

**Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995 (Cth)*
Public Consultation Paper**

Submission to the Attorney-General's Department

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Response to the proposed amendment to ‘create a new corporate offence of failing to prevent foreign bribery’.

1. Summary

- 1.1 There is a strong case for creating a new offence of “failure to prevent foreign bribery” (FPFB). Consistent with earlier submissions,¹ we support the enactment of a new FPFB offence subject to the following qualifications.
- 1.2 We have identified a number of issues with the proposed FPFB offence:
 - 1.2.1 There is a real risk that the proposed FPFB offence will become a ‘fall-back’ offence, used to prosecute *all* cases in which corporations have failed to prevent foreign bribery. This is problematic, as a matter of principle and policy, since the proposed offence does not reflect the different levels of fault associated with intention, knowledge, recklessness or inadvertence/negligence, attributed to the corporation, in failing to implement adequate procedures preventing foreign bribery. It also limits the courts’ ability to apply higher penalties to reflect the increased seriousness of the offence (in terms of culpability or consequential harm).
 - 1.2.2 In general terms, the proposed FPFB offence appears not to have been drafted with reference to the *Guide to Framing Commonwealth Offences* (2011). Specifically, insufficient justification has been provided in the explanatory materials for framing the offence as one of strict liability and shifting the legal burden to the corporation.
- 1.3 We offer the following recommendations to address these issues:
 - 1.3.1 The Office of the Commonwealth Director of Public Prosecutions (CDPP) must publish comprehensive Prosecution Guidelines relating to Foreign Bribery Offences (similar to those in the US and UK). Specifically, these Guidelines should address the following:
 - 1.3.1.1 In all cases where there is prima facie evidence that corporation **intentionally, knowingly or recklessly** failed to act to prevent bribery, priority consideration must be given to prosecution of the corporation, applying the general corporate criminal responsibility principles in Part 2.5 of the *Criminal Code Act 1995* (Cth).
 - 1.3.1.2 The proposed FPFB offence should be used only as a *minor* regulatory offence in situations where the corporation has inadvertently or negligently failed to implement adequate procedures to prevent offending conduct by its officers, employees or agents.
 - 1.3.2 The existing offence of bribing a foreign official (s 70.2) should be amended to provide for an alternative verdict of FPFB where the jury is not satisfied that there has been an intentional, knowing or reckless failure to prevent

¹ See for example S Bronitt, N Passas, W Pei and C Widmaier, ‘Submission to the Senate Standing Committee on Economics Committee’, Submission 35; see also S Bronitt, ‘Policing corruption and corporations in Australia: towards a new national agenda’ (2013) 37 (5) *Criminal Law Journal* 283.

foreign bribery under the corporate criminal responsibility provisions in Part 2.5 *Criminal Code Act 1995* (Cth).

- 1.3.3 Further consideration of the case for strict liability is needed in accordance with *A Guide to Framing Commonwealth Offences* (2011). Strict liability for a minor regulatory offence may require further justification. In the alternative, the fault element for the proposed FPFb may be amended to permit the offence to be satisfied by negligence, or modifying the strict liability standard by placing an evidential, rather than legal, burden on the offender to prove the conduct was not culpable.
- 1.3.4 We endorse the proposal to extend liability to cover the conduct of ‘associates’ as defined in the proposed amendments (i.e. an employee, agent, contractor or subsidiary of the other person, [a person] controlled by the other person or [who] performs services for or on behalf of another person’).² To ensure consistency in the law, we recommend that Part 2.5 of the *Criminal Code Act 1995* (Cth) be similarly amended to extend liability to the conduct of ‘associates’.

2. Framing Offences: A Graded Approach to Culpability and Harm

- 2.1 As noted above, we are concerned that the proposed FPFb offence will become a ‘fall-back’ offence, used to prosecute *all* cases where corporations fail to prevent foreign bribery. This approach fails to recognise the different levels of culpability involved in failing to prevent the crime of foreign bribery. A body corporate may fail to implement adequate procedures to prevent foreign bribery due to carelessness or ineptitude (which would fall within negligence). Equally however, a corporation may fail to prevent foreign bribery *intentionally, knowingly, or recklessly*.

2.1.1 The range of states of corporate fault is apparent from the recent English decision of *R v Hayes* [2015] EWCA Crim 1944 which involved the corporate toleration of serious dishonesty in the manipulation of financial markets.³ In this case, Mr Hayes, a derivatives trader of Japanese Yen London Interbank Offered Rate (‘Libor’), was charged with eight counts of conspiracy to defraud having attempted to manipulate foreign currency rates. Although he admitted to having engaged in this behaviour, he pleaded not guilty on the basis that he had not acted dishonestly. The defence submitted that not only were others in the market undertaking the same practices, but his employers were aware of his actions. He contended that his actions were ‘standard market practice’ and sought to admit evidence that:

- he was ‘never trained in the Libor process and, in particular, as to what was or was not a legitimate consideration for a submitter to take into account’;
- ‘he had no regulatory or compliance obligations imposed on him by either UBS or Citigroup when he was employed by them’;

² Commonwealth Attorney-General’s Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 15.

³ *R v Hayes* (Tom Alexander) [2015] EWCA Crim 1944.

- ‘his actions were not only condoned, but also encouraged by his employers and he was instructed to act in the way which he did’;⁴ and
- the ‘Bank of England and the Financial Services Authority... [refused] to step in or Regulate LIBOR... despite knowing that (a) the benchmark suffered from flawed governance and (b) the LIBOR rate was not accurate.’⁵

- 2.5 The Libor scandal was described by the Assistant Attorney-General of the US Department of Justice as ‘one of the largest, if not the largest white-collar case in history’.⁶ The routine practice of banks at the time ‘repeatedly attempt[ing] to manipulate and ma[k]e false, misleading or knowingly accurate submissions concerning... global benchmark interest rates’⁷ demonstrates how deviant behaviours can become entrenched and even encouraged within an industry’s culture and operational practices.⁸
- 2.6 On the other hand, there may be circumstances where the failure to prevent the criminal conduct does not result from *culpable* conduct in a legal or regulatory sense but rather may be seen as merely ‘careless’.⁹ For example, the banking crisis in Ireland has been described as not being ‘so much a matter of conscious recklessness as of systematic miscalculation or misjudgement of risks’.¹⁰
- 2.7 To ensure that culpable corporate failures (involving intentional, knowing or reckless conduct) are prosecuted under the most appropriate (and serious) charge, prosecutors should first consider whether the brief of evidence discloses *prima facie* evidence of the commission of the more serious offence (*viz.*, bribing a foreign official: s 70.2). Inadvertent, careless or negligent conduct should be prosecuted under the less serious proposed ‘regulatory’ FPFb offence.
- 2.8 The imperative to draw graded distinctions between offences underscores core principles of criminalisation and criminal responsibility: the importance of distinguishing between crimes and penalties based on different levels of ‘moral culpability’ is often explained by reference to the principle of ‘representative’ or ‘fair labelling’.¹¹ As a normative ideal, aims to ensure that ‘widely felt distinctions between different kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled to represent fairly the nature and magnitude of the law breaking’.¹² Differentiating between offences

⁴ *R v Hayes* (Tom Alexander) [2015] EWCA Crim 1944, at [8].

⁵ *R v Hayes* (Tom Alexander) [2015] EWCA Crim 1944, at [25].

⁶ *PBS Frontline*, ‘Lanny Breuer: Financial Fraud has not gone unpunished’ (22 January 2013).

⁷ Commodity Futures Trading Commission, Release pr6289-12, *CFTC Orders Barclays to pay \$200 Million Penalty for Attempted Manipulation of False reporting concerning LIBOR and Euribor Benchmark Interest Rates* (27 June 2012), available at www.cftc.gov/PressRoom/PressReleases/pr6289-12.

⁸ George Gilligan, ‘“Bad” behaviour in international financial markets: national and multilateral perspectives’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 260.

⁹ Bob Ferguson, ‘Sanctions, incentives and better behaved banks’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 91, 97.

¹⁰ Bob Ferguson, ‘Sanctions, incentives and better behaved banks’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 91, 98.

¹¹ Andrew Ashworth, *Principles of Criminal Law* (2006), 88 – 90; James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 (2) *Modern Law Review* 217.

¹² James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 (2) *Modern Law Review* 217 citing Andrew Ashworth, *Principles of Criminal Law*, 88 – 90.

based on degrees of fault performs a symbolic function: ‘it can symbolise a degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded’.¹³

- 2.10 More serious omissions to prevent foreign bribery can and *should* be prosecuted under the corporate criminal responsibility provisions in Part 2.5 of the *Criminal Code Act 1995* (Cth). The objections to applying the ‘organisational blameworthiness’ or corporate culture model have been overstated. Sections 12.3(2)(c) and (d) treat ‘proof of absence of a culture of compliance and proof of the existence of a culture of non-compliance as equivalent grounds for the conclusion that the corporation gave its authorisation or permission for the offence’.¹⁴ These sections ‘reflect a “holistic”... approach to corporate fault or liability by which corporations are only at fault if they failed to take appropriate measures’ to prevent the non-compliance.¹⁵ Although clearly innovative, these sections have not been tested in the courts. When these principles of corporate responsibility are coupled with the existing offence of bribing a foreign official (s 70.2), it is apparent that many organisational failures to prevent bribery may be criminalised through sections 12.3(2)(c) and (d) of the *Criminal Code Act 1995* (Cth). The Code further clarifies that corporate forms of negligence may be evidenced by inadequate corporate management, control or supervision of the conduct of one or more of the corporation’s employees, agents or officers or by the failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate (s 12.4(3)).
- 2.11 *A Case for Alternative verdicts?* Due to the considerable potential overlap between corporate criminal responsibility for the offence of bribing a foreign official (Part 2.5 with s 70.2 *Criminal Code* (Cth)) and the proposed FPFb offence, it is desirable to amend the primary offence (s 70.2) to permit an alternative verdict of FPFb (whether trial by judge alone or jury), in cases where the physical elements are satisfied, but the prosecution did not discharge its burden in relation to fault elements of intention, knowledge or recklessness.
- 2.13 Under the *Criminal Code* (Cth), alternative verdicts are available for certain theft, fraud, bribery and related offences;¹⁶ drug offences;¹⁷ perjury and for perverting the course of justice.¹⁸ In other Australian criminal jurisdictions, alternative verdicts include those for murder/manslaughter;¹⁹ common assault/wounding;²⁰ and theft/obtaining property by deception.²¹ The advantage of using an alternative verdict in related offences is that ‘the prosecution is relieved of the burden of choosing between charges at a time when the factual circumstances surrounding the alleged

¹³ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 (2) *Modern Law Review* 217.

¹⁴ Olivia Dixon, ‘Corporate criminal liability: the influence of corporate culture’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 260 citing Ian Leader-Elliot, ‘The Commonwealth Criminal Code: A Guide for Practitioners’, (March 2002) 321.

¹⁵ See Radha Ivory and Anna John, “Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations” (2017 unpublished m/s). See also Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2001), 159.

¹⁶ See *Criminal Code Act 1995* (Cth), Division 3.9.2 ‘Alternative verdicts – Ch 3’;

¹⁷ See *Criminal Code Act 1995* (Cth), Part 6.6 ‘General Provisions for drug offences’, ss 634 – 636A.

¹⁸ See *Criminal Code Act 1995* (Cth), ss 727 – 728.

¹⁹ See for example *Crimes Act 1958* (Vic), ss 421(6)(2) and (10)(3).

²⁰ *Crimes Act 1900* (ACT), s 49; *Criminal Code* (NT), s 315; *Criminal Code* (Qld), s 575; *Criminal Code* (Tas), s 334A.

²¹ See for example *Criminal Code* (ACT), ss 370 – 372; provisions governing alternate verdicts for theft and obtaining property by deception have also been included in the Model Criminal code – see cl 17.2(6), MCCOC, *Chapter 3 – Theft, Fraud, Bribery and Related Offences*, Final Report (1995) p 39.

offence may not be revealed'.²² It has also been recognised that the interests of justice may demand that lesser alternatives be left to the jury or judge 'to guard against the... dangers of [being] faced with a false choice' which could lead a jury or judge to either acquit where the accused should be convicted of an alternative offence, or convict the accused for a more serious offence out of fear that an accused may be let off 'scot-free'.²³

- 2.14 *Sentencing Framework* Different levels of culpability *should* also be reflected in the sentencing framework applied to foreign bribery offences. Under the present proposal, the penalty for a body corporate under the *Criminal Code Act 1995* (Cth) is the same as the proposed FPFb offence. To address the concerns above, a graded approach to penalties should also be applied: penalties should be significantly higher where the corporation is found liable under the general principles governing 'corporate criminal responsibility'. Less severe penalties should be applied to strict liability cases under the proposed FPFb.
- 2.15 The proposed FPFb envisages two maximum penalties: the first and highest applies in those cases 'where the underlying offence by the associate is the intention offence in new section 70.2'²⁴, and a lower penalty applies in cases 'where the underlying offence is the recklessness offence in new section 70.2A'.²⁵ While we agree that there should also be a graded approach to penalties as part of the FPFb offence, we submit that the current approach which is linked to the fault element of the underlying offence, is problematic. There may be situations where the harmful consequences of an act will not be directly linked to the fault element accompanying the underlying conduct of the associate of the corporation. It is conceivable, for example, that a reckless act of the associate, which has not been prevented over a prolonged period of time will be more harmful (to financial markets, consumer protection and/or public safety) than a single act of an associate, albeit accompanied with intention, of the corporation.
- 2.16 **Recommendations:**
- 2.16.1 Prosecution Guidelines should provide that in cases where corporate failures have been more culpable (that is, it is intentional, reckless or based on knowledge) *and* harmful (to markets, employees and the wider community), offenders should be prosecuted under the offence of 'bribing a foreign official' (section 70.2), which carries a higher sentence. A criticism of Part 2.5 of the *Criminal Code Act 1995* (Cth) has been that '[t]o impose personal liability on directors and officers for the subculture of a business unit fails to recognise that directors and officers may have had little or no knowledge of the business unit's subculture'.²⁶ In this type of case, under our proposed graded offence

²² Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2016) Ch 12, 'Property offences' [12.100].

²³ See Judicial College of Victoria, Bench Notes, [3.9.1] 'Alternative Verdicts': <www.judicialcollege.vic.edu.au/eManuals/Downloadable%2520documents/3.9.1%2520-%2520Alternative%2520Verdicts/Verdicts%2520and%2520Jury%2520Deliberation%2520-%2520Alternative%2520Verdicts%2520-%2520Bench%2520Notes.doc+&cd=2&hl=en&ct=clnk&gl=au>

²⁴ Commonwealth Attorney-General's Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 15.

²⁵ Commonwealth Attorney-General's Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 16.

²⁶ John HC Colvin and James Argent, 'Corporate and personal liability for "culture" in corporations?' (2016) 34 (1) *Company and Securities Law Journal* 30, 40.

model, the lesser regulatory offence of ‘failure to prevent foreign bribery’ should be used. Similarly, where a corporation has been charged with the primary offence of ‘bribing a foreign official’, but the jury or trial judge cannot be satisfied that the corporation’s failure met the fault element for the primary offence, FPFB should be available as an alternative verdict.

2.16.2 To further underscore the graded nature of the offences above, sentences for FPFB should *not* reflect the fault state accompanying the underlying offence (as per the proposed amendment). The proposed approach would have the effect of converting a strict liability (no-fault) offence into a fault-based offence by the ‘backdoor’. If aggravation of penalties is considered necessary, the sentencing judge should be directed under the offence provision to consider *additional harms* caused by the failure to prevent, such as damage to markets, consumer safety etc. Alternatively, such aggravating factors may be left to the usual principles governing sentencing law.

3. Part 2.5: A Case of Legal Uncertainty or Enforcement Deficit?

3.1 A frequent criticism levelled at Part 2.5 is that it ‘suffers from evidential burdens too high to meet with any practical certainty.’²⁷ In its submission to the Senate Economics References Committee on ‘Foreign Bribery’ in 2015, the Law Council of Australia noted that:

‘The Working Group believes that there is a problem with section 12.2 of the Criminal Code. We believe that problem is self-evident when the lack of corporate enforcement based on section 12.2 over the last 15 years is considered. Even at the time the corporate culture aspects of section 12.2 were recommended, it was recognised that the ambiguity of the terms used could cause problems for prosecutions’.²⁸

3.2 This problem, however, is not insurmountable. We concur with Olivia Dixon’s view that the efficacy of the provision would be improved by further ‘[g]uidance on interpreting fundamental aspects of the provisions, including how to prove a corporation’s culture...’.²⁹ Moreover, the CDPP would need to bring more test cases seeking clarification, through judicial elaboration, of the meaning and scope of these provisions. In our view, it is not conceptual incoherence or vagueness that prevents the use of the corporate culture provisions, but the historic lack of priority attached to investigating and prosecuting bribery and corruption by multinational corporations, and other forms of white collar crime.

4. Extend liability to cover subsidiaries

4.1 An important shortcoming of the current *Criminal Code Act 1995* (Cth) is that there are no provisions which expressly extend liability to agents or subsidiaries of the corporation. The conduct element extends to acts or omissions of ‘employees, agents

²⁷ John HC Colvin and James Argent, ‘Corporate and personal liability for “culture” in corporations? (2016) 34 (1) *Company and Securities Law Journal* 30, 44; Olivia Dixon, ‘Corporate criminal liability: the influence of corporate culture’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 268.

²⁸ Law Council of Australia, Foreign Bribery, Submission 10, pp 7 - 8 <

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions>

²⁹ Olivia Dixon, ‘Corporate criminal liability: the influence of corporate culture’ in Justin O’Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 268.

or officers’.³⁰ This means that if a non-Australian subsidiary of an Australian parent company engages in criminal conduct, there can be no liability ‘against the Australian parent unless the conduct can be directly attributed to the Australian parent through the parent’s conduct (and the conduct of its employees and agents)’.³¹ In response to this deficit, Transparency International has called upon Australia to widen the offence to include ‘agents or subsidiaries’.³²

- 4.2 The proposed offence of ‘failing to prevent foreign bribery’ would extend liability to corporations for offences committed by ‘an associate’. The amendments provide that: ‘A person is an ‘associate’ of another person if the first-mentioned person is an *employee, agent, contractor or subsidiary of the other person*, is controlled by the other person or performs services for or on behalf of another person.’³³
- 4.3 While we welcome this extension, the proposed amendment does not affect the scope of the existing Part 2.5 *Criminal Code Act 1995* (Cth) and would only apply to a prosecution under the proposed FPFBI offence. Accordingly, we recommend that section 12.2 of the *Criminal Code Act 1995* (Cth) should be amended to widen the offence to include subsidiaries.

5. Strengthening the Case for Strict Liability

- 5.1 The proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995* (Cth) would make a corporation ‘automatically liable’ for the failure to prevent an offence of foreign bribery where the physical elements of the first person’s conduct are established.³⁴ All the prosecution needs to prove is that the corporation failed to prevent a breach of the foreign bribery provisions by an associate. The legal burden of disproving organisational fault (i.e. persuading the court that its procedures were sufficient) falls on the corporate defendant.
- 5.2 Concerns have been expressed about the fairness of strict liability provisions and their potential to impair the right to a fair trial. Anthony Gray, in a recent article on this issue in the context of drug offences, identified the following rationales for maintaining the presumption of innocence:
- fear of convicting an innocent person;
 - respect for humanity where citizens should be assumed to be law-abiding unless the contrary is proved;
 - the high value given to liberty in liberal democracies;
 - balancing the power and resources of the State over individuals; and
 - retaining public confidence in the system by avoiding wrongful convictions.³⁵

³⁰ *Criminal Code Act 1995* (Cth), s 12.2 ‘physical elements’;

³¹ Law Council of Australia, Foreign Bribery, Submission 10, p 8 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions>.

³² Transparency International, *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention*, p 12 <http://www.transparency.org/whatwedo/pub/exporting_corruption_enforcement_of_the_oecd_anti_bribery_convention> recommending: “Legislation should clearly spell out the responsibility of companies for bribery committed by subsidiaries and other intermediaries, as presently the Australian provisions may not apply unless it can be proven that the Australian company ‘caused’ the bribery”.

³³ Commonwealth Attorney-General’s Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 15.

³⁴ Commonwealth Attorney-General’s Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 8.

³⁵ Anthony Gray, ‘Presumption of Innocence in Australia: A threatened species’ (2016) 40 (5) *Criminal Law Journal* 262, 265 – 266.

- 5.3 The *Guide to Framing Commonwealth Offences*, developed by the Commonwealth Attorney-General, underscores the careful consideration needed before strict liability is contemplated. The Guide provides that the application of strict liability to criminal offence is “exceptional”, and only appropriate in the following situation:

The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.

There are legitimate grounds for penalising persons lacking ‘fault’, for example, because they will be placed on notice to guard against the possibility of any contravention.³⁶

- 5.4 The Guide goes on to provide that ‘strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so. *This justification should be carefully outlined in the explanatory material*’.³⁷ In our view, the explanatory material supporting the proposed FPFb offence does *not* meet this requirement. The explanation merely states that making corporations ‘automatically liable’ would help address the ‘challenge’ of establishing criminal liability for companies ‘due to the complex nature of foreign bribery’.³⁸ As Andrew Ashworth and Lucia Zedner have noted, the use of strict liability ‘should be regarded as exceptional and in need of a strong justification, particularly when the offence is serious’.³⁹ By contrast, in cases where ‘the penalty and the stigma of conviction are low, it is thought acceptable to have the kind of streamlined process that strict liability offers’.⁴⁰ A corporate offence of failing to prevent bribery (FPFB) is justified only as a strict liability offence where the corporate failures are less serious commensurate with the the degree of organisational blameworthiness and harm caused. It is important that the prosecution guidelines, offence definitions and penalties are framed in a way which reflects these graded distinctions.

³⁶ Attorney General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011) 23.

³⁷ Attorney General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011) 22 at [2.2.6].

³⁸ Commonwealth Attorney-General’s Department, *Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, Public Consultation Paper (2017) 8.

³⁹ Andrew Ashworth and Lucia Zedner, ‘Defending the criminal law: reflections on the changing character of crime, procedure, and sanctions’ (2008) 2 *Criminal Law and Philosophy* 21, 33.

⁴⁰ Andrew Ashworth and Lucia Zedner, ‘Defending the criminal law: reflections on the changing character of crime, procedure, and sanctions’ (2008) 2 *Criminal Law and Philosophy* 21, 32.