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Parliament of Australia,
Parliament House,
Canberra,
ACT 2600.

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Re: The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

14 January 2020

To whom it may concern,

Thank you for the opportunity to submit my observations to the Senate Standing Legal and Constitutional Affairs Committee on some aspects of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

I make this submission based on my professional and research expertise. I am a legal academic, holding the Francine V. McNiff Chair of Criminal Jurisprudence at Monash University. I have written numerous peer-reviewed academic articles on corporate crime and corruption, and the legal mechanisms used to address these.

The Committee will be aware of the timeliness of this inquiry. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry identified the extent and nature of corporate wrongdoing and criminality in its hearings and reports. The Australian Law Reform Commission has published its Discussion Paper on Corporate Criminal Responsibility (DP 87). Of course, this present Bill intersects with the insights and issues arising there.

My comments below focus on the offence of "failure to prevent bribery of foreign public officials", and Deferred Prosecution Agreements (DPAs).

Failure to prevent bribery of foreign public officials:

My remarks on the corporate failure to prevent bribery offence centre on: 1. the "adequate procedures" defence; 2. due process rights, and 3. effectiveness.

1. The **"adequate procedures" defence** mirrors that in section 7(2) of the Bribery Act 2010 (UK), which introduced an offence of failure of commercial organisations to prevent bribery. Sections 45 and 46 of the Criminal Finances Act 2017 (UK) include a defence of reasonable prevention procedures for the corporate offences of failure to prevent the facilitation of tax evasion. One could argue that if the procedures have failed to prevent bribery they are, by definition, inadequate! Given the absence of judicial testing of these provisions in the UK, it remains unclear how we differentiate between adequate and reasonable procedures. Though

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one could question why the defences were not standardised in the UK, it seems to be the case that reasonableness is a less onerous standard. For clarity, I suggest that reasonable procedures be adopted in the 2019 Bill.

2. Though concerns may be raised about **due process rights** in respect of the absolute liability character of the corporate failure to prevent bribery offence, these are not determinative.

   Proof of fault is not necessary in respect of the corporate entity's failure, and instead there is an onus to demonstrate reasonable compliance measures to avoid absolute liability. Though one could argue this encroaches on the presumption of innocence, in certain circumstances Parliament may and does allocate legitimately a legal burden to the accused in criminal trials.

   While there is no direct legal effect on an individual under this provision, one could argue that conviction of a company for failure to prevent could make the pursuit and conviction of an employee, such as a compliance manager, more likely. Evidence gathered could be used in a subsequent individual trial, but this again would be for a separate, substantive offence with associated legal protections.

   There may be due process implications for the individual on whom the corporate offence hinges (i.e. the apparent briber/bribee). If there is a contested trial, he will have evidence raised against him in the course of the trial, given that his actions need to be established. This is not his criminal trial and there will be no individual conviction; nonetheless, he has no capacity to defend himself against these assertions. Though this may seem unpalatable, it does not breach his right to be presumed innocent. Overall, I would conclude that there are no due process objections to extension of the failure to prevent approach.

3. The **likely effect** of this proposed provision in preventing and reacting to bribery of foreign public officials is unclear. There is no evidence that compliance programmes, as are required by such defences, are transformative in preventing or deterring crime, and in fact they may impact negatively in permitting the rationalisation of problematic behaviour. To my knowledge, there has been no reported causative or correlative decrease in corporate misdeeds anywhere since the introduction of compliance requirements, nor any qualitative indication from individuals in corporations that their behaviour is altered/improved. Moreover, any effect on individual and corporate behaviour depends on knowledge of the legal provisions and their criteria, as well as a belief in the likelihood of detection and enforcement. If introduced, awareness of this provision and its implications for criminal liability is key.

   All that said, the defence provides an incentive to create and implement procedures, which should prompt at least incremental changes in corporate reflection and practice. Thus, on balance, debatable effectiveness is not fatal to this proposed provision.

Deferred Prosecution Agreements:

In brief, while it is imperative to revisit how we respond to corporate crime, the introduction and proposed use of DPAs in this respect must be considered carefully. My comments examine: 1. whether these are deferred or non-prosecution agreements; 2. the initiation of DPA discussions; 3. the relationship and coherence with enforceable undertakings; 4. if and how DPAs might displace the criminal law for corporate wrongdoers; 5. DPAs' availability for recidivist offenders; 6. the impact on individual criminal liability, and 7. the link to corporate criminal liability overall.

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1. While these mechanisms are described as DPAs, the Bill makes it clear that if a DPA were approved, criminal proceedings must not be commenced against the corporation in respect of the offences covered by the DPA. This, in fact, makes it akin to a ***non*-prosecution agreement**, in contrast to England and Wales, where proceedings are preferred but then suspended. Proceedings will be commenced only if the DPA is breached or if the corporation has provided inaccurate, incomplete or misleading information in connection with the DPA (ss 17A(2)-(3)). This should be altered, or DPAs should be renamed in the Bill.

2. There is some inconsistency between the content of the Bill and the Code in respect of the **initiator of DPA negotiations**. The Bill refers to the Commonwealth Director of Public Prosecutions "negotiating, entering into, or administering" a DPA without indicating who initiates the proceedings, but the Draft Code of Practice appears to permit a corporation to seek a DPA (paragraph 2.1), though resiles from this position in paragraph 2.3. I suggest that there is no reason to limit the initiation of DPA discussions to the CDPP. Requesting a DPA does not guarantee negotiation or approach. That said, if corporations are to be able to request a DPA this must be predicated on self-reporting and a commitment to cooperate to the greatest extent possible.

3. DPAs are cognate to and have common rationales as enforceable undertakings, in seeking to remedy and improve corporate behaviour through negotiation and agreement. Despite some commonalities between DPAs and enforceable undertakings, such as the imposition of compliance system reviews and the appointment of an independent expert, there are **key differences between DPAs and enforceable undertakings**. According to the Bill, DPAs will be available to corporations only, they would replace criminal proceedings, and may be negotiated by the CDPP for a limited range of offenses. In contrast, EUs may be 1. chosen or offered, by 2. an individual or entity; 3. criminal proceedings may ensue in parallel; 4. they are used by numerous regulators at federal and state level, and 5. they are available in relation to a wide range of offences.

   Concerns have been raised about the agreed facts in enforceable undertakings. Commissioner Hayne found that ASIC had agreed to EUs in situations where the entity admitted no more than that ASIC had reasonably based "concerns" about its conduct, rather than any detailed or critical appraisal of the corporate behaviour (Royal Commission, 2018: 2.2). I would raise comparable concerns as regards DPAs, which would lead to issues about accuracy, fairness, consistency, and possible undue leniency.

4. A major concern relating to DPAs, not just in relation to the 2019 Bill, is that they could **supersede and ultimately replace criminal prosecution and conviction**. This would mean moving away from the stigma inherent in criminal conviction. Prosecution involves exposition and contestation of arguments, both in terms of putting prosecution to proof, as well as exposure of witness testimony, through cross-examination and media reporting as the trial proceeds. Indeed, it was the absence of this calling to account that Commissioner Hayne highlighted in the Final Report of the Banking Commission (2019: 4). This matter goes to the core of the Bill overall, rather than to any particular element of the proposed legislative scheme.

5. Though history of offending is included in the draft Code of Practice indicating whether a particular action or decision is in the public interest, this Code does not refer to **recidivist**

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offenders in particular nor preclude the availability of DPAs to them. As John Braithwaite and Ian Ayre's work on responsive regulation emphasises (2002; 1993), if corporations continue to exploit and breach the rules, law enforcement responses need to be escalated – in this instance from the option of a DPA to criminal prosecution. This is not evident in how DPAs have been applied in the US (Garrett, 2014: 165). I suggest that the Bill should be amended to indicate that DPAs should not be available for recidivist corporate offenders.

6. DPAs may also supplant **individual criminal liability** in the context of corporate harms. Commissioner Hayne in the Royal Commission interim report (2018: 2.2) was concerned about the lack of corporate prosecutions being brought by ASIC, in that its criminal prosecutions have all been directed at individuals. The introduction of DPAs could lead to the pendulum swinging the other way, so to speak, by focusing on corporate rather than human actors. This concern is borne out in the US, where DPAs and NPAs typically are not accompanied by prosecutions of individuals (Garrett, 2014). When employees *have* been charged, most have not been "higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals" (Garrett, 2015). The situation in England and Wales is comparable, where no individual implicated in the wrongdoing admitted by corporate actors in any of the DPAs to date has resulted in domestic conviction (Campbell, 2019; Hawley et al, 2020).

   On this note, the Draft Code of Practice provides that a corporation participating in DPA negotiations typically will be expected to cooperate in any investigation and prosecution against culpable individuals (1.5). I endorse Professor Brent Fisse's suggestion in responding to the 2017 iteration of this Bill that this should be a prerequisite and thus a standard term of the DPA, not a typical expectation. Full and accurate disclosure about the individuals involved in the relevant offence should be a precondition for the opening of DPA discussions.

7. Finally, I would emphasise that while DPAs are proposed to be introduced as a way of mitigating and remedying the issues with **existing law on corporate criminal liability** they still are predicated upon it. If DPAs are to be a useful addition to the legal landscape then there must be mutual incentives to agree one, as well as a possible alternative for the CDPP to deploy. Even if prosecution is a last resort, it must be viable and feasible. The corporate incentive to agree to a DPA depends on the nature of the process and the possible penalty discount, when compared to the likelihood of conviction under in the conventional corporate criminal liability model. If there is no possibility of prosecution/conviction, then we may see corporate actors refusing to agree DPAs, and "taking their chances" in contested proceedings. The case of Tesco in the UK exemplifies this.

   The interrelationship with corporate criminal liability underlines the fact that this Bill should not be passed, at least until the report of the ALRC report has been finalised and published.

I would be pleased to provide further detail on any of the above submissions, should that be of help to the Committee.

Yours faithfully,

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