the CDPP will exercise its discretion regarding DPAs.

28. The Law Council supports the offences to which a DPA may relate in proposed section 17B of the Bill as well as secondary liability offences under section 11 of the Criminal Code. In addition, the Law Council recommends that there be periodic review of appropriate offences that may be subject to a DPA.
29. The Law Council supports the mandatory content (proposed subsection 17C(1)) and the optional content (proposed subsection 17C(2)) of a DPA with one exception. Proposed paragraph 17C(2)(c) notes that a DP may contain 'any other term that the Director considers appropriate'. The Law Council considers that a new subsection should be inserted to make it clear that the terms (a) do not affect a corporation's entitlement to client legal privilege in respect of material to which the privilege applies; and (b) do not contain a formal admission of criminal liability.
30. The Law Council supports the approval of a DPA process by way of a retired judge as an alternative to its initial primary recommendation of an independent administrative panel. The Law Council also supports that the review process is not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
31. Proposed sections 17D and 17F would set out the approval and variation process for a DPA respectively. Proposed subsection 17D(7) for example would require the approving officer to give written notice of the decision to approve the DPA to the person and the Director. Proposed subsection 17D(7) would require the Director within 10 business days after the day notice of the decision is given, publish the DPA on the Office's website. Certain exceptions may be made with regard to whether publish the DPA or a modified form in proposed subsections 17D(8) and (9).
32. Subsection 17H(1) would provide that in civil or criminal proceedings against a person (other than an individual) who is, or was, a party to a DPA, or negotiation for a DPA, documents (other than the DPA itself) that indicate the person entered into negotiations for a DPA/were created solely for the purpose of negotiating a DPA are not admissible in evidence against the person. Proposed subsection 17H(4) would provide that, to avoid doubt, this section does not affect the admissibility in evidence of any information or document obtained as an indirect consequence of a disclosure of, or any information contained in, any document mentioned in subsection (1).
33. In the Law Council's view, proposed section 17K, as presently drafted, may insert uncertainty into negotiations under the DPA Scheme, that could affect the overall success of negotiations as companies who disclose information while negotiating, entering into, or administering a DPA would be at risk of this information being disclosed further in a range of ways that may be adverse to the company. This is particularly because the proposed 'purposes for which disclosure may be made' as presently drafted are very broad. The Privacy Commissioner should be consulted on the privacy implications of proposed section 17K and any issues raised by the Privacy Commissioner should be addressed prior to the provision's enactment.
34. The Law Council also reiterates several of its earlier recommendations here, including:
 - a comprehensive program of education in relation to the finalised DPA scheme should be undertaken;
 - the Australian Government should further investigate means by which a Commonwealth DPA could also resolve breaches of state and territory laws;

- the Australian Government should consider, and if necessary address, whether the CDPP and the AFP have the full range of skills and experience to engage in corporate negotiation and compromise;
- the DPA scheme should include a tolling of the limitation period in respect of any related civil proceedings that arise out of the offending conduct;
- independent corporate monitors should be engaged in appropriate cases.⁷ Where a monitor is engaged, consideration needs to be given to the need for confidentiality of their reports and findings. These reports should be confidential and not publicly available, unless required in proceedings for a breach of the DPA; and
- the DPA scheme could also include a process for resolving disputes, including having an independent third party determine whether there has been a material breach of a DPA.

⁷ It is noted that this proposal also had support from the Attorney-General's Department: see the Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (March 2017) <<https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>> p. 11.