



Law Council
OF AUSTRALIA

Office of the President

8 May 2017

The Hon Michael Keenan MP
Minister for Justice
c/o Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: foreign.bribery@ag.gov.au

Dear Minister,

Amendments to the foreign bribery offence

1. The Law Council is grateful for the opportunity to provide a submission in relation to the *Combating Bribery of Public Officials Consultation Paper (the Consultation Paper)* regarding amendments to foreign bribery offences and the accompanying draft provisions (**the Exposure Draft**).
2. The Law Council acknowledges the assistance of the Foreign Corrupt Practices Committee of the Business Law Section, the National Criminal Law Committee and the Law Society of South Australia in the preparation of this submission.
3. The Law Council would be pleased to elaborate on any of the views expressed.

Preliminary comments

4. The Law Council makes the following general comments.
5. 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.
6. The Consultation Paper states that the purpose of the current review is to ensure that the law reflects community expectations and does not present unnecessary barriers to effective prosecution.¹
7. 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

¹ Attorney-General's Department, *Combating Bribery of Public Officials: Proposed amendments to the foreign bribery offence in the Criminal Code 1995* (April 2017), 3.

extent possible, be consistent with the position in other major trading nations such as the United States (**US**) and the United Kingdom (**UK**). This would ensure that there is a consistent overlap of obligations. Further, there may be some benefit in the Exposure Draft explicitly providing that international material may be used in clarifying ambiguity in legislative provisions (but not so as to displace the terms of the *Criminal Code 1995 (Cth)* (**Criminal Code**)). This may assist in creating greater consistency in the legislative responses of major trading partners and provide access to material for advisers to identify relevant legislative considerations where there is ambiguity or uncertainty.

8. Specific comments in relation to the Consultation Paper and the Exposure Draft are set out below.

Extended definition of 'foreign bribery official'

9. The Law Council supports the proposed amendment to extend the definition of 'foreign public official' in section 70.1 of the Criminal Code to capture candidates for office. The Law Council agrees with this amendment on the basis that, while legitimate donations to candidates should be permissible (subject to existing laws on donations), the foreign bribery provisions of the Criminal Code should apply equally to conduct in relation to persons who already hold office, and those who are standing or nominated for office.

'Improperly influencing' a foreign public official

10. It may be that there is substance to concerns about the meaning of 'not legitimately due' in the current offence. However, introducing the concept of 'improperly influencing' a public official will introduce further uncertainty and is likely to create its own difficulties. For this reason, the Law Council does not support the proposed amendments to include the concept of 'improperly influencing' a foreign public official.
11. Concepts such as 'improperly influence' are, intentionally, broad and non-technical concepts requiring judgment and discernment to ascertain the concepts associated with the legislative language. While the Exposure Draft sets out a non-exhaustive list of factors that the court can take into account in determining whether there has been improper influence,² the court must still ultimately determine the question without any statutory definition. 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.
12. 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.
13. 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 is difficult. The proposed subsection 70.5B is noted but the value of that section depends on the quality and timeliness of this material.

² Exposure Draft, Crimes Legislation Amendment Bill 2017, proposed section 70.2B(3).

14. In contrast and as acknowledged in the Consultation Paper,³ 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.

Extended offence to cover bribery to obtain a personal advantage

15. The Law Council supports the proposal to extend the offence to cover bribery to obtain a personal advantage. The Law Council considers this to be a sensible extension of liability to ensure there is a prohibition of bribes to foreign public officials for both personal and business purposes.

New offence based on recklessness

16. The Law Council does not support the introduction of a new foreign bribery offence based on recklessness. Foreign bribery arises in a complex and nebulous commercial environment in foreign countries. It can involve both individual and corporate liability. This means that clarity around the source of criminal liability, including corporate liability, is essential in an effective legal framework which addresses foreign bribery.
17. The Law Council is concerned that the proposed new offence of recklessness would create unnecessary complexity, particularly when coupled with ancillary liability (e.g. aiding and abetting), section 72 offences and section 12.2 of the Criminal Code relating to physical elements for corporate criminal responsibility.
18. International standards in this area should be aligned as far as possible across different legislative regimes to ensure clarity for companies and individuals operating across jurisdictions that are subject to multiple overlapping legal regimes. While similar recklessness offences exist in Australia for money laundering and false accounting offences in Divisions 400 and 490 of the Criminal Code, neither the US⁴ nor the UK⁵ foreign bribery laws criminalise recklessness with respect to foreign bribery. Introducing a new offence based on recklessness would therefore put Australia out of step with the regimes in the US and the UK, and create differing legal compliance thresholds for those operating across those jurisdictions.
19. Further, the *OCED Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)* only requires States Party to criminalise intentional conduct.⁶ There is no requirement to criminalise reckless conduct. In 1998 an Exposure Draft implementing Australia's obligations under the

³ Attorney-General's Department, *Combating Bribery of Public Officials: Proposed amendments to the foreign bribery offence in the Criminal Code 1995* (April 2017), 6.

⁴ Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

⁵ *Bribery Act 2010* (UK).

⁶ Opened for signature 17 December 1997, [1999] ATS 21, 37 ILM 1 (entered into force 15 February 1999), OECD Doc DAF/FE/IME/MR(97)20, Article 1(1).

OECD Convention was given to the Joint Standing Committee on Treaties (**JSCOT**) for consideration. JSCOT recommended that the offence be amended such that proof of recklessness would be sufficient to prove the offence.⁷ However, the Australian Government did not accept this recommendation on the basis for example that if fault elements were expanded to include recklessness, the legislation would travel beyond the requirements of the OECD Convention.⁸ These views remain appropriate.

20. An offence based on recklessness focuses the inquiry on whether it was unjustifiable to take a risk. In the context of foreign bribery, where conduct under scrutiny will often be occurring in markets where there is a known heightened risk of corruption, this test is likely to inhibit ethical companies from investing and operating in difficult markets. This outcome would be adverse to the underlying policy objectives of the legislation and in our respectful submission would potentially amount to overreach of criminalisation
21. Finally, the Law Council notes that there is a question of how a recklessness offence could operate should the 'dishonesty' threshold be adopted in relation to the foreign bribery offence, as supported by the Law Council (as discussed above).

New corporate offence of failing to prevent foreign bribery

22. 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. However, it encourages the Australian Government to investigate other options for regulation (including but not limited to civil penalty provisions) as the proposed criminal offence gives rise to a number of concerns (as outlined below). This issue warrants a more thorough and extended public consultation, including with ASIC. The Law Council notes that the introduction of an offence in the UK for addressing concerns around preventing foreign bribery followed a multi-year process, including various reports and consultation rounds from the UK Law Commission. The Law Council strongly believes more consultation should be undertaken on options for regulating corporations failing to prevent foreign bribery, given the various (and complex) issues that should be addressed in more detail. The Law Council suggests this process be extended over the next 3-6 months (in parallel with the deferred prosecution agreement and whistleblowing consultations) without holding up the balance of the reforms.
23. The Law Council notes the following issues of concern in relation to the proposed new corporate offence of 'failing to prevent' foreign bribery:
 - 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. The consultation paper addresses a number

⁷ Joint Standing Committee on Treaties, *OECD Convention on Combating Bribery and Draft Implementation Legislation, 16th Report* (June 1998), xxi.

⁸ Parliamentary Library, Bills Digest Service, *Bills Digest No 176 (1998-99), Criminal Code (Bribery of Foreign Public Officials) Bill 1999* (11 May 1999), 3.

of proposed amendments to the primary offence which the Government considers may address challenges currently faced by authorities in investigating and prosecuting foreign bribery. In light of these proposals, 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.⁹ Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.¹⁰ 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'.
- If the associate is not convicted of the offence, absolute liability should not apply to the corporation because *mens rea* will need to be proved on the part of the associate; it is not clear how this could be proved. It potentially will create unfairness and miscarriages of justice.
- 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. 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.

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

⁹ 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>>

¹⁰ Ibid.

24. The Law Council recommends that further consideration be given to removing the requirement of influencing a foreign public official 'in their official capacity'.
25. 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 *Bribery Act 2010* (UK) (**UK Bribery Act**) may be preferable to the omission currently proposed.
26. 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.

Receipt or obtaining of business or advantage

27. The Law Council supports the proposed amendments to clarify that the business or advantage can be obtained or secured for another person, not only the person who provided or offered the benefit.

Specific business advantage

28. Subject to the new offence of recklessness being removed, the Law Council supports the proposed amendments to clarify that there need not be a specific business or advantage intended to be secured when providing or offering the bribe.
29. While the UK Bribery Act says little about the business or business advantage element of the offence, the Law Council considers that the drafting used in section 6 of UK Bribery Act (being an intention to obtain or retain an 'advantage in the conduct of business') is wide enough to encompass the payment of bribes without a specific business advantage in mind. The Law Council therefore supports amending the provisions in the Criminal Code to make it clear that no specific business or advantage must be intended or in mind (subject to the new offence of recklessness being removed).

Facilitation payments defence

30. The Law Council supports the removal of the facilitation payments defence from the Criminal Code.

Please contact Dr Natasha Molt, Senior Legal Advisor, Policy Division (02 6246 3754 or natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Fiona McLeod', written in a cursive style.

Fiona McLeod SC
President