

10 May 2019

The Hon Justice S C Derrington  
President  
Australian Law Reform Commission  
PO Box 12593  
George Street  
BRISBANE QLD 4003



By email: [corporatecrime@alrc.gov.au](mailto:corporatecrime@alrc.gov.au)

Dear President

### **Review into Australia's corporate criminal responsibility regime**

The Law Council of Australia welcomes the opportunity to provide comment to the Australian Law Reform Commission (**ALRC**) on the scope of the inquiry and issues relevant to its Terms of Reference for the review into Australia's corporate criminal responsibility regime (**the Review**).

The Law Council is grateful for the assistance of its National Criminal Law Committee and Corporations Law Committee of its Business Law Section in preparing this submission.

The Law Council acknowledges that corporations and the people who carry out the activities of corporations should be held to the general standards of criminal responsibility that apply to all members of the community, with the same application of the principles that underpin the rule of law.

I note that the Terms of Reference determined by the Commonwealth Attorney-General, the Hon Christian Porter MP, request the ALRC to review the following matters:

- the policy rationale for Part 2.5 of the Commonwealth Criminal Code contained in Schedule 1 of the *Corporate Criminal Code Act 1995* (Cth) (**the Code**);
- the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;
- the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness, including mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct;
- the appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations; and
- options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime.

The established general principles of criminal responsibility contained in Schedule 1 of the Code and the policy rationale contained in the Model Criminal Code Committee Report released in 1992<sup>1</sup> set out fundamental provisions and rationale which were the subject of careful examination and extensive consultation. The Law Council encourages the ALRC to consider these as the starting point for any review, including of Part 2.5 of the Code.

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<sup>1</sup>See especially the statement of principle applicable to corporations at 105-109 of the Criminal Law Officers of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2 - General principles of criminal responsibility* (Final Report, December 1992).

Further, corporate and individual criminal liability has been extended in specific legislation, such as the *Corporations Act 2001* (Cth) (**Corporations Act**) or in the area of occupational health and safety.<sup>2</sup> Some of these specialised regimes include provisions where individuals are made liable for conduct on bases inconsistent with the general criminal law. For example, in occupational health and safety legislation, criminal liability is imposed for civil negligence rather than criminal negligence. Accordingly, the review should consider how changes to the general principles of corporate criminal responsibility interact with these specialised legislative schemes.

In addition, the Law Council encourages the ALRC to consider the following issues as relevant to the scope of its inquiry and the Terms of Reference:

- corporate criminal responsibility and its cross-over with individual criminal responsibility (such as liability of officers of corporations) in the context of the application of principles of complicity, including conspiracy, joint criminal enterprise, extended joint criminal enterprise and accessorial liability and whether reform is needed to clarify the law in these areas;
- the appropriate test of dishonesty if applicable to a corporate entity;
- in many situations legislation does not adopt the individual and corporate criminality responsibility regime specified in Chapter 2 of the Code but adopts alternative mechanisms to apply in specific circumstances. For the reasons given above, departures from the general principles of criminal responsibility need strong justification and this should be considered in relation to the Terms of Reference, both with respect to corporations and individuals working within them;
- relevant available enforcement alternatives and identification of considerations that a regulatory agency should apply in the so-called 'enforcement pyramid';<sup>3</sup>
- current sanctions for corporate criminal liability and alternative sanctions to promote corporate responsibility and early resolution of proceedings;
- the application and fitness for purpose of criminal procedure laws and rules in the various jurisdictions with responsibility to implement corporate criminal laws; and
- without limiting the above, the appropriateness of the application of section 769A and section 769B of the Corporations Act to Chapter 7 of the Corporations Act.

If you are of the view that any of these issues do not arise within the current Terms of Reference, can I respectfully suggest you request that the Attorney-General amend the Terms of Reference.

Thank you for your consideration, the Law Council looks forward to participating in the review over the coming year and would be pleased to assist the ALRC in any way.

Please contact Christopher Brown, Senior Policy Lawyer, at first instance on 02 6246 3732 or at [Christopher.brown@lawcouncil.asn.au](mailto:Christopher.brown@lawcouncil.asn.au) if you would like any additional information or to discuss this further.

Yours sincerely



**Arthur Moses SC**  
**President**

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<sup>2</sup> See, eg, *Occupational Health and Safety Act 2004* (VIC) considered in *DPP v JCS Fabrications Pty Ltd and Anor* [2019] VSCA 50 (13 March 2019).

<sup>3</sup> See, eg, Treasury, *ASIC Enforcement Review - Strengthening Penalties for Corporate and Financial Sector Misconduct* (Positions Paper 7, 2017) 7, [1.1].