Australian Government
Attorney-General's Department

Attorney-General's Department Response

Senate Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

Questions on notice

Question 1

What was the government's rationale for excluding the fault element of recklessness in section 70.2 on the CCC bill?

Departmental response:

As the Committee notes, the exposure draft provisions the government released in April 2017 included a proposed offence of recklessly bribing a foreign public official. This offence would have required the prosecution to prove that the person intended to provide, promise or offer the benefit and the person was reckless as to whether that conduct would improperly influence a foreign public official in relation to obtaining or retaining business or an advantage. The proposed penalty for the recklessness offence was half that of the corresponding intentionally bribing a foreign public official offence, reflecting the differing degree of culpability attaching to these fault elements.

As noted in the department's submission to the Committee, after considering the benefits and disadvantages of an offence of recklessly bribing a foreign public official, including views expressed in submissions received in response to the April 2017 discussion paper, the government elected not to proceed with a recklessness offence.

Several submissions received in response to the 2017 discussion paper raised concerns that the offence would set too low a standard for culpability. 'Recklessness' is defined in section 5.4 of the Criminal Code, which provides that a person is reckless with respect to a result or circumstance if he or she is aware of a substantial risk that the result or circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk. Submissions to the April 2017 discussion paper emphasised that it would be difficult for corporations to develop policies and procedures that govern the assessment of an unjustified substantial risk in the context of foreign bribery, which is complex by nature and can be particularly difficult to identify and easy to conceal.

Submissions also identified that a recklessness offence would be inconsistent with international standards. Some submissions also recalled that a recklessness offence was considered by the Australian Government when the foreign bribery offence was introduced in 1999, and not pursued. Other matters considered by government in deciding not to implement a recklessness-based foreign bribery offence in the current package of reforms include:

- a recklessness offence for foreign bribery is not required for Australia to meet its obligations under the OECD Anti-Bribery Convention. Furthermore, the proposed failure to prevent foreign bribery offence goes beyond the requirements of the Convention, and would also enhance the capacity of Australian law enforcement to address instances of wilful blindness by corporations which might otherwise fall within the scope of a recklessness offence.
- the US and UK have not adopted a recklessness offence. The US Congress has previously considered and rejected a 'reckless disregard' fault standard with respect to the *Foreign Corrupt Practices Act 1977*, and in 2008 the UK Law Commission rejected the inclusion of recklessness as a fault element for foreign bribery in the now *Bribery Act 2010*.

Question 2

How does the CCC bill ensure that foreign bribery offences are of greater utility in addressing foreign bribery (which often occurs in instances of recklessness/wilful blindness by senior management to activities occurring within their companies and a lack of readily available written evidence to establish intention)?

Departmental response:

The Bill enhances Australia's response to foreign bribery by expanding the substantive foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (Criminal Code) and by introducing a new corporate offence for failing to prevent foreign bribery.

Amendments to existing section 70.2 of the Criminal Code will remove undue impediments to the successful investigation and prosecution of foreign bribery. This will be achieved by broadening the offence, removing unnecessarily restrictive requirements that inhibit successful prosecutions and clarifying some requirements, including:

- extending the offence to cover bribery to obtain a personal (i.e. non-business) advantage
- removing the requirement that the foreign official must be influenced in the exercise of the official's duties , and
- replacing the requirement that a benefit and business advantage must be 'not legitimately due' with the concept of 'improperly influencing' a foreign public official.

The new offence of failing to prevent bribery by a corporation will be automatically triggered where an associate of the corporation commits bribery for the profit or gain of the corporation. Attaching absolute liability to the offence will address the issues Australian prosecuting agencies have previously experienced with the lack of written evidence to establish intention in foreign bribery cases.

This new offence creates an incentive for corporations to implement measures to prevent bribery, because the only way for corporations to avoid liability is to show that they had adequate compliance procedures in place. It will also serve as a deterrent to corporations being wilfully blind to corrupt practices within their business.

A similar offence has been successfully implemented in the United Kingdom.

Question 3

What was the rationale for specifying the Ghosh test with the specification that 'dishonesty' is to be judged according to the standards of ordinary people in Australia, as opposed to the Peters test?

Departmental response:

The list of factors that may be considered in determining whether influence is improper includes whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly. The explanatory memorandum clarifies that dishonesty in this context would be determined according to the standards of ordinary people and whether the defendant must have realised what they were doing was dishonest according to those standards (i.e. the Ghosh test). The explanatory memorandum makes it clear that dishonesty is not to be assessed by reference to the standards in the location of the foreign public official.

The 'Peters test' requires the fact finder to consider whether ordinary people would consider conduct to be dishonest (i.e. a purely objective test). The Peters test is not appropriate because it would be inconsistent with the definition of dishonesty as it applies to other offences in the Criminal Code, for example bribery of Commonwealth officials, abuse of office, forgery, fraud and general dishonesty offences. In addition, given the gravity of the offence of intentionally bribing a foreign public official, it is appropriate to have regard to both the subjective and objective standard when considering whether the defendant behaved dishonestly.

Question 4

Should the committee wish to recommend an amendment to introduce the offence for reckless conduct constituting the bribery of a foreign public official, how would this offence operate with the Ghosh test? i.e. Could an accused be found to be simultaneously 'reckless' and 'dishonest'? Noting that in order to establish 'dishonesty' under the Ghosh test, the prosecution must establish knowledge on the part of the accused, whereas a 'recklessness' offence would require the prosecution to establish an awareness of the existence of a substantial risk.

Departmental response:

The government considered submissions from industry and other stakeholders on the possible introduction of an offence of recklessly bribing a foreign public official and has decided not to introduce such an offence for the reasons explained in response to question 1 above.

The offence for reckless conduct included in the exposure draft did not combine the elements of recklessness and dishonesty. Dishonesty was added to the list of factors to which the trier of fact may have regard in determining whether the influence was improper, after the public consultation process. An offence of recklessly bribing a foreign public official would likely need to remove the subjective limb of dishonesty (i.e. to adopt the Peters test instead of the Ghosh test) for the purpose of determining improper influence. This is because—as part of the subjective limb—the defendant's conduct would be known by the defendant to be dishonest according to the standards of ordinary people, and would arguably be at odds with a fault element of recklessness, which requires awareness of a substantial risk that the conduct is dishonest. As noted at Question 1, the Bill does not include such an offence, noting to do so would be inconsistent with international approaches.

Question 5

Will the government publish guidance to explain what factors will be considered in determining whether there has been 'improper influence'?

Departmental response:

Proposed subsection 70.2A(3) of the Bill details matters that a trier of fact may have regard to when determining whether influence is improper (the list is non-exhaustive). As noted in the department's submission to this inquiry, these factors draw on operational experience of foreign bribery investigators and prosecutors.

It will be a matter for the trier of fact to determine whether there has been improper influence on a case-by-case basis. The explanatory memorandum provides a number of examples, in addition to explaining the list of factors included in subsection 70.2A(3).

Question 6

To assist body corporates to determine the extent to which they may be liable for parties 'down the supply chain', does the government intend to publish guidance on how the definition of 'associate' in proposed section 70.5B will be applied in practice? If so, when? (For example, the UK Ministry of Justice has issued guidance about procedures which relevant corporations can put into place to prevent persons associated with them from bribery under the UK Bribery Act 2010 (UKBA). This includes at paragraphs 37–44 guidance on the interpretation of a person 'associated' with bribes for the purposes of section 7 of the UKBA).

Departmental response:

The department anticipates that Ministerial guidance published under proposed section 70.5B will discuss the concept of 'associate' and its practical application to measures that a body corporate can take to prevent foreign bribery by its associates. The timing for issuing the guidance will be a matter for government, but will occur prior to the commencement of the 'failing to prevent' offence (which will commence 6 months after Royal Assent).

As the Committee notes, the Bill includes a list of persons the term 'associate' will cover. An associate includes a person in a particular position or legal arrangement (officer, employee, agent, contractor, subsidiary, etc.) or a person who otherwise provides services for or on behalf of the corporation. This list extends to a broad range of individuals and entities. The department notes however that a corporation would only be liable for the 'failing to prevent' offence if its associate committed bribery *for the profit or gain* of the corporation (proposed paragraph 70.5A(1)(c)).

Submissions to the Committee by the Law Council of Australia and the Australian Institute of Company Directors have raised concerns that the definition of 'associate' in the Bill is broader than that in section 8 of the Bribery Act 2010 (UK). In the UK, an associated person is someone who performs services for or on behalf of the corporation. The fact that a person holds a certain position would not automatically make them an associate under the UK approach. However, there is no requirement in the UK for the prosecution to demonstrate that the bribery was committed for the benefit of the corporation (see section 7 Bribery Act (UK)). The practical effect of the two different approaches is analogous. Under the Bill—although a corporation could be liable for the conduct of any agent, contractor or subsidiary—the prosecution would still need to prove that the associate committed the bribery for the profit or gain of the corporation.

Question 7

The proposed definition of 'associate' extends to persons who 'otherwise perform services for and on behalf of the other person'. What is the government's rationale for taking this different approach to legal liability compared to the current corporate criminal responsibility provisions under the Criminal Code?

Departmental response:

Under Division 12 of the Criminal Code, corporate criminal liability extends to the actions of an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority. The definition of 'associate' is broader– it extends to a person who is an officer, employee, agent, contractor or subsidiary of the corporation, is controlled by the corporation or performs services for or on behalf of the corporation.

As noted above in relation to question 6, under the proposed new offence of failing to prevent foreign bribery, a corporation's liability for the actions of its associates would be limited to circumstances in which the associate committed foreign bribery for the profit or gain of the corporation. This same limitation is not included in the current corporate criminal responsibility provisions of the Criminal Code. Thus, while the categories of individuals and entities that would be associates of the corporation are broader than the categories currently prescribed in Division 12 of the Criminal Code, additional protections are included in this Bill to limit the extent of corporate culpability.

Operational experience has demonstrated that associates not controlled by the corporation (but that provide services for it) are still in a position to commit foreign bribery for the profit or gain of the corporation. The government considers it appropriate that a corporation consider its associates as part of any foreign bribery risk assessment and to ensure that any identified risk is mitigated appropriately.

In the absence of this expanded definition, corporations may be able to structure their affairs in ways which allow them to improperly limit or avoid exposure to criminal liability. Noting the serious nature of foreign bribery and the identified barriers to successful prosecutions, the proposed broad definition of 'associate', balanced by the limitations on corporate criminal liability, is reasonable and appropriate.

Question 8

Why is the corporate offence in subsection 70.5A(5) limited to bribing foreign public officials? What is the government's rationale for not including a broader jurisdictional scope of the corporate offence in proposed subsection 70.A(5) to ensure that it creates an onus on all companies carrying out business in Australia to create adequate procedures to prevent bribery of domestic public officials and bribery between private parties? (For example, in the UK, the strict liability corporate offence for companies and partnerships of failing to prevent bribery relates to all types of bribery, including bribery between two private parties.)

Departmental response:

Australian investigators and prosecutors have identified specific operational challenges regarding the effectiveness of the offence of bribery of foreign public officials, to which the proposed corporate offence of failing to prevent foreign bribery responds, that are not necessarily present in the domestic context.

The Commonwealth only has offences for bribery of Commonwealth public officials and foreign public officials, and does not have any offences for bribery between private parties. The department notes that states and territories have offences that are not limited to public officials, which cover conduct between private parties. For example, section 176 of the *Crimes Act 1958* (Vic) makes it an offence for an agent to corruptly receive or solicit any valuable consideration as an inducement on account of doing or not doing any act in relation to his or her principal's affairs or business.

Question 9

What role will the guidance the minister must publish under proposed section 70.5B have in relation to establishing the defence in proposed subsection 70.5A(5)?

Departmental response:

Whether the defence in section 70.5A(5) is established – i.e. that a company has in place adequate procedures designed to prevent foreign bribery by its associates – is ultimately a matter for the court.

The guidance under proposed section 70.5B will be principles-based, aimed at helping corporations understand the steps they can take to prevent bribery of a foreign public official. The guidance will help corporations understand the policies and procedures they may put in place to implement robust and effective steps to prevent foreign bribery, according to their specific circumstances.

Corporations that are able to point to the existence of effective and well-integrated compliance regimes would be able to establish the defence in proposed subsection 70.5A(5).

Question 10

Will the government publish an exposure draft of the guidance required under proposed section 70.5B for consultation? If so, when?

Departmental response:

The release of exposure draft of guidance is a matter for Government.

Question 11

Will the guidance required under proposed section 70.5B align to current international standards in this area to ensure effective compliance for those operating across jurisdictions?

Departmental response:

The guidance will be informed by the guidance that the United Kingdom Ministry of Justice has published in relation to section 9 of the *Bribery Act 2010* (UK). This is in line with the preference Australian industry expressed during the 2017 consultation process and will ensure minimal impact on Australian corporations that have already framed their anti-bribery policies on international guidelines.

In preparing this guidance, the department will also have regard to other existing guidance, including that published by the Australian Trade Commission[1]; United States Department of Justice[2]; International Organization for Standardization[3]; and OECD, UNODC and World Bank.[4]

[1] Australian Trade Commission (Austrade), undated, "Anti-bribery and corruption (ABC): A guide for Australians doing business offshore" < https://www.austrade.gov.au/Australian/Export/Guide-to-exporting/Legal-issues/Bribery-of-foreign-public-officials>.

[2] United States Department of Justice, 2017, "Evaluation of corporate compliance programs" <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

[3] International Standards Organization (ISO), 2016, "ISO 37001: Anti-bribery management systems—requirements with guidance for use" <https://www.iso.org/standard/65034.html>

[4] Organisation for Economic Development and Co-operation (OECD), United Nations Office on Drugs and Crime (UNODC), World Bank Group (World Bank), 2013, "Anti-corruption ethics and compliance handbook for business" <http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>.

Question 12

If a body corporate complies with the guidance published by the minister under proposed section 70.5B may that body corporate nevertheless still be convicted of an offence of failing to prevent the bribery of a foreign public official?

Departmental response:

The department anticipates that the guidance under proposed section 70.5B will be principles-based, rather than a checklist of compliance. It will be designed to be of general application to corporations of all sizes and in all sectors. It will comprise suggested anti-bribery policies and procedures that should be read against the background of two overarching guiding principles: proportionality and effectiveness.

It is reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. However, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation—it is not reasonable to expect small and medium-sized enterprises to put in place a compliance program of the same size that would be required of a large multi-national corporation. Similarly, a corporation with limited exposure to foreign bribery risk should not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile.

Departure from the guidance's suggested procedures will not of itself give rise to a presumption that a corporation does not have adequate procedures in place. Indeed, not all of the policies and procedures suggested in the guidance are necessarily applicable to the circumstances of each corporation. However, corporations will need to implement robust and effective steps to prevent foreign bribery in their circumstances. Corporations with effective and well-integrated compliance procedures that a court considers adequate would obtain the benefit of the defence in subsection 70.5A(5).

Question 13

As the guidance the minister must publish under proposed section 70.5B will clarify the limits of criminal liability with respect to the offence in proposed section 70.5A(5), why is it appropriate for such guidance to be exempt from disallowance (and thereby removed from the effective oversight of the Parliament)?

Departmental response:

The guidance will not determine or clarify the limits of criminal liability with respect to the offence. This is appropriately a matter for courts, taking into account the circumstances of each case.

It is not intended that the guidance would be directed at courts, but rather, intended to assist corporations to understand the steps that could be taken to prevent foreign bribery and create a culture of compliance.

The guidance will be principles-based and will not impose a checklist of compliance. As outlined at question 12, departure from the guidance's suggested procedures will not of itself give rise to a presumption that a corporation does not have adequate procedures in place. Indeed, the application of suggested policies and procedures is likely to differ from corporation to corporation – depending on the corporation's size, business and exposure to foreign bribery risk.

Question 14

Will the government include internal corporate whistleblowing systems as part of any recommended 'adequate procedures' designed to prevent the bribery of a foreign public official?

Departmental response:

The department intends to consider this in development of the proposed guidance.

Question 15

Ordinarily, the defendant should bear an evidential, not legal, burden of proof. The offence proposed in section 70.5A reverses the onus of proof, placing the 'legal burden' on the defendant corporation to prove that it had adequate procedures in place to prevent an associate's commission of the foreign bribery offence. Why is the policy intention of encouraging corporations to adopt measures to prevent bribery a sufficient justification for departing from the generally accepted approach to framing offences? (The committee notes that the Scrutiny of Bills Committee raised similar concerns in its comments in relation to the CCC bill in Alert digest 1 of 2018.)

Departmental response:

The new failure to prevent offence is intended to encourage corporations to adopt adequate compliance measures to prevent bribery and to more effectively address situations of wilful blindness on the part of corporations' senior management. As the Committee notes, corporations will only be able to avoid liability for this offence by proving that they had adequate procedures in place designed to prevent an associate from committing foreign bribery. The corporation would bear a legal burden in relation to this matter. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code).

The government considers it appropriate to require corporations to prove existence of a robust and well-integrated compliance regime, rather than to point to evidence that suggests a reasonable possibility that such a situation exists (as would be the case if the 'evidential burden' defence was prescribed instead). As the Committee noted (in question 2 above), foreign bribery often occurs in instances of recklessness/wilful blindness by senior management to activities occurring within their corporations and a lack of readily available written evidence to establish intention. Placing a legal burden on corporations to prove the existence of adequate procedures will enable prosecuting authorities to deal more appropriately with corporations where senior management turn a blind eye to bribery occurring in their businesses.

Question 16

The 'absolute liability' nature of the offence proposed in section 70.5A(2) means that, in the absence of demonstrating 'adequate procedures' to prevent foreign bribery of associates, a corporation will be liable under s 70.5A without the need for the prosecution to establish any culpability on the part of the corporation. Legislative use of 'absolute liability' requires strong justification and should only occur in limited circumstances (see AG's Guide to Framing Commonwealth Offences, p. 22). Given the seriousness of the proposed offence, its broad application, and the potential penalty and stigma of a conviction, how is the application of absolute liability to the offence justified?

Departmental response:

As outlined in the explanatory memorandum to this Bill and for similar reasons to those outlined above (in response to question 15), the justification for attaching absolute liability to the offence is to create a strong positive incentive for corporations to adopt measures to prevent foreign bribery. Applying absolute liability to certain elements of the new offence is necessary to ensure the effectiveness of the new offence and the enforcement regime.

The government considers that there is a risk that requiring the prosecution to prove specific fault elements in relation to this offence may involve unnecessary complexity, also noting the traditional difficulties in prosecuting foreign bribery offences the Committee has identified above (in relation to question 2). Specifically, it is necessary to overcome challenges in establishing liability of corporate entities for foreign bribery, and to ensure that corporations are not able to avoid liability through wilful blindness. Attaching fault elements to this offence may also have the potential to undermine the broad policy objectives of this legislation—which is aimed at bringing about a shift in compliance culture across Australian industry.

It is not an objective of this legislation to impose criminal sanctions against corporations with well-integrated compliance regimes that experience an incident of corruption on their behalf. Indeed, to achieve an appropriate balance between the objectives of the legislation and the burden placed on corporations, a full defence is available to corporations with adequate procedures under proposed subsection 70.5A(5). The Attorney-General will publish guidance under proposed section 70.5B to assist corporations to implement appropriate mitigation strategies, and support the development of adequate procedures to prevent foreign bribery.

The thorough implementation of robust and effective steps to prevent foreign bribery should result in a strong and genuine culture of integrity. The government considers it reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their businesses and to be required to prove the existence of these procedures in instances of non-compliance.

Question 17

Will the proposed corporate offence of failing to prevent foreign bribery only be considered where deficiencies with the operation of the primary offence and any possible civil penalty provision are identified?

Departmental response:

The Department does not agree with the submission to the Committee by the Law Council of Australia that the failing to prevent offence would be unnecessary if deficiencies in the primary offence are addressed. The government's proposed amendments to the primary offence and introduction of a new corporate offence of failure to prevent bribery serve related, but separate, purposes (i.e. to remove unnecessarily restrictive requirements that inhibit successful prosecutions of the primary offence, and to encourage a culture of corporate compliance under the proposed new corporate offence). Together these amendments appropriately strengthen Australia's legislative regime against foreign bribery by corporations of all sizes and individuals.

Where a corporation could have committed both the primary foreign bribery offence and the failure to prevent offence, the Commonwealth Director of Public Prosecutions (CDPP) follows the guidelines established in the *Prosecution Policy of the Commonwealth* (Prosecution Policy) in making decisions relating to the prosecution of Commonwealth offences. In line with this policy, where an offence may be made out against more than one law, the CDPP will choose the charge that most 'adequately reflects the nature and extent of the criminal conduct disclosed by the evidence and which will provide the Court with an appropriate basis for sentence'[5].

Under the Prosecution Policy, the CDPP will have regard to matters including the strength of the available evidence and the probable lines of defence to a particular charge when determining whether, and under which offence, to charge a corporation suspected of foreign bribery.

[5] Commonwealth Director of Public Prosecution, 'Prosecution policy of the Commonwealth – guidelines for the making of decisions in the prosecution process', p 7 <https://www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf>.

Question 18:

With respect to proposed subsection 70.5A(2), can the government clarify the burden of proof the prosecution must establish with respect to: the circumstance in subparagraph (1)(b)(i) that the associate commits an offence against section 70.2; and the circumstance in subparagraph (1)(b)(ii) that the associate engages in conduct outside Australia that, if engaged in in Australia, would constitute the notional offence?

Departmental response:

Absolute liability attaches to the circumstances contained in subparagraphs 70.5(1)(b)(i) and (ii). This means that the prosecution would not be required to prove fault in relation to these elements of the offence. The prosecution would bear a legal burden of proving the physical elements of the circumstance in both subparagraphs, which would need to be discharged beyond reasonable doubt (section 13.2 of the Criminal Code). This includes the need to prove the associate committed the primary offence in section 70.2.

Question 19

[Regarding facilitation payments] What are the next steps in the process for the government following the consultation process?

Departmental response:

The 2012 public consultation process on the facilitation payment defence was conducted by the previous government. No outcome from that process was announced.

The government will continue to review the operation of this defence, as required under the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 2009.

Question 20

What is the government's rationale for retaining the facilitation payments defence?

Departmental response:

Operational experience has indicated that the facilitation payment defence has not been an impediment to the enforcement of the foreign bribery offence. Facilitation payment defences are also not prohibited under the OECD Anti-Bribery Convention and its related recommendations.

Such payments were considered specifically in the OECD's *2009 Recommendation for Further Combating Foreign Bribery*. While the OECD recommended that member countries take steps to discourage corporations from making facilitation payments, it did not require countries to prohibit such payments. Facilitation payments are maintained by some other countries, including the United States.

In line with the OECD Recommendation, government agencies strongly discourage Australian businesses from making facilitation payments. Such payments, while permissible under Australian law, may constitute an offence in the jurisdiction they are made. They can also create a business risk by opening corporations up to bribe requests.

Question 21

Under the proposed new offence of 'failure to prevent bribery' by an 'associate', companies will face strict liability for bribery by 'associates' (including subsidiaries) if they do not have adequate procedures in place designed to prevent bribery of foreign public officials by their 'associates'. Therefore, companies will need to consider updating policies and procedures to ensure they reflect the new provisions and standards in the CCC bill and guidance issued under it regarding what constitutes 'adequate procedures'. Given this, why has a RIS not been prepared in relation to the CCC bill?

Departmental response:

The Attorney-General's Department did consider the RIS requirements for this bill. The Office of Best Practice Regulation supported the Department's determination that a RIS is not required.

While the proposed new offence for failing to prevent bribery creates a stronger incentive for Australian corporations that face a risk of foreign bribery to have adequate procedures to prevent it, corporations are already expected to have measures in place to mitigate this risk. Bribery of a foreign public official has been a serious criminal offence under federal Australian law since 1999. Under the existing provisions in section 12.3 of the Criminal Code, a corporation that expressly, tacitly or impliedly authorised or permitted foreign bribery could be held criminally liable for the misconduct. Such authorisation or permission could be established by proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the law or by proving that the corporation failed to create and maintain a corporate culture that required compliance with the law (paragraphs 12.3(2)(c) and (d)).

In addition, Australian corporations are subject to possible criminal liability for foreign bribery under the broad extra-territorial anti-bribery laws of other countries, particularly the United States and the United Kingdom. Several submissions to the government's public consultation on these proposed reforms noted the Bribery Act 2010 (UK) prompted many Australian corporations to amend their anti-bribery policies and procedures.

Question 22

Can you please provide details about the likely regulatory impact of the CCC bill?

Departmental response:

The amendments to the primary foreign bribery offence are likely to have limited regulatory impact. Australia already criminalises the bribery of foreign public officials in international business transactions. The amendments, including introducing the concept of 'improper influence' and incremental extension of the offence to cover bribery of candidates for foreign public office, seek to improve the effectiveness of the primary foreign bribery offence while retaining the same fundamental principle that the intentional bribery of a foreign public official is a serious criminal offence.

The offence of failing to prevent foreign bribery would further encourage corporations to adopt measures to prevent foreign bribery. As discussed in answer to question 21 above, corporations are already expected to have measures in place to mitigate the risk of foreign bribery and to promote a culture of integrity. Corporations that face a risk of foreign bribery would be encouraged to assess and revise their anti-bribery policies and procedures in response to the specific elements of the new offence and the related guidance.

Guidance on steps that a corporation can take to prevent foreign bribery by an associate will assist affected corporations in assessing and revising their anti-bribery measures. Respondents to the government's consultation on the exposure draft provisions called for the guidance to be drawn from existing materials in other jurisdictions, such as that already issued by the US and the UK, and called for public consultation on the proposed form and content of the guidance. Consistency with international guidance will limit regulatory impact as many corporations (particularly multinationals) already take preventative action based on UK/US requirements.

The Export Council of Australia expressed concerns that small and medium sized enterprises may not have the capacity to develop systems of internal controls and compliance and that it may be more difficult for them to influence or control their contractors and agents. The department anticipates the guidance will make clear that anti-bribery measures need only be proportionate to the circumstances taking into consideration such matters as the risk profile, the size of the corporation and its business activities. The guidance will also comment on what a corporation can do to mitigate risk connected with non-controlled associates, and that it will not be prescriptive but instead allow corporations to take a flexible approach to compliance.

The measures to introduce a deferred prosecution agreement scheme are likely to have no regulatory impact. The scheme would establish an alternative procedure for resolving certain economic offences suspected to have been committed by corporations and will be voluntary in nature.

Question 23

What is the government's timeframe for a comprehensive review to assess the effectiveness of the revised foreign bribery offence?

Departmental response:

The Bill does not prescribe a statutory review of the scheme. The government will keep the measures under constant review after the Bill's passage, in consultation with stakeholders where appropriate. In addition, Australia's foreign bribery framework is subject to regular peer review by the Organisation for Economic Cooperation and Development. Most recently, Australia was reviewed in December 2017 and will be subject to a follow up review in December 2019, which will likely consider the amendments in this Bill and any other changes to Australia's foreign bribery landscape, including agency arrangements.

Question No. 24

Will the statement of facts relating to each offence specified in the DPA provide details of any financial gain or loss, with supporting material?

Departmental response:

Proposed paragraph 17C(1)(a) of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act) requires all DPAs to include 'a statement of facts relating to each offence specified in the DPA'. The Bill does not prescribe any further requirements for the content of the statement of facts. This ensures that the content of the statement of facts can be appropriately adapted to the case at hand.

Where the Commonwealth Director of Public Prosecutions (CDPP) considers it appropriate, the CDPP may require the corporation to agree to include information relating to any financial gain or loss in the statement of facts as a condition of being offered a DPA. The CDPP may also include supporting material in the statement of facts, or otherwise attach it to the DPA.

The department is currently developing a draft DPA Code of Practice (the Code) for public consultation. The purpose of the Code is to provide detail on the practical operation of the DPA scheme, including on the types of matters that might be included in a DPA. The department proposes that the Code would include information on how the CDPP would consult with other government agencies throughout the DPA process to ensure relevant matters are included in the DPA (either in the DPA's terms and in the DPA's statement of facts).

The Bill ensures the terms of the DPA will, where appropriate, reflect any financial loss or gain resulting from the misconduct, regardless of the content of the statement of facts. A DPA may, for example, reflect any profit gained due to the misconduct by including a term of the type described in proposed subparagraph 17C(2)(a)(iii), requiring a corporation to forfeit any likely benefits (including profits) accrued as a result of the misconduct specified in the DPA. Furthermore, proposed subsection 17D(4) requires the terms of the DPA to be in the interests of justice, and to be fair, reasonable and proportionate. Information detailing any financial gain or loss incurred by the corporation may often be highly relevant to determining whether the terms of a DPA fulfil these criteria.

Question No. 25

Will the statement of facts include the company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence? If not, why not?

Departmental response:

The success of the DPA scheme is contingent on the scheme striking an appropriate balance between the need to encourage corporations to self-report serious offending and the need to hold corporations accountable for serious corporate crime.

Feedback to the government's March 2017 consultation on a proposed model for a DPA scheme strongly suggested that corporations would be deterred from seeking a DPA if they would be required to admit to criminal liability as part of the DPA process. For this reason, the Bill does not require a corporation to formally admit to criminal liability in order to obtain a DPA.

However, to ensure corporations are nonetheless held to account for their misconduct and do not exploit the DPA scheme to avoid criminal liability, the proposed scheme requires corporations to admit to agreed facts detailing the nature and scope of their offending. Under proposed subsection 17H(5), this statement of facts will be taken to be agreed facts for the purposes of section 191 of the *Evidence Act 1995* (Cth) in criminal proceedings instituted with respect to the offences specified in the DPA (for example, where the company has materially contravened the DPA) and in related proceedings under the *Proceeds of Crime Act 2002* (Cth). As such, the CDPP would not be required to prove the existence of the facts in the statement of facts and neither party would be able to adduce evidence to contradict or qualify these facts unless leave was given by the Court.

This approach is consistent with the DPA schemes of the United States and the United Kingdom. Under these schemes, a corporation is not necessarily required to admit to criminal liability in exchange for a DPA. However, in the United States 'an admission or an agreement not to contest the relevant facts underlying the alleged offenses is generally appropriate'.[6] Under section 13 of schedule 17 to the UK *Crime and Courts Act 2013*, the statement of facts is to be treated as an admission of fact by the corporation under section 10 of the *Criminal Justice Act 1967* in any criminal proceedings brought against a corporation for the offences specified in the DPA.

[6] United States Securities and Exchange Commission Enforcement Manual, 28 November 2017, https://www.sec.gov/divisions/enforce/enforcementmanual.pdf, page 101.

Question No. 26

Will the Director of CDPP's determination of a material contravention of a DPA be subject to merits review? If not, what is the justification for the exclusion of merits review?

Departmental response:

The Director's determination of material contravention will not be subject to merits review. This is consistent with the principles outlined in the Administrative Review Council's (ARC) publication '*What decisions should be subject to merit review?*' (the Merits Review publication).[7]

The Merits Review publication specifies that 'decisions to institute proceedings' and 'decisions of a law enforcement nature' should not be subject to merits review. The Director's determination that a material contravention has occurred falls within both of these categories. Specifically:

- the determination constitutes 'a decision to institute proceedings' because it forms part of the CDPP's decision to prosecute, and
- the determination constitutes 'a decision of a law enforcement nature' because it enforces the DPA scheme and the laws criminalising the conduct described in the DPA.

In the Merits Review publication, the ARC also emphasised that 'the right to proceed to court for the resolution of a dispute must always be available, without any hindrance'.

Subjecting the Director's determination that a material contravention has occurred to merits review would encumber the CDPP's ability to take the matter to court. If review of the Director's determination were available this could jeopardise the enforcement of the law. Furthermore, the Director's determination is not a final determination of liability, and would not impact the corporation's access to fair and transparent judicial process if prosecutions are instituted. For these reasons, and consistent with the principles outlined in the Merits Review publication, it would not be appropriate for the Director's determination to be subject to merits review.

[7] https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx

Question No. 27

Will the terms of a DPA together with the decision as to whether or not a DPA will or will not be approved, including the reasons for such a decision (to the extent the Director considers it will not prejudice any other ongoing investigation(s)) be published? If not, how will this enhance the integrity of the process, and ensure the community can see the system working transparently?

Departmental response:

Proposed subsections 17D(7) – (10) of the DPP Act would ensure that the terms of a DPA and notification of a DPA's approval are published unless there are compelling reasons not to do so. These provisions would require the Director of the CDPP to publish a DPA on the CDPP's website unless the Director considers it appropriate not to publish the DPA (or to publish a redacted version of the DPA) in the interests of justice.

In circumstances where a DPA is not approved, the Bill would not require any person or authority to publish a notification or reasons. The terms of the approving officer's appointment would specify that this information should not be disclosed by the approving officer to anyone other than the parties to DPA negotiations. The non-disclosure of this particular information is appropriate because the CDPP and corporation may elect to continue to negotiate the DPA and submit a new draft DPA for the approving officer's consideration. The parties should be able to continue negotiations with the same level of confidentiality that attaches to DPA negotiations before an approving officer has considered a draft DPA. This will encourage corporations to continue to engage openly and honestly in DPA negotiations. Further, corporations are unlikely to enter into DPA negotiations if there is a risk that the existence and content of these negotiations may be made public in the event that DPA negotiations fail.

The Bill also does not require reasons for approving a DPA to be published. It is proposed that the terms of the approving officer's appointment and/or engagement will specify that this information may be published if the parties to the DPA agree. This will ensure that an approving officer may write and publish reasons where appropriate.

Question No. 28

Why doesn't the DPA scheme include a requirement for a DPA to be published as part of a company's continuous disclosure obligations; or as part of annual reporting requirements?

Departmental response:

Not all corporations have annual reporting or continuous disclosure obligations. For corporations that are subject to relevant annual reporting or continuous disclosure obligations, these requirements may (in their current form) already oblige the corporation to publish a DPA or information relating to DPA in certain circumstances.

Section 17D would require the CDPP to publish an approved DPA unless it would not be in the interests of justice to do so. It is appropriate that the CDPP be responsible for publishing a DPA, as this arrangement ensures that a DPA may be published regardless of whether the corporation in question has relevant annual reporting or continuous disclosure obligations and establishes a central reference point for all published DPAs.

Question No. 29

What is the government's rationale for excluding some level of judicial input and approval of DPAs in Australia?

Departmental response:

The department is mindful of the separation of powers under the Constitution. The department considers the approach in the Bill of using a retired judicial officer is a constitutionally robust mechanism to provide independent oversight and expert scrutiny within the Australian context.

The Bill ensures that DPAs in Australia are subject to independent and expert scrutiny. All DPAs will need to be approved by a DPA 'approving officer' before entering into force. DPA approving officers will be former judges, with relevant expertise and knowledge (for example, in business or corporate law). Approving officers will bring expertise in fair and impartial adjudication to the DPA process, and provide independent assurance that all DPAs are in the interests of justice.

Question No. 30

How will the appointment of an 'approving officer' support greater public confidence in the process and ensure that DPAs are the appropriate prosecutorial approach?

Departmental response:

The role of the approving officer would be to consider whether the terms of the DPA are in the interests of justice and are fair, reasonable and proportionate having regard to the nature of the wrongdoing. If the approving officer is not satisfied of these factors, they must not approve the DPA.

The approving officer role supports public confidence in the DPA process and ensures that, in each case, a DPA is the appropriate prosecutorial approach. A person would only be able to be appointed by the Attorney-General as an 'approving officer' if they are a former judicial officer of an Australian court. In addition, the Attorney-General must be satisfied that the person has the necessary knowledge or experience to perform the approving officer role. This may include, for example, experience presiding over cases involving economic crime, corporate crime or other serious corporate misconduct. Having this role performed by a suitably qualified and independent approving officer promotes public confidence in the scheme and ensures that the terms of every DPA are fair and appropriate.

Question No. 31

Can you please provide a response to concerns raised in the Law Council of Australia's submission to this inquiry as to: Whether the Privacy Commissioner has been consulted on the privacy implications of proposed section 17K? And if so, were any issues raised by the Privacy Commissioner addressed in the drafting of the bill?

Departmental response:

The Australian Information and Australian Privacy Commissioner was consulted on the privacy implications of proposed section 17K. The Commissioner noted the application of the Bill to serious specified corporate crimes and the Bill's incorporation of safeguards to ensure that DPAs are only used in appropriate circumstances. The Commissioner had no specific recommendations or comments regarding proposed section 17K.

Question No. 32

What is the government's rationale for excluding monitorships from the DPA scheme?

Departmental response:

The Bill does not exclude monitorships from the DPA scheme.

The Bill does not limit the terms that might be included in a DPA, and the government envisages that it will often be appropriate for DPAs to include terms requiring the engagement of an independent monitor to carry out particular functions in a manner that is adapted to the circumstances of the case at hand. These functions may include assessing the effectiveness of a corporation's existing compliance program, advising on how a corporation can develop an effective (or more effective) compliance program and monitoring a corporation's compliance with DPA terms.

As noted in the response to question 24, the department is currently developing a draft DPA Code of Practice (the Code) for public consultation. The department proposes to include information on the possible roles and appointment of independent monitors in the Code.

Question No. 33

Does the government intend to issue guidance in relation to the appointment and methodology of monitors in relation to the DPA scheme? (For example, in the US, external independent monitors may be appointed at the cost of the defendant to oversee the defendant's compliance with the DPA.)

Departmental response:

Terms relating to the appointment and methodology of monitors would be contained in the DPA. However, as noted in the response to question 32, the proposed DPA Code of Practice is also likely to include information on the possible roles and appointment of monitors.

Question No. 34

What is the government's timeframe for a comprehensive review to assess the effectiveness of the DPA scheme?

Departmental response:

The Bill does not prescribe a statutory review of the scheme. The government will keep the measures under review after the Bill's passage, in consultation with stakeholders where appropriate. Monitoring the use and effectiveness of the provisions in practice is likely to be more effective, particularly noting that the frequency and pace at which DPAs will be negotiated, while unknown, is likely to be modest. There is a significant degree of variation between the pace at which DPAs are negotiated in the UK and the US, and given that the Australian DPA model is a hybrid of the UK and US approaches it is not possible to predict where Australia will sit on this spectrum. Keeping the scheme under review as it is used will provide the flexibility to monitor and evaluate the Australian DPA scheme as and when lessons from DPA negotiations arise.

Question No. 35

If the committee were to recommend a periodic review of appropriate offences that may be subject to a DPA, what would be an appropriate timeframe for such a review? Why?

Departmental response:

See answer to question 34 above. The government consulted broadly to develop the list of offences in proposed section 17B. The government proposes to keep the list of offences included in the DPA scheme under review, and to amend the list as necessary to reflect practical experience negotiating DPAs and any relevant law reform. Paragraph 17B(2)(b) of Schedule 2 would ensure the government can respond efficiently where amendments to the list of offences are necessary or desirable by allowing further offences to be added to the DPA scheme through regulations.

Question No. 36

Does the government intend to provide education to the corporate sector on the finalised DPA scheme?

Departmental response:

As noted in the response to question 32, the department is developing a Code of Practice to provide additional detail on the practical operation of the DPA scheme, and intends to conduct a public consultation on a draft Code. The department will review opportunities to provide further outreach and education activities after the DPA scheme comes into operation.

Question No. 37

Does the government intend to issue guidance in relation the level of cooperation expected from corporates who are seeking to enter into a DPA?

Departmental response:

The DPA Code of Practice will include guidance on the level of cooperation expected from corporations seeking a DPA, and on the steps corporations may be expected to take to meet the required degree of cooperation.

Question No. 38

Has the government investigated means by which a Commonwealth DPA could also resolve breaches of state and territory laws?

Departmental response:

Extending the scheme to state and territory offences would require consideration of how DPAs relating to offences in multiple jurisdictions should be negotiated, which state and territory authorities would need to be involved in a DPA process and how penalties imposed throughout the DPA process should be divided amongst jurisdictions.

Extending the scheme to states and territories could also involve constitutional complexity and would require consultation with states and territories.

Question No. 39

How does the proposed DPA scheme operate with the statute of limitations period in respect of any related civil proceedings that arise out of the offending conduct?

Departmental response:

The DPA scheme is designed to address corporate criminal offending. As such, where a DPA has been approved, the scheme only prohibits the institution of 'criminal proceedings' (and not civil proceedings) with respect to offences specified in a DPA (see proposed subsection 17A(2)).

The DPA scheme does not affect the operation of limitation periods with respect to civil proceedings. In appropriate circumstances, relevant parties to a possible civil matter may agree to resolve that matter via the terms of a DPA. For example, a corporation may agree to include terms in the DPA requiring the corporation to take particular action to resolve related matters of concern to regulators or law enforcement agencies, or to compensate victims who have a civil claim. However, while the scheme may be used by parties to agree to a course of action and avoid civil litigation, the scheme does not otherwise prevent the institution of civil proceedings.