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# Inquiry into the Crimes Legislation Amendment (Combating Foreign Bribery) Bill 2023 - *submission by the Australian Federal Police*

Senate Legal and Constitutional Affairs Legislation Committee



**AFP**

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## Introduction

1. The AFP welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee review of the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023.
2. The AFP supports this Bill, because it will enhance protection of Australian businesses, foreign governments and civil society from corruption, and promote corporate cultures of integrity. These amendments will also assist the AFP and other agencies to more effectively and efficiently investigate foreign bribery and corporate crime.
3. The AFP notes the Attorney-General's Department (AGD) has also made a submission to this review. The AFP provides the following information to assist the Committee's understanding of the Bill's law enforcement impact.

## Threat environment

4. The AFP is Australia's primary Commonwealth policing agency, with responsibility for investigating foreign bribery under Division 70 of the *Criminal Code 1995* (Cth) (*Criminal Code*). This includes allegations of foreign bribery relating to Australian natural or legal persons, including Australian-registered corporations, who are suspected of committing foreign bribery offences, or any instances of foreign bribery which occurred partly or wholly within Australia.
5. In this role, the AFP works closely with domestic and international partners, including the International Foreign Bribery Taskforce (consisting of law enforcement agencies from the Five Eyes countries) and the International Anti-Corruption Coordination Centre. The AFP also helped establish an anti-corruption public private partnership which resulted in the Bribery Prevention Network, which brings together business, civil society, academia and government with the shared goal of supporting Australian business to prevent, detect and address bribery and corruption. The AFP is also part of the Australian delegation to the OECD Working Group on Bribery, which reports on Australia's enforcement and legislative outcomes in this area.
6. Foreign bribery is a serious concern for the AFP, as this crime type has significant consequences for Australia's international reputation, and for the countries impacted by the offending conduct. Foreign bribery distorts economic markets, artificially inflates prices, undermines democratic governments and institutions, can lead to the procurement of sub-standard products and projects, and contributes to social and economic inequality in communities in which it occurs.
7. The AFP currently has 21 active foreign bribery matters that are either under investigation, referred to the CDPP for assessment, currently before the courts, or referred to the AFP-led Criminal Asset Confiscation Taskforce for potential resolution using the *Proceeds of Crime Act 2002* (POCA). Eleven of those 21 matters have been active for more than three years, which demonstrates the difficulties which can arise when investigating this complex crime type.

8. Foreign bribery is often opaque and sophisticated. Investigations are hampered by a range of factors, including mechanisms that allow individuals to conceal their identity, and complex corporate structures that conceal the offending and make it more difficult to hold company officers responsible. By its very nature, foreign bribery usually occurs offshore. Matters are frequently complicated by a lack of assessable documentary evidence, and difficulties in obtaining this material from the jurisdiction in which the alleged bribery occurred. There are often few incentives for corporations to assist an AFP investigation and, if matters progress to court, the proceedings are generally long and complex, against well-resourced defendants.
9. Finally, as identified by the Bill, the current foreign bribery provisions in Division 70 of the *Criminal Code* no longer adequately reflect the reality of how foreign bribery occurs.

## AFP commentary on specific amendments

10. The AFP strongly supports the proposed amendments to Division 70 of the *Criminal Code*, because these measures will **strengthen** the existing foreign bribery provisions, and remove some of the impediments encountered when investigating and prosecuting this offence.

### Expanding the definition of “foreign public official” to include political candidates

11. The AFP supports expanding the definition of *foreign public official*, in section 70.1 of the *Criminal Code*, to include an individual standing, or nominated (whether formally or informally), as a candidate to be a foreign public official.
12. Under existing provisions, it would not be an offence for an Australia corporation to pay a bribe to an individual running for office in a foreign country, even if the bribe was paid on the assumption that the individual would act in a corporation’s business interests once elected. This deficiency is corrected by this Bill, and ensures that conduct which may damage the broader integrity of another country’s political system is appropriately criminalised.

### Obtaining a personal advantage

13. AFP supports the expansion of the foreign bribery offence in section 70.2 of the *Criminal Code* to capture where a bribe is paid to obtain a **personal** advantage.
14. In the AFP’s experience, foreign public officials can be bribed to obtain a broad range of beneficial outcomes for corporations or other persons, not all of which are immediately apparent as a “business advantage”. The AFP has previously received and assessed foreign bribery referrals which have not progressed to an investigation, due to challenges in classifying the advantage obtained through bribery as a “business advantage” (and thus low prospects of a successful prosecution).
15. For example, under existing section 70.2, it is unlikely to be an offence for an Australian citizen to pay a bribe to a foreign public official to receive a visa or foreign citizenship. This is because the visa or citizenship is likely to be considered a *personal advantage*, rather than a business advantage. Similarly, paying a bribe to ensure the release of an individual from custody, or obtain a favourable court outcome, is more likely to be a personal advantage,

rather than a business advantage. However, it is clear that bribery to obtain these types of outcomes can equally damage the integrity of government or other institutions in another country, or negatively impact local communities.

16. In some circumstance, it could be argued that something is both a personal and business advantage – for example, where the grant of a visa or citizenship enables a person to enter a country and therefore more easily conduct business in that jurisdiction (e.g. tendering for contracts). However, amending section 70.2 to explicitly capture both business *and personal* advantage helps clarify this issue and ensures a broader range of activities and outcomes which can be subject to bribery are appropriately captured.

### **“Improperly influencing” a foreign public official**

17. The AFP strongly supports removing the existing requirement in existing section 70.2(1)(b) that the benefit be ‘*not legitimately due*’ to the other person, and instead replacing it with the broader concept of ‘*improperly influencing*’ a foreign public official. This includes removing the requirement in existing section 70.2(1)(c) that the person intends to influence the foreign public official in the exercise of their “official duties”.
18. In the AFP’s experience, proving that a benefit was “*not legitimately due*” is often the hardest element of the offence to satisfy. This is because bribes are frequently built into legitimate contractual arrangements, or disguised as contractual obligations. The bribe could also be paid through intermediaries, explained as marketing expenses, or take non-monetary forms (for example, scholarships for children, or employment opportunities).
19. For example, a subcontractor on an infrastructure project may agree to forward part of their subcontract payments to foreign public officials. However, the progress payments and invoices issued by the subcontractor are unlikely to distinguish between the legitimate and illegitimate components.
20. Further, as previously noted, much of the evidence base in foreign bribery matters is held overseas. In these circumstances, it can be extremely difficult, if not impossible, to establish that any part of contractual payments for services were not “legitimately due”. Investigators will often need to seek expert advice on, or invest their own time and resources in researching, the laws of another country, or specific processes and procedures of the industry in which the foreign bribery occurred. For example:
  - A payment to bribe a freight taxation official to minimise the amount of tax owed by a company would require proof that the advantage gained was not legitimately due – i.e. that the ultimate tax calculation was incorrect. This would involve an extensive evidence gathering process involving international tax law.
  - Foreign bribery investigations have often revolved around engineering and mining companies, which requires the AFP to obtain expert evidence and develop intricate knowledge of how infrastructure and mining projects are obtained, such as government tendering processes.

21. The change to “improper influence” will reduce some of these challenges, as the Bill instead provides a list of certain matters which can be considered to determine whether the influence is “improper”. This means investigators will not need to become experts on a particular industry, or on the laws of another country, and can instead focus on the conduct of the alleged offender, and their intent in providing the alleged illicit benefit.
22. Finally, the AFP also supports removing the requirement that the person intends to influence the foreign public official in the exercise of their official duties. In reality, foreign public officials can often have influence in government and broader civil society extending well beyond their position. Further, without a detailed understanding of the other country’s political and legal systems, it can be difficult to obtain evidence as to the full scope of official duties.
23. As such, the AFP supports the change to “improper influence”, as it more adequately captures the different ways that bribes can be made to foreign public officials, helps address challenges which arise when dealing with offshore evidence, and more accurately reflects the broader sphere of influence that foreign public officials can have beyond their official duties.

#### **New offence – failing to prevent foreign bribery**

24. The AFP **strongly supports** introduction of the proposed offence for “*failing to prevent bribery of a foreign public official*” (new section 70.5A of the *Criminal Code*).
25. In AFP’s view, the proposed offence creates incentives for corporations to implement measures to prevent foreign bribery. It will also help address some of the problems encountered with the complex corporate structures of international corporations, which can otherwise make it difficult to establish the liability of corporations, particularly where there has been wilful blindness to the activities of officers, employees or agents.
26. For example, under the existing offence provisions, it is difficult to attribute liability to an Australian parent company for the acts of overseas subsidiaries. Even if the subsidiary company has committed the physical and fault elements required by section 70.2 of the *Code*, the AFP cannot assert jurisdiction over the subsidiary – for example, because they are registered overseas and operate entirely in offshore jurisdictions. In these circumstances, no criminal liability can be established, and the offending conduct cannot be effectively investigated and prosecuted.
27. By contrast, under the proposed offence for “*failing to prevent bribery of a foreign public official*”, the Australian parent company would become liable for the acts of its overseas subsidiary. This ensures criminal conduct undertaken by the subsidiary, for the ultimate benefit of the Australian parent company, can be properly addressed. The new offence will likely encourage companies to more closely monitor the activities of their subsidiaries and employees, conduct due diligence, improve and promote a corporate culture of integrity and compliance, and ideally prevent foreign bribery from occurring in the first place.
28. The AFP suggests consideration be given to specifying proposed section 70.5A as a **serious offence** in the *Proceeds of Crime Regulations 2019 (Regulations)*. This will ensure the AFP-led Criminal Asset Confiscation Taskforce (CACT) can take appropriate action to deprive

offenders of any benefits obtained due to their failure to prevent foreign bribery. Specifically, this includes the ability to apply for a pecuniary penalty order on a non-conviction basis (under section 116(1)(b) of the POCA), which requires the court to be satisfied of the commission of a “serious offence”.

29. Currently, proposed section 70.5A is not listed as a ‘serious offence’ in the POCA or the Regulations, nor does it meet the criteria in section 338(a) of the POCA, which defines a “serious offence” as an *indictable offence punishable by imprisonment for three or more years (and involving the conditions prescribed in section 338(a))*. The penalty proposed for the new section 70.5A does not include imprisonment; rather it is a fine based on a set penalty unit amount, percentage of annual turnover, or the value of the benefit attributable to the offending conduct. Therefore, failing to include section 70.5A as a ‘serious offence’ in the Regulations will preclude the making of a pecuniary penalty order on a non-conviction basis in reliance on an offence under section 70.5A. This limits the utility of this offence to relinquish benefits derived from a corporation’s failure to prevent foreign bribery, whether via contested POCA litigation or a negotiated settlement.

### Prohibiting a person from claiming bribery as a tax deduction

30. The AFP notes the Bill will amend the *Income Tax Assessment Act 1997* (Cth), to preserve the existing rule which prohibits a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official. The AFP supports this amendment, as permitting a person to claim bribes made as a tax deduction would appear to undermine the principal of foreign bribery offences, and enable a person to profit from their offending.

## Conclusion

31. Combatting foreign bribery is an important objective for the AFP. As such, the AFP strongly supports this Bill, particularly the expansion to include *personal advantage* and the redrafting of the foreign bribery offence to focus on *improperly influencing* a foreign public official. The proposed measures in this Bill will **strengthen** the existing foreign bribery provisions, and assist the AFP to progress investigations in this area, by removing some of the impediments encountered when investigating and prosecuting foreign bribery.
32. The AFP welcomes the opportunity to engage further with the Committee to support the ongoing review of the Bill.