



Law Council
OF AUSTRALIA

Draft guidance on adequate procedures to prevent the commission of foreign bribery

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of its Business Law Section, its National Criminal Law Committee and its Foreign Corrupt Practices Working Group in the preparation of the submission.

Executive summary

1. The Law Council welcomes the opportunity to provide this submission to the Commonwealth Attorney-General's Department in response to the Australian Government's *Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials (Draft Guidance)*, released on 2 December 2019.
2. The Law Council considers that it is entirely appropriate that the proposed legislation that has been introduced contemplates the provision of this guidance. Specifically the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (**the Bill**), introduced in the Senate in December 2019, contains proposed section 70.5B which provides that the Attorney-General must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign officials.
3. The Law Council's input to the Draft Guidance should be read in the context of earlier submissions that the Law Council has made in relation to the Bill to the Senate Legal and Constitutional Affairs Legislation Committee dated 14 January 2020. In that submission, the Law Council has highlighted a number of concerns with the proposed new corporate offence of failing to prevent foreign bribery, recommending that several problematic features of the offence be reconsidered.
4. For the purposes of the Draft Guidance, the Law Council provides the following suggestions for improvement:
 - the use of examples in the Draft Guidance could better draw out practical themes, including the use of real case studies rather than generic examples to provide additional context;
 - the discussion of dishonesty should be clarified to ensure it accurately describes the practical effect of the proposed reforms, that is, an approach that aligns with the High Court's decision in *Peters v The Queen* (1998) 192 CLR 493 (**Peters**). In this regard, the Law Council opposes the inclusion of the *Peters* test in the proposed reforms, and continues to advocate for the existing definition of 'dishonesty' as contained in the Criminal Code to be endorsed;
 - the issue of intermediaries should be addressed in an integrated and comprehensive way rather than in a way that is sprinkled throughout the general discussion in the Draft Guidance;
 - the Draft Guidance could better address the defences available to an 'associate' if they were to be charged with an offence under proposed section 70.2 of the Criminal Code under sections 70.3 and 70.4 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**);
 - there is scope for more tangible examples to be provided as to how a corporation should determine whether an associate has 'sufficient measures in place to mitigate the risk' and 'demonstrate its commitment to integrity' as well as 'implement anti-bribery measures proportionate to the risk as necessary';
 - the Draft Guidance should include a discussion of the accounting records offences that has been introduced into Division 490 of the Criminal Code or that are contained in the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - greater discussion of whistleblowing in the context of Section IV of the Draft Guidance would be of assistance.
 - the Draft Guidance should discuss the different roles performed by directors, senior management and line management in developing and implementing anti-bribery policies and what each groups function is in that regard;

- the definition of a foreign public official should be explained in a more practical way, noting that it is likely to be the case that Australian business would be surprised by how far the definition could extend;
 - the Draft Guidance should stress in the discussion of facilitation payments that Australian corporations should introduce internal controls to identify and escalate internally consideration of payments or conduct that might be considered to involve a facilitation payment;
 - the discussion in paragraphs 137 to 139 of the Draft Guidance relating to hospitality and entertainment policies should reference the need to consider the proportionality of the provision of largesse when considered against what would be regarded as customary in the jurisdiction where the beneficiary lives; and
 - there should be a public commitment to a periodic review of the Draft Guidance as an important commitment to improved standards in this area.
5. Each of these recommendations are further elaborated upon throughout this submission.

Introduction

6. The Law Council supports measures to mitigate the risk of foreign bribery and corruption. Such measures assist in ensuring the integrity and transparency of international business contracts and preventing the exploitation of vulnerable economies and people. This is consistent with Australia's obligations under international conventions and the Law Council's participation in the G20 Anti-Corruption Working Group and Action Plan.
7. The Law Council has previously made submissions to government that practical guidance as to how Australian corporations can take steps to guard against foreign bribery occurring in their organisations would be a positive development to show leadership as to how Australian businesses should manage this risk. This approach accords with similar guidance promulgated in both the United States and United Kingdom (as well as by a variety of non-government agencies).
8. The published guidance is specifically designed to assist bodies corporate from being prosecuted for the new corporate offence contained in proposed section 70.5A of the Bill of failure to prevent bribery of foreign officials by an associate of the corporation where the bribery is done for the profit or gain of the corporation. Proposed subsection 70.5A(5) of the Bill provides a defence where a corporation had in place 'adequate procedures' to prevent the commission of a foreign bribery offence. The Draft Guidance is designed to inform what may constitute 'adequate procedures'.
9. As has been noted in the Organisation for Economic Co-operation and Development (**OECD**) reviews of Australia's compliance with the Foreign Corrupt Practices Directive, there is much that still needs to be done to bring Australia's enforcement regime and business practices up to international best practice in the area of foreign bribery risk minimisation.¹ In light of these observations, the Draft Guidance is a welcome initiative to advance business awareness.

Timing of the Draft Guidance

10. The Draft Guidance is contingent on the passage of the Bill, which is currently before the Senate Legal and Constitutional Affairs Legislation Committee, with a report due on 17 March 2020. The Law Council has provided submissions to this inquiry, and in doing so has raised a number of concerns with the proposed measures together with extensive recommendations for improvement.
11. It is noted that the Draft Guidance assumes the Bill will be enacted in its current form. While the Law Council is engaging with the Draft Guidance for the purposes of the current consultation, the concerns of the Law Council and others with the proposed measures remain outstanding and this submission should not be read as an endorsement of the reforms contained in the Bill in its present form.
12. Further, the Law Council has argued that it would be more appropriate if the adoption of the new corporate offence were to be deferred until recommendations are made by the Australian Law Reform Commission in its Discussion Paper 87 which examines the issues of Corporate Criminal Responsibility, as released on 15 November 2019.²

¹ Organisation for Economic Co-operation and Development, *Implementing the OECD Anti-Foreign Bribery Convention, Phase 4 Report: Australia* (2016) <<http://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf>>.

² Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion paper 87 (November 2019).

Use of examples in the Draft Guidance

13. The use of examples in the Draft Guidance is a welcome approach to illuminate the offence and to illustrate appropriate risk minimisation steps that should be undertaken.
14. However, the Law Council considers the examples of conduct outlined in the Draft Guidance to be formulaic and could do better to draw out practical themes. Generic examples that present a simplistic view of some of the nuances that arise in real world practice risk trivialising the message communicated by the Draft Guidance.
15. There are a variety of case studies internationally involving settlements that have incorporated statements of agreed facts and structured settlements that could be used to provide additional context and warrant broader dissemination as an educational tool within Australia. The Law Council considers that the actual discussion of the conduct that has led to substantial penalties against prominent multinational organisations to be a more helpful learning tool than the more generic references to behaviours that are described as examples in the Draft Guidance.
16. While legal regimes in other jurisdictions may be different to the Australian regime there is significant commonality in the type of conduct that should be considered as proscribed. In particular, the Law Council considers that the case studies set out in the United States Foreign Corrupt Practices Act Resources Guide (**FCPA Resource Guide**)³ offers more sophisticated and nuanced examples than those described in the Draft Guidance and would be of assistance to Australian business.
17. The Law Council understands the reticence of the Australian government to reference individual multinational enterprises that have entered foreign corrupt practices settlements in its guidance. The identity of individual enterprises need not be referenced in the examples used - see for example some of the anonymised case studies in the FCPA Resource Guide.
18. There are now some Australian case studies that could be appropriately described that would also add useful context to the risks that should be managed.

Clarifying ‘improperly influence’

19. The Law Council notes that Schedule 3 of the Bill seeks to insert a test of dishonesty into the Criminal Code that aligns with the High Court’s decision in *Peters*, and the Draft Guidance is premised on this definition being incorporated into the Criminal Code. In its submission to the Bill to the Senate Legal and Constitutional Affairs Legislation Committee, the Law Council has strongly opposed the inclusion of the *Peters* test in such reforms and continues to advocate for the existing definition of ‘dishonesty’ as contained in the Criminal Code to be endorsed. The Law Council maintains that people should not be convicted of serious criminal offences of dishonesty in the absence of subjective intent.⁴
20. In the event that the Bill proceeds in its current form (noting the Law Council’s opposition to this approach), the Law Council notes that that paragraph 14 of the Draft Guidance should be clarified to ensure it is accurately describing the assessment of

³ U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, Resource Guide to the United States Foreign Corrupt Practices Act (November 2012) <<https://www.justice.gov/criminal-fraud/fcpa-guidance>>

⁴ See Law Council of Australia’s submission to the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (14 January 2020), [19].

'dishonesty' under the proposed reforms. Currently, this passage refers to the requirement that a defendant 'must have realised his or her conduct was dishonest', albeit with reference to an objective standard. This is the position which the Law Council supports, and is not aligned with the approach in *Peters*.⁵

21. In providing input to the Bill, the Law Council has also raised concern about the ambiguity surrounding the term 'improperly influence'. Unfortunately, the Draft Guidance does not diminish this uncertainty as it states the 'determination as to whether influence is improper is a matter for the courts, and will be made on a case by case basis'.⁶ The Law Council suggests that it may be helpful to include the list of relevant factors set out in proposed subsection 70.2A(3) of the Bill that the court can consider in determining 'improperly influence' as well as some discussion of those factors to assist in providing some clarification of this concept.

Dealings with intermediaries

22. The Law Council considers that a particularly difficult issue for Australian business to grapple with in the area of foreign bribery is what is expected of them in their dealings with and use of intermediaries and agents in foreign jurisdictions. Poorly supervised activities of intermediaries have been demonstrated in many offshore circumstances to cause considerable risk. The Law Council believes this is an area where particular assistance and guidance can be provided to Australian business.
23. Issues surrounding intermediaries are discussed in the Draft Guidance in example 2 at paragraphs 35 to 37 and paragraphs 83.5, 88(a) and (f), 90, 98, 104-7, 132-3 and 144-7. The Law Council considers it would be more helpful to discuss the issue of intermediaries in an integrated and comprehensive way rather than in a way that is sprinkled throughout the general discussion in the Draft Guidance.
24. The 2009 OECD report on the Typologies on the Role of Intermediaries in International Business Transactions illustrates the significance of the use of intermediaries in facilitating bribery and explains why focus on risk minimisation in this area should be a particular focus.⁷ The Law Council considers that wilful blindness to possibly corrupt behaviour entered into by intermediaries should be emphasised as particularly problematic behaviour and given greater prominence than the discussion set out in footnote 2 on page 11 of the Draft Guidance. The discussion of the wilful blindness issue on pages 22 and 23 of the FCPA Resources Guide is instructive and would merit more specific discussion in the Draft Guidance.
25. However, the Law Council notes that while the concept of 'wilful blindness' forms part of the proposed reform measures, including references in the Explanatory Memorandum to the Bill, it is important to acknowledge that this remains a difficult concept to be applied in practice and for this reason has been deliberately omitted from the Criminal Code fault elements. Rather than 'wilful blindness', the Criminal Code refers to the fault element of 'recklessness' to capture a situation where a person engages in prohibited conduct, knowing there is a substantial risk that such conduct is prohibited. The Law Council therefore urges caution in the development of any guidance material relating to wilful blindness and submits that further stakeholder consultation should take place in this regard.

⁵ *Peters v The Queen* (1998) 192 CLR 493, per Toohey and Gaudron JJ [18].

⁶ Draft Guidance, [12].

⁷ Organisation for Economic Cooperation and Development, Working Group on Bribery in International Business Transactions, Typologies on the Role of Intermediaries in International Business Transactions, *Final Report* (9 October 2009).

26. More specific discussion of risks and expectations concerning the general range of factors in dealings with intermediaries along the lines of paragraph 4.4 to 5 of the United Kingdom Ministry of Justice, *Bribery Act 2010: Guidance to help commercial organisations prevent bribery* (2012) (**UK Guidance**)⁸ and pages 60-5 of the FCPA Resources Guide (rather than the general factors listed in paragraph 98) would be helpful in a standalone section in Part 2 of the Draft Guidance. Reference to Transparency International's adequate procedures checklists might also be of assistance in this area.⁹

Defences available to an associate

27. In relation to the Draft Guidance on 'What defences are available' on page 11 of the Draft Guidance, the Law Council considers the Draft Guidance should also list the defences available to the 'associate' if they were to be charged with an offence under proposed section 70.2 of the Criminal Code under sections 70.3 and 70.4 of the Criminal Code, the defence of local law and that relating to facilitation payments, and pointing out there may be other defences available under the Criminal Code, for example duress or honest and reasonable mistake of fact.
28. The Law Council has raised concerns with the Bill's treatment of 'associates' with the Senate Legal and Constitutional Affairs Legislation Committee, noting that the proposed approach represents a very different approach to legal liability when compared with the current corporate criminal responsibility provisions under Part 2.5 of the Criminal Code. Importantly, any such guidance, should the reforms proceed, ensure consistency with the concepts of accessorial liability as set out in the Criminal Code and the existing principles relating to the attribution of criminal responsibility.

Due Diligence

29. The Law Council notes that the Draft Guidance has a section as to due diligence on page 23 designed to provide guidance for corporations in situations where an associate not controlled by the corporation, may in the course of providing services for the corporation, nonetheless potentially commit a foreign bribery offence for the profit or gain of the corporation. Despite the Draft Guidance stating 'Associates in this category may include joint venture partners or other contractual relationships where the corporation has little control over the other entity'¹⁰ the Corporation is still expected to exercise a degree of due diligence.
30. The Draft Guidance states, for example, the 'corporation should determine whether the associate has sufficient measures in place to mitigate the risk' and 'demonstrate its commitment to integrity' as well as 'implement anti-bribery measures proportionate to the risk as necessary'.¹¹ However, there could perhaps be practical guidance provided as to what this might entail, and given the corporation may have little control over the manner in which the associate operates in practice the Law Council suggests that perhaps some more tangible examples could be included in the Draft Guidance.

⁸ United Kingdom Ministry of Justice, *Bribery Act 2010: Guidance to help commercial organisations prevent bribery* (2012), pp 27-28.
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf>.

⁹ Transparency International (UK), *The 2010 UK Bribery Act Adequate Procedures Checklist* (May 2012) <https://www.transparency.org.uk/publications/adequate-procedures-checklist-pdf/>.

¹⁰ Draft Guidance, paragraph 106.

¹¹ *Ibid.*

31. For example, it could suggest that in any contract between the associate and the corporation that the associate, not engage in any illegal foreign bribery activity in order to facilitate any profit or gain for the corporation. However, the Law Council notes that the Draft Guidance does suggest some practical steps that can be taken such as preparing a 'questionnaire for the associate to complete, web-searches, searches of relevant government/public databases and lists or inquiries of third parties'.
32. The Law Council considers that emphasis should be also placed in the Draft Guidance on ensuring there is information, education and training by the body corporate to those agents, employees or 'associates' concerning the definition and meaning of 'foreign bribery'.
33. The Law Council is also concerned by the suggestion in the Draft Guidance¹² that companies should consider terminating relationships or not proceeding with transactions with non-controlled 'associates' where the company is unable to require the 'associate' to implement anti-bribery measures. This suggestion is problematic for a number of reasons. First, where a corporation does not exercise control over an 'associate', it is unlikely the corporation will be in a position to 'require' the 'associate' to put in place anti-bribery measures. Accordingly, the Draft Guidance appears to cut across legitimate passive investments, and potentially render Australian companies at a competitive disadvantage. Second, even if some companies may be able to exert influence over non-controlled 'associates' to encourage them to implement anti-bribery measures, this will not be the case for all companies. The binary approach suggested by the Draft Guidance will disadvantage companies with less influence. Third, many joint venture relationships are very long term, and participants will not necessarily have the right to terminate simply because another participant will not implement satisfactory anti-bribery measures.
34. In such cases, the Draft Guidance (as currently drafted) may suggest that companies should (in order to follow the guidance) put themselves in breach of an existing contract by terminating the arrangement (and expose the company and its shareholders to costly legal proceedings). Further, the suggested 'cut-and-run' approach creates a false dichotomy between implementing anti-bribery measures and terminating or not proceeding with a relationship.
35. The Law Council considers that the Draft Guidance should make clear that what constitutes 'adequate procedures' will depend on the facts and circumstances, and that a factor relevant to the determination will be the degree of control over the 'associate'. To this end, the Law Council is supportive of the equivalent guidance by the UK Ministry of Justice that the 'question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation'.¹³
36. The Law Council considers that it would be beneficial for the Draft Guidance to provide guidance on alternatives short of termination of a relationship and make clear that ending a relationship should be viewed as a last resort. The ability of Australian companies to take a leading role in global bribery prevention will not be promoted by encouraging companies to withdraw from international contracts and ventures.

¹² Draft Guidance, paragraphs 106 and 155.

¹³ United Kingdom Ministry of Justice, *Bribery Act 2010: Guidance to help commercial organisations prevent bribery* (2012), 6.

Successor liability

37. The direct and indirect liability of an entity that acquires a corporation that has engaged in foreign bribery raises potentially significant issues for Australian business. The Law Council considers this is a broader issue than the discussion of due diligence on foreign subsidiaries after they have been acquired at paragraphs 150 to 155 of the Draft Guidance.
38. This issue and the need for undertaking targeted pre acquisition due diligence to assess foreign bribery risks as part of mergers and acquisition transactions would benefit from discussion in the Draft Guidance. In this regard it is useful, by way of comparison to refer the FCPA Resources Guide.¹⁴

Books and record offences

39. The Draft Guidance does not contain a discussion of the accounting records offences that has been introduced into Division 490 of the Criminal Code or that are contained in the Corporations Act.
40. The Draft Guidance would benefit from some discussion of these offences and expectations of the conduct required of company officials (paragraph 28 of the Draft Guidance notes an incorrect books and records entry but does not discuss the consequences while paragraph 88(h) is not very specific). The Law Council suggests that pages 38-9 of the FCPA Resources Guide is an example of the type of discussion that could be included. In that regard, using an actual example of a successful prosecution of a company officer for accounting irregularities in a related context is useful and deserves some publicity through the Draft Guidance.

Whistleblowing

41. The Law Council considers that the relationship of anti-bribery practices and policies to whistleblowing could be more usefully highlighted and discussed in the guidance. Experience, both in Australia and globally, suggest that whistleblowing disclosures are an important source for investigations concerning foreign corrupt practices. The whistleblowing provisions of the Corporations Act were significantly strengthened in 2019, including through a requirement for formal whistleblowing policies for all significant Australian companies by 2020.¹⁵
42. Greater discussion of whistleblowing in the context of Section IV of the Draft Guidance would be of assistance.¹⁶

Role of board and management

43. In the Law Council's opinion, the different roles of management and directors in developing and supporting anti-bribery policies and procedures could be better delineated.

¹⁴ U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *Resource Guide to the United States Foreign Corrupt Practices Act* (November 2012), pp 28-33 <<https://www.justice.gov/criminal-fraud/fcpa-guidance>>.

¹⁵ See the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.

¹⁶ For example, see the discussion at pages 82-3 of the FCPA Resources Guide.

44. In general terms the role of directors is to set corporate strategies and policies and to appoint and review the performance of management. Management is charged with the implementation of corporate policy and strategy.
45. The Draft Guidance notes the responsibility of management personnel in developing and promoting anti-bribery policies.¹⁷
46. It would be helpful for the guidance to note and discuss the different roles performed by directors, senior management and line management in developing and implementing anti-bribery policies and what each groups function is in that regard (including setting the right 'tone' at the top). In that regard the Law Council notes Section 2.4 of the UK Guidance may be of assistance as an example.

Perverse employee remuneration incentives

47. The structure of employee remuneration incentives may have a distorting effect on conduct engaged in by employees operating in foreign jurisdictions and may encourage excessive risk taking and lead to bribery. Many case studies illustrate that remuneration structures that encourage a 'whatever it takes' attitude to winning new business in foreign jurisdictions and insufficient encouragement of care and due diligence are particularly problematic issues. The Draft Guidance discussion of managements' role does not explicitly discuss this issue.¹⁸
48. In this regard a broad analogy can be drawn to distorted remuneration practices within Australian financial institutions that were the subject of criticism by the recent banking royal commission.¹⁹ In this context reference to certain principles described in the Australian Prudential Regulation Authority (**APRA**) Practice Guide 511 might be of assistance.²⁰
49. The importance of correctly aligned incentives that discourage bribery could therefore be usefully discussed. For example, it may be useful to compare the discussion at page 13 of the FCPA Resources Guide.

Description of a foreign public official

50. The Law Council notes that the Draft Guidance references in very general terms the definition of foreign public official.²¹
51. The Law Council considers it would be beneficial to explain the definition in a more practical way and consider it is likely to be the case that Australian business would be surprised by how far the definition could extend. For example, it could extend to officers of commercial corporations where government has a controlling shareholding or disproportionate influence or persons involved with public institutions where a person might not generally be seen as a government official (an example is a medical professional working in a public hospital).

¹⁷ Draft Guidance, paragraphs 100-103.

¹⁸ Draft Guidance, paragraph 102(e).

¹⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (February 2019).

²⁰ Australian Prudential Regulation Authority, Australian Government, *Prudential Practice Guide SPG – 511* (November 2013) <https://www.apra.gov.au/sites/default/files/prudential-practice-guide-spg-511-remuneration_0.pdf>.

²¹ Draft Guidance, paragraph 11.

52. The contrast in the proposed Draft Guidance to the discussion of this issue on pages 20-1 of the FCPA Resources Guide is instructive.

Facilitation payments

53. The Law Council supports the approach adopted in the Draft Guidance to discourage Australian businesses from making facilitation payments.²² The Law Council considers that from the experience of its Foreign Corrupt Practices Working Group, most major Australian businesses now default to the *Bribery Act 2010* (UK) provisions when considering issues surrounding facilitation payments.
54. The Law Council considers that it is unhelpful to imply in the Draft Guidance that facilitation payments can ever be considered 'legitimate' or appropriate conduct. An exception to the bribery offence does not confer legitimacy on demands for unauthorised payments by calling them facilitation payments. The Law Council has previously supported the removal of the facilitation payments defence from the Criminal Code.²³ A better approach would be to refer to conduct involving the payment of facilitation as lacking the essential element of conferring benefits to seek to obtain or retain business. The distinction, including the use of hypothetical examples is discussed at page 25 of the FCPA Resources Guide may be of assistance in this area.
55. The Law Council considers that it would be helpful for the Draft Guidance to stress in the discussion of facilitation payments that Australian corporations should introduce internal controls to identify and escalate internally consideration of payments or conduct that might be considered to involve a facilitation payment.
56. In this context the Law Council considers that it would be helpful for the Draft Guidance to include a discussion of the measures Australian business might adopt to provide support and guidance to employees located in foreign jurisdictions who are confronted with behaviours by foreign government officials that might be considered to involve a facilitation payment. Those measures may also reference government diplomatic channels that might be used to assist in resisting facilitation payments. For example, see the discussion in the UK Guidance concerning facilitation payments.²⁴ The Law Council also notes the question raised in paragraph 44 of the Draft Guidance is not clearly answered and should contain more detail as to how the issue raised can be resolved.
57. The Law Council suggests that the last paragraph in the 'Note' in the highlighted section on pages 8 and 9 of the Draft Guidance be removed as it undermines the basic message that should be clearly communicated by government.

Guidance as to reasonable hospitality

58. The Law Council notes that the discussion in paragraphs 137 to 139 of the Draft Guidance relating to hospitality and entertainment policies does not reference the need to consider the proportionality of the provision of largesse when considered against what would be regarded as customary in the jurisdiction where the beneficiary lives.

²² Draft Guidance, paragraph 8.

²³ Law Council of Australia 'Amendments to the foreign bribery offence' Submission to the Attorney General's Department's consultation: Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995 (8 May 2017), [30].

²⁴ United Kingdom Ministry of Justice, *Bribery Act 2010: Guidance to help commercial organisations prevent bribery* (2012), 33.

59. While this is a relatively minor issue in the overall context of the hospitality discussion, the Law Council considers that is an important reference point in practice that such a comparison should be a relevant consideration. The Law Council notes that what might be considered modest hospitality in a developed country like Australia might be considered vast extravagance in a third world country in the context of a low level official.
60. In the context of the issues relating to 'hospitality' generally the Law Council considers that the principles set out in the discussion at pages 15 to 18 of the FCPA Resources Guide may provide a useful example to consider in the course of settling the Draft Guidance.

Review of guidance

61. The Law Council considers that it would be helpful for government to commit to periodic review of its guidance.
62. It is likely both government and Australian business will learn from the promulgation of guidance and enforcement developments over the coming years. Just as a corporate anti-bribery policy should be seen as a living document that should be informed by experience in its application, so should the guidance given by government. As such a public commitment to periodic review and consultation (say on a 3 year cycle) should be seen as an important commitment to improved standards in this area.