



Law Council
OF AUSTRALIA

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

Legal and Constitutional Affairs Legislation Committee

18 July 2023

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
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- Ms Elizabeth Carroll, Executive Member
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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

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

Introduction

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) inquiry into the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (the **Bill**).
2. Part 1 of Schedule 1 to the Bill would amend the offence of bribery of a foreign public official under section 70.2 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) and introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate under proposed section 70.5A.
3. Part 2 of Schedule 1 contains consequential amendments to the *Income Tax Assessment Act 1997* (Cth) to preserve the existing rule, which prohibits a person from claiming as a deduction for a loss or outgoing a bribe to a foreign public official.
4. 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.
5. In producing this submission, the Law Council has had regard to stakeholder views on the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the **2017 Bill**) and the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (the **2019 Bill**), both of which lapsed when respective Parliaments were prorogued. The Law Council has also had regard to the findings of the Australian Law Reform Commission (**ALRC**) report '*Corporate Criminal Responsibility*' (Report 136) published in April 2020 (the **ALRC Report**).¹
6. Regrettably, in the time available for submissions to the Committee, the Law Council has not had an opportunity to adequately consult its membership and produce a comprehensive analysis on all aspects of the Bill. Despite this, key areas of focus have been set out below, including, where appropriate, recommendations for improvements to the Bill.

Bribing a public official

Extending the definition of 'foreign public official'

7. Item 4 of Schedule 1 to the Bill seeks to amend the definition of 'foreign public official' to include an individual standing, or nominated (whether formally or informally), as a candidate to be a foreign public official covered by any of paragraphs (a) to (k) of the existing definition.
8. 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.

¹ Australian Law Reform Commission, '*Final report: Corporate Criminal Responsibility*' (ALRC Report 136, April 2020).

Bribing a foreign public official to obtain a 'personal advantage'

9. Item 6 of Schedule 1 to the Bill would extend the existing foreign bribery offence to include bribery conducted to obtain a personal advantage, noting that the current offence is restricted to bribery conducted to obtain or retain a business advantage.

10. In justifying this extension, the Explanatory Memorandum states:

Law enforcement experience has also shown that foreign bribery can occur where the advantage sought is both a business and personal advantage, for example, where a foreign official seeks a visa. The grant of a visa is personal insofar as the person may enter the country, while also providing a business advantage by allowing the person to more easily tender for contracts or undertake business in the jurisdiction.²

11. The Law Council considers this proposal 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.

Improperly influencing a foreign public official

12. Currently, the Criminal Code offence of bribing a foreign public official applies to a benefit or business advantage that is 'not legitimately due to the recipient' for the purposes of the foreign bribery offence. Subsections 70.2(2) and 70(3) set out matters to be disregarded when determining whether a benefit or business advantage is not legitimately due to a person, namely:

- (a) whether it may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit or business advantage; and
- (c) any official tolerance of the benefit or business advantage.

13. The Bill proposes to remove the existing requirement that a benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official.

14. The Law Council has previously expressed concern that the concept of 'improperly influencing' a public official may give rise to difficulties as to how the courts, as the trier of fact and law, may interpret this provision in practice.³

15. Concepts such as 'improperly influence' are intentionally, broad and non-technical, requiring judgment and discernment to ascertain the concepts associated with the legislative language. While proposed subsection 70.2A(2) sets out matters that must be disregarded when determining whether influence is improper (and subsection 70.2A(3) lists matters to which regard may be had), this undefined concept has the potential to create more uncertainty and unnecessary complexity in the foreign bribery offence.

16. Consistent with its position in relation to the 2019 Bill, the Law Council agrees that, if the change is made from 'not legitimately due' to 'improperly influence', then the fault element should be 'intention', as has been specified in proposed

² Explanatory Memorandum, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, [63].

³ Law Council of Australia submission to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (14 January 2020), 8.

paragraph 70.2(1)(b). However, the Law Council considers this intention should be accompanied with the requirement for the person to be acting with ‘dishonesty’, which should be elevated from being a factor that may be considered at proposed paragraph 70.2A(3)(f) to an element of the offence, so that a person commits the offence if the person dishonestly does the things listed in proposed subparagraphs 70.2(1)(a)(i) to (iv).

17. Unlike the term ‘improperly influence’, the concept of ‘dishonesty’ is well-understood in Australian criminal law. The definition of dishonesty contained in section 130.3 of the Criminal Code encompasses both a subjective and objective test, which permits a trier of fact to make straightforward decisions with respect to the factual circumstances surrounding allegations of foreign bribery.
18. This approach would be consistent with the wording adopted in existing section 141.1 of the Criminal Code relating to the offence of bribery of a Commonwealth public official, which provides that a person commits an offence where ‘the person dishonestly’ does the things listed in that subsection.⁴
19. In the view of the Law Council, introducing the concept of dishonesty 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.
20. The Law Council acknowledges 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. These complex issues require further consultation.

Recommendation

- **The fault element of intention for the offence contrary to proposed section 70.2 of foreign bribery should be accompanied with a requirement that the person be acting with dishonesty, which should be elevated from being a factor that may be considered within proposed paragraph 70.2A(3)(f) to an element of the offence.**

Exercise of official duties

21. Currently, section 70.2 of the Criminal Code requires that, for an offence to take place, a foreign public official must be influenced in the exercise of their official duties. The Bill proposes to remove this requirement, with the Explanatory Memorandum highlighting that establishing this limb may require reliance on international legal assistance processes ‘which may take time and/or prove unsuccessful, and the investigation/prosecution may be compromised as a result’.⁵
22. The Law Council has previously recognised the rationale for this change. However, it has suggested that 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) (the **UK Bribery Act**) may be preferable to the amendment currently proposed.⁶

⁴ Criminal Code, 141.1(1)(a).

⁵ Explanatory Memorandum, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, [54]

⁶ Law Council of Australia submission to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (14 January 2020), 13.

23. By way of context, 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 definition permits prosecution without needing evidence of fact from the jurisdiction concerned as to the precise scope of the official's duties.
24. The Law Council considers the UK approach could better achieve the policy intent of the proposed reform, without having to remove the nexus to official duties in its entirety.

Recommendation

- **Consideration should be given to adopting the approach in subsection 6(4) of the *Bribery Act 2010* (UK), instead of removing altogether the requirement that a foreign public official be influenced in the exercise of their official duties.**

Failing to prevent bribery of a foreign public official

25. Item 8 of Schedule 1 to the Bill seeks to introduce new section 70.5A to the Criminal Code, which would establish a corporate offence of failing to prevent foreign bribery by an associate of a body corporate.
26. The Law Council recognises that the introduction of a new corporate offence of failing to prevent bribery aims to provide an incentive for corporations to take active measures 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 has several concerns with the measures proposed by section 70.5A, as set out below.

Definition of associate

27. Item 2 of Schedule 1 to the Bill would provide that a person is considered an 'associate' of a body corporate if the person is: an officer, employee, agent, contractor or subsidiary of the body corporate; is controlled by the body corporate; or performs services for or on behalf of the body corporate. In order for an offence to be committed, misconduct must have been pursued by an associate for the purpose of the profit or gain of the body corporate.
28. Importantly, the proposed definition of 'associate' could be regarded as broader than that contained in the equivalent offence in the UK Bribery Act, which focuses on the substantive nature of the relationship between the corporation and the associate, rather than the formal status of relationship. In order to be an 'associated person' under the UK Bribery Act, a person must perform services 'for, or on behalf of' the corporation.⁷ Under this approach, for bribes paid by the 'associated person' to lead to criminal responsibility for the corporation, the 'associated person' must intend to obtain or retain business, or an advantage in the conduct of business, for the corporation concerned.⁸

⁷ *Bribery Act 2010* (UK), section 8.

⁸ *Ibid*, section 7.

29. However, on whether the definition of ‘associate’ in the Bill is broader than equivalent provisions in the UK Bribery Act, the ALRC observes that:
- ... while the definition is nominally broad, the limitation that the associate must be acting for the benefit of the corporation is a significant and appropriate limitation. Importantly, this ensures that corporations will not be liable for any and all misconduct that takes place in their supply chains, but only when the particular misconduct was done by an associate for the purpose of benefiting the corporation.*
30. In response to a similar proposed provision in the 2019 Bill, the Law Council raised its concern that the definition of ‘associate’ was too expansive and departed from the usual principles of corporate criminal responsibility reflected in Part 2.5 of the Criminal Code. This concern remains, noting that the proposal creates a disparity between the application of the principles of criminal responsibility for natural persons and the application of principles of criminal responsibility for corporations and officers of corporations who have contravened Commonwealth laws.
31. The Law Council acknowledges that the ALRC has concluded that this approach is more appropriate in a transnational context than in a general attribution context in light of the complex structure of multinational corporations, in which responsibilities and roles may be diffused across borders and throughout different entities within a corporate group or along a supply chain.⁹
32. However, the Law Council continues to query whether it is appropriate to expand the definition of ‘associate’ beyond what is currently provided by section 12.2 of the Criminal Code relating to the scope of criminal responsibility for a body corporate for this specific offence.

Burden of proof when relying on exception

33. Pursuant to proposed subsection 70.5A(5) of the Bill, the offence of failing to prevent bribery of a foreign public official will not apply where the body corporate has in place adequate procedures designed to prevent the foreign bribery offence by an associate. However, the Bill seeks to place a legal burden on the accused to establish that such adequate procedures existed. Only once this is established (on the balance of probabilities) is the prosecution required to prove (beyond reasonable doubt) that no adequate procedures were in place to prevent the foreign bribery offence from occurring.
34. The Attorney-General’s Department’s *Guide to Framing Commonwealth Offences* clearly states that instances of placing a legal burden of proof on a defendant should be kept to a minimum.¹⁰ This principle is also reflected in the approach taken within the Criminal Code which indicates that, where the law imposes a burden of proof on the defendant, it is an evidential burden, unless the law expresses otherwise.¹¹
35. The Explanatory Memorandum’s justification for imposing this legal burden on the body corporate is simply that it will incentivise corporations to adopt measures to actively prevent foreign bribery.¹² In the absence of a more detailed explanation as to why there is a need to depart from well-accepted principles, the Law Council

⁹ Australian Law Reform Commission, *Final report: Corporate Criminal Responsibility* (ALRC Report 136, April 2020) [10.55].

¹⁰ Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), 51.

¹¹ Criminal Code, 13.3 and 13.4.

¹² Explanatory Memorandum, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, [28]

continues to hold the view that any burden that is imposed on an accused should be evidentiary rather than legal.

36. Regardless of the burden of proof placed on a corporation when having to demonstrate the adequacy of its procedures, the Law Council considers that detailed guidance must be developed as to what constitutes an effective compliance program, and the steps that should be taken to properly implement such a program. To this end, the Law Council welcomes proposed section 70.5B which compels the Minister to publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.

Recommendation

- **The defendant should bear an evidentiary rather than a legal burden to establish the matters contained in proposed subsection 70.5A(5).**

Penalties

37. Proposed subsection 70.5A(6) provides that the maximum penalty for the new offence of failing to prevent foreign bribery is the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit obtained directly or indirectly by the associate, three times that value; or
 - (c) if the court cannot determine the value of that benefit, 10 percent of the annual turnover of the body corporate.
38. The Law Council notes the significant challenges in determining the value of a benefit (both direct and indirect) obtained by the associate. For example, the Law Council queries how the value of benefits referred to in the Explanatory Memorandum could be quantified: for example, the granting of visas or other residency benefits, or the bestowing of personal titles or other honour.¹³
39. Due to this difficulty, it is likely that the 10 percent calculation will be relied upon for larger corporations. This may result in significant penalties for entities, for actions, which as noted above, may well be beyond their control under existing principles of criminal attribution.

Deferred Prosecution Agreement scheme

40. In light of the above challenges associated with the proposed new offences, the Law Council continues to support the adoption of a Deferred Prosecution Agreement (DPA) scheme as a means of addressing corporate criminal activity that may avoid some of the cost, delay and uncertainty of traditional criminal prosecutions. The DPA scheme proposed in the 2019 Bill was supported by the majority of the Committee as then constituted, however it has been omitted from the current Bill.¹⁴

¹³ Ibid, [61].

¹⁴ See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (2020).

41. The ALRC has also endorsed the establishment of a DPA scheme for foreign bribery offences as part of its inquiry into corporate criminal responsibility. The ALRC recommended that the 2019 Bill should have been amended to:
- (a) vest the power of approval of a deferred prosecution agreement in a Judge of the Federal Court of Australia (if needs be, as a *persona designata*);
 - (b) permit the parties to present oral submissions to the approving officer; and
 - (c) require the publication of the reasons for any approval in open court.
42. The Law Council supports the ALRC's views and refers to the Law Council's own submissions about the 2019 Bill on how a DPA scheme can be effectively implemented in relation to measures to combat foreign bribery.

Recommendation

- **A Deferred Prosecution Agreement regime should accompany any legislative response to Combatting Foreign Bribery.**