Law Council
OF AUSTRALIA

Discussion Paper: Corporate Criminal Responsibility

Australian Law Reform Commission

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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:

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- 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

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

Acknowledgement

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Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide this submission to the Australian Law Reform Commission (**ALRC**) in relation to its Discussion Paper on Corporate Criminal Responsibility (**Discussion Paper**).[1]

2. The Law Council recognises the need for there to be an effective regime in place to prosecute and punish criminal offending by corporations. Incidents of criminal offending by corporations can adversely impact communities, including the potential for loss of life or serious injury, and negative impacts on the environment and the economy. It is therefore important that bodies corporate are accountable for their conduct.

3. The release of the Final Report of the *Royal Commission into Misconduct by the Banking, Superannuation and Financial Services Industry* (**the Royal Commission**)[2] has highlighted how pervasive and far reaching the effects of corporate misconduct can be, as well as the serious corrosive effects such misconduct has on public confidence in the corporate institutions that operate in the financial services sector.

4. In this context it is important that the criminal law be capable of effective application to conduct that properly amounts to a criminal offence committed by a corporation, be it under the *Criminal Code Act 1995* (Cth) (**Criminal Code**), the *Corporations Act 2001* (Cth) (**Corporations Act**) or the range of other legislation that applies to corporate regulation.

5. However, it is important that this be done in accordance with the fundamental principles that underpin the rule of law and the criminal justice system in Australia. This must be the starting point when considering reform in the area of corporate criminal responsibility.

6. There are a range of approaches adopted in various pieces of legislation to attribute corporate criminal responsibility from the very serious offences to those offences which are essentially regulatory and more minor in nature.

7. Due to the wide range of corporate criminal conduct the subject of federal legislation, the Law Council considers that there needs to be a range of approaches to framing offence provisions depending on the nature of the conduct sought to be proscribed and the public interest considerations involved.

8. The enactment of Part 2.5 of the Criminal Code was an innovative attempt to address deficiencies in the criminal law as it related to attributing criminal liability to the corporate sector. However, while it is applicable to offences committed under the Criminal Code, it has been excluded from a number of other pieces of legislation that seek to regulate the conduct of corporations such as the financial services provisions of the Corporations Act. In such instances, this has the effect of limiting the application of Part 2.5 of the Criminal Code.[3]

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[1] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019).
[2] *Royal Commission into Misconduct by the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).
[3] An example is *Corporations Act 2001* (Cth), s 769A which excludes Part 2.5 of the Criminal Code from having any application to the offences based on Chapter 7 of the Corporations Act and instead generally imposes a vicarious liability culpability standard (see s 769B).

9. The proposed redraft of section 12.2 of the Criminal Code deems any conduct by one or more (widely defined) 'associates' of a body corporate to have been engaged by the body corporate. By way of defence, a legal burden lies on the body corporate to demonstrate that it exercised due diligence to prevent the conduct. For fault elements other than negligence, it is proposed that it be sufficient to show that either one or more of the associates had the requisite state of mind or the body corporate authorised or permitted the conduct.

10. The proposal creates a significant disparity between the application of the principles of criminal responsibility for individuals and the application of principles of criminal responsibility for corporations and officers of corporations who have contravened Commonwealth laws. In this respect, the proposal entails a lowering of the bar for proof of criminal offences against corporations and officers allegedly involved in contraventions of Commonwealth laws, in circumstances where those individuals would not otherwise be guilty of an offence by reason of the extensions of criminal responsibility in Chapter 2 of the Criminal Code. This disparity is not addressed by the Discussion Paper; nor is any satisfactory justification for creating it offered.

11. The Law Council further notes the Discussion Paper's argument that there is a need for a 'principled basis for the criminal responsibility of corporations' to reduce the exposure of a corporation to criminal prosecution 'so that criminality will only attach where justified'.[4] However, it is for these reasons that the Law Council does not support the proposed model in the Discussion Paper for the attribution of corporate criminal responsibility, as there is a concern that it will serve to artificially expose corporations and officers of such corporations to criminal prosecution in a way that natural persons would not be exposed.

12. When the current Part 2.5 of the Criminal Code was under consideration, the authors of the *Model Criminal Code Report* attempted to ensure the provisions in the Criminal Code attributed criminal responsibility to corporations in accordance with the general principles that underpin the criminal law as they apply to natural persons.[5] The Model Criminal Code Committee was made up of senior criminal lawyers from all Australian jurisdictions, there was wide consultation on the draft and little criticism of the provisions that were eventually settled on by that Committee.

13. The underlying principle during the formulation process was that corporations deserved no more or less favourable treatment under the criminal law and that the task was to make the rules for the attribution of criminal responsibility as analogous as possible to those applicable to natural persons.[6] That would still allow strict responsibility, or the reverse onus of proof for some offences in the same way as occurs for natural persons. It also allows for specific offences for corporations. This is not only as a matter of fairness to corporations, but also to avoid the risk of distorting complicity for the natural persons who work for such entities by making them liable through the corporation.

14. The Law Council supports that principle.

15. In this regard, the Law Council is concerned about the model for attribution of criminal responsibility proposed in Chapter 6 of the Discussion Paper, as it seeks to expand the means by which a corporation can be held criminally responsible beyond what is

[4] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [4.25].
[5] Criminal Law Officers Committee of the Standing Committee of Attorney's General, Commonwealth of Australia, *Model Criminal Code, Final Report* (December 1992) 104-113.
[6] Ibid 104.

consistent with established principles relating to criminal culpability. If this is the case, it will cut across the observation of the Australian Securities Investments Commission Enforcement Review Taskforce (**ASIC Review Taskforce**) that:

> *The framework for the prosecution of criminal offences includes processes and protections to preserve civil rights and liberties. Regulatory regimes should be formulated so that criminal conduct is prosecuted within this framework – ie as a criminal offence – ensuring that criminal process rights are attached.*[7]

16. It is important to recognise that decisions to prosecute for alleged offences will not be made on the basis of the existence or otherwise, of a viable defence of due diligence (which a defendant might seek to establish at trial) but on the bare fact of evidence of contravention by a so-called 'associate'. This has the potential to effect real oppression on corporations, at large, and officers of corporations, in the regulatory sphere. It has significant potential structural and economic downsides which have not been addressed in the Discussion Paper.

17. The potential reach of these proposals should not be underestimated. The vast majority of business in Australia is conducted by small businesses and largely through the vehicle of incorporation. For instance, a small building construction company might on any one job engage external concrete contractors, bricklayers, engineers, electricians, plumbers (and so forth) all of which are themselves independent businesses. In the model proposed by the Discussion Paper, the building construction company would be deemed liable for any offence committed by any one of those contractors each of which would be deemed 'associates'. Acts caught would extend to conduct over which the corporation had little control, including even acts done against the corporation. It is unclear how it is proposed that small companies would actually function in such a regulatory environment. This would be a clear disincentive to incorporation.

18. The Law Council responds to each of the proposals in the Discussion Paper in detail below.

[7] ASIC Enforcement Review Taskforce, Commonwealth of Australia, *Report* (December 2017) 78.

Appropriate and effective regulation of corporations

Proposal 1

Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):

a) criminal offences;
b) civil penalty proceeding provisions; and
c) civil penalty notice provisions.

Criminal offences or civil regulation

19. The Law Council agrees, as a general proposition, that there should be a principled distinction between criminal and civil regulation of corporations. The Law Council also agrees that criminal offences should be reserved for conduct that the Parliament considers warrants the application of the moral denunciation and stigma associated with the sanction of the criminal law.

20. While the Law Council agrees that, in terms of holistic reforms, some 'recalibration' of what conduct should be properly categorised as a criminal offence is warranted, the Law Council does not agree that there should be any capacity 'to escalate some civil contraventions across the divide into criminal where appropriate' as suggested in the Discussion Paper.[8] Such an approach could be considered to be inconsistent with what was stated by the ALRC in its Principled Regulation Report that:

> *The distinction between criminal law and non-criminal law (civil) law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced.*[9]

21. The Law Council agrees that the distinction between civil regulation and the criminal law should be maintained for corporations, just as it is distinct in the way it is formulated and categorised for natural persons. It can be confusing, inconsistent and can lead to selective, arbitrary decision making in relation to enforcement of breaches of the law, where, as a general position, the same breaches can be dealt with as either a criminal offence or by way of civil regulation.

22. However, corporate regulation is complex, and it is useful for the law to be equipped with a range of responses to corporate misconduct so that there can be a nuanced response to instances of misconduct that are proportionate to the nature of the breach.

23. Asserted 'seriousness' of defined proscribed conduct is not the only factor guiding whether conduct should be dealt with criminally or otherwise. A good deal of corporate 'criminal' legislation is essentially regulatory conduct to which strict or absolute liability applies. A paradigm of 'seriousness' alone is far too simplistic in determining whether conduct should be dealt with criminally or by way of civil penalty or otherwise.

24. Further, public interest may mean that a range of responses will be appropriate for different conduct contravening the same legislative provision. Thus, for instance, it is

[8] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [4.1].
[9] Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 25.

most unlikely that the regulator, the Australian Competition and Consumer Commission (**ACCC**), would accept that all cartel conduct only be dealt with by way of criminal proceedings, or only be dealt with by way of civil penalty proceedings. The same can be said for a good deal of conduct regulated by the Australian Securities and Investments Commission (**ASIC**) under the Corporations Act, which may, depending on a range of factors, be appropriately dealt with by one or other approaches, involving potentially different agencies including the Commonwealth Director of Public Prosecutions (**CDPP**).

25. The Law Council is also concerned that where conduct is alleged to be criminal, it is dealt with in the criminal courts where the protections afforded by the criminal justice system and the rule of law are provided to the accused, be they a corporation or a natural person. The Law Council opposes any means by which these protections can be usurped or by-passed by allowing a regulator a general power to pursue enforcement of a breach of the law by circumventing the rigours of the criminal justice system through the issuance of an infringement notice or pursuing a matter by way of civil penalty proceedings.

Proposal 2

A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:

a) the contravention by the corporation is deserving of denunciation and condemnation by the community;
b) the imposition of the stigma that attaches to criminal offending is appropriate;
c) the deterrent characteristics of a civil penalty are insufficient; and
d) there is a public interest in pursuing the corporation itself for criminal sanctions.

Principled criminalisation

26. The Law Council notes that the different methods for attributing criminal (and civil) liability to a corporation have been formulated with particular legislative schemes or industries in mind. As a result, an expansive or more limited approach may have been deliberately adopted to achieve the policy objectives when targeting a specific industry. For example, an expansive approach to the attribution of criminal responsibility to a corporation may be more appropriate for some offences but not others. Replacement of the various methods for attributing criminal (or civil) responsibility to corporations in Commonwealth legislation should not be undertaken without a careful consideration of the implications this may have for specific industries and legislative schemes.

27. The proper and primary question is whether the conduct warrants the sanction of the criminal law and that should be the primary consideration, rather than asking a question about the limitations of any civil penalty to achieve a deterrent effect. The Law Council disagrees with the suggestion that criminalisation should occur when the 'deterrent characteristics of a civil penalty are insufficient'.

28. The Law Council also notes that, while there are some challenges with the ability to bring parallel proceedings, it allows some flexibility and co-operation between regulators and corporations. There may be benefit in retaining discretion in terms of allowing the regulator to proceed by way of civil penalty provision rather than by way of criminal prosecution, even though the conduct in question may be technically capable of being pursued through either channel of enforcement.

29. It could be further argued that it is in the public interest for there to be some regulation rather than no regulation due to the challenges in proving a charge to the criminal standard of proof. Where the only option for regulation is the pursuit of criminal prosecution, it can, and does, prove costly, time consuming and is a blunt instrument to regulate instances of corporate misconduct.

30. In the context of principled criminalisation, the Law Council also notes that the ASIC Review Taskforce[10] recommended the removal of imprisonment as a sentencing option for an offence that was either a strict or absolute liability offence as it considered that:

> *… where an offence warrants a custodial sentence, ASIC should be compelled to pursue that outcome via an offence provision that includes the usual protections and proof requirements applicable under the criminal justice system*.[11]

31. The proposal of the ASIC Review Taskforce was that some of the existing strict or absolute liability offences should be accompanied by what it termed an 'ordinary' offence requiring proof of a fault element and would attract higher penalties 'to reflect that the contravention is a deliberate breach of corporate law and therefore a higher level of culpability'.[12]

32. On this point, the Law Council also notes the Commonwealth Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which states that the application of strict or absolute liability to *all* physical elements of an offence is generally only considered appropriate where the offence is not punishable by imprisonment.[13]

Civil penalty proceedings and civil penalty notices

Proposal 3

A contravention of a Commonwealth law by a corporation that does not meet the requirements for designation as a criminal offence should be designated either:

a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or
b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

33. In principle, the Law Council considers that the use of civil penalty notices (**CPNs**), which are akin to infringement notices, should, as stated in the proposal, be strictly limited to instances where the contravention is prima facie evident without court proceedings. The Law Council considers CPNs should only be available for relatively minor offences that could be categorised as strict liability or absolute liability offences and do not require the exercise of judgment as to the commission of the offence or assessment of the factual circumstances constituting the gravity of the offence. In this regard, the Law Council agrees with the Discussion Paper that CPNs should only be

[10] ASIC Enforcement Review Taskforce, Commonwealth of Australia, *Report* (December 2017).
[11] Ibid 70.
[12] Ibid 71.
[13] Attorney-General's Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Attorney-General's Department, 2011), [2.2.6].

for a 'confined subset of contraventions and not be available for any contravention that requires an evaluative judgment'.[14] The use of CPNs, like infringement notices, could be useful where a high volume of contraventions occur and it is easy to assess the guilt or innocence of the offender. The Law Council agrees they would have utility for the 'majority of minor regulatory contraventions that are currently criminal offences'.[15]

34. However, the Law Council does not consider that the majority of the current civil penalty provisions would fall into this category and does not support the widespread use of CPNs as it may lead to lackadaisical regulation. As noted in the Discussion Paper, this was an issue commented on by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which stated:

> *Too often serious breaches of law by large entities have yielded nothing more than a few infringement notices, an enforceable undertaking (EU) not to offend again (with or without immaterial 'public benefit payment') or some agreed form of media release.*[16]

35. In relation to civil penalty provisions (**CPPs**) the Law Council notes that the current list of CPPs in section 1317E of the Corporations Act was determined after extensive consultation and detailed consideration. The Law Council considers that Parliament should be reluctant to add to this list without clear evidence it is necessary to meet the policy objectives of the relevant provision.

36. The Law Council has some concern about what conduct may be subject to a CPP while not coming within the ambit of the criminal law. For example, section 180 of the Corporations Act (together with subsection 344(1) and paragraph 601FD(1)(b) which also raises this issue) are the only Commonwealth statutory provisions that apply a civil penalty regime to ordinary negligence.

37. The concept of civil penalties was introduced by reforms to the Corporations Act in 1993. Civil penalties were first applied to director's duties (then contained in section 232 of the Corporations Act) by the *Corporate Law Reform Act 1992* (Cth). The 1992 reforms gave effect to the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs that criminal liability under the Corporations Law not be applied in the absence of criminality, and that civil penalties provided in the Corporations Law were for breaches where no criminality is involved.[17] It has been observed that since 1993 the 'use of civil penalties in legislation has become much more prevalent, and their nature perhaps less well defined'.[18]

38. The Law Council considers that caution should be exercised in which conduct is subject to a civil penalty provision. This need for caution is illustrated in the discussion on whether ordinary negligence ought to form the basis for action by the state, particularly where that action has the potential to result in the imposition of pecuniary penalties.

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[14] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) 93.
[15] Ibid.
[16] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) 433.
[17] Explanatory Memorandum, Corporate Law Reform Bill 1992 [61].
[18] ASIC Enforcement Review Taskforce, Commonwealth of Australia, *Report* (December 2017) 72.

Proposal 4

When Commonwealth legislation includes a civil penalty notice provision:

a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;
b) there should be a mechanism for a contravenor to make representations to the regulator for withdrawal of the civil penalty notice; and
c) there should be a mechanism for a contravenor to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

39. The Law Council notes that the Discussion Paper is proposing that a CPN would effectively replace infringement notices and that 'the majority of minor regulatory contraventions that are currently criminal offences would become CPN provisions and be removed from the court system'.[19]

40. The Law Council agrees that legislation should specify the penalty payable upon the issue of a civil penalty notice, as this will provide a degree of certainty and consistency. The amount should be confined to a set amount, and the Law Council agrees with the ASIC Review Taskforce's recommendation that infringement notices should be generally limited to prescribed maximum penalties set out in the Attorney-General's Department Guide – 12 penalty units for individuals and 60 penalty units for corporations.[20]

41. The Law Council further agrees there should be a mechanism for a corporation to make representations for the withdrawal of a CPN and, in the event that it is not successful, there should be a mechanism to challenge a CPN in court with costs to follow the event.

Proposal 5

Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:

a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or
b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;

the contravention constitutes a criminal offence.

42. As noted above, the Law Council does not agree that there should be any general capacity to escalate some civil contraventions across the divide into criminal matters when considered appropriate as suggested in the Discussion Paper.[21] Such an approach would be inconsistent with what was stated by the ALRC in the Principled

[19] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [4.18].
[20] Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).
[21] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [4.1].

Regulation Report that the distinction between civil and criminal law should be maintained and, where necessary, reinforced.[22]

43. Creating a mechanism whereby civil penalty proceedings are escalated to criminal sanctions has the potential to blur the distinction between criminal law and non-criminal (civil) law. This is particularly problematic because the consequences of failing to adhere to duties resulting in sanction become unclear where they are attendant on a subjective test – in this case proposed as repeated contraventions as a 'flouting of or flagrant disregard' for the prohibition.

Repeated contraventions

44. In addressing the proposal of escalating civil penalty provisions to criminal offences due to repeated contraventions, the Law Council considers the Discussion Paper's use of subsection 74(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) as an example to be inappropriate because that subsection is not a civil penalty provision, but enacts a criminal offence proved by strict liability, with further subsections which are aggravated forms of that criminal offence. The initial provision contravened in that example (subsection 74(2)) *criminalises* the provision of certain remittance services by an unregistered person. Subsection 74(4) then creates an aggravated form of this offence where a person has breached the physical elements of the offence in subsection 74(2) and has additionally received a direction under subsection 191(2) that the person must not provide a registrable designated remittance service without the person's name or registrable details being on the Register or provided an undertaking under section 197 in relation to subsection 74(1).[23] Subsequent provisions (subsections 74(6) and 75(8)) provide further aggravated offences along the same regime of increasing criminal penalties.

45. The regime in the AML/CTF Act cannot be said to be analogous to a repeat civil contravention. The example given is more akin to the escalation of the penalty for a criminal offence where a person has previously been found guilty of a similar offence and is therefore liable to be found guilty and sentenced for an aggravated form of a less serious offence.

Flouting or flagrant disregard

46. The second limb of this proposal is directed at what is described as the flouting or flagrant disregard of a civil prohibition, which covers circumstances where a corporation, although not necessarily having been found to have contravened a particular civil provision on a previous occasion, has contravened a particular civil provision to such a degree of magnitude that its conduct demonstrates contumelious disregard of the relevant prohibition.

47. The Law Council notes that the Discussion Paper does not suggest that the example used (contraventions by Commonwealth Bank of the requirement in subsection 43(2) of the AML/CTF ACT) would have warranted criminal prosecution and that it arose from 'an inadvertent failure to update and configure' the relevant reporting processes. It is therefore difficult to see how this example supports the proposed principle.

[22] Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 25.
[23] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 107.

48. Escalation of civil contraventions to criminal offences (based on 'flagrant disregard') contravenes the rule of law principle that the law must be known in advance.[24] In particular, people (or in this case, corporations) must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty.[25] Creating circumstances where the contravening conduct crosses from having civil to criminal consequences on a subjective criterion such as the one proposed is, on its face, an unacceptable breach of this principle.

49. It is especially important that regulatory frameworks applicable to corporations be readily known, certain and clear because corporations must invest heavily in compliance programs to ensure that their employees abide by the law. Uncertain obligations arising out of the application of a nebulous test have the potential to unduly increase the regulatory burden on corporations.

50. Repeat or 'flagrant' contraventions of CPN or CPP provisions could be addressed by increasing civil penalties for repeat breaches upon a readily ascertainable statutory basis.

51. The principles underlying these tests should mirror the principles applied by courts ascertaining an individual's ability to pay a fine.

Proposal 6

The Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.

Amendments to the AGD Guide for Framing Offences

52. The Law Council agrees that there should be amendments to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, to ensure that it is consistent with any legislative change resulting from this consultation.

53. However, the Law Council does not agree with the removal of Ch 2.2.6 of the Guide. The Law Council considers that this chapter contains important principles and procedural guidelines that should be observed to limit the use of strict liability and absolute liability when drafting offences. It is also critical to note that this chapter applies not only to principles of corporate criminal responsibility, but also to individual criminal responsibility where it has important application.

54. Rather than removing Ch 2.2.6, the Law Council considers that it should remain, and administrative mechanisms should be implemented that require substantial justification for deviation from the principles (as proposed by the Discussion Paper).

[24] Policy Statement: Rule of Law Principles, *Law Council of Australia*, March 2011, [1].
[25] Ibid.

Proposal 7

The Attorney-General's Department (Cth) should develop administrative mechanisms that require substantial justification for criminal offence provisions that are not consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* as amended in accordance with Proposal 6.

Requiring drafters to justify creation of criminal offences

55. The Law Council agrees that the principles in the Attorney-General's Department's (**AGD**) Guide to Framing Offences are often departed from without adequate justification. The Law Council regularly provides submissions on proposed offences or amendments to offences drawing attention to these departures from the Guide to Framing Offences.

56. The Law Council therefore strongly supports the proposal that the Attorney-General's Department develop administrative mechanisms that require substantial justification for deviation from the AGD Guide to Framing Offences.

Reforming corporate criminal responsibility

Proposal 8

There should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which:

a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and
b) a due diligence defence is available to the corporation.

57. The Law Council notes that the proposed redraft of section 12.2 of the Criminal Code deems any conduct engaged in by one or more associates of a body corporate to have been engaged in by the body corporate. There is a defence, the *legal* burden of which lies on the body corporate to demonstrate that it exercised due diligence to prevent the conduct. For fault elements other than negligence, it is proposed that it be sufficient to show that either one or more of the associates had the requisite state of mind or the body corporate authorised or permitted the conduct. This both imposes vicarious criminal liability and casts the onus of proof on the accused. It makes simple negligence the sole fault element for any criminal offence by a corporation.[26]

58. The definition of 'associate' is critical to understanding the breadth of the proposal. The proposed definition of associate is:

> *Any person who performs services for or on behalf of the body corporate, including:*
>
> *(a) an officer, employee, agent or contractor; or*

[26] The Law Council notes the Discussion Paper considers that the fault element in the attribution model should be referred to broadly as a 'state of mind' to ensure that all fault elements, including negligence, are captured by the section. The Discussion Paper considers having specific fault elements 'may create unnecessary difficulties when applying Part 2.5' (see paragraph 6.22 of Discussion Paper). However, the Discussion Paper is only proposing to amend s 12.3 of the Criminal Code dealing with fault elements other than negligence, and there is no proposal to amend s 12.4 or s 5.5 which defines 'negligence'.

(b) a subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or
(c) a controlled body (within the meaning of the Corporations Act 2001) of the body corporate.[27]

59. The Discussion Paper's proposal contravenes fundamental criminal law principles and represents a significant expansion of the principles of attribution of criminal responsibility to corporations on a number of counts:

    (i) it extends well beyond the conduct of those involved in directing the body corporate or even those in high managerial roles;

    (ii) it extends liability to contractors of the body corporate;

    (iii) it pierces the corporate veil for corporate groups;

    (iv) there is no limitation on the conduct that can be attributed to the body corporate, such as that the person engaging in the conduct was acting within the actual or apparent scope of the person's employment or authority;

    (v) there is no requirement that there be a nexus between the person's conduct alleged to have formed the physical element of the offence and the services he or she performs for, or on behalf of, the body corporate; and

    (vi) it extends liability to subsidiaries and controlled bodies, thereby distancing the actual criminal conduct from the corporation to be held criminally responsible.

60. The proposal entails a remarkable expansion of criminal responsibility for corporations, intended to apply to all contraventions of Commonwealth laws, without any consideration as to whether such an approach is justified in the context of those particular laws. There are likely to be many instances where such a broad approach to the attribution of criminal responsibility to body corporates is unwarranted, unnecessary and apt to lead to over-criminalisation. This is particularly concerning given the serious consequences a criminal conviction can have, even for bodies corporate, and given the proposal to make officers with the capacity *to influence* the body corporate guilty of a criminal offence (depending on that person's state of mind at the time).

61. The proposal will apply to every charity that operates as a public company limited by guarantee. It is difficult to see how this expansion of criminal responsibility for corporations is justified for charities. It would represent a significant regulatory burden not commensurate to the risks for charities which have a corporate structure. It would also result in disparity in the treatment of charities based on nothing more than structure.

62. The 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. In this respect, the proposal entails a striking lowering of the bar

[27] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), 131.

for proof of criminal offences against corporations and officers alleged to be involved in contraventions of Commonwealth laws, in circumstances where those individuals would not otherwise be guilty of an offence by reason of the extensions of criminal responsibility in Chapter 2 of the Criminal Code.

The aims of reform

63. The Law Council also questions whether the proposal meets any of its stated aims some of which are addressed in turn below. Before that, it is noted that what is proposed may not legitimately be described as a method for attributing criminal responsibility to a body corporate. The Law Council considers it can also be described as a deeming provision creating, in effect, a statutory fiction.[28]

Simplicity

64. The proposed method of attribution is said to be justified on the basis that it achieves simplicity.[29] Simplicity is an important objective for criminal laws. However, the proposal gives primacy to (perceived) simplicity while creating an incoherence and inconsistency with fundamental principles of the criminal law, corporations law and the practical realities of the use of corporations to conduct business in Australia. Furthermore, it is questionable whether the proposal does, in fact, simplify matters – particularly when the method for attribution is to be applied in the circumstances of any given case in a prosecution for criminal offences such as those in the Criminal Code or the Corporations Act.

65. The matter may well become more complicated, in any given case, by the extension of the definition of 'associate' to subsidiaries and controlled bodies. For example, what are juries to make of cases where the company and a subsidiary company are both charged? What are juries to make of complex contractual agreements in cases where the company is charged with an offence committed by a contractor? None of these issues appear to be adequately addressed in the Discussion Paper.

Certainty

66. The proposal is said to be justified on the basis that it will provide certainty for corporations as well as regulators and prosecutors.[30] The proposal may well create more certainty for regulators and prosecutors, in the sense that it considerably expands and facilitates the attribution of criminal responsibility to corporations. However, the proposal by no means creates certainty for corporations, their directors or their officers. The proposal leaves corporations open to findings of criminal guilt in a wide range of circumstances, including where the director or officer had no control over another person's conduct (the 'associate'). This concern is not remedied by introducing a defence of due diligence (addressed further below).

67. Certainty for regulators and prosecutors is one thing. However, given that the preferred mode for doing business in Australia is through corporations, the proposal has the capacity to create significant uncertainty in what is already a complex regulatory environment for most businesses. The Discussion Paper recognises that the ability of businesses to trade as corporations 'is of critical importance to the taking of risk which is critical for innovation, for competitive markets, and to ultimate success

[28] *Re Culleton (No 2)* (2017) 263 CLR 176, [27].
[29] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), 128 [6.4], [6.6].
[30] Ibid 128 [6.4].

of Australia's economy'.[31] However, the economic implications and potential effects on companies (including charities), including the insurance implications and potential for the costs to be passed to the consumer (or benefits not received by public, in the case of charities), are left unexplored.

68. Further, the proposed method of attribution is at odds with fundamental criminal law principles, including the concepts of blameworthiness and culpability.[32] The common law's traditional focus on the directing mind of the corporation was firmly grounded in the criminal law's focus on blameworthiness and culpability as well as the practical reality of corporate action and behaviour – that is, it is controlled and directed by its executives/high managerial agents.[33] Part 2.5 of the Criminal Code was firmly grounded in the criminal law's focus on blameworthiness and culpability, and, to the extent that it allowed for regard to be had to the corporate culture, this was at least sought be done on a principled basis.[34] In the context of attributing criminal responsibility to a corporation, the focus should be firmly on the corporation itself.

69. However, analogising principles applicable to individuals to corporations – collective entities – has proved very difficult. Clearly tests like that applied in *Tesco Supermarkets Ltd v Nattrass*[35] are too narrow. Vicarious liability for agents of the corporation is far too broad. The concept of 'corporate culture' was introduced to bridge the gap where the conduct of the corporation viewed as a whole led to the inference that it intended or was reckless about the forbidden conduct. For a recent example, a corporation over many years removed fire protection equipment from parts of its operation. Although that decision could not be traced to a specific individual or a board decision, an inference that, viewed overall, it was reckless about the consequences of fire could be drawn and would be consistent with the basic principles of Part 2.5 of the Criminal Code. It may well be that the concept of 'corporate culture' requires further consideration. However, neither *Tesco* nor vicarious liability is the answer. The Law Council maintains that any amendments to Part 2.5 must still be based on the fundamental principles of the criminal law in the attribution of corporate criminal responsibility and there is no justification for departure from this principled approach to legislative reform in this area.

70. Finally, the proposal does not engage with what it means for a corporation (that is, an entity made up of a number of individuals with varying responsibilities and authority) to commit a crime. It is difficult to see how extending the criminal liability of corporations to any criminal conduct engaged in by an employee, officer, agent or contractor performing services for, or on its behalf, is in any way connected to the blameworthiness or culpability of the corporation itself. The extension of criminal liability in this way in effect creates strict liability until a successful defence of no negligence (due diligence) is invoked by the corporation, and upon which it bears the legal onus, in circumstances where the employee, agent or contractor who engaged in the conduct was the one who had the requisite state of mind for the offence. In this regard, it is concerning that the broad definition of associate leaves the corporation open to criminal liability on the conduct of a rogue employee. That, as the Discussion Paper recognises, is inconsistent with notions of culpability in the criminal law.[36]

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[31] Ibid 24 [1.10].
[32] Ibid 128 [6.6]. However, see express provisions such as s 769 of the Corporations Act.
[33] Ibid 109 [5.3]; [5.4].
[34] Ibid 29 [1.33]; 113 [5.39].
[35] [1972] AC 153.
[36] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), 131 [6.18].

Commercial reality

71. Extension of criminal liability in the manner proposed does not reflect the reality of corporate action and behaviour.[37] This reality is that bodies corporate are controlled by their directors and high managerial agents. Extension of criminal liability in this way is also inconsistent with the theory and rationale of the corporation. Again, this is why the common law focused on the directing mind or those with the ability to control the body corporate's behaviour. It is also why the model established under the *Trade Practices Act 1974* (Cth) (**TPA Model**) required the conduct that is attributable to the corporation to be within the actual or apparent scope of employment or authority. The extension of Part 2.5 to corporate culture similarly also reflected the fact that what is being regulated/or criminalised is the conduct of a body corporate – a group of people. The Law Council considers that while that extension may have been justified, the current extension proposed by the Discussion Paper is not.

72. The Law Council considers that the proposal is not fit for purpose in the existing legal environment. As discussed above, the different methods for attributing criminal (and civil) liability to a corporation have been formulated with particular legislation or industries in mind. Replacement of the various methods for attributing criminal (or civil) responsibility to corporations in Commonwealth legislation should not be undertaken without a careful consideration of the implications this may have for corporations and individuals and the criminal and civil consequences provided for in any given legislation. Given the variation in the methods for attributing responsibility to corporations in Commonwealth legislation, the Law Council considers that it would be a mistake to identify a method with the most expansive approach to attribution and adopt that as a proposed model.

Pragmatism

73. The Discussion Paper suggests that the proposal meets the objective of being pragmatic.[38] This is said to be because there was a strong preference among regulators for corporate attribution models based on the TPA Model.[39] However, the Law Council considers that the following matters can be noted:

    (a) policy should not be formulated on the grounds that it is desired by regulators. This basis is apt to produce a skewed outcome and one uncoupled from fundamental principles; and

    (b) this needs to be counterbalanced against other imperatives given the potential economic implications of the proposal.

74. The Law Council submits that the proposal endorsed in the Discussion Paper does not, in fact, resemble the TPA Model. The features of the TPA Model are identified in the Discussion Paper[40] and notably include attribution of the conduct of a director, employee or agent where the person acts within the scope of his or her actual or apparent authority and attribution of conduct of any other person acting at the direction or with the consent or agreement of a director, employee or agent. These features are absent from the proposal. The TPA Model is similar in some respects to the vicarious liability model adopted at a federal level in the United States.[41] However, certain

[37] Ibid 128 [6.6].
[38] Ibid 128 [6.6].
[39] Ibid.
[40] Ibid 121 [5.78].
[41] Ibid 108 [5.16]; 108 [5.16]. The US model of vicarious liability (respondent superior) requires that the employee engage in conduct within the scope of their employment and that the conduct in part benefits the

jurisdictions reject that model. Canada, for example, has expressly rejected the vicarious liability model 'because it imposes the stigma of a criminal offence on a corporation when its actions might not be morally blameworthy'.[42]

75. In the Discussion Paper it is said that the breadth of the definition of 'associates' is necessary to prevent corporations from using corporate structures to avoid criminal responsibility.[43] However, it is far from clear that this is a serious problem affecting the regulation of corporations. Nor does the proposal adequately address the potential that such conduct is already criminalised by virtue of the extensions of criminal responsibility that exist in the Criminal Code, for example the conspiracy provisions contained in section 11.5. The Discussion Paper states that the breadth of the proposal is ameliorated or counter-balanced by the introduction of a due diligence defence, and that this is necessary because without it the important principle of corporate blameworthiness would be missing.[44] It is apparent from the section discussing the defence that the corporation would need to show positive steps were taken to prevent the commission of the offence or adequate/reasonable measures were in place to prevent it. Concerns with this proposed defence are discussed further below.

The proposed due diligence defence

76. The Law Council does not consider that allowance of a due diligence defence adequately addresses the concerns raised in relation to the breadth of the provision. Far from providing protection and certainty for those conducting businesses through corporate structures, the Law Council is concerned that the defence is likely to create further and significant uncertainty. So much appears to be acknowledged by the observation that '[d]ue diligence is an elastic concept that takes its meaning from the context in which it must be exercised'.[45] The Discussion Paper suggests that guidelines be provided to assist corporations with understanding the proposed due diligence defence.[46] There is reference to various bodies as to what amounts to due diligence in particular industry sectors.[47] The Organisation for Economic Co-operation and Development (**OECD**) is given as an example of such a body. It is not clear what the status of such guidelines are, what the jury is to make of them, or whether what is identified in those guidelines would, in fact, be enough to establish the defence in any given case. The fact that there would be guidelines underscores the uncertainty of the meaning of 'due diligence' in any given case.

77. The proposed defence does not adequately limit the liability of corporations in a way that gives any effect to the principle of corporate blameworthiness or culpability. The defence envisaged by the Discussion Paper appears to require the corporation to take positive steps to prevent the commission of an offence. However, this would still leave the corporation liable for an offence committed by a person providing services for or on its behalf, in circumstances where the corporation had no control or influence over that person and his or her commission of the offence or where the person's conduct was wholly unrelated to the corporation's business unless steps had been taken to

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corporation. This standard has been criticised for imposing corporate culpability for the acts of rogue employees, even where the employee acts in breach of corporate policies without the knowledge or negligence of senior officers – for discussion see A Weissman, 'A new approach to corporate criminal liability' (2007) *American Criminal Law Review* 1319.

[42] Ibid, [5.20].

[43] Ibid 131 [6.19].

[44] Ibid, [1.63]; [6.13]; [6.21].

[45] Ibid, [6.27].

[46] Ibid, [6.28].

[47] Ibid, [6.31].

prevent the commission of the offence. This appears to be recognised by the Discussion Paper when it notes that it might be reasonable to expect the corporation to take greater measures with respect to associates over whom it can exercise greater control.[48] However, it is reasonable to ask how this would apply to an offence committed by a person that was completely unforeseen or could not reasonably be foreseen.

78. Further, the proposal casts a *legal* burden on the corporation to establish the defence. This is inconsistent with the statement that the defence is necessary so that the proposal adequately accords with the principle of corporate blameworthiness. This should be reflected in the elements of the offence – not in a defence that is required to be established by the corporation. The imposition of a legal burden is said to be justified on the basis that the corporation is in a better position to provide evidence of its preventative procedures than the prosecution.[49] However, this does not justify the imposition of a legal burden. It is possible for an evidential burden to be cast on the corporation to establish the defence and it being for the prosecution to disprove it beyond reasonable doubt as provided by section 13.3 of the Criminal Code. This possibility is not addressed in the Discussion Paper. The fact that there are presently some statutes that do not provide for a defence of due diligence at all does not justify imposing a legal burden on the corporation because of some perceived windfall they might receive as a result of having the defence made available to them as a result of the proposal being adopted.[50]

79. Particular problems arise with the defence of due diligence in this context. The scope of the obligation to exercise due diligence is extraordinarily wide because it applies to any conduct of an associate. It is difficult to know how a corporation, large or small, could reasonably address such a question.

80. Finally, the application of the defence leaves the ultimate question of determination to the vagaries of any given jury's view that due diligence has been established. What then happens to certainty for businesses when so much will ultimately turn on what the jury makes of the issue when the scope of the obligations are so all-encompassing, and the jury is considering the issue with the benefit of hindsight?

81. The proposed due diligence defence may add significant compliance burden and costs to charities, particularly if the guidance is not relevant to areas of operation for most charities. Most charities will not have the legal expertise, nor resources to obtain the legal expertise, to put in place additional compliance procedures for such an expansion of how corporate criminal responsibility could arise.

[48] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [6.27].
[49] Ibid, [6.25].
[50] Ibid, [6.26].

Individual liability for corporate conduct

Proposal 9

The *Corporations Act 2001* (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

Proposal 10

The *Corporations Act 2001* (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

Question A

Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?

Question B

Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?

82. The Law Council considers it is appropriate that Proposals 9 and 10 (and Questions A and B) be dealt with together.

83. Proposal 9 makes a person who has capacity to influence the corporation's conduct in relation to the contravention subject to a civil penalty, unless the officer proves that he or she took reasonable measures to prevent the contravention. Proposal 10 makes the person criminally liable if he or she intentionally, knowingly or recklessly engages in such conduct.

84. Proposal 9 does not address a person who exercises his or her influence over the corporation to bring about the contravention. Rather, it penalises a person who has the capacity to influence the corporation in relation to the contravention and then imposes a legal burden on the officer to prove he or she took reasonable measures to prevent the contravention. This is particularly concerning in that a person can then be held criminally responsible for a breach in the defined circumstances in proposal 10. How the legal burden operates in the context of a criminal proceeding for the offence in proposal 10 is not addressed. The Law Council considers that the breadth of this proposal and its capacity for unfair application is not balanced by retaining the defence of 'reasonable measures' nor is it balanced by retaining a fault element for criminal proceedings.

85. The Law Council considers that the approach in Proposal 9 represents a dilution of the concept of intent. This proposal does not include an element of intent and it amounts to a reversal of the onus of proof, which the Law Council cannot support. A reversal of the onus of proof is inconsistent with a cornerstone principle of our legal system, that the prosecution is generally required to prove the guilt of an accused person beyond reasonable doubt. The magnitude of the risk of that proposal is heightened by the absence of any need to establish intent.

Position of influence

86. The Law Council also raises the following concerns about the concept of 'position of influence' in Proposal 9:

    (a) The concept will need further clarification and guidance. The Law Council considers there ought to be some connection with the authority of the relevant person to make decisions within the corporation in relation to the particular conduct, not only the concept of 'influence';

    (b) It is acknowledged that in a large organisation, there is the potential for senior management to be guilty of improper conduct leading to the corporation contravening the Corporations Act framework, and so this proposal does respond to a gap in the legislation. However, there appears to be no intent to draw a distinction between small and large corporations and how the concept of 'influence' will apply in a small corporation. The Law Council envisages circumstances arising in a 'Mum and Dad' company where one spouse puts into effect the direction of a director (the other spouse), which then gives rise to a breach of the Corporations Act. This raises the question of where it is proposed to 'draw the line' when determining who is in a position to influence the conduct of a small company. It is likely that only a handful of people will hold a position which might ordinarily be considered a 'management' position, but the decision-making responsibility will typically rest with one or two directors. In these circumstances, is it appropriate to find that a family member 'human resources manager' is responsible for the conduct?

    (c) If the intent of this proposal is to capture shadow directors, there are other provisions already within the Corporations Act framework which should respond to such a concern. If this reform is actually aimed at addressing shadow director roles but with a lower test for liability, this would be a further cause for concern;

    (d) Further clarification is needed to confirm that the reform would not apply to advisors to companies such as legal advisors. There should be a clear exclusion of third-party advisors from the scope of the section and the concept of the person in a 'position of influence'. Professional advisors are exposed to the client under the law of negligence for their advice. However, it should never be the case that providing independent advice to a company can ever amount to a 'position to influence'. It is a matter for the client, not the professional advisor, as to whether the advice is accepted;

    (e) The Law Council also notes that if professional advisors were to be included within the scope of these liability provisions, it may deter advisors from accepting an engagement when approached for advice on particular issues. As a matter of public interest, there should never be a disincentive for a person to obtain independent professional advice, particularly legal advice, in relation to its obligations under legislation and how to meet those obligations. To create such a disincentive risks an increase in unintended questionable conduct;

    (f) The Discussion Paper indicates that the implementation of this proposal will be accompanied by regulatory guidance that clarifies the standards of conduct and accountability expected of senior corporate officers by the community and regulators (paragraph 7.79). The Law Council considers that this will be critical in community understanding of the scope of this proposal and that

further public consultation should be conducted on any draft guidance, before amending legislation takes effect. Further consultation is needed to ensure that the draft guidance is helpful and provides the necessary information to the community;

(g) There is a substantial body of materials developed by the International Standards Organisation and Standards Australia concerning relevant compliance standards and due diligence defences and[51] these materials ought to be considered for inclusion as suitable standards for conduct and accountability;

(h) The 'position of influence' concept, if adopted, should be linked to part (b) of the definition of 'officer' in the Corporations Act, so that liability would arise only where there is a connection with influencing the 'whole of business', particularly in small corporations; and

(i) There should include a range of 'factors' or indicia that regard must be had to when determining whether a person has a position of influence in an organisation. At present, the drafting is open to broad interpretation and could extend to third party independent advisors. It is noted that a range of factors are proposed in relation to proposals 13 and 14 and some of these may be of assistance.

87. Proposals 9 and 10 are an attempt to adopt a single deemed liability model to replace the various provisions under the current law. As with proposal 8, it should be noted that the various models in operation at present may well have been chosen having regard to the particular legislation and industry in mind. Their replacement with a single model may well have unintended consequences.

88. It is noted that the proposals would potentially make an officer criminally responsible for a contravention by a corporation in circumstances where that person would not be held criminally responsible for such conduct applying the extensions to criminal responsibility in Chapter 2 of the Criminal Code. This distorts the principles underpinning the extensions of criminal responsibility in Chapter 2 of the Criminal Code by making officers liable through the corporation.

89. The Law Council questions the need for the new offence, given that if a relevant person has committed a fraud, the existing provisions of the criminal law should provide grounds for criminal prosecution.

90. The Law Council notes that what is described as the 'common practice' of corporations indemnifying their officers against liability does not apply to all corporations and should not dictate policy choices in extending the application civil penalty or criminal provisions.[52] Further, it is not possible for a corporation to indemnify their officers against the imposition of a prison sentence imposed in relation to a criminal offence. In addition, as these proposals will apply to all companies including charities it should be borne in mind that most directors are volunteers and many charities do not hold appropriate insurance. Nor should the perception that individual liability for corporate contraventions is not adequately enforced in Australia

[51] See, for example, AS/ISO 19600: 2015 Compliance Management, Draft ISO 31022 Legal Risk Management; HB 296:2007 Australian Guidance on Legal Risk Management.
[52] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [7.35].

dictate policy choices.[53] This may be a product of inadequacies in the regulatory, investigative and prosecuting agencies as opposed to a deficiency in the law.

91. Further, as with the defence of due diligence, there are serious uncertainties surrounding the proposal. For example, there is ambiguity concerning the definition of 'influence' and 'reasonable measures'. These are matters that should not be left to the consideration of regulators, prosecutors or, ultimately, the jury. The Law Council considers that 'influence' is a vague concept and has potentially broad application.

92. 'Reasonable measures' is likewise vague and undefined. The Discussion Paper suggests that the preferable course may be to provide guidance as to the meaning of 'reasonable measures' in regulatory form.[54] This has the advantage of enabling targeted industry regulation. However, it also has the potential to create further uncertainty depending on the status of those regulations, their ability to change and the fact that it would ultimately be a question for the tribunal of fact to determine. Added to this is the uncertainty attendant by use of the word 'capacity'. Does the officer merely need to have the capability by virtue of his or her position in the organisation, in the absence of any knowledge or even awareness of the alleged contravention? This cannot be considered in the context of large corporations alone. The fact that such questions are raised by the proposals undermines the suggestion that the proposals have the attraction of simplicity.

93. It will be critical for 'reasonable measures' to be further defined and clarified. Examples from a wide range of different contexts will be required, to provide some comfort and guidance to the many company executives who will be caught by these provisions. For example, it is unclear whether 'reasonable measures' includes obtaining legal advice in relation to the particular conduct. This raises a further issue of how the conduct should be treated if the person in a 'position of influence' acted on legal advice obtained, but the conduct was subsequently found to be in contravention of the legislation.

94. There is an attempt to justify the breadth of the proposals on the basis that it is necessary to address to ensure large multinational corporations do not unjustifiably escape criminal conviction where the potential for harm from contraventions can be immense and irremediable.[55] This is not a sound justification for the proposals. The Law Council is concerned that the proposals are not limited in application to large or multinational corporations and could have myriad of unintended consequences. For example, the proposals will apply to charities, most of which are small, and none of which engage in the same type of activities as large multinational corporations.

Comparison with accessorial liability and civil liability

95. The Law Council does not support proposals 9 and 10 or consider the proposals to be justified or necessary. Individual liability in the context of corporate regulation is already adequately addressed under both the extensions of criminal responsibility contained in Chapter 2 of the Criminal Code as well as under the Corporations Act.

96. Part 2.4 of the Criminal Code provides for complicity and common purpose, joint commission, commission by proxy, incitement and conspiracy. This includes codification of the principles of complicity developed by the common law and

[53] Ibid, [7.68].
[54] Ibid, [7.87].
[55] See , eg, discussion in Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [7.94], [7.107].

otherwise known as accessorial liability, joint criminal enterprise, extended joint criminal enterprise and conspiracy. Complicity in all of these forms as provided for by the Criminal Code involves blameworthiness established by known and tested bounds of criminal liability, and is a more appropriate and principled framework to deal with alleged individual criminal responsibility than that which is suggested in proposals 9 and 10.

97. Directors duties of care, skill and diligence have also been codified in the Corporations Act.[56] The obligations of a director or other officer, are to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were an officer in the corporation's circumstances and occupied the office held and had the same responsibilities of the officer. While contravention of the statutory duty may be enforced through the civil penalty regime, this is an example where the same alleged conduct that is engaged in by an officer or director of a corporation can be dealt with by either a civil penalty provision or as a criminal offence, depending on the circumstances.[57]

98. The Law Council also notes the Discussion Paper states the amendments are not proposed to target directors who are not involved in the day to day operations of corporations.[58] While the Law Council does not support proposals 9 and 10, the Law Council considers that if these proposals are to proceed in some form, there is no reason why directors should be excluded from the scope of the proposals. To do otherwise is inconsistent with the idea that a director may be in a position of being the 'directing mind' of the corporation and yet fall outside the intended scope of proposals 9 and 10.

99. In summary, the proposals involve the expansion of criminal liability not only for corporations but also officers within those corporations without proper justification. This is particularly concerning given the serious consequences that can follow from a finding of guilt for a criminal offence. Aside from the obvious punishment attendant on a finding of guilt, these consequences include potential disqualification from holding certain offices or obtaining certain licences, disqualification and suspension implications, market reporting requirements both domestic and in overseas jurisdictions, proceeds of crime/money laundering offences and exposure to forfeiture regimes.

100. The Law Council is concerned that the proposals are not only inconsistent with fundamental principles of criminal law and corporations law, they entail the very real prospect of unnecessarily increasing compliance costs for businesses in what is already a complex regulatory environment – particularly for small businesses, and charities.

[56] See Part 2D.1 of the Corporations Act.
[57] Section 180 of the Corporation Act sets out the requirement for a director or officer of a corporation to act with the degree of care and diligence that a reasonable person would exercise if they were in the position of Director or an officer in a corporation. This is a civil penalty provision of the Act. However, s 184 of the Corporations Act provides that a Director who acts 'recklessly' or 'dishonestly' in discharging their duties can be charged with a criminal offence.
[58] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [7.112].

The Banking Executive Accountability Regime - an alternative model of individual liability for corporate fault

101. The Law Council notes that subsequent to publication of the Discussion Paper, the ALRC released information inviting stakeholders to also consider an approach to individual liability for corporate misconduct modelled on the Banking Executive Accountability Regime (**BEAR**), which commenced in 2018 and applies to Authorised Deposit-taking Institutions (**ADI's**).[59]

102. The Law Council considers that extending the BEAR to non-financial sector corporations would be problematic because:

    (a) the reversal of the onus of proof inherent in such provisions is contrary to the general presumption of innocence in criminal law; and

    (b) it would require a significant regulatory burden on non-financial firms which would only be compounded by BEAR's infancy, including with respect to appropriate approaches to the drafting of accountability statements.

103. Further, reservations have previously been set out by the Law Council in its 2017 submission to the consultation paper on the 'Review of Banking Executive Accountability Regime'.[60]

Incorporated legal practices under the Legal Profession Uniform Law

104. Incorporated legal practices are regulated, in relation to the provision of legal services, under specific State and Territory legislation. They are also regulated, if they are a company, under the Corporations Act.

105. The Law Council notes a number of questions arise about how the proposed reforms might impact the regulation of incorporated legal practices (**ILPs**) under State and Territory laws in relation to the provision of services. Consideration needs to be given to these impacts.

Regulating the provision of legal services by ILPs

106. The definition of *law practice* in section 6 of the Legal Profession Uniform Law (**LPUL**) includes an incorporated legal practice. Thus, LPUL provisions applying to law practices generally will also apply to ILPs, subject to any specific modifications, or will apply exclusively under specific provisions relating to ILPs. Also, ILPs that are companies will be subject to regulation under the Corporations Act. However, section 113 of the LPUL (and similar provisions in legal profession legislation in other jurisdictions) provide for corporations legislation displacement provisions or excluded matters for the purposes of sections 5G and 5F of the Corporations Act respectively.

[59] Australian Law Reform Commission, 'News and Media' <https://www.alrc.gov.au/news/>.
[60] Law Council of Australia, Submission to Treasury, *Banking Executive Accountability Regime Consultation Paper* (23 August 2017).

Criminal and civil offences under the LPUL

General approaches

107. The LPUL makes distinctions between criminal offences and civil penalties on a provision-by-provision basis. The interpretative rule in section 451(1) is that if the word 'penalty' is set out at the foot of a provision and is not preceded by the words 'civil penalty', then the offence is a criminal offence. Section 452(3) provides that proceedings for criminal offences are to be dealt with in accordance with jurisdictional law. Further section 454 provides that a contravention of a civil penalty provision is not an offence.

108. Criminal offences are found only in the LPUL, and not in the Uniform Rules or regulations.

Civil offences by directors, officers or employees

109. Section 111 of the LPUL extends vicarious liability to ILPs for civil offences relating to (trust) money or property, or to debts or damages payable to a client as a result of a dishonest act or omission, by a director, officer or employee of ILPs, where the ILP would be liable if the law practice and those officers and employees were carrying on business in partnership. There is no similar provision relating to criminal offences.

Criminal offences applying directly to an ILP

110. There are a number of criminal offences that could apply to an ILP under the LPUL.[61]

Criminal offences applying to directors, officers, employees, agents or other associates of an ILP

111. The LPUL uses the term 'associate' to refer to a person who is a principal, partner, director, officer, employee, agent or consultant to a law practice. It also uses the term 'entity' to refer to an individual, an incorporated body, an unincorporated body or other organisation, and a partnership or assignee or receiver of a partnership. A number of criminal offences could apply to an associate of an ILP.[62]

General comments

112. The LPUL is State legislation – enacted by Victoria and then adopted/applied as local legislation pursuant to an application Act in the participating States and Territories (currently New South Wales and, from 1 July 2020, Western Australia).

113. The LPUL specifically recognises the application of the Corporations Act in certain circumstances (generally in relation to insolvency-type issues and powers of investigation) but also specifically provides for a declaration of displacement provisions or exclusions under sections 5F and 5G of the Corporations Act. Section 5G and inconsistencies between the Corporations Act and State and Territory legislation has been the subject of recent litigation that has resulted in some

[61] For example, the LPUL prohibits an entity from engaging in legal practice when not qualified (section 11), and providing legal services when the law practice does not have a principal (section 106).
[62] For example, the LPUL prohibits engaging in legal practice when not qualified (section 11), unduly influencing a law practice or legal practitioner associate to contravene the LPUL, Uniform Rules or other professional obligations (section 39), or misleading an investigator (section 388).

inconsistent decisions. A special leave appeal to the High Court of Australia on the subject was declined, such that this issue remains unclear.[63]

114. The LPUL contains a limited number of criminal offence provisions, focussed on actions or activities generally related directly to the conduct of a law practice, rather than criminal offences generally.

115. While the LPUL (section 35) renders the principals of a law practice liable (in certain circumstances) for contraventions of the LPUL by a law practice, it cannot be said that under the LPUL, an ILP is deemed liable for the criminal contraventions of a principal, director, officer, employee, agent or consultant – there are, for example, no provisions that attach criminal responsibility to the ILP for actions of individuals acting within the authority of the ILP.

116. Section 120 of the LPUL enables an ILP to be disqualified from engaging in legal practice where:

- it has an unapproved lay associate;
- it fails to comply with a management system direction;
- it has provided a prohibited service or conducted a prohibited business; or
- a legal practitioner associate has been found guilty of unsatisfactory professional conduct or professional misconduct.

117. Only the first of these is a criminal offence under the LPUL.

Potential impact of proposals

118. A general extension of corporate criminal responsibility would require re-consideration of the grounds upon which an ILP can be disqualified. The Law Council notes that case law has clearly established that a criminal conviction of a legal practitioner is not automatic grounds for the individual being struck-off, and the same principle should apply to an ILP.

119. In addition, it may be considered necessary to introduce a 'fit and proper person' type test to whether or not a corporation should be entitled to engage in legal practice as an ILP where the corporation, a director, officer or employee has been, or is, convicted of a criminal offence.

120. Adoption of Proposals 9 and 10 needs to be considered in light of the limitation in section 35 of the LPUL (see above) to contraventions of the LPUL by the ILP.

121. Proposal 8 greatly extends the existing common law position in respect of the attribution of criminal responsibility to corporations. It is difficult to envisage the practical public policy purpose for this, and it remains unclear what conduct proposal 8 intends to capture that is not already addressed by existing regulation/ common law. Proposal 8 also doesn't appear to recognise situations where the corporation is also a victim of an employee's criminal act. Further, to the extent that such criminal acts represent the individual acting outside the scope of their employment/ in opposition to established workplace culture, it is not clear how the defence of due diligence would operate or what 'reasonable steps' could be taken to prevent an individual employee/contractor from committing a crime.

[63] See *Re Linc Energy Ltd (in Liq)* [2017] QSC 53; *Longsley & Ors v Chief Executive, Department of Environment and Heritage Protection and Ors* [2018] QCA 32, on appeal, [2018] HCATrans 185 (14 September 2018).

Whistleblower protections

122. The Law Council acknowledges there is significant public interest in ensuring appropriate protections are afforded to whistleblowers in both the corporate and public sectors, as well as the not-for-profit sector.

123. Statutory protections for corporate whistleblowers were first enacted in 2004 and are contained in Part 9.4AAA of the Corporations Act. Broadly, these provisions provide whistleblowers with statutory immunity from civil or criminal liability, a right to seek compensation if damage is suffered as a result of victimisation (which is specifically prohibited) and prohibit the disclosure of the whistleblowers identity or the information disclosed subject to certain exceptions.

124. The laws relating to whistleblowing were further strengthened, as noted by the ALRC, with the enactment of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (**Whistleblower Protection Amendment Act**) which commenced on 30 June 2019. This also amended the *Taxation Administration Act 1953* (Cth) to provide protection for whistleblowers in relation to tax matters in a new Part IVD in relation to disclosures about possible breaches of tax law.

125. The Whistleblower Protection Amendment Act requires public companies, large proprietary companies and corporate trustees of registerable superannuation entities to implement and make publicly available their whistleblower polices from 1 January 2020.

126. The Law Council considers that Australian boards do generally seek to ensure that there is a culture of compliance with existing laws and regulations. This is reinforced by the reference to culture in the corporate culpability provisions of Part 2.5 of the Criminal Code.

127. The importance of the whistleblowers and their influence on corporate cultures of compliance cannot be over-emphasised. Indeed, the decision (although largely in the form of obiter dicta) of Justice French in the case of *ASIC v Chemeq Limited*,[64] emphasised the very significant impact that a culture of compliance should have on the behaviour and obligations of corporations and other organisations. This culture of compliance is central in evaluating how the whistleblowing provisions will be administered and regulated.

Proposal 11

Guidance should be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has exercised due diligence to prevent the commission of a relevant offence.

128. While the Law Council does not support the model proposed by the Discussion Paper to attribute corporate criminal responsibility, the Law Council agrees with the proposition that an effective corporate whistleblower protection policy would be a relevant consideration in determining whether a corporation had exercised due diligence to prevent the commission of an offence. Furthermore, as discussed above it is also strongly demonstrative of a culture of compliance, and improvements in this

[64] *ASIC v Chemeq Limited* [2006] FCA 936.

area assist in meeting the broader public interest in improving the integrity and compliance of the corporate sector.

Compensation scheme for whistleblowers

Question C

Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to provide a compensation scheme for whistleblowers?

129. The Law Council is supportive of improved access to compensation for whistleblowers in both the public and private sectors. Compensation for victimisation experienced by a whistleblower arising out of disclosures of information can be difficult to access, and the Law Council considers that the claim process for both tax and corporate whistleblowers should be administered by an independent oversight agency. The potential remedies available should be clarified in legislation and information on the claims process should be published by the oversight agency in a single compensation scheme for whistleblowers.

130. The negative impact experienced by many whistleblowers on their reputation and future career prospects is well recognised. Australian whistleblowers may encounter large corporate entities that take active steps to protect their reputation in response to whistleblowing, including vilification of whistleblowers, reprisals, termination of employment, internal policies prohibiting disclosure and other professional consequences. To the extent that retaliation remedies are available, these have been underutilised in part due to inaccessibility and cost.

131. Accordingly, any whistleblower regime needs to recognise the potential imbalance in power between an individual and corporation and provide both:

- an accessible and low-cost mechanism for whistleblowers to access compensation and remedies; and
- a regime which strongly encourages corporate entities to respond to credible whistleblowing through careful review and appropriate responses rather than retaliation.

132. An effective way of achieving these outcomes is to charge regulators with a responsibility to pursue sanctions for retaliatory conduct, rather than leaving the matter to an under-resourced whistleblower. In terms of remedies for retaliation, the Law Council supports a broad judicial discretion to make orders, including loss of past and future earnings and damages that are very broadly defined. The Law Council notes that the orders for compensation which can be made under section 1317AD of the Corporations Act can be made by a court. However, this can often be a daunting and costly forum for an aggrieved person to pursue compensation over retaliatory conduct.

133. Noting these existing barriers, it is submitted that the relevant forum to consider whistleblower compensation should aim to be accessible and low cost. If a court is the appropriate forum, a mechanism should be considered to permit access to the court if the whistleblower is or has become impecunious, perhaps through the allocation of Commonwealth funding to State and Territory Legal Aid Commissions for this specific purpose.

134. Compensation should be funded by a compensation order made against the party who has engaged in retaliation. Where compensation is provided by means of a payment, it should be payable by the company or taxpayer which committed the acts giving rise to the compensation claim. This should impose limited additional cost to the Australian Government to implement the system and should act as a further deterrent to engaging in reprisal or retribution.

135. The Law Council considers there should be some constraints in such a scheme including those proposed in the Discussion Paper (paragraph 8.28) that the compensation reflect the information disclosed and be determined against a number of criteria.

136. The Law Council also suggests that conviction of the organisation for an offence should not be a prerequisite, but that a cap of some kind be applied, perhaps at twice the person's annual remuneration package to ensure that the whistleblower has some financial support in the period immediately following the disclosure.

137. It may be that if compensation is not to be linked to conviction of the corporation, the compensation will need to be publicly funded. However, if the corporation is convicted, it would be appropriate to impose a levy on the corporation to recover any compensation amount paid.

The need for a comprehensive whistleblower regime

138. More broadly, the Law Council considers there is a need for a comprehensive whistleblower regime, as identified by the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS**) Whistleblower Protections Report.[65] The PJCCFS recommended:

- the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation beyond the Bill's corporate financial service and tax entities;
- access to non-judicial remedies (for example through the Fair Work Commission under the *Public Interest Disclosure Act* 2013 (Cth));
- an agency empowered to implement the regime such as a whistleblower protection authority; and
- appropriate resourcing for effective implementation.

139. The Law Council considers such a scheme could also provide a consistent approach to the provision of compensation for whistleblowers.

Financial reward system

140. The most contentious issue associated with the current whistleblowing debate is whether a reward system should be introduced. The Law Council's preliminary view is that a reward system should not be supported. However, it is important that the merits of a reward system are comprehensively identified and debated.

[65] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, 13 September 2017) .

Extraterritorial application of whistleblower protections

Question D

Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to apply extraterritorially?

141. The Law Council supports efforts to extend the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) to allow these regimes to apply extraterritorially.

142. On 19 October 1999, Australia ratified the Organisation for Economic Co-operation and Development's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (**OECD Anti-Bribery Convention**).[66] Annexed to the OECD Anti-Bribery Convention is a recommendation that members set up or revise their system to manage risks of, and respond to, instances of corrupt practices, including as appropriate a reporting/whistleblowing mechanism which should (emphasis added):

> *Issue clear instructions on how to recognise indications of corruption and on the concrete steps to be taken if suspicions or indications of corruption should arise, including reporting the matter as appropriate to law enforcement authorities in the beneficiary country and/or the international development agency's home country;*
>
> *Assure broad accessibility of secure reporting mechanisms, beyond the staff of the international development agency to include implementing partners to the extent possible;*[67]

143. The Law Council notes that reporting and whistleblower mechanisms may not be available in some jurisdictions where Australian corporations or regulated entities operate, raising the need to make available Australian reporting mechanisms where our corporations reap benefits from overseas activities.

144. Further, Australia signed the *United Nations Convention against Corruption* on 9 December 2003 which was ratified it on 7 December 2005.[68] Article 33 compels state-parties to provide protection against unjustified treatment for whistle-blowers who report offences contrary to the convention reasonably and in good faith.[69]

145. There is some precedent for the applicability of Australian regulation of corporate activities extraterritorially. On 1 March 2016, Australia enacted broad false accounting offences into the Criminal Code, which apply to both intentional and reckless

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[66] Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ratified 19 October 1999, [1999] ATS 21 (entered into force 17 December 1999).
[67] *Recommendation of the Council for Development Co-Operation Actors on Managing the Risk of Corruption* to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (9 December 2016) 9.
[68] United Nations Office on Drugs and Crime, 'Australia', *Country Profile* (Web Page) <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AUS>.
[69] *United Nations Convention against Corruption*, GA Res 58/4, UN Doc A/58/422 (adopted 31 October 2003) art 33.

conduct.[70] The OECD noted in its report on Australia's implementation of the OECD Anti-Bribery Convention that these offences have extraterritorial effect and the maximum penalties available against natural and legal persons are the same as those for foreign bribery.[71]

146. Some observers have noted that the private sector whistleblower protections under the Corporations Act may already have extraterritorial application, noting that sections 3 and 5 dictate that provisions may apply to acts and omissions outside Australia. This is because the definition of 'regulated entity' is defined to include a constitutional corporation as well as a foreign corporation, 'disclosable matters' includes conduct of a related body corporate which may capture foreign holding companies and 'eligible recipients' of a body corporate include an officer or senior manager of a related body corporate. These same observers note that the following circumstances may be captured by the private sector whistleblower protections:

    (a) a disclosure of conduct by an Australian company that occurs overseas; and

    (b) a disclosure by an eligible whistleblower who is based outside of Australia about a disclosable matter in relation to an Australian company.[72]

147. However, it is not beyond doubt that the Corporations Act provisions as to whistleblowers apply extraterritorially, or that similar protections in the *Taxation Administration Act 1953 (Cth), Banking Act 1959 (Cth)* and *Insurance Act 1973 (Cth)* apply outside of Australia.

148. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 applies to a securities whistleblower that provides 'original information' – meaning information that is 'derived from the independent knowledge or analysis of the whistleblower' and 'is not known to the Commission from any other source'.[73] Whistleblowers are eligible to receive a bounty in a related Securities and Exchange Commission (**SEC**) case that results in monetary sanctions over $1 million in aggregate.[74]

149. Some observers have noted that the new whistleblower law does not restrict the types of persons who can receive a bounty, with the exception of certain auditing firm and law enforcement personnel.[75] Whistleblowers outside of the United States may be eligible to receive a bounty, notably employees of foreign subsidiaries and affiliates of publicly traded companies are eligible, and have new incentives to report perceived wrongdoing as a result of Dodd-Frank's expansion of the pool of persons who can bring retaliation claims.

150. The Law Council considers that ensuring protection for whistle-blowers reporting misconduct by Australian corporations overseas is appropriate to ensure that:

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[70] Criminal Code, Division 490 (ss 490.1 to 490.7)
[71] Organisation for Economic Co-operation and Development, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: Australia* (Report, 15 December 2017) 35.
[72] Ashurst, 'Australian whistleblower laws: One month on', *Australian whistleblower laws one month on | Ashurst* (Web Page, 1 August 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/australian-whistleblower-laws-one-month-on/>.
[73] HR 4173—466 § 922, codified at *The Securities Exchange Act of 1934,* 15 USC § 78u–6 (21 July 2010).
[74] Ibid.
[75] Grayson D Stratton, The extra-territorial reach of the new Dodd-Frank whistleblower law, *White Collar Crime Update* (9 September 2010) https://www.dlapiper.com/en/australia/insights/publications/2010/09/the-extraterritorial-reach-of-the-new-doddfrank-__/.

(a) Australian businesses lead by example in ensuring integrity in their overseas dealings; and

(b) Australia is a model global citizen by ensuring that its corporations assist in preventing bribery and corruption in jurisdictions with less rigorous safeguards, by providing access to Australian whistleblower reporting regimes and protections in such jurisdiction.

Deferred prosecution agreements

Question E

Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?

151. The Law Council strongly supports the adoption of a deferred prosecution agreement (**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.[76] 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.

152. In relation to the focus of the scheme, the Law Council agrees that an Australian DPA scheme should prioritise reparation and remediation, a vehicle for restitution to victims of crime, financial penalties and the implementation of effective compliance programs. The Law Council would also include in this list the improvement of corporate governance and culture.

153. The Law Council considers it critical that the regulatory implementation of a DPA scheme in Australia gives corporations the confidence to self-report in exchange for meaningful reductions in penalties and resolution timeframe where there is genuine co-operation and remediation by the corporation. If corporations do not have sufficient certainty to conduct a cost benefit analysis at the outset, that will likely affect the level of participation in the scheme.

154. In the view of the Law Council, a DPA scheme should include the following two attributes:

- transparency of operation to potential applicants, law enforcement and the public; and
- to the greatest extent possible, certainty and predictability operation. This will encourage self-reporters to come forward and provide a framework for those operating the scheme to ensure consistent and appropriate standards are applied.

155. The Law Council notes that the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (**the Bill**) was tabled in the Senate on 2 December 2019, and seeks to introduce a DPA scheme in Australia by inserting 'Part 3 – Deferred prosecution agreement scheme' into the *Director of Public Prosecutions Act 1983*

[76] 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) https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/ .

(Cth) (**DPP Act**). The Law Council has provided a written submission on this Bill, which may assist the ALRC in relation to further views on the proposed DPA scheme.[77]

156. The Law Council is generally supportive of the draft Bill and supports its enactment pending the further consideration of DPA's by the ALRC.

157. As will be seen from the Law Council submission to the Senate Committee the key areas of concern concerning DPA's identified by the Law Council are as follows:

- 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; and
- The DPA scheme should also include a process for resolving disputes as to whether there has been a material breach of a DPA.

158. The Law Council has also had the opportunity to review the 'Deferred prosecution agreement scheme code of practice' (**Draft Code**) released by the AGD in 2018.

159. The Law Council generally supports the terms of the Draft Code and notes its policy similarities to many aspects of the UK Code of Practice[78] and the US Attorneys' Manual.[79] The Law Council has made minor suggestions to improve the guidelines as set out in a previous Law Council submission provided to the AGD.[80]

[77] Law Council of Australia, *Submission: Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019*, Senate Legal and Constitutional Affairs Legislation Committee (14 January 2019).
[78] United Kingdom Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013*, https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.
[79] United States Department of Justice, *United States Attorneys' Manual* 9-28.000 *et seq* (Principles of Federal Prosecution of Business Organizations) https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
[80] Law Council of Australia, *Deferred prosecution agreement scheme code of practice*, 12 July 2017.

Sentencing corporations

Sentencing purposes and principles

Proposal 12

Part IB of the *Crimes Act 1914* (Cth) should be amended to implement the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

160. Recommendation 4-1 of the ALRC's 2006 report *Same Crime, Same Time Sentencing of Federal Offenders*[81] is to provide a statutory definition of the purposes of sentencing to be applied when a court is required to impose a sentence for a Commonwealth criminal offence. As noted by the ALRC in the *Same Crime, Same Time* report, this is a codification of the principles that have developed in the common law as the recognised purposes of sentencing and has been adopted in other jurisdictions within Australia.[82]

161. The Law Council considers this recommendation has merit given that there is currently no legislative statement setting out the purposes of sentencing in Commonwealth criminal legislation. The inclusion of such a provision is a useful starting point for a court when sentencing either an individual or corporate offender. The legislative statement reflects the principles that underpin the justification for the application of the criminal law to certain conduct and the Law Council supports the inclusion of such a provision in Part IB of the Crimes Act.

162. The purposes of sentencing proposed by the ALRC are:

- to ensure the offender is punished justly for the offence;
- to deter the offender and others from committing the same or similar offences;
- to promote the rehabilitation of the offender;
- to protect the community by limiting the capacity of the offender to re-offend;
- to denounce the conduct of the offender; and
- to promote the restoration of relations between the community, the offender and the victim.

163. The Law Council considers the following factors could also be added to the general purposes of sentencing, that could also be relevant to a corporate offender:

- to make the offender accountable for their actions; and
- to recognise the harm done to the victim and the community.

164. The Law Council considers that where possible, the principles of the criminal law which apply to individuals should be extended to corporations, and this includes in relation to sentencing. This may of course result in different types of penalties being imposed on a corporation than would be appropriate for an individual, but this does not

[81] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103) 13 September 2006.
[82] See C*rimes (sentencing) Act 2005* (ACT) s 7, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A, *Sentencing Act 1995* (NT) sub s 5(1); *Penalties and Sentences Act 1992* (Qld) sub s 9(1) and *Sentencing Act 1991* (Vic) sub s 5(1).

mean that the principles and purpose of sentencing to be applied when sentencing a corporate offender should differ from a natural person.

165. However, while the purposes of sentencing may be the same for a corporate or individual offender, the Law Council considers that the sentencing options to be applied by the courts to achieve these purposes must inevitably be different.

166. In terms of deterrence, the Law Council considers there will still be some difficulty in reconciling the culpability of the individual actors within the corporation and the corporate entity as a distinct legal persona and how the sentence can be tailored to ensure that it achieves both specific and general deterrence for corporations and the individuals actors whose conduct may have constituted the offending conduct. This requires some flexibility in approach to ensure the sentence imposed can achieve the purpose it seeks.

167. The Law Council notes Recommendation 5-1 of the ALRC *Same Time, Same Crime Report,* that the common law principles of sentencing be codified in the following terms:

    (a) a sentence should be proportionate to the objective seriousness of the offence, which includes the culpability of the offender (proportionality);

    (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);

    (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);

    (d) where possible, a sentence should be similar to sentences imposed on like offenders for like offences (consistency and parity); and

    (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).

168. The purpose of this recommendation was to state the fundamental principles to be applied in sentencing a federal offender in order to achieve any of the stated purposes of sentencing. The Law Council again considers that it would be of benefit for the codification of the above common law principles of sentencing in the Commonwealth sentencing legislation set out in Part IB of the Crimes Act. The Law Council considers that these fundamental sentencing principles do have equal application in sentencing both corporate and individual Commonwealth offenders and could assist in promoting a consistent approach to sentencing for all Commonwealth criminal offences.

Sentencing factors

169. The Law Council notes that Recommendation 6-1 of the ALRC's *Same Crime, Same Time* report was that:

> *Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to a purpose or principle of sentencing, where that factor is known to the court. The legislation should group these factors into categories and provide examples of sentencing factors under each category.*

170. The Recommendation listed the following categories of factors relating to:

- the offence;
- the conduct of the offender in connection with the offence;
- the conduct of the offender other than the specific conduct constituting the charged offence;
- the background and circumstances of the offender;
- the impact of the offence;
- the impact of a finding of guilt, a conviction or sentence on the offender or the offender's family or dependants;
- the promotion of sentencing purposes in the future; and
- any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence.

171. The Law Council notes that subsection 16A(2) of the Crimes Act currently sets out the matters to which the court is to have regard when passing sentence. This list provides 23 factors, and the list is not exhaustive. There is also a significant body of common law principles and jurisprudence applicable. In these circumstances, the Law Council does not consider it necessary to add the criteria in Recommendation 6-1 set out above except for the final factor listed above. This inclusion of this factor would assist in ensuring consistency by the courts when it comes to considering the 'detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence'. This is a matter which could have broad application and be relevant when sentencing a corporation as well as an individual and compliments the notion of *extra curial* punishment at common law.[83]

172. Finally, the Law Council notes Recommendation 6-8 in the ALRC's *Same Crime, Same Time* report that:

> *Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:*
>
> > *(a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made; and*
> >
> > *(b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence.*

173. The Law Council notes that these matters are already, in substance, required to be considered in paragraph's 16A(2)(g) and (h) of the Crimes Act, and does not consider further legislative reform is required to implement this recommendation.

[83] *Einfeld v The Queen* (2010) 200 A Crim R 1 [86].

Proposal 13

The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:

a) the type, size, internal culture, and financial circumstances of the corporation;
b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;
c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;
d) the involvement in, or tolerance of, the criminal activity by management;
e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;
f) whether the corporation self-reported the unlawful conduct;
g) any advantage realised by the corporation as a result of the offence;
h) the extent of any efforts by the corporation to compensate victims and repair harm;
i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:
    i. internal investigations into the causes of the offence;
    ii. internal disciplinary actions; and
    iii. measures to implement or improve a compliance program; and
j) the effect of the sentence on third parties.

This list should be non-exhaustive and should supplement rather than replace the general sentencing factors, principles, and purposes as amended in accordance with Proposal 12.

174. The Law Council notes that Proposals 12, 13 and 14 are 'aimed at the provision of harmonised statutory guidance on sentencing and making civil penalty orders for corporations'.[84] The Law Council supports the introduction of measures that promote consistency in sentencing, while maintaining judicial discretion to impose the appropriate penalty that takes into account all the relevant circumstances of the offence and the offender.

175. The Law Council accepts the proposition of the ALRC that there are a number of factors relevant to sentencing a corporation that are not included in subsection 16A(2) of the Crimes Act and that not all the factors listed in subsection 16A(2) may be relevant to a corporation. However, subsection 16A(2) is not intended to be an exhaustive list of matters to be taken into account in sentencing Commonwealth offenders. Importantly, the overarching principle of sentencing is set out in subsection 16(1) of the Crimes Act that 'a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'.

176. The Law Council also considers that the matters contained in Proposals 13 and 14 are matters that a court would already have regard to when sentencing a corporation, in accordance with the common law as it presently stands. While this list may provide additional guidance to the courts on the matters to be taken into account, it is important that the court has discretion in what weight is to be placed on these matters when arriving at an appropriate sentence. The Law Council considers it appropriate

[84] Australian Law Reform Commission, Corporate Criminal Responsibility (Discussion Paper No 87, November 2019), Discussion Paper 87, 207.

that the list is non-exhaustive and does not impose a prescriptive formula to be applied to the sentencing process.

177. The Law Council concedes there is some judicial authority for the proposition that that 'the task of appraising the nature and seriousness of particular contravening conduct in a civil penalty proceeding is relevantly the same as appraising the seriousness of an offence for the purpose of imposing a criminal sentence'.[85] However, the Law Council would caution against being overly prescriptive of the matters to be taken into account in sentencing. As stated by Justice Wigney in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha*:

> *The point to emphasise is that the list of factors that has been developed in the civil penalty context should not be treated as a rigid catalogue or checklist of matters to be applied in each case. The overriding principle is that the Court should weigh all relevant circumstances.*[86]

178. The Law Council notes that while the Discussion Paper refers to the factors listed in the case of *Trade Practices Commission and CSR Limited*[87] as relevant to the sentencing of corporations, not all these factors, which at common law are required to be considered, are included in Proposal 13. The factors listed by Justice French at that time were:

    (a) the nature and extent of the contravening conduct;

    (b) the amount of loss or damage caused;

    (c) the circumstances in which the conduct took place;

    (d) the size of the contravening company;

    (e) the degree of power it has, as evidenced by its market share and ease of entry into the market;

    (f) the deliberateness of the contravention and the period over which it extended;

    (g) whether the contravention arose out of the conduct of senior management or at a lower level;

    (h) whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

    (i) whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.[88]

179. The Law Council considers that if the aim of Proposal 13 is to promote consistency in the sentencing of corporations, then the factors listed in Proposal 13 should be more closely aligned with the common law factors to be taken in account as set above, with the exception of proposed factor (j) 'the effect of the sentence on third parties'. The effect of a sentence on third parties such as consumers, shareholders and others is a factor that the court should be required to consider when deciding what is the most appropriate sentence to be imposed, so that courts are required to consider the 'spill-over' effect of a given sentence and as noted by the Discussion Paper, serves to

[85] *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 [220] per Wigney J.
[86] Ibid.
[87] (1991) 13 ATPR 41-076.
[88] *Trade Practices Commission v CSR Limited* (1991) 13 ATPR 41-076 [42] per French J.

'promote consideration of how to limit the extent to which the burden of the penalty may be passed on to innocent third parties, such as employees and consumers'.[89]

Proposal 14

The *Corporations Act 2001* (Cth) should be amended to require the court to consider the following factors when imposing a civil penalty on a corporation, to the extent they are relevant and known to the court, in addition to any other matters:

a) the nature and circumstances of the contravention;
b) any injury, loss, or damage resulting from the contravention;
c) any advantage realised by the corporation as a result of the contravention;
d) the personal circumstances of any victim of the offence;
e) the type, size, internal culture, and financial circumstances of the corporation;
f) whether the corporation has previously been found to have engaged in any related or similar conduct;
g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;
h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;
i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;
j) the involvement in, or tolerance of, the contravening conduct by management;
k) the degree of cooperation with the authorities, including whether the contravention was self-reported;
l) whether the corporation admitted liability for the contravention;
m) the extent of any efforts by the corporation to compensate victims and repair harm;
n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:
    i. any internal investigation into the causes of the contravention;
    ii. internal disciplinary actions; and
    iii. measures to implement or improve a compliance program;
o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and
p) the effect of the penalty on third parties.

180. The Discussion Paper observes that there 'is no general statutory provision for the factors applicable to making civil penalty orders, for individuals or corporations'.[90] Rather the matters to be considered have developed within the common law. The stated goal of Proposals 13 and 14 is therefore to promote consistency between sentencing corporations for criminal offences and the imposition of civil penalties.

181. However, the Law Council questions the validity of this assertion given the different types of culpability that is sought to be addressed by the imposition of the criminal law, which under the proposed model is reserved for the most serious conduct warranting the application of retribution and denunciation, and the 'less serious' forms of contravention that are to be dealt with by the imposition of a civil penalty order, which

[89] Australian Law Reform Commission, *Corporate Criminal Responsibility*, (Discussion Paper 87, November 2019) 208.
[90] Ibid, 210

is limited to being more regulatory in nature and promoting compliance, albeit with some deterrent effect.

182. In these circumstances, the Law Council considers there will always need to be a necessary divergence in both the matters to be considered and the weight to be attributed to those factors in sentencing for a criminal offence as opposed to imposing a civil penalty order.

183. However, the Law Council considers that the list of factors listed in Proposal 14 may assist in promoting some consistency of approach to the imposition of a civil penalty under the Corporations Act with the exception of (d) 'the personal circumstances of any victim of the offence.' The Law Council is concerned that this factor may be used as an aggravating feature of a regulatory offence and may be when the 'personal circumstances of the victim' are not likely to be known to the offender and may not be strictly relevant to the commission of the offence. If this factor is aimed at addressing any breach of trust that existed between the offender and the victim, then this should be specified as a factor to be taken into account in sentencing. If the victim was vulnerable due to age or disability and this was taken advantage of by the offender, then again this should be specified. However, it is submitted that the 'personal circumstances of the victim in itself', is too broad to be applied with any certainty. The Law Council further notes that this is not a factor listed in Proposal 13.

Non-monetary penalties for corporate offenders

Proposal 15

The *Crimes Act 1914* (Cth) should be amended to provide the following sentencing options for corporations that have committed a Commonwealth offence:

a) orders requiring the corporation to publicise or disclose certain information;
b) orders requiring the corporation to undertake activities for the benefit of the community;
c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
d) orders disqualifying the corporation from undertaking specified commercial activities; and
e) orders dissolving the corporation.

Proposal 16

The *Corporations Act 2001* (Cth) should be amended to provide the following non-monetary penalty options for corporations that have contravened a Commonwealth civil penalty provision:

a) orders requiring the corporation to publicise or disclose certain information;
b) orders requiring the corporation to undertake activities for the benefit of the community;
c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and
d) orders disqualifying the corporation from undertaking specified commercial activities.

Proposal 17

a) The *Corporations Act 2001* (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period that

the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.

184. The Law Council notes that there is already the provision for non-monetary penalties as a sentencing option under several legislative schemes which apply to corporate criminal conduct.[91] The rationale provided in the Discussion Paper for extending the availability of additional sentencing options, presumably under the Crimes Act, is that the 'availability of non-monetary penalties, in conjunction with monetary penalties as appropriate, would strengthen the ability of the courts to pursue relevant sentencing purposes'.[92]

185. The Law Council, as a matter of principle, supports the introduction of a variety of sanctions for corporate criminal conduct if it can be done in a way that will promote fairness, justice and the imposition of an appropriate penalty in all the circumstances of the case. It is of benefit to the criminal justice system to have a range of different sentencing options available to the court when it comes to sentencing an individual as it permits the court greater flexibility in tailoring the appropriate penalty in all the circumstances of the case, and this can be of equal benefit when it comes to sentencing corporate offenders.

186. However, in sentencing individuals, there are prescribed limitations that reflect the principle of parsimony and that the least restrictive or onerous penalty be imposed as is required by the case. This finds expression in the restriction of full-time imprisonment not being imposed unless the court finds 'the threshold is crossed' and that no other form of sentence would appropriate.[93] The Law Council considers that if there is to be a hierarchy of sentencing options for corporations, it should be clearly stated in the sentencing legislation that an option as drastic as a 'disqualification order' or a 'dissolution order' should not be permitted unless the court is satisfied that no other sentencing option was appropriate in the circumstances. Sentencing options that are more punitive in nature should be reserved for cases where there is a greater fault element or moral culpability to justify the imposition of such a sentence.

187. The Law Council acknowledges that there has been longstanding criticism of the effectiveness of monetary penalties in meeting the purposes of sentencing of corporate criminal offenders, and particularly their limitation in achieving both specific and general deterrence. These include that monetary sanctions:

    (a) may have little impact on those people within a corporation that are able to control corporate conduct, rather the penalties may have a spill-over effect on employees, consumers and shareholders;

    (b) do not necessarily result in the taking of internal disciplinary measures against those individual responsible for the offending conduct; and

[91] *Australian Consumer Law* s 247; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB; *Competition and Consumer Act 2010* (Cth) s 86D; *National Consumer Credit Protection Act 2009* (Cth) s 192; *Work Health and Safety Act 2011* (Cth) s 236.
[92] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper 87, November 2019) 213.
[93] See for example *Crimes Act 1914* (Cth) s 17A and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.

(c) do not ensure that corporate offenders will respond by revising their internal operating procedures to reduce the likelihood of re-offending.[94]

188. The Law Council considers that this criticism is not without foundation and that it will in principle be constructive for a court to have a greater range of sentencing options for corporate criminal offenders as discussed below.

189. Finally, the Law Council also considers there should be clear rights of appeal against the severity of such a sentence and the means by which such a decision can be stayed pending the outcome of any appeal against the sentence or conviction.

Publicity/disclosure orders

190. The Discussion Paper proposes that a court should have a general power to make orders requiring the publication or disclosure of information for the purpose of punishment, or to achieve some rehabilitative effect on a corporate offender.

191. The Law Council notes that there is an existing deterrent effect from the natural consequence of the adverse publicity that can affect a corporation that is caught engaging in criminal conduct.[95] This may impact on the profitability of a corporate offender if there is a loss of business, even in the absence of a court making an order for adverse publicity.

192. However, in less high-profile cases this may be a useful sentencing option. The Law Council notes that information disclosure orders, advertisement orders and adverse publicity orders can already be made under the *Competition and Consumer Act 2010* (Cth) (**Consumer Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) on the application of CDPP, and it may be useful to extend these options to be available at the discretion of the court when sentencing a corporation in appropriate circumstances.

Community service orders

193. The Discussion Paper proposes that a court can also order a corporation to perform a community service order whereby the corporation is required to 'expend time and effort to undertake activities for the benefit of the community'. This is also an order that can be made at present as a 'non-punitive order' under the Consumer Act and the ASIC Act, but again only on the application of the CDPP.[96]

194. The Discussion Paper's proposal is that the court should have the discretion to impose a community service order when the court considers it appropriate. The court can modify the order to require the corporate offender to provide some acts of restoration to the community or parts of the community linked to the offending conduct. The Discussion Paper suggests that where court supervision would be inappropriate:

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[94] Brent Fisse, Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law (2019) 40 *Adelaide Law Review*, 293-294.

[95] For example the recent case concerning Westpac and the alleged non-compliance with their legal obligations relating to financial transactions - see article by Michael Janda and Peter Ryan *Westpac faces fines over 'serious and systemic' anti-money laundering breaches, AUSTRAC says,* ABC News (20 November 2019), <https://www.abc.net.au/news/2019-11-20/westpac-to-face-fines-anti-money-laundering-terrorism-breaches/11720474>.

[96] *Competition and Consumer Act 201*0 (Cth) s 86C(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA(4). See also *Australian Consumer Law* s 246(2)(a), (aa).

> *… an independent monitor (e.g. a lawyer, accountant, auditor receiver or other appropriately qualified person) should be appointed to supervise compliance with the project and prepare pre-service and post-service reports as requested by the court. The costs of supervision would be paid by the corporation.*[97]

195. The Law Council suggests that it may be inappropriate for the corporate offender to be responsible for paying the costs of their supervision. This may lead to a potential conflict of interest between the corporation and the independent monitor as it may serve to compromise the independence of the monitor if they are being paid directly by the corporation. A preferred model may be for the monitoring of any community-based sentencing order to be supervised by a government agency to ensure administration of the sentence is done with independence and integrity and that non-compliance is reported back to the court and enforcement action commenced when appropriate.

196. The Law Council considers that a further option for inclusion is requiring individuals involved in the corporate contravention to undertake a course (akin to 'corporate rehabilitation') or community service. The Court should be authorised to order individuals to undertake training courses to educate and improve their future behaviour. Further consideration will need to be given as to how this option is enforced and the support to be offered to the individual subject to such an order.

Probation/correction orders

197. It is proposed that corporate probation orders could be used to compel a corporation to investigate an offence, take internal disciplinary action, and where necessary, implement organisation reforms.

198. The Law Council notes that again this is a sentencing option that is a 'non-punitive' order that can be made on application to the court under the Consumer Act and the ASIC Act. The Law Council considers that if this is to be recommended as a sentencing option there should be some statutory limitations on the conditions that are attached to the probation order so that they are reasonable and necessary in the circumstances of the case, and proportionate to the nature of the offending conduct. There should also be a limit on the length of time a probation order can be imposed.

199. The Law Council would again suggest that probation orders, as with community service orders, should be supervised by a government agency rather than a private entity whose costs are reimbursed by the corporate offender. This is so that there is genuine independence and objectivity in the process of supervision.

Disqualification orders

200. The Discussion Paper proposes that a sentencing court should have the option of imposing a 'disqualification order' which could be used to compel a corporation from:

- engaging in certain commercial activities for a period;
- refrain from trading in a specific geographic region;
- revoke or suspend licenses for certain activities; or
- to freeze the corporation's profits.[98]

[97] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper 87, November 2019) 216.
[98] Ibid, 218.

201. The Law Council considers that this may be an appropriate sentencing option in particular cases, however there should be clear restraints on this option noting its severity. Such limitations should make it clear that disqualification orders are only permitted where the court considers that no other sentence is appropriate.

Dissolution

202. The final sentencing option recommended in the Discussion Paper is that of 'dissolution', described as an:

> *… extreme penalty, which is liable to have significant impact on third parties – namely, employees, shareholders and consumers. It would therefore be rightly confined to the most serious offending, or where the corporation was operated primarily for a corporate purpose.*[99]

203. The Law Council is concerned about the significant impact on third parties that could be occasioned by the imposition of such a penalty and cautions against adopting this a sentencing option unless there are very clear rules governing in what circumstances such a penalty can be imposed. As submitted above, if this type of penalty was to be implemented at all, it must only available where no other sentencing option could be reasonably considered appropriate.

Maximum penalties

Question F
Are there any Commonwealth offences for which the maximum penalty for corporations requires review?

204. The Law Council has previously provided a submission to the Review Taskforce in relation to the potential strengthening of penalties for corporate and financial sector misconduct.[100] The Law Council in general supports the increase in maximum penalties of imprisonment as they relate to ASIC administered legislation where the relevant offence clearly involves dishonesty, or the deliberate commission of an offence. The Law Council opposes increases in the maximum penalties for other offences contained in ASIC administered legislation without proper justification.

205. The Law Council notes the recommendation of the Review Taskforce that the maximum penalties of imprisonment for criminal offences in ASIC-administered legislation should be increased.[101] As noted in the Discussion Paper, in response to the findings of the Review Taskforce, the maximum penalties for these offences have been revised and legislation introduced which has increased the maximum penalties for a range of offences.[102]

206. It is worth noting that the Review Taskforce found that 'the highest prison terms for white collar and corporate offences in Australia are generally comparable with those in other jurisdictions'.[103] As such, the Law Council does not consider there are any offences which require an immediate increase in the applicable maximum penalty.

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[99] Ibid, [10.78].
[100] ASIC Enforcement Review Taskforce, Commonwealth of Australia, *Report*, December 2017.
[101] Ibid, Recommendation 32.
[102] *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).
[103] Australian Government, *ASIC Enforcement Review Taskforce Report*, December 2017, 60.

The Law Council maintains that if there are to be any increases in maximum penalties, these should be limited to offences that involve an element of dishonesty that ground greater moral culpability and criminality justifying the increase in the maximum penalty.

207. Finally, the Law Council notes that penalty units are widely used in the criminal law and this is a useful and efficient method of quantifying the applicable maximum penalty. As there is indexation of the amount every three years mandated by legislation, this negates the need to make more frequent legislative changes to the maximum penalty for offences.[104]

Question G

Should the maximum penalty for certain offences be removed for corporate offenders?

208. Maximum penalties prescribed by legislation provide courts with guidance as to the seriousness of an offence. The maximum penalty provides a 'yardstick' and invites 'comparison between the worst possible case and the case before the court at the time'.[105]

209. The Law Council does accept that there may be instances where due to criminal conduct a corporation may obtain financial benefit (either through gains or avoiding losses) that may exceed the applicable maximum penalty. In these cases it is appropriate that the court can have consideration to an alternative means of calculating the maximum penalty based on the amount of benefit obtained by the corporation multiplied so that the purposes of punishment can be realised and that offending corporations do not stand to profit from their criminal activity. If the value of the financial gain obtained from the offending cannot be quantified, the Law Council accepts that it may be appropriate for the maximum penalty to be a percentage of the annual turnover for the corporation. This is the approach that has been adopted for cartel offences under the Australian Consumer Law.[106]

210. However, the Law Council opposes a removal of the flat maximum penalty to the extent that it would allow the courts to derive a maximum pecuniary penalty based on 10 percent of annual turnover even where the court can readily determine the value of the benefits obtained (or loss avoided). The Law Council's rule of law principles requires that the law be both certain and readily known.[107] The Law Council considers the circumstances in which a maximum penalty can be removed and replaced with an alternative method for determining the upper limit of the objectiveness seriousness of the offence should be only done in limited circumstances and should be clearly set out in the legislation.

211. Further, the Law Council generally opposes a mechanism where a court can choose between various methods of calculating the maximum penalty and selecting which one may apply in each case. This would undermine the rule of law principle of equality before the law and permit the arbitrary imposition of different maximum penalties for

[104] *Crimes Act 1914* (Cth) sub s 4AA(3).
[105] *Elias v The Queen* (2013) 248 CLR 483 [27]; *Gilson v The Queen* (1991) 172 CLR 353, 364; *Markarian v The Queen* (2005) 228 CLR 357 [31].
[106] *Competition and Consumer Act 2010*, subsection 44ZZRG(1) where the maximum penalty for the cartel offence is the greater of $10 million, three times the benefits attributable to the commission of the offence, or if the benefits cannot be determined 10 percent of the corporation's annual turnover in respect of supplies connected with Australia in the 12 months preceding the offence.
[107] Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011).

the same conduct constituting the offence without reference to any connection between the conduct and the criteria used to determine the penalty.

212. By way of example, when Parliament increased penalties for insider trading and market manipulation offences in 2010, the 10 percent annual turnover test was only to be used where the Court cannot determine the value of the benefits obtained (or loss avoided) – not as a standalone test or prescribed formula of general application.

213. The Law Council notes that in the United Kingdom (**UK**) there are no maximum penalties for fines which can be imposed for corporate offenders convicted of certain offences. Rather, as referred to in the Discussion Paper, there are mandatory sentencing guidelines, prepared by the Sentencing Council of England and Wales (**Sentencing Council**), which prescribe how a penalty is to be calculated by a sentencing court. The Sentencing Council is a statutory body established under the *Coroners and Justice Act 2009* (UK).

214. The Law Council opposes the encroachment of the legislature into the practice of sentencing and legislative attempts to fetter judicial discretion. This can result in unjust outcomes and the Law Council maintains it is important a sentencing court be able to impose an appropriate, proportionate sentence in all the circumstances of the case.

215. The Law Council also questions the constitutional validity of any statutory body established to devise sentencing guidelines as this may infringe the separation of legislative from judicial power that is established by Chapter III of the Australian Constitution, which is a significant difference to the constitutional framework that exists in the UK.

Compensation for victims

Question H

Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?

216. As noted in the Discussion Paper, paragraph 21B(1)(d) of the Crimes Act, permits the court to compel a corporation or person convicted of an offence to 'make reparation to any person, by way of monetary payment or otherwise, in respect of any loss suffered, or any expense incurred, by the person by reason of the offence.'

217. The Law Council considers that this provision is broad and provides the court with adequate discretion to order that compensation be paid where it is in the interests of justice to do so, and the identity of the victims and quantity of reparation to be paid is readily known. In instances where these details are not known at the time the reparation order is to be made, the Law Council agrees that section 21B of the Crimes Act in its present form may be problematic.

218. One option for reform is that section 21B be amended to allow the Court to order that the corporation be compelled to advertise that people may be eligible for compensation and that people who may be eligible for compensation need to notify the prosecuting authority within a specified period of time. Once that time period expires, the court can make final orders for reparation based on who is agreed as being eligible and for what amount of compensation.

219. If a person comes forward after the advertised time period, then they will need to pursue civil compensation as there needs to be some finalisation of the proceedings

and any related orders for reparation made under section 21B. However, the court could also make a 'redress facilitation order' so that if people come forward at a later time who are eligible for compensation it will be easier for them to access and facilitate the application for compensation, or other redress of loss caused by the contravening conduct, in subsequent and separate civil or administrative proceedings.[108]

220. The Law Council considers that the approach to orders for compensation to a 'class of persons' as provided in sections 239 to 243 of the *Australian Consumer Law* is unworkable if such a scheme were to be adopted into the Crimes Act as a method for general reparation ancillary to corporate criminal offending. It is too uncertain in the scope and application of the orders which could be made. The court cannot make open ended orders for reparation under section 21B of the Crimes Act – rather, there needs to be some specificity to enable compliance with and enforcement of the order.

221. The Law Council considers that it would be useful to avoid duplication and inconsistencies across federal legislation as to where the powers to make orders for compensation for breaches of the criminal law and civil penalty provisions occur. To address this issue, it would be useful to consolidate the powers to make orders for reparation following a criminal conviction for a corporation in the Crimes Act and for a civil penalty provision in the Corporations Act.

222. The Law Council also considers that there should be compensation to customers by way of returning amounts previously paid by the customers. However, this needs to be carefully considered in circumstances where the company becomes insolvent, to ensure that employee entitlement rights remain paramount.

Development of a unified debarment regime

Proposal 18

The Australian Government, together with state and territory governments, should develop a unified debarment regime.

223. The Law Council notes the proposal in the Discussion Paper that the implementation 'of a unified debarment regime would limit the involvement of criminally convicted corporations in government work'. It is suggested that 'debarment may represent a significant deterrent for corporations with an interest in government work'.[109] The Law Council does not disagree with this proposition. However, the Law Council is concerned whether such a scheme can operate in a fair, consistent and impartial manner.

224. Debarment of corporations is a globally recognised penalty that has a sound policy basis. The World Bank, European Union, Canada and the US all have debarment regimes in place that seek to discourage bribery and corruption in the area of public procurement and send a message of deterrence to corporations who engage in such illegal and unethical behaviour.

225. However, there has been no coherent application of this type of penalty in Australia which was a concern of the OECD when assessing Australia's implementation of the

[108] Brent Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85, 91.
[109] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper 87, November 2019) 226.

Anti-Bribery Convention, where it was recommended that this be implemented.[110] The Law Council notes that this recommendation is yet to be implemented in Australia and this remains an issue for the OECD who 'reiterate their recommendation that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery'.[111]

226. However, the Law Council is also concerned that (as noted by the ALRC) debarment of a corporation 'may penalise employees and directors who were not involved in the misconduct'.[112] The Discussion Paper goes on to argue that:

> *… if the prosecution or corporations and individuals is approached on a principled basis, corporate convictions would only be pursued in circumstances where responsibility for the offending was not readily attributable to individual personnel.*[113]

227. The Law Council is concerned that the model for attribution of corporate criminal responsibility recommended in the Discussion Paper will in fact deliberately increase the scope and potential for corporate liability because the actions of individual personnel, including 'associates' of the corporation will be attributed to the corporation. Further, the burden of proof will shift to the corporate defendant to establish the defence of due diligence as discussed above.

228. In these circumstances the Law Council opposes the possibility of debarment, if it is coupled with a proposal that drastically expands the scope of corporate criminal responsibility well beyond the principles of accessorial liability and common purpose that apply to an individual convicted of a criminal offence.

229. Nonetheless, the Law Council considers that debarment does have some utility as being used for punishment and deterrence but perhaps should be limited as a sentencing option to convictions in Australian courts that concern bribery, corruption or dishonesty. If it is limited to these types of offences it will serve the primary purpose of a debarment regime, which is to preserve the integrity of the procurement process.

Pre-sentence reports

Proposal 19

The *Crimes Act 1914* (Cth) should be amended to permit courts to order pre-sentence reports for corporations convicted of Commonwealth offences.

230. The Law Council supports the introduction of any measures that can assist the court to be informed of the relevant matters in order to impose the most appropriate penalty in all the circumstances of the case. The use of pre-sentence reports is common in all jurisdictions in Australia and pre-sentence reports are frequently requested by the criminal courts when sentencing individual offenders.

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[110] See Organisation for Economic Co-operation and Development, *Phase 3 OECD Report on Implementing the OECD Anti-Bribery Convention in Australia* (October 2012), Recommendation 16(a), 48.
[111] Organisation for Economic Co-operation and Development, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia* (15 December 2017), 46,
[112] Ibid.
[113] Ibid.

231. Generally, a pre-sentence report is used to provide background information about the offender, assess the offender's suitability for certain sentencing options (such as community service work or participation in programs to address the offenders rehabilitation) and/or supervision by the government agency responsible for the administration of community based sentencing options.

232. A pre-sentence report can also comment on the offender's prospects of rehabilitation, likelihood of re-offending and the attitude of the offender towards the commission of the offence.

233. The Law Council appreciates that in sentencing a corporate offender, a pre-sentence report may be useful to provide some independent assessment of these types of matters in the context of a corporate criminal offence. A valuable feature of a pre-sentence report is that it can be a means of independently assessing whether there is any corroboration of the self-reporting, and possibly self-serving statements of the offender.

Question I

Who should be authorised to prepare pre-sentence reports for corporations?

234. At a state and territory level, pre-sentence reports are prepared by the government agencies that are responsible for the administration of community-based sentencing options such as Corrective Services NSW, Corrections Victoria or Queensland Corrective Services.

235. The Law Council considers that given the requirement for integrity in the sentencing process and the weight that is often placed on pre-sentence reports, the author of the report should be either an independent government agency or professional body with a code of professional ethics with which they are required to comply, similar to an expert code of conduct that applies to an expert witness under the Uniform Evidence Law.

236. The Law Council considers that the offender should not be required to pay for the cost of the report as it may undermine the perceived independence of the report. The offender may already face substantial monetary penalties that will be paid to the Commonwealth and the costs of preparing the report should paid for by the Commonwealth as an expense of administering the criminal justice system. It is the court which orders the pre-sentence report to assist the court with the task of sentencing, and this cost should not in principle be imposed on the offender.

Victim impact statements

Proposal 20

Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to permit courts, when sentencing a corporation for a Commonwealth offence, to consider victim impact statements made by a representative on behalf of a group of victims and/or a corporation that has suffered economic loss as a result of the offence.

237. The Law Council does not object in principle to the provision of victim impact statements in the sentencing exercise as presently provided by sections 16AAA and 16AB of the Crimes Act. In the context of corporate crime, there would be utility in

providing a mechanism for a victim impact statement to be made by either an individual or on behalf of a group of victims, within the limits prescribed by section 16AB. It may, in certain cases, be useful in assisting the court to appreciate the implications and impact of an offence.

Illegal phoenixing activity

Proposal 21

The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide that only a court may make orders undoing a creditor-defeating disposition by a company, on application by either the liquidator of that company or the Australian Securities and Investments Commission; and
b) provide the Australian Securities and Investments Commission with the capacity to apply to a court for an order that any benefits obtained by a person from a creditor-defeating disposition be disgorged to the Commonwealth, rather than to the original company, where there has been no loss to the original company or the original company has been set up to facilitate fraud.

Proposal 22

The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;
b) require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and
c) grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.

238. The Law Council generally supports Proposals 21 and 22. As noted at paragraph's 11.27-29 of the Discussion Paper, the Law Council maintains concerns that the new powers contained in proposed section 588FGAA of the Treasury Law Amendment (Combatting Illegal Phoenixing) Bill 2019 (**Illegal Phoenixing Bill**) are too broad and may be unconstitutional. The primary concern of the Law Council, as stated previously, is that restraining orders relating to the assets of a company suspected of making a creditor-defeating disposition ought to be made by a court. In principle, this should also apply to the making of any interim order and the Law Council questions the proposal to grant administrative power to the Australian Taxation Office (**ATO**) and ASIC to 'freeze' assets in the absence of a judicial determination which requires an independent assessment of the grounds for making the order.

239. However, the Law Council acknowledges that the 48-hour timing requirement and de novo review powers contained in Proposal 22 goes some way to addressing the concerns that have been previously raised by the Law Council. Consideration could also be given for establishing a statutory mechanism to provide recompense to any company for any loss suffered as a result of having assets frozen where the court subsequently finds there are no grounds for making the restraining order.

Proposal 23

a) The *Corporations Act 2001* (Cth) should be amended to establish a 'director identification number' register.

240. The Law Council supports the establishment of a director identification register. The policy basis to support the introduction of a director identification number register is well set out in the 2015 report on Insolvency in the Australian Construction Industry.[114] Verification against another database (State-based drivers licenses and Commonwealth passports) would be positive. It states there are demonstrated errors in the data either provided to ASIC (incorrect information) or actually registered.

Question J

Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor defeating disposition provisions?

241. The supervision and discipline of insolvency practitioners who are liquidators is dealt with at Schedule 2 of the Corporations Act. The law already allows for disqualification of registered insolvency practitioners in circumstances where their conduct falls short of the standard reasonably to be expected of them in their position (such as was observed in *Commissioner of Taxation v Iannuzzi (no. 2)*).[115]

242. However, it is appreciated that the provisions in current law do not make explicit reference to facilitating illegal phoenix activity as a basis for disciplinary action. The Law Council supports explicit reference to that matter so that the current regime applies in this situation. The Law Council is satisfied that the current regime provides a satisfactory mechanism for appeal and review where disciplinary action has been undertaken.

243. The Law Council supports an amendment to the Corporations Act that provides that when a person has been removed from the register of liquidators they may not act as an officer of a corporation or an advisor to a corporation in connection with insolvency matters during the period of removal. The Law Council believes such an approach would be a simple way of disqualifying advisors found to have contravened creditor defeating disposition provisions without the complexity of introducing a licensing or regulatory scheme for pre-insolvency advisors.

244. Such a regime would also assist to encourage greater diligence on the part of the persons who may provide advice in this area. However, it should the noted that many insolvency and restructuring advisors operating as 'pre-insolvency advisors' (as mentioned in paragraph 11.12 of the Discussion Paper) are unlicensed and unregulated. In the absence of the introduction of a system of registration of pre-insolvency advisors under which comparable disqualification penalties could be ordered, the Law Council favours a regime under which unlicensed and unregulated insolvency and restructuring advisors may suffer disqualification from holding appointments as directors or otherwise taking part in management of corporations.

[114] Senate Economics References Committee, Parliament of Australia, *Insolvency in the Australian construction industry* (Report, 3 December 2015).
[115] [2019] FCA 1818.

Question K

Are there any other legislative amendments that should be made to combat illegal phoenix activity?

245. As mentioned above, the Law Council would encourage the introduction of a system of registration of pre-insolvency advisors (i.e. advisors who are not registered liquidators) which would then permit the regulation of such advisors. Some care will be needed in drafting to work out what conduct may constitute being an advisor to a corporation in connection with insolvency matters, so that the new laws are effective without inadvertently catching those providing legitimate advice.

246. The Law Council would encourage a review of the new regime some period after the new laws are implemented to assess their effectiveness and to form a view as to whether standards have improved. An assessment of whether any additional legislative amendments could then be considered after being informed by that experience.

247. Consideration could also be given to ASIC and the Australian Financial Security Authority (including the Personal Property Securities Register) providing free access to their data bases for all registered insolvency appointees and their legal advisors for the purposes of performing searches relating to the affairs of a corporation or bankrupt.

Transnational business

Question L

Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

248. Issues concerning the imposition of due diligence obligations on Australian corporations in relation to extraterritorial offences need to be considered in the context of those particular offences rather than in a generalised way. The Law Council considers that Divisions 14 and 15 of the Criminal Code provide a comprehensive and principled approach to the potential extraterritorial effect of Australia's criminal laws.

249. As noted above, many of the offences in the Criminal Code that have extraterritorial effect reflect Australia's commitments under international human rights frameworks and anti-crime conventions. To the extent a due diligence framework is relevant to the attribution of corporate criminal culpability, the Law Council considers that no additional criteria is necessary to be specified to define what is appropriate due diligence to prevent legal liability for an offshore crime.

250. Consideration of the facts of the various civil penalty proceedings undertaken against officers of the AWB Limited in the Iraq Oil for Food scandal provide a practical illustration of Australian courts considering whether individuals (and by analogy corporations) are acting with appropriate care and diligence in relation to conduct that may occur outside Australia.

251. The Law Council is of the view that the most serious challenges that arise in the enforcement of offshore crime do not relate to the design of Australia's criminal law but to the level of skills and tools available to Australia's enforcement bodies in dealing with the challenges of investigating conduct outside Australia and the need for international co-ordination and co-operation among enforcement bodies. This is an

area where significant progress has been made in recent years, one that requires further work and additional resources.[116]

[116] See, for example, the discussion of this issue Organisation for Economic Co-operation and Development, *Phase 3 OECD Report on Implementing the OECD Anti-Bribery Convention in Australia* (October 2012).