



Law Council
OF AUSTRALIA

Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019

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 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

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

Executive Summary

1. The Law Council welcomes the opportunity 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 2019 (**the Bill**). The Law Council notes that the Bill contains substantially similar provisions to the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017, which lapsed on 1 July 2019 (**the 2017 Bill**).
2. Schedule 1 of the Bill would amend the offence of bribery of a foreign public official under section 70.2 of the *Criminal Code Act 1995* (Cth) (**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. Schedule 2 of the Bill seeks to implement a Commonwealth Deferred Prosecution Agreement (**DPA**) scheme, and Schedule 3 of the Bill seeks to amend the definition of 'dishonesty' in the Criminal Code.
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 conventions¹ and the Law Council's participation in the G20 Anti-Corruption Working Group and Action Plan.
4. The need to continually review regulatory and enforcement frameworks as they apply to corporations has also been brought to light following the findings of the Royal Commission into the Banking, Superannuation and Financial Services Industry.² This process has highlighted the need to ensure there are adequate frameworks in place to promote early detection and strong deterrence of corporate wrongdoing.
5. Subject to the issues and concerns raised in this submission being addressed, the Law Council broadly supports the:
 - proposed amendments to the foreign bribery offence in section 70.2 of the Criminal Code; 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.
6. However, in relation to the proposed DPA scheme, the Law Council considers a new subsection should be inserted to make it clear that the terms of a DPA do not affect a corporation's ability to exercise legal professional privilege in respect of material to which privilege applies, and does not contain a formal admission of criminal liability.
7. In relation to the proposed amendments to the foreign bribery offence, the Law Council considers the concept of 'improper influence' should be replaced with 'dishonesty' as currently defined in the Criminal Code. In the alternative, if the words 'not legitimately due' are to be replaced with the provisions which define what constitutes 'improperly influence', the Law Council considers the fault element of intention should be

¹ See the Organisation for Economic Co-operation and Development (**OECD**) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed 17 December 1997, entered into force 15 February 1999.

² *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

accompanied by a requirement the person acted with 'dishonesty' as presently defined in the Criminal Code.

8. The Law Council recommends that the proposed new corporate offence of failing to prevent foreign bribery be reconsidered given several problematic features of the offence. The Law Council also considers that adoption of the new corporate offence should be deferred until recommendations are made by the Australian Law Reform Commission (**ALRC**) in relation to its Discussion Paper 87 which examines the issues of Corporate Criminal Responsibility, as released on 15 November 2019.³
9. If the measures are 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**), noting that the proposed definition represents a very different approach to legal liability when compared with the current corporate criminal responsibility provisions under Part 2.5 of the Criminal Code, and creates the potential for a corporation to be held responsible for the acts of individuals who may intentionally be acting against the interests of the organisation. The guidance to the application of the offence provisions under proposed section 70.5B of the Criminal Code should be developed through a public consultation process (as has been contemplated by the announcement of the Attorney-General's Department in November 2019 to release the consultation draft of the draft guidance a body corporate can take to prevent an associate from bribing foreign public officials).⁴
10. The Law Council is also of the view that further consideration be given to removing the requirement of influencing a foreign public official in their official capacity but expanding the definition of bribery to include the context in which influence may occur along the lines of the UK Bribery Act formulation.
11. In relation to amending the definition of 'dishonesty' in the Criminal Code, the Law Council considers that to justify the attribution of criminal responsibility the person ought to know they are engaging in dishonest conduct rather than their conduct being dishonest according to the standard or ordinary people as intended by the proposed amendments in Schedule 3 of the Bill. The Law Council is therefore opposed to changing the existing definition of 'dishonesty', which requires both an objective and a subjective test, to a definition limited to an objective test. The requirement for knowingly engaging in dishonest conduct is consistent with the fundamental principles of the criminal law that criminal culpability attaches to those who knowingly engage in such conduct.
12. In relation to the Bill the Law Council therefore makes the following further recommendations:
 - The fault element of intention for the offence contrary to proposed section 70.2 of foreign bribery 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 within proposed paragraph 70.2A(3)(f) to an element of the offence;

³ Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion paper 87 (November 2019).

⁴ Attorney-General's Department, *Consultation Draft: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials* (November 2019).

- The meaning of 'dishonesty' should be consistent with the existing definition in section 130.3 of the Criminal Code as applies to all offences in Chapter 7 of the Criminal Code;
- Consideration of the new corporate offence of failing to prevent foreign bribery by an associate should be deferred until final recommendations are made by the ALRC in relation to its review of corporate criminal responsibility;
- The defendant should only bear an evidentiary rather than a legal burden to establish the matters contained in proposed subsection 70.5A(5);
- Absolute liability should not apply in relation to the matters contained in proposed paragraphs 70.5A(1)(b) and (c);
- The offence contrary to section 70.5A should be redrafted so that the element of conduct is clearly set out in the offence provision;
- The criteria setting out the circumstances in which a DPA can be entered into should be specified in legislation;
- 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;
- The protection provided by proposed section 17H should be extended to derivative use immunity and any information or document obtained as a direct or indirect consequence of a disclosure made during the process of negotiating a DPA should be inadmissible in any related criminal prosecution;
- The Australian Government should further investigate means by which a Commonwealth DPA could also resolve outstanding breaches of state and territory laws;
- 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;
- The DPA scheme should also include a process for resolving disputes as to whether there has been a material breach of a DPA; and
- If the proposed definition of dishonesty is to be inserted into the dictionary of the Criminal Code, it should be framed as currently defined in section 130.3 of the Criminal Code, requiring both a subjective and objective limb to the test.

13. 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**).⁵ These previous submissions may also be of assistance to the Committee.⁶

⁵ 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>>.

⁶ Law Council of Australia, *A Preferred Model for a Proposed Deferred Prosecution Scheme in Australia*, (3 May 2017) <<https://www.ag.gov.au/Consultations/Documents/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia/Law-Council-of-Australia-DPA-Submission.PDF>>.

Amendments relating to foreign bribery offences

'Improperly influencing' a foreign public official

14. The Law Council maintains its view expressed in relation to the 2017 Bill that introducing the concept of 'improperly influencing' a public official creates uncertainty, and gives rise to difficulties as to how the courts, as the trier of fact and law, may interpret this provision in practice. Proposed subsection 70.2A(2) 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 states 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 to what may amount to 'improper influence'.
15. Accordingly, the Law Council considers that introducing this novel and undefined concept risks creating additional uncertainty and unnecessary complexity in the foreign bribery offence. This is particularly the case through the placement of such a pivotal aspect of criminal liability such as dishonesty as something that may or may not be taken into account.
16. 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 perceived as improper in the Australian environment.
17. The Law Council considers 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 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 within proposed paragraph 70.2A(3)(f) to an element of the offence in proposed paragraph 70.2(1)(a) 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). This approach would be consistent with the wording adopted in section 141.1 of the Criminal Code relating to the offence of Bribery of a Commonwealth official, where subsection 141.1(1) provides the person commits an offence 'if: (a) the person dishonestly' does the things listed in the subsection.
18. In the absence of judicial guidance to clarify the meaning of the key 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, however the value of that section is limited in the absence of judicial guidance in the interpretation of the provisions.
19. In contrast, the concept of 'dishonesty' is currently well-established and understood in Australian criminal law. The current definition in Chapter 7 of the Criminal Code encompasses both a subjective and objective test, which permits a trier of fact to make well-informed decisions with respect to the factual circumstances surrounding allegations of foreign bribery. The Law Council notes that the existing definition of 'dishonesty' was developed following consideration of the test adopted in the UK and best summarised in the decision of *R v Ghosh*⁷ where 'dishonesty' is based on the knowledge of the accused of their engaging in conduct that the community would see

⁷ [1982] QB 1053.

as dishonest. It is submitted that this test remains effective and allows subjectivity to be taken into account when it is reasonable. The removal of the subjective aspect of the test as proposed by the Bill is not appropriate in the context of the Criminal Code and the attribution of criminal responsibility.

20. 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.
21. 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. This links to the broader discussion of the proposed definition of 'dishonesty' addressed in more detail below at paragraph [83] of this submission. The Law Council generally opposes the definition of 'dishonesty' being changed to one that requires an objective test only. However, in the context of this particular offence provision, it serves to illustrate why the objective test as proposed by Schedule 3 of the Bill is uncertain in its application. The Explanatory Memorandum states:

The factor in paragraph 70.2A(3)(f) is whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly. Under the amendments set out in Schedule 3 of the Bill, 'dishonest' will mean 'dishonest according to the standards of ordinary people'. It is intended that ordinary people in this context would be ordinary people residing in Australia.⁸

22. The proposed definition of 'dishonesty' does not state 'according to the ordinary people residing in Australia'. If this is what is intended in this particular provision relating to foreign bribery, then this should be specified in the legislation. However, even then it is unclear what the 'ordinary people residing in Australia' would consider to be 'dishonest' in the context of the range of different cultural contexts, norms and narratives contemplated by the foreign bribery offence provisions.
23. The Law Council considers that this potential uncertainty illustrates why it is preferable to retain the existing definition of 'dishonesty' found in Chapter 7 of the Criminal Code. This requires that the person knows they are acting dishonestly according to the standards of ordinary people before they can be found by the trier of fact to have been dishonest in the context of foreign bribery offences. This requirement for knowingly engaging in dishonest activity in seeking to bribe a foreign official is appropriate. As stated in the Explanatory Memorandum, given the 'seriousness of the foreign bribery offence and the high penalty it can attract, it is desirable that its scope is clearly articulated'.⁹

Recommendations:

- **The fault element of intention for the offence contrary to proposed section 70.2 of foreign bribery 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 within proposed paragraph 70.2A(3)(f) to an element of the offence;**

⁸ Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 [87].

⁹ Ibid, [74].

- **The meaning of ‘dishonesty’ should remain consistent with the existing definition in section 130.3 of the Criminal Code as applies to all offences in Chapter 7 of the Criminal Code.**

New corporate offence of failing to prevent foreign bribery

24. The Law Council recognises that the introduction of a new corporate offence of failing to prevent bribery seeks 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 but has several concerns with the measures proposed by section 70.5A.

Definition of associate

25. The Law Council also notes the proposed definition of ‘associate’ extends to persons who ‘otherwise perform services for and on behalf of the other person’.¹⁰ This represents a very different approach to legal liability when compared with the current corporate criminal responsibility provisions under Part 2.5 of 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’.¹¹
26. The Law Council is concerned that proposal creates a significant 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. Of further concern, the proposed scheme appears to create the potential for a corporation to be held responsible for the acts of a range of individuals who may intentionally be acting against the interests of the corporation.
27. In this respect, the Law Council questions 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.

Interaction with primary offence

28. The proposed corporate offence requires that an associate commits an offence against section 70.2 of the Criminal Code (**the primary offence**). If the primary offence is able to be prosecuted effectively after the reforms proposed in the Bill, it is not clear why the proposed new offence for the corporation is necessary, particularly given the availability of ancillary offences framed around extensions of criminal responsibility depending on the facts of the case. The Law Council considers the proposed new corporate offence should only be considered if deficiencies with the operation of the primary offence and any possible civil penalty provisions continue to be identified.
29. Further, given 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

¹⁰ Proposed amendment to section 70.1 of the Criminal Code.

¹¹ *Bribery Act 2010* (UK), s 8. This section states a person (“A”) is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C. The capacity in which A performs services for or on behalf of C does not matter. Accordingly, A may (for example) be C’s employee, agent or subsidiary. Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

a new corporate offence is likely to interact with the primary offence and the anticipated implications for prosecutions of individuals and companies for the primary offence.

30. In that regard the Law Council notes that this type of corporate offence is currently the subject of detailed consideration by the ALRC, as set out in Discussion Paper 87 titled '*Corporate Criminal Responsibility*', and in particular Chapter 6 of the Discussion Paper on reforming corporate criminal responsibility. In addition, the ALRC Discussion Paper contemplates important consideration of the nexus of criminal and civil penalties for contraventions involving corporations,¹² noting that this Bill does not contemplate the possibility of civil penalties. The Law Council further notes that the preliminary view of the ALRC is that the new offence would be 'superfluous' if the ALRC's proposal to reform to Part 2.5 of the Criminal Code were to be implemented.¹³
31. The Law Council considers that in these circumstances it is preferable to defer consideration of proposed section 70.5A until there are recommendations made by the ALRC in relation to this type of offence.

Burden of proof

32. The Law Council notes the offence under proposed section 70.5A will place a legal burden on the accused to establish that they had adequate procedures in place that were designed to prevent the foreign bribery offence. Only if this is established is the prosecution required to disprove this beyond reasonable doubt.
33. The Law Council considers that any burden that is imposed on the defendant should be evidentiary rather than legal.
34. In this regard, the Law Council notes that the only element of conduct in the proposed section 70.5A offence required to be proven is actually implied from the 'exception' in subsection 70.5A(5). The Law Council considers this to be confusing and contrary to established principles in framing Commonwealth offences, which includes that:

Criminal offences should generally be expressed in a way that enables each physical element of the offence to be clearly distinguished (either expressly or by construction).

...

The physical elements of an offence can be distinguished in a number of ways. One of the most common ways to achieve this is by placing each physical element in a separate paragraph. This is the approach that is generally used in the Criminal Code and is the preferred drafting model as it separates out each of the physical elements so it is clear how the Criminal Code will apply.¹⁴

35. The Law Council considers that the offence should be redrafted so that the element of conduct (the omission of the accused corporation to have in place 'adequate procedures') is clearly set out in the offence provision.

Absolute liability

36. Further concerns for the Law Council are that while 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

¹² Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion Paper 87, Chapter 4.

¹³ Ibid, [6.75].

¹⁴ Attorney-General's Department 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' [2.2.2]

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. However, proposed section 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 a physical element will need to be proved on the part of the associate under paragraph 70.5A(1)(c) and it is not clear how this could be proved.

37. The Law Council considers that 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.¹⁵ The guidance under proposed section 70.5B of the Criminal Code should be developed through a public consultation process. In this regard the Law Council welcomes the release by the Attorney-General's Department (**AGD**) in November 2019 of the consultation draft of the guidelines that a body corporate can take to prevent an associate from committing a foreign bribery offence.¹⁶
38. The Law Council considers that alignment with international standards in this area is 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 is considered critical.

Penalties

39. 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 by the associate, 3 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.
40. The Law Council notes the significant difficulties in determining the value of a benefit obtained by the associate, meaning that the 10 percent calculation is likely to be relied upon for larger corporations. This may result in extremely significant penalties for entities, for actions, which as noted above, may well be beyond their control, and potentially for the acts of individuals who may be intentionally acting against the interests of the organisation.

Recommendations:

- **Consideration of the new corporate offence of failing to prevent foreign bribery by an associate should be deferred until final recommendations are made by the ALRC following its review of corporate criminal responsibility;**
- **The defendant should bear an evidentiary rather than a legal burden to establish the matters contained in proposed subsection 70.5A(5);**

¹⁵ Detailed guidelines have been developed in the UK, US and more recently, in France.

¹⁶ Attorney-General's Department, *Consultation Draft: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials* (November 2019).

- **Absolute liability should not apply in relation to the matters contained in proposed paragraphs 70.5A(1)(b) and (c); and**
- **The offence contrary to section 70.5A should be redrafted so that the element of conduct is clearly set out in the offence provision.**

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

41. The Law Council notes that the intention to 'improperly influence a foreign official' will replace the current requirement in paragraph 70.2(1)(c) for the intention to influence the public official 'in the exercise of the official's duties as a foreign public official'.
42. The Law Council recognises that foreign public officials can be bribed to act outside their official duty to secure a business or other 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.
43. 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

44. The Law Council strongly supports the adoption of a DPA scheme in Australia. The success of the UK system since its introduction in 2014 illustrates the advantages from a regulatory enforcement perspective that can be achieved through the principled application of a DPA regime.¹⁷ 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.
45. The proposed DPA scheme in Schedule 2 of the Bill appears to be largely based on the model discussed in the Government Consultation Paper released in 2017.¹⁸ Further, on 8 December 2017 the Commonwealth Director of Public Prosecutions (**CDPP**) and the Australian Federal Police (**AFP**) created *Best Practice Guidelines on Self-Reporting of Foreign Bribery and Related Offending by Corporations* (**Best Practice Guidelines**) and in May 2018 the AGD released a Consultation Draft of the *Deferred Prosecution*

¹⁷ For discussion see Ben Morgan, 'The future of Deferred Prosecution Agreements after Rolls-Royce' (Speech delivered at a seminar for General Counsel and Compliance Counsel for corporates and financial institutions, Norton Rose Fulbright LLP, 7 March 2017) <www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce>.

¹⁸ Attorney-General's Department, Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia (March 2017). <www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>.

Scheme Code of Practice (Draft Code).¹⁹ The Best Practice Guidelines and the Draft Code are a positive starting point to enable companies to understand how the CDPP will exercise its discretion regarding DPAs.

46. The Law Council notes that the issue of DPA's is also to be the subject of consideration and analysis by the ALRC as outlined in Chapter 9 of its Discussion Paper 87. The Law Council supports the introduction of the proposed legislation notwithstanding the review being undertaken by the ALRC.
47. The Law Council supports the list of offences to which a DPA may be considered appropriate at proposed section 17B of the Bill, as well as the secondary liability offences under section 11 of the Criminal Code. However, to ensure the DPA scheme is meeting its objectives, the Law Council recommends there be a periodic review of appropriate offences that may be subject to a DPA.

Negotiation of a DPA

48. The Law Council maintains that there should be clear, transparent criteria so that companies know what is expected of them and when they will be entitled to seek to negotiate a DPA, ideally set out in the enabling legislation. However, the only criteria specified in the Bill to initiate negotiation of a DPA is in proposed section 17A. This section provides a DPA may be negotiated where the CDPP considers it appropriate to enter a DPA with a corporation for an offence listed in proposed section 17B.
49. The Law Council considers that it is important there is clarity around the following issues:
- when and how the CDPP discretion will be exercised;
 - the company's exposure during the pre-invitation and negotiation stage and how this is managed; and
 - the level of co-operation required.
50. The Draft Code is useful in this regard and provides some guidance on these matters. It provides that the CDPP will only enter into DPA negotiations where it is satisfied it is in the public interest to do so, and there is a reasonable prospect of the parties agreeing to a DPA.²⁰ The factors to be considered in an assessment of the public interest are specified in some detail in the Draft Code.²¹
51. The Law Council believes that it will be important for all relevant regulators (the CDPP, the AFP), the Australian Securities and Investments Commission (**ASIC**), the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) and the Australian Taxation Office (**ATO**) to embrace the relevant principles and approach and proactively engage in educational activities surrounding DPAs with the business community as part of the implementation of the scheme proposed in the Bill. It is important that the CDPP and AFP have available to them the full range of skills, knowledge and experience necessary to engage in the process of corporate negotiation and compromise that would be an essential feature of the DPA scheme created by the Bill. It would be of benefit for a comprehensive program of education in relation to the finalised DPA scheme to be

¹⁹ See Attorney-General's Department, *Deferred Prosecution Agreement Scheme, Code of Practice* - Consultation Draft (May 2018) <www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme-code-of-practice/Deferred-prosecution-agreement-scheme-draft-code-of-practice.pdf>.

²⁰ Attorney-General's Department, *Deferred Prosecution Agreement Scheme Code of Practice (Consultation Draft)* May 2018, 4.

²¹ *Ibid*, 19.

undertaken by the Government agencies involved in the implementation of the DPA scheme.

52. The Law Council also considers that 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.
53. Finally, the Law Council submits that 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.

Recommendations:

- **The criteria setting out the circumstances in which a DPA can be entered into should be specified in legislation; and**
- **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.**

Admissibility of evidence

54. The Law Council considers it important that there be clarity that a DPA not require admission to a contravention of law to encourage self-reporting and use of DPAs, having regard to the implications of a formal admission in terms of civil class actions and other potential litigation (compare the impediments created by section 1317E of the *Corporations Act 2001* (Cth) (**Corporations Act**) to civil penalty settlements with ASIC in the Corporations Act context).
55. Proposed 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 negotiating for a DPA, documents (other than the DPA itself) that indicate the person entered into negotiations for a DPA or were created solely for the purpose of negotiating a DPA are not admissible in evidence against the person (with some exceptions such as where the document contains deliberately misleading information). However, 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).
56. While the Law Council welcomes the protection against the admissibility of statements given in the negotiations of the DPA, the Law Council considers the entire negotiation process for a DPA should be conducted on a 'without prejudice' basis. The Law Council is concerned that the protection provided by proposed section 17H does not extend to derivative use immunity and that 'any information or document obtained as indirect consequence of a disclosure' made during the process of negotiating a DPA can be admitted into evidence. If one of the aims and benefits of a DPA scheme is to encourage greater self-reporting of illegal activity, then failing to maintain derivative use immunity would seem contradictory to that aim and benefit.

57. However, as stated above, the Law Council maintains a DPA should not contain a formal admission of criminal liability,²² and is pleased that there is no such requirement in the DPA scheme proposed in the Bill.

Recommendation:

- **The protection provided by proposed section 17H should be extended to derivative use immunity and any information or document obtained as a direct or indirect consequence of a disclosure made during the process of negotiating a DPA should be inadmissible in any related criminal prosecution.**

Credit for self-reporting

58. Noting that one of the aims and benefits of a DPA scheme is to encourage greater self-reporting of illegal activity, there needs to be sufficient credit given to self-reporting in the DPA assessment process. Companies should be provided with a strong indication that self-reporting, together with full co-operation, will generally result in a DPA, and that the DPA will be modified to take into account the degree, and benefit derived from both the co-operation and self-reporting of certain matters, particularly disclosure of otherwise unknown offences. If this is not encouraged the benefits of self-reporting with the possibility of using a DPA are diminished.
59. The Law Council notes that proposed subsection 17C(3) of the Bill provides that the financial penalty must be of a severity that the CDPP considers appropriate having 'regard to all the circumstances relating to the DPA' including 'the person's co-operation'. However, there should also be a specific requirement in the legislation for the determination of the financial penalty in the DPA to take into account the degree, nature and benefit of self-reporting by the corporation.
60. The Law Council notes that while the Draft Code details what might be required of a co-operating corporation, it is silent as to likely reduction in penalty that will be obtained. This information should be indicated at the outset of the negotiating process so that a corporation can make an informed decision and analysis of the benefits of committing itself to the DPA process. The Law Council notes that the Draft Code states the level of cooperation with law enforcement 'will constitute a particularly influential public interest factor' and further that 'considerable weight' may be given when offending is brought to the attention of law enforcement of the 'corporations offending otherwise unknown to the CDPP within a reasonable time'. The Law Council considers that this should be specified early in the negotiation process.
61. The Law Council notes that the Draft Code does provide a list of factors to be considered by the CDPP in determining an appropriate financial penalty which largely reflect the matters to be considered by a court when imposing a sentence under subsection 16A(2) of the *Crimes Act 1914* (Cth) (**Crimes Act**). One of these factors is the degree to which the corporation has cooperated with law enforcement agencies in the investigation of the offence or of other offences.
62. The Law Council also welcomes proposed subsection 17C(4) which provides that a financial penalty may be dispensed with where the 'Director is satisfied that that there

²² Law Council of Australia, Submission: *A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*, Attorney-General's Department, 3 May 2017.

are exceptional circumstances and it is not in the interests of justice' to include such a penalty in the DPA.

Content of the DPA

63. Under proposed section 17C of the Bill, a DPA must contain the following information:

- a statement of facts relating to each offence referred to in the DPA;
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of the financial penalty to be paid by the person to the Commonwealth;
- the circumstances which constitute a material contravention of the DPA; and
- where there is a material contravention of the DPA on the basis of knowingly providing misleading or inaccurate information, the person consents to the CDPP commencing a prosecution of the person on indictment for an offence listed in the DPA without the person having been examined or committed for trial.

64. Under proposed subsection 17C(2) of the Bill, the DPA *may* include a term requiring a person to:

- compensate victims for an offence in the DPA;
- donate money to a charity or other third party;
- consent to any likely orders under the *Proceeds of Crime Act 2002* (Cth) being made in relation to an offence specified in the DPA;
- implement a compliance program or policies;
- co-operate in any investigation or prosecution relating to a matter specified in the DPA; and
- pay reasonable costs incurred by a Commonwealth entity relating to negotiations for the DPA.

65. A DPA may also contain a term setting out the consequences of a failure by the person to comply with the terms of the DPA, and any other term the CDPP considers appropriate.

66. The Law Council considers that the 'term setting out the consequences of a failure by the person to comply with the terms of the DPA' is a matter which should be set out in a DPA. This must be clear and always specified in the final DPA to be approved. It would also be useful if any means by which a dispute over compliance can be resolved is set out in the DPA.

67. The Law Council supports the mandatory content (proposed subsection 17C(1)) and the optional content (proposed subsection 17C(2)). However, while proposed paragraph 17C(2)(c) notes that a DPA 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 in a DPA do not:

- (a) affect a corporation's entitlement to client legal privilege in respect of material to which the privilege applies; or
- (b) contain a formal admission of criminal liability.

68. Further, the Law Council does not consider it appropriate for there to be a possible condition in a DPA that the person will 'co-operate in any investigation or prosecution

relating to a matter specified in the DPA'. This condition appears to undermine the intention of the scheme to promote co-operation prior to the approval of the DPA being finalised. Part of this process includes effectively calling in all other outstanding offences that could form part of the DPA where the CDPP and the company should consider all applicable federal and/or state and territory offences that arise from the relevant conduct. The DPA should provide for some certainty and conclusion of this process of assessing the appropriate possible offences. Once the scope of the DPA is agreed upon, the company should not be subject to any other form of criminal or civil penalty proceedings by a Commonwealth, state or territory-based agency based on the conduct the subject of the DPA.

69. The Law Council also considers that prosecution policy should be amended to allow for the use of subsection 9(6D) of the DPP Act whereby the CDPP may provide an undertaking not to prosecute in situations where a company has fulfilled its obligations under a DPA.
70. The Law Council notes a condition of the prosecution being deferred is the compliance by the person with the other punitive conditions of the DPA. If the DPA is breached and a prosecution commences, it should be a matter for the person the degree to which they co-operate with the prosecution process. There are already benefits that will be relevant to the person if they are sentenced for the offence that they are entitled to under subsection 16A(2) of the Crimes Act for their degree of assistance and co-operation. The Law Council objects to a person being compelled by a condition of the DPA to co-operate in the prosecution that was deferred under the scheme, should the prosecution now be required to occur. This type of condition undermines the presumption of innocence and reverses the onus of proof that is always on the prosecution to prove a criminal offence beyond reasonable doubt.
71. The Law Council also considers that a corporation should not in any circumstances be obliged to provide privileged information to a prosecutor in order to prove its degree of co-operation. In this regard the draft code states that while corporations will not be expected to waive legal professional privilege, doing so 'may demonstrate a high degree of co-operation'. While the Law Council notes that a corporation cannot claim privilege against self-incrimination under the common law in Australia²³ a corporation can claim legal professional privilege to the extent that the privilege does not mask the commission of a crime.
72. A further matter that could be addressed in the contents of a DPA is a tolling of the limitation period in respect of any related civil proceedings which arise out of the offending conduct. As most common law and statutory causes of action, including civil penalty proceedings, have limitation periods, any negotiation for a DPA, which might be quite lengthy, or the DPA itself, should place any regulator, or any person who has suffered losses as a result of the offending conduct, in a disadvantageous position. The tolling could occur for the period until negotiations are terminated, or if an agreement is reached, when the DPA is approved and made public.

Approval of a DPA

73. Under the Bill once the DPA is agreed between the CDPP and the person, the CDPP must provide the 'approving officer' with a written statement that the CDPP is satisfied that there are 'reasonable grounds' to believe that an offence specified in the DPA has been committed and that entering the DPA is in the public interest.

²³ *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74.

74. Proposed sections 17D and 17F would set out the approval and variation process for a DPA respectively. Proposed subsection 17D(7) would require the approving officer to give written notice of the decision to approve the DPA to the person and the CDPP. Proposed subsection 17D(7) would require the CDPP within 10 business days after the day notice of the decision is given, to publish the DPA on the CDPP's website. Certain exceptions may be made with regard to whether to publish the DPA or a modified form of the DPA in proposed subsections 17D(8) and (9).
75. The 'approving officer' is a former judicial officer with the requisite knowledge and experience to perform the role as set out in proposed section 17G and under proposed subsection 17D(4) must only approve the DPA where satisfied that:
- the terms of the DPA are in the interests of justice; and
 - the terms of the DPA are fair, reasonable and proportionate.
76. The Law Council's preferred approach for the approval of a DPA is where the CDPP would be required to make a written application to an independent administrative panel seeking approval of the final terms of the DPA and the panel should be empowered to compel the parties to comply with the terms of the DPA. However, the Law Council agrees that a retired judge is an acceptable and practical alternative.
77. Under the DPA scheme proposed by the Bill, once the CDPP is satisfied that there has been a material contravention of the agreement by the person or that the person provided inaccurate, misleading or incomplete information and the person ought to have known the information was inaccurate, incomplete or misleading, proposed subsection 17A(3) provides that subsection 17A(2) does not apply. This means the prohibition on criminal proceedings being instituted as provided by subsection 17A(2) must be set aside.
78. Proposed subsection 17E provides that where the DPA ceases to be in force because the 'Director is satisfied that there has been a material contravention of the agreement' the DPA remains in force until such time until the person is given notice of the initiation of criminal proceedings.
79. The Bill seems to indicate that the only way for a resolution of a dispute as to whether a 'material contravention' has occurred is through litigation as proposed by paragraph 17E(2)(b) which refers to the court making a declaration that there has not been a material contravention of the agreement.
80. The Law Council considers that the legislation should require the DPA to specify a process for resolving disputes about whether there has been a 'material contravention' before the CDPP can commence a prosecution based on being satisfied there has been a contravention for purposes of proposed section 17A(3)(a). The Draft Code is silent on how a determination of a material contravention should be made by the CDPP. Perhaps the legislation could require that the company be given notice of the alleged contravention, have an opportunity to make submissions and provide that an approving officer review the circumstances and make a recommendation to the CDPP before the CDPP takes action based on proposed section 17A(3)(a).
81. The Law Council considers the use of independent corporate monitors to be appointed under the scheme in appropriate cases may be of considerable benefit. Where a monitor is engaged, consideration needs to be given to the need for confidentiality of their reports and findings.
82. The independent monitor may play a useful role in ensuring compliance with the scheme and identifying any reasons for breaches of the DPA. An independent monitor may

assist the parties in reaching an agreement to seek a variation of the DPA in appropriate circumstances to address any issues which may be contributing to non-compliance with the terms of the DPA. In this regard the Law Council notes that proposed section 17F of the Bill provides a means by which the DPA can be varied with the consent of both the CDPP and the company.

Recommendations:

- **The Australian Government should further investigate means by which a Commonwealth DPA could also resolve outstanding breaches of state and territory laws;**
- **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; and**
- **The DPA scheme should include a process for resolving disputes as to whether there has been a material breach of a DPA.**

Definition of Dishonesty

83. Schedule 3 of the Bill seeks to introduce amendments relating to the definition of 'dishonest' to be applied throughout the Criminal Code. Item 6 of Schedule 3 of the Bill seeks to achieve this by replacing the existing definitions of dishonesty in subsections 73.9(3), 92A.1(2) and sections 130.3, 470.2 of the Criminal Code with a new definition of 'dishonesty' which will be inserted in the Dictionary of the Criminal Code. This will provide a uniform definition to the term 'dishonesty' when it is applied in the Criminal Code, subject to any existing qualifications that already exist as discussed further below.

84. The proposed definition in the Bill is that 'dishonest' will mean 'dishonest according to the standards of ordinary people'. This statutory, objective definition of the word 'dishonesty' is qualified, as stated in the note attached to Item 6 of Schedule 3 of the Bill, in that 'the following provisions affect the meaning of dishonest' in certain cases:

- section 131.2 (theft);
- subsection 134.1(5) (obtaining property by deception);
- subsection 474.1(2) theft of mail receptacles, articles or postal messages); and
- subsection 474.47(8) (using a carriage service for inciting property damage, or theft on agricultural land).

85. The new definition will replace the existing definition that is found in various sections of the Criminal Code that define 'dishonesty' as:

- dishonest according to the standards of ordinary people; and
- known by the defendant to be dishonest according to the standards of ordinary people.²⁴

²⁴ For example, Criminal Code ss 130.3, 474.1, 480.2, 92A.1.

86. The Law Council is concerned that the proposed definition of ‘dishonesty’ removes any requirement for the accused to have actual knowledge that he or she is engaging in dishonest conduct. This means a person may believe that they are acting honestly, but if the jury or trier of fact considers accused to have been ‘dishonest’ according to the ‘standards of ordinary people’ then the person can be found guilty of an offence involving dishonesty where there was no evidence the person knowingly engaged in ‘dishonest’ conduct.
87. The Law Council notes that the existing definition of ‘dishonesty’ in the Criminal Code avoids this problem and was developed following consideration of the test adopted in the UK and best summarised in the abovementioned decision in *Ghosh*²⁵ where ‘dishonesty’ is based on the knowledge of the accused of their engaging in conduct that the community would see as dishonest. In *Ghosh* it was held that the test for dishonesty in both offences concerning fraudulent activity and theft should be the same. It remains the position in England that the *Ghosh* test, the test that is sought to be repealed by the Bill, remains the basis for criminalisation of certain offences relating to acts of dishonesty.
88. The concern of the Law Council is that removal of the subjective aspect of the test is not appropriate in the context of the Criminal Code and the attribution of criminal responsibility. To remove the subjective aspect of this test is to dilute the requirement for the mental element of a criminal offence that involves dishonesty. This does not conform with the fundamental principle of the criminal law that underpins the Criminal Code that a physical act (*actus reus*) must be accompanied by a relevant fault element (*mens rea*). In amending the definition of dishonesty as proposed by Schedule 3 of the Bill, the Law Council considers this will cause unnecessary confusion and undermine the principles that informed the existing definition of ‘dishonesty’.

The test in *Peters*

89. The rationale for the proposed change in the definition stated in the Explanatory Memorandum is that ‘this will align the Criminal Code’s definition of ‘dishonest’ with the single-limb objective test for dishonesty endorsed by the High Court in *Peters v The Queen* (1998) 192 CLR 493’.²⁶ It is noted there were no other substantive reasons given as to why the existing definition of dishonesty in the Criminal Code is inadequate or any examples of where prosecutions are repeatedly failing because of any identified issues with the current definition.
90. The Explanatory Memorandum goes on to state that:
- In Peters, the High Court adopted a new test to determine dishonesty. The new test requires the defendant’s knowledge, belief or intent to have been dishonest according to the standards of ordinary, decent people. Under the test adopted in Peters, there is no requirement to also prove that the defendant was aware that their knowledge, belief or intent was dishonest in this sense. The new definition in item 6 reflects this jurisprudence.*²⁷
91. The Law Council notes that in the judgment of Toohey and Gaudron JJ in *Peters* their Honours qualify this new test to some extent in stating:

²⁵ [1982] QB 1053.

²⁶ Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, 36 [203].

²⁷ *Ibid*, [204].

*If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if "dishonest" is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest.*²⁸

92. The case of *Peters* concerned whether the directions given to the jury at trial in the County Court of Victoria were correct. The appellant in *Peters*, a solicitor, had been charged with several counts of conspiracy to defraud the Commonwealth pursuant to sections 86A and paragraph 86(1)(a) of the Crimes Act (as well as a charge of conspiracy to pervert the course of justice, of which he was acquitted). At trial the Judge gave the jury directions in relation to 'dishonesty' that required the objective and subjective test be considered in accordance with the authorities of *R v Ghosh*²⁹ and also *R v Salvo*.³⁰ The High Court used this appeal to define the principles in relation to the common law test of 'dishonesty' to be applied in Australia. The appellant's case was that he was not part of the conspiracy, rather than he did not act 'dishonestly'. It was noted that the appellant's argument had assumed dishonesty was an element of the common law offence of conspiracy to defraud. It was stated by their Honours Gaudron and Toohey JJ:

*... that assumption is correct in the sense that dishonesty is a characteristic of the means agreed to be employed to affect the fraud and is also descriptive of what is involved in fraud. However, the assumption is not correct in the sense that dishonesty is a separate element of the offence. The difficulty which emerges in this case is partly due to the failure to appreciate that dishonesty is not a separate element and partly due to the different tests of dishonesty which have been adopted in the decided cases.*³¹

93. However, in *Peters* it was not decided that the offence of conspiracy to commit fraud did not require some subjective knowledge in relation to proof the offender engaged in 'dishonest means' because in the judgment of McHugh, which was agreed to by Gummow J, it stated that:

In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by:

- *making or taking advantage of representations or promises which they knew were false (emphasis added) or would not be carried out;*
- *concealing facts which they had a duty to disclose; or*
- *engaging in conduct which they had no right to engage in.*³²

94. In *Peters* Kirby J made it clear that as a basic principle of the criminal law:

²⁸ *Peters v The Queen* (1998) 192 CLR 493, per Toohey and Gaudron JJ [18].

²⁹ [1982] QB 1053.

³⁰ [1980] VR 401.

³¹ *Peters v The Queen* (1998) 192 CLR 493, per Toohey and Gaudron JJ [8].

³² *Ibid*, per McHugh J [84].

*...to establish criminal wrongdoing, the accused must be shown by the prosecution to have done the acts charged with a criminal intention. The objective act must be shown to coincide with the subjective intention of the accused.*³³

95. In the judgment of Kirby J, he argued that decision in *Ghosh* in importing an objective test in assessing dishonesty may have represented a significant departure from the basic principles of criminal law. He stated that:

*To do so is to countenance the punishment of an accused on the basis of a criminal intention derived from a fiction based on objective standards rather than on the foundation of the accused's actual intention, subjectively held at the time of the criminal act charged. Such a departure from principle could certainly be achieved by statute. No doubt it would be applauded by some. But it is out of harmony with one of the most fundamental concepts - perhaps the most fundamental idea - of the criminal law of this country.*³⁴

96. While the decision in *Peters* focussed on the test to be applied to determine dishonesty and whether fraud involves an element of dishonesty 'over and above the use of dishonest means',³⁵ the Law Council notes that 'dishonesty' is used in a variety of contexts within the Criminal Code. The discussion above concerning foreign bribery offences serves to illustrate this as proposed paragraph 70.2A(3)(f) uses the proposed definition of dishonesty as a quality of the benefit to have regard as a matter in determining whether influence is improper for the purpose of paragraph 70.2(1)(b). While *Peters* seeks to bring a simple approach to determine whether conduct is dishonest, some have argued that it creates confusion in conflating the mental element of the offence with the physical element because:

*...it creates an offence, the physical elements of which are only determined after the event, and which, in order to constitute the external physical elements of the crime, rely on inferences as to the offender's state of mind.*³⁶

97. The Law Council considers that where 'dishonesty' is the requisite state of mind to establish a fault element of an offence, the existing requirement to satisfy both an objective and subjective test should be maintained in the context of the Criminal Code.
98. However, there may be limited instances where the objective test specified in *Peters* could be applied such as in the area of consumer law and misleading and deceptive conduct or as applied presently in certain offences under the Corporations Act. The Law Council, in the context of improving consistency in corporate regulation has supported the adoption of a consistent test for dishonesty offences across the Corporations Act and other associated legislation, and in this context supported the adoption of the *Peters* test. The Law Council notes that this was also the recommendation of the ASIC Enforcement Review Taskforce Report, that 'the Corporations Act should include a single definition of dishonesty that reflects current common law'.³⁷
99. The Law Council notes that the current definition of 'dishonesty' was inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth). The Explanatory Memorandum to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (**1999 Bill**) commented on the proposed section 130.3 – the current definition of 'dishonesty'. Parliament acknowledged the approach to

³³ Ibid, per Kirby J [98].

³⁴ Ibid, per Kirby J [137].

³⁵ Ibid, [24].

³⁶ Alex Steel, Describing Dishonest Means: The Implications of seeing 'Dishonesty' as a course of conduct or mental element and the parallels with Indecency, *Adelaide Law Review* 31 (2010), 45.

³⁷ ASIC Enforcement Review Taskforce Report (December 2017), Recommendation 35, 69.

'dishonesty' adopted in *Peters* but expressly rejected it. It was stated in the Explanatory Memorandum that:

In Peters v R (1998) 151 ALR 51 the High Court held that the Ghosh test was no longer appropriate and developed a new test which does not include a subjective component. The approach in Peters is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing.

Paragraph (a) of the definition of 'dishonest' seeks to achieve this by linking the definition of dishonesty to community standards (this is not novel, whether a person is negligent is assessed by a jury on the basis of what the reasonable person would have done in the circumstances).

*Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the Criminal Code is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. It reflects a preference for the law which existed prior to the 1998 decision of the High Court in Peters and is particularly important to the Criminal Code because it has additional offences which rely on 'dishonesty' even more so than the Model Criminal Code offences...*³⁸

100. The proposed definition which was subsequently adopted was also preferred over the approach in *Peters* by the Standing Committee of Attorneys-General at its April 1998 meeting. Additionally, the Senate Standing Committee on Legal and Constitutional Affairs accepted the current definition in the 1999 Bill, noting:

*Despite Peters taking a different approach to defining dishonesty than Ghosh, in the absence of submissions expressing opposition to the way dishonesty is defined in the Bill and in light of the Committee's own consideration of the matter, the Committee accepts the Bill's definition of dishonesty.*³⁹

101. The Law Council notes that no justification has been provided as to departure from the view held on the definition of dishonesty in the 1999 Bill. The Law Council also considers that it is important to distinguish that the decision in *Peters* was defining 'dishonesty' in a different context and for different applications other than in the Criminal Code which covers a far wider range of offences and context for the use of the term 'dishonest'.
102. The Law Council considers that if a new definition of 'dishonesty' is to be inserted into the Dictionary of the Criminal Code, the definition of the *Peters* test should not be the preferred model. Rather the existing definition in section 130.3 of the Criminal Code should be inserted in the Dictionary as a definition of 'dishonest'. In the absence of a requirement to prove a fault element that reflects the subjective intention to engage in knowingly dishonest conduct, the Law Council opposes the importation of a purely objective test to be applied by the trier of fact to determine 'dishonesty'. Serious penalties and consequences follow for a person convicted of dishonest, criminal

³⁸ Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, [58-60].

³⁹ Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999* (26 June 2000).

conduct because there is a principled and moral basis to engage the requirements for denunciation, retribution and the other purposes of sentencing.⁴⁰

103. For the application of the criminal law to be justified, there needs to be an assessment of the moral culpability of an offender that entails the offender knowingly engaging in dishonest conduct that can be defined as ‘according to the standards of ordinary people’ as occurs with ‘negligence’ or ‘indecent’. However, this requirement for knowingly engaging in dishonest conduct before there can be the attribution of criminal responsibility is a fundamental principle of the criminal law, namely that the *actus reus* is accompanied by the *mens rea* before an offence can be said to be committed.⁴¹ This is reflected in the existing definition of ‘dishonesty’ found throughout the Criminal Code and is one that the Law Council considers ought to be retained.

Recommendation:

- **If the proposed definition of dishonesty is to be inserted into the dictionary of the Criminal Code, it should be framed as currently defined in section 130.3 of the Criminal Code, requiring both a subjective and objective limb to the test.**

⁴⁰ For example, the offence under section 92A.1 of the Criminal Code relating to theft of trade secrets involving foreign government principal attracts a maximum penalty of 15 years imprisonment and involves the current test of ‘dishonesty’.

⁴¹ See for example the reasoning in *He Kaw Teh* (1985) 157 CLR 523.