We, Professors Fiona Haines and Christine Parker,[1] welcome the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (hereafter the Bill).

Much of the Bill is welcome in particular the strengthening of the definition of foreign bribery. We cautiously welcome the introduction of Deferred Prosecution Agreements (DPAs) subject to addressing the second of our concerns below. We welcome the prohibition against tax deductions associated with the costs associated with a DPA (Part 2 Section 14).

We have two substantive concerns.

***Firstly, we do hope the timing of this Bill and this Inquiry can benefit from the Australian Law Reform Commission comprehensive review of corporate offending*.** The ALRC review has specific questions it is addressing with regards to DPAs which is of direct relevance to this Bill and the ALRC scrutiny of extraterritorial enforcement of Commonwealth criminal law may also hold material of relevance in the case of bribery overseas. It would be of significant public benefit for the lessons from the ALRC Inquiry relevant to this Bill are included in its provisions.

Secondly, we have concerns regarding the potential lack of public transparency concerning DPAs (Sections 17D and F). We welcome the additional scrutiny of DPAs by an approving officer. However, we note that *an approving officer is not the same as judicial oversight as the officer is not an officer of the court at the time of approving the DPA*, even given their legal qualifications and judicial experience. For this reason, the architecture of the Bill is significantly less stringent than the UK DPA regime where DPAs involve significant court oversight. As the ALRC discussion paper notes[2] regarding court oversight in the UK regime:

> 9.28 …. Following the conclusion of negotiations, but before the terms of a DPA are agreed, ***the prosecutor must apply to the court at a 'preliminary' hearing held in private for a declaration that entering into a DPA is 'likely' to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. The court must give reasons for its decision and, if a declaration is declined, a further application is permitted.*** [emphasis added]. This procedure is designed to ensure the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings were public.
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> 9.29 If the first declaration is granted, and the DPA is finalised on the terms previously identified, the ***prosecutor must apply to the Crown Court*** [emphasis added] at a 'final' hearing for a declaration that the DPA is not just 'likely' to be, but in fact is in the interests of justice, and

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[1] Professor Haines, Professor of Criminology at the University of Melbourne has extensive research experience in understanding corporate crime and effective regulation. Information is available at https://findanexpert.unimelb.edu.au/profile/13687-fiona-haines

Professor Parker also has extensive expertise in corporate accountability and regulation. She has undertaken research into enforceable undertakings and deferred prosecution agreements. Information is available at https://findanexpert.unimelb.edu.au/profile/5378-christine-parker

[2] The footnotes of this section of the ALRC discussion paper (pp189-190) have been removed for clarity of reading. The discussion paper is available at https://www.alrc.gov.au/wp-content/uploads/2019/11/Corp-Crime-DP-87.pdf

> that the terms of the DPA are indeed fair, reasonable and proportionate. The court must give reasons for its decision. The hearing may be held in private but, if the DPA is approved, ***the reasons must be given in open court*** [emphasis added]. The prosecutor will then prefer an indictment, which will however be immediately suspended pending the satisfactory performance, or otherwise, of the DPA. ***The prosecutor must then publish the DPA, the declaration of the court and the court's reasons, unless the court orders postponement of publication to avoid prejudicing proceedings*** [emphasis added].
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> 9.30 The role of judicial oversight is seen as critically important within the UK context. In evidence given to the House of Lords Select Committee on the Bribery Act 2010 ('the Select Committee'), Sir Brian Leveson said:
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> > I think [judicial oversight] is absolutely critical, because we do not do plea bargains in this country, as others do***. This has to be conducted in public, so that, in other words, everybody can see what is being done in their name. Therefore, there is no private deal between a prosecutor and a company that nobody ever hears anything about ... The disinfectant of transparency in this area is absolutely critical*** [emphasis added].

Leading commentators of corporate criminal law in the US have also argued that limited court oversight is essential to ensure deferred prosecution agreements are neither too soft nor too harsh.[3]

There is also weakness of public oversight in the proposed Bill in the form of material to be made available to the public for scrutiny regarding DPAs. The Bill requires publication of the DPA (Section 17D (7)) but then considerable discretion for withholding that information (at (8)). The same applies to variations to a DPA (Section 17F (6)(7)). There appears to be no requirement for providing a meaningful statement of reasons to the public for withholding the content of a DPA from public scrutiny.

These weaknesses are significant. Firstly, there has been significant public anger directed at corporations in the wake of scandals and inquiries in the financial and banking sector. In light of this, justice must be seen to be done. This is not possible if information on what meaningful action is required by the corporation as part of the DPA – and in a reasonable amount of detail – is not available to the public. This may be a matter of injustice if there are members of the public who have suffered loss or harm as a result of the criminal conduct. Scrutiny by an approving officer cannot fulfil this function. Justice may be served by the approval of the approving officer, but not that it is seen to be done. Time will tell whether DPAs will be publicly available, but the Bill would be strengthened by the inclusion of the requirement, at a minimum, for the Director to publish on their website substantive reasons why DPAs are not made available should this be deemed necessary. It would also be beneficial for publication of a DPA as a matter of course following the completion of the DPA if this has not already occurred. It is worth considering whether it is possible to make DPAs available either before or acter they are completed for comment to an advisory group made up of members of the public with rlevant and appropriate

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[3] Eg J. Coffee, "Deferred prosecution: has it gone too far?" *The National Law Journal*, 25 July 2005. Coffee comments that "Deferred prosecution resembles probation, but probation conditions are imposed by courts, not prosecutors. If deferred prosecution agreements had to be presented to, and approved by, the courts, as they do today in some districts, the prosecutor's ability to impose arbitrary terms or conditions unrelated to the causes of the crime would be desirably restrained."

expertise and experience in order to enhance accountability. Some Australian regulators have used such a process in the past as part of the process for settling potential regulatory enforcement action.[4]

The second reason why the weaknesses are problematic is educative. DPAs are an innovation in Australia and learning from experience following their introduction is essential to ensure they make a genuine contribution in tackling corporate crime. Education cannot take place in an information vacuum. The ALRC discussion paper has benefited from the relative openness of the UK regime (see Appendix L of their report). Indeed, publicly available information on the content of DPAs from the UK regime may well have informed Part 2, Section 14 of the Bill in terms of the tax treatment of costs incurred from a DPA noted above. If our suggested amendments (on the publication of reasons and the automatic publication of DPAs previously withheld following their completion) were to be included this would provide an additional check that the reasoning of the Director meets public expectations concerning the public interest in the long term. This would, over time, add to the robustness and legitimacy of DPAs and of decisions made by the Director. If DPAs prove an important aspect of combatting corporate crime, this legitimacy becomes critical in ensuring that hasty removal of the DPA regime does not follow the next corporate scandal. As Hess and Ford commented in their comprehensive evaluation of the potential and use of deferred prosecution agreements in the US context, "transparency fosters credibility and trust". [5]

We are happy for this submission to be made public.

Thursday, 9 January 2020

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[4] The Queensland health and safety regulator and Victorian environment regulator used this process before finalising enforceable undertaking (a related regulatory enforcement tool): see Richard Johnstone, and Christine Parker, "Enforceable Undertakings in action: Report of a roundtable discussion with Australian regulators." *Available at SSRN 1551627* (2010): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551627 See also C. Parker, "Regulator-required corporate compliance program audits" (2003) 25 *Law & Policy* 221-244 at 236-7 for further discussion of problems that can be caused by lack of accountability. Available at

[5] David Hess and Cristie L. Ford. "Corporate corruption and reform undertakings: a new approach to an old problem." *Cornell Int'l LJ* 41 (2008): 307 at 336. They also argue for the need for "centralized data collection, aggregation, and analysis" in order for all stakeholders to learn what steps work to address problems of corporate corruption.