

27 February 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Supplementary Submission: Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019

On 12 February 2020, the Law Council appeared before the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) as part of its inquiry into the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (**the Bill**).

Definition of dishonesty

During the course of the Law Council's appearance, reference was made to the Final Report of the Model Criminal Code Officer's Committee of the Standing Committee of Attorneys-General (**Final Report**).¹ Specifically, the Committee was interested in the Final Report's consideration of theft, fraud, bribery and related offences in the context of Schedule 3 of the Bill and the proposed change to the definition of 'dishonesty' in the *Criminal Code Act 1995* (Cth) (**Criminal Code**). A copy of the Final Report is attached to this submission to assist the Committee as to the reasons why the existing definition of dishonesty was inserted into the Criminal Code.²

Criteria for deferred prosecution agreements

The Law Council received a question from Senator Anthony Chisholm in relation to the criteria that should be satisfied before a deferred prosecution agreement (**DPA**) can be entered into with a corporate offender, and whether the criteria should reflect the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**).

The Law Council supports the adoption of a DPA scheme in Australia. A DPA scheme provides opportunities to deal with corporate criminal activity that may avoid some of the cost, delay and uncertainty of traditional criminal prosecutions. Further, a DPA scheme can potentially encourage self-reporting of corporate criminal conduct and be a means to

¹ Model Criminal Code Officer's Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 3, Theft, Fraud Bribery and Related Offences, *Final Report* (December 1995).

² Ibid 8-25.

achieve accountability and regulation for corporate misconduct that may not otherwise occur within the existing regulatory regime.

The proposed DPA scheme in Schedule 2 of the Bill is based on the model discussed in the Government's Consultation Paper released in 2017.³ Further, in May 2018 the Attorney-General's Department (**AGD**) released a Consultation Draft of the Deferred Prosecution Scheme Code of Practice (**Draft Code**).⁴ The Draft Code is a starting point to enable both the public and companies alike to understand how the Commonwealth Director of Public Prosecutions (**CDPP**) will exercise its discretion regarding DPAs.

The Law Council notes that the Banking Royal Commission did not make any specific recommendations in relation to the need for a DPA scheme. However, the Banking Royal Commission did make a recommendation in relation to the Australian Security and Investments Commission's (**ASIC**) approach to enforcement in the context of enforceable undertakings under the *Australian Securities and Investments Commission Act 2001* (Cth).⁵ Here, the Banking Royal Commission recommended that ASIC should adopt an approach to enforcement that considers 'as a starting point, the question of whether a court should determine the consequences of contravention' and further that ASIC also 'recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in enforcement undertakings'.⁶

The Law Council further notes what the Banking Royal Commission generally observed in relation to prosecution policies:

*Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences. There are cases where there is good public reason not to seek those consequences. Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment.*⁷

The Law Council notes and supports the list of offences to which a DPA may be considered appropriate as listed in proposed section 17B of the Bill as well as the secondary liability offences under section 11 of the Criminal Code. However, the Law Council recommends there be a periodic review of appropriate offences that may be subject to a DPA to ensure the scheme is operating in both the broader related interests of justice and the Australian community.

³ 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>>.

⁴ See Attorney-General's Department, *Deferred Prosecution Agreement Scheme, Code of Practice* - Consultation Draft (May 2018) <<https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme-code-of-practice/Deferred-prosecution-agreement-scheme-draft-code-of-practice.pdf>>.

⁵ Recommendation 6.2, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1 (February 2019) 446.

⁶ Ibid. The Law Council also notes that DPA's and enforceable undertakings are different and operate with different checks and balances which does qualify to some degree the comparisons between the approach recommended to be taken to enforcement undertakings and DPA's.

⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1 (February 2019) 432-433.

The Law Council maintains that there should be clear, transparent criteria so that both companies and the public clearly understand how the proposed scheme will operate in practice and how the CDPP's discretion to defer a prosecution will be exercised.

The Draft Code provides further guidance about when a DPA can be entered into by the CDPP. It states the CDPP will only enter into DPA negotiations where satisfied it is in the public interest to do so, and there is a reasonable prospect of the parties agreeing to a DPA.⁸ The factors to be considered in an assessment of the public interest are specified in some detail in the Draft Code of Practice.⁹ These are in addition to the general guidelines relating to criminal prosecutions in the Prosecution Policy of the Commonwealth.¹⁰ The matters listed as being in the public interest in the Draft Code are as follows:

- (a) whether the corporation has self-reported the misconduct, and the quality and timeliness of that self-report;
- (b) whether there is a history of repeated or serious breaches of the law, and/or a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the corporation and/or its directors/partners and/or majority shareholders;
- (c) whether the conduct alleged is part of the business practices or culture of the corporation;
- (d) whether the corporation has already taken steps to avoid an occurrence of the misconduct (including where the corporation has taken such steps before becoming aware of the offending) or has demonstrated a genuine commitment to taking such steps (for example, by dismissing culpable individuals and committing to improve governance processes);
- (e) whether the corporation has been previously subject to warning, sanctions, regulatory action or criminal charges in relation to misconduct (and in particular, misconduct that is similar to the misconduct described in the DPA) and has nonetheless failed to take adequate action to prevent future unlawful conduct, or has continued to engage in the conduct;
- (f) whether the corporation reported the wrongdoing but failed to verify it, or reported it knowing or believing it to be inaccurate, misleading or incomplete;
- (g) whether there was a significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments;
- (h) whether a corporation has withheld material that is required for the effective investigation and, where appropriate, prosecution of individuals involved in the offending conduct;
- (i) whether the misconduct to which the DPA relates has been subject to extensive investigation by a Commonwealth agency and the extent to which the corporation has cooperated during that investigation and any subsequent prosecution of culpable individuals;
- (j) the existence of a proactive corporate compliance programme both at the time of offending and at the time of reporting but which failed to be effective in this instance;

⁸ Attorney-General's Department, *Deferred Prosecution Agreement Scheme Code of Practice (Consultation Draft)* May 2018, 4.

⁹ *Ibid*, 19.

¹⁰ Commonwealth Direction of Public Prosecutions, *Prosecution Policy*, <<https://www.cdpp.gov.au/prosecution-process/prosecution-policy>>

- (k) whether the corporation has self-reported the same or related offending in another jurisdiction and complied with any penalties/orders imposed by that jurisdiction, and the nature of those penalties/orders;
- (l) whether the offending represents isolated actions by individuals;
- (m) whether the offending is recent and the corporation in its current form is effectively a different entity from that which committed the offences (for example if the corporation has been taken over by another organisation, it no longer operates in the relevant industry or market and/or its management team has completely changed);
- (n) whether the corporation has taken steps to redress any harm caused by the offending;
- (o) whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the seriousness of the alleged offending by the corporation;
- (p) disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending, and
- (q) a conviction is likely to have significant and disproportionate effects on the public, the corporation's employees, shareholders or members of a superannuation scheme managed or facilitated by the corporation.

The Law Council considers the above criteria could be set out in the enabling legislation so there are clear statutory requirements that stipulate when the scheme will be available for corporations which engage in criminal offending. This level of transparency is necessary for the public to have confidence that the scheme operates with consistency, impartiality and in accordance with law.

A further safeguard for the integrity of any DPA scheme is that before a DPA is approved by the 'approving officer', who is proposed to be a suitably qualified retired judicial officer¹¹, the approving officer be required to take the same criteria into account. This would include the requirements of specific and general deterrence as noted above, in making a determination that the terms of the DPA are 'in the interests of justice' and are 'fair, reasonable and proportionate' within the meaning of proposed subsection 17(4) of the Bill, and are also 'in the public interest' before a DPA can be approved.

Thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact

Yours sincerely

Pauline Wright
President

¹¹ Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, cl 17G.