THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:CorporateLawyers:GUgm

2 May 2016

The Hon Michael Keenan, MP
Minister for Justice
c/o Attorney-General's Department

By email: criminal.law@ag.gov.au

Dear Minister,

**Inquiry into deferred prosecution agreements ("DPAs")**

Thank you for the opportunity to comment on the consultation paper, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia* ("Consultation Paper"), issued in March 2016. The Law Society of NSW provides the following general observations, followed by specific answers to the questions raised in the Consultation Paper.

**General observations**

The Law Society is generally in favour of creating options for law enforcement agencies, which enable them to seek alternative penalties for defendants, in appropriate circumstances. Such alternatives are of particular importance when considering that prosecuting defendants for corporate crime is a complex, time-consuming and resource-heavy task, as has been shown by the mixed success in prosecuting companies in Australia for corporate crimes to date. The Law Society is broadly in favour of introducing a Deferred Prosecution Agreement ("DPA") scheme, as one such alternative, subject to the comments set out below.

To tackle complex corporate crime, and to be able to make effective use of a DPA scheme, we suggest a multi-agency approach be adopted, drawing on expertise from each of the Australian Federal Police; Australian Securities and Investments Commission ("ASIC"); Australian Competition and Consumer Commission ("ACCC") and Commonwealth Director of Public Prosecutions ("CDPP").

To facilitate this, we suggest considering the use of a specialised, multi-disciplinary body (along similar lines to the UK's Serious Fraud Office "SFO"), which can draw on expertise from each of the above prosecuting bodies. For a DPA scheme to be successful, the Government must commit to the creation and funding of such a body, and equip it with the necessary powers. Without such a body, a DPA scheme may be ineffective.

While we broadly support the creation of a DPA scheme, the Law Society's position is that individuals who commit serious crimes should be prosecuted, as a deterrent to others. Accordingly, we consider a DPA scheme for corporate defendants, should be introduced in addition to retaining the current prosecutorial framework for both corporate and individual defendants (but enhanced for corporate defendants as above).

**Question 1: Would a DPA scheme be a useful tool for Commonwealth agencies?**

Subject to the broad principles set out above in the 'General observations' section, the Law Society considers that DPAs would be a useful tool for Australia. As noted below, these benefits will only manifest themselves, if the threshold is set correctly and possible outcomes of DPA negotiations are transparent and aimed at incentivising corporate defendants to agree to negotiate. We summarise some of the key benefits below.

Benefits for the Commonwealth:

- Australia would be introducing a scheme which has been used effectively in the United States of America ("US") and (more recently) in the United Kingdom ("UK"), which is particularly important given the growing nature of the corporate economy;
- DPAs are more efficient, cheaper and can have more assured outcomes for prosecution and defence, as they avoid the cost, delay and uncertainty of a trial;
- A transparent DPA scheme can encourage companies to self-report crime;
- The terms of DPAs can provide for reparation to victims of corporate crime;
- The fines paid by corporate defendants can raise revenue for the Commonwealth (within certain limits – please see our answer to Question 11 below); and
- Information provided by companies during the DPA process can provide evidence to prosecuting agencies to support a criminal prosecution against individuals and other companies involved in corporate crime.

Benefits for companies:

- A successful prosecution of a company (particularly those operating in the government sector) can have 'knock-on' adverse consequences to innocent third parties including employees, shareholders, customers and suppliers. Entering into a DPA would avoid such consequences;
- DPAs can provide a complete resolution to allegations of wrong-doing in a relatively short time frame and avoid lengthy and expensive trials;
- Creating a DPA scheme in Australia would bring it into line with other common law jurisdictions (eg US and UK), creating a more level playing field for Australian companies with operations in those jurisdictions and for foreign companies operating in Australia;
- The concept of a DPA is not dissimilar to that of enforceable undertakings which are already in existence in Australia, used by agencies such as ASIC and the ACCC, and therefore would not be a wholly alien concept for Australian companies (and their advisors) to understand; and
- While there are risks for companies entering into DPA negotiations (including a requirement to disclose potentially incriminating documentation and a lack of a guarantee of the DPA being agreed to), a company is not compelled to enter into DPA negotiations and can choose instead to risk prosecution.

Disadvantages to the Commonwealth:

To balance the above perspective, we note that there are arguments against the creation of a DPA scheme for Australia, on the basis that this would bring a number of disadvantages for the Commonwealth. In summary, these include[1]:

- A DPA scheme might be seen to be a weakening of the deterrent of prosecution;
- A DPA scheme might be seen as allowing companies to 'buy their way out of trouble';
- A DPA scheme might be considered as providing a two-tier system: on the one hand corporations can escape criminal liability, while on the other hand, individuals do not have the same option;
- A DPA scheme, if used to the exclusion of prosecutions, would prevent a body of case law being created, which examines criminal conduct of corporations in an open and transparent manner and which is subject to judicial scrutiny; and
- We understand there is a risk that prosecutorial agencies might shift their focus toward seeking to reform corporate culture through the imposition of a DPA, rather than pursuing criminal conduct through the Court.

**Question 2: In relation to which offences should a Commonwealth DPA scheme be available?**

We consider that DPAs should be restricted to serious corporate crimes, including anti money-laundering, fraud and anti-bribery, and corruption offences (both private and public as well as domestic and foreign). Consideration could also be given to prescribing a minimum penalty threshold for crimes for which can a DPA can be used.

We also consider that DPAs should not be made available to individuals. The combined effect of these two restrictions is to send a strong message to Australian citizens that individuals can and will be prosecuted for serious crime, but valuable court resources will not be unduly tied up in considering DPAs. As noted above, we consider that DPAs should sit alongside prosecutions for individuals.

Further, restricting DPAs to corporations incentivises corporations to improve their corporate compliance culture both in Australia and overseas. This brings with it greater transparency for company shareholders and assists in the orderly conduct of markets. This also sends an important message to potential investors in Australian companies that a compliance culture is central to company management, and that they can be confident that boards of Australian companies value compliance, if DPAs are used successfully.

**Question 3: Should DPAs be available for companies only, or for both companies and individuals?**

We consider that DPAs should not be made available to individuals. Please see answer to Question 2 above.

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[1] Peter Reilly, Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions, Brigham Young University Law Review, 25 September 2014.

**Question 4: To what extent should the Courts be involved in an Australian DPA scheme?**

We consider that it is of fundamental importance that there is judicial oversight of the DPA scheme, to provide the necessary checks and balances to ensure the interests of justice are served. Further, it provides a second layer of accountability, ensuring that any policy and law is consistently applied.

We understand that there has been criticism leveled at the US DPA scheme, such that the Court's involvement is seen as a 'rubber-stamping' of the DPA agreed between the prosecuting agency and the corporate defendant. This allows the prosecuting agency to effectively act as judge and jury in relation to the terms of the DPA. We advocate for a transparent, Court-led process where the Court is the final arbiter of the terms of the DPA. We also agree that this is required under Australia's Constitution[2].

This transparency is important not only for the corporate defendants, but also for the public, to ensure that any DPAs are in the public interest, and any accusations that a particular corporate defendant is simply 'buying its way out of an offence' can be met. Court involvement will therefore maintain public confidence by providing a public and transparent layer of scrutiny. It will also aid corporations considering entering into DPA discussions, by providing a body of decisions and guidance on when DPAs are appropriate, and their terms.

**Question 5: What measures could enhance certainty for companies invited to enter into a DPA?**

The Law Society broadly agrees with the factors a prosecutor must consider when deciding whether a company should be invited to enter a DPA, set out in section E (on page 17) of the Consultation Paper. We also agree with the factors that should be considered by a prosecutor as to whether the public interest test has been met, set out in section E (on page 18) of the Consultation Paper.

The Law Society considers that clear prosecution guidelines and levels of penalties should be issued. This would provide corporations with a clear understanding of the potential level of fines and other sanctions which might be included in a DPA. We also advocate for a limitation on the level of such fines, so that it should not exceed the amount of financial penalty a Court would impose on a company following a guilty plea for the same offence[3]. Without such limitations, there is a disincentive for a company to enter into DPA negotiations, if it considers that it would be better off either by defending the prosecution, or pleading guilty to the offence.

**Question 6: Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publication postponed?**

The Law Society considers that DPAs should be made public as this will provide consistency and transparency, both for corporate defendants and the public. It will also provide a body of case law, discussing factors to be considered in approving a DPA, which gives greater certainty to the process.

In certain circumstances, it may be necessary not to publish or to delay publishing a DPA, where there are compelling reasons to do so, for example if publishing a DPA would create

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[2] See Section D of the Consultation Paper.

[3] This is broadly in line with the UK's SFO and CPS Joint Code of Practice for Deferred Prosecution Agreements at section 8.3.

a substantial risk of prejudice to the administration of justice in any legal proceedings.[4] Any decision not to publish a DPA should be a matter for a Court to decide.

**Question 7: How should DPA negotiations be structured?**

We support the proposition that only the prosecuting agency, not the investigating agency, can enter into DPA negotiations.

We agree with the US and UK position that the purpose of negotiations should be to resolve factual disputes, and that these should be held in confidence between the parties.

We also agree that the defendant's conduct of the negotiations, in addition to the quality of internal investigations carried out, should be taken into account in determining the terms of the DPA. This will further incentivise companies to ensure their internal investigation is thorough, and will support a greater culture of compliance within the company going forward.

**Question 8: What factors should be considered in agreeing a proposed settlement?**

We consider that the guiding principles of agreeing a proposed settlement should be the interests of justice and proportionality.

We also broadly agree with the principles set out in the US Department Of Justice's '*United States Attorneys' Manual, Principles of Federal Prosecution of Business Organisations, Titles 9-28.000-9-28.1300*' which is broadly reflected by the UK's *SFO and CPS Joint Code of Practice for Deferred Prosecution Agreements* ("Joint Code") regarding public interest factors[5], which have been given judicial approval.[6] Such factors include:

- The seriousness of the offence;
- Whether the defendant has a history of similar conduct;
- Whether this was an isolated incident or part of an established business practice of the defendant;
- Whether the defendant had an effective corporate compliance program at the time of the offence (and whether it has shown subsequent improvement);
- Whether the defendant self-reported the offence to the relevant authorities and the sufficiency of the information provided;
- Whether the defendant genuinely and pro-actively co-operated with the investigation by the prosecution authority; and
- Whether a conviction would have a disproportionate consequence for the defendant or innocent third parties (eg the defendant's employees or shareholders).

We further note that the above is broadly consistent with the approach the US Securities and Exchange Commission ("SEC") takes in determining whether, and to what extent, it grants leniency to defendant companies for cooperating in its investigations and for related good corporate citizenship. This includes: self-policing prior to the discovery of the misconduct; self-reporting and prompt disclosure of the misconduct to relevant agencies; and remediation and co-operation with authorities.[7]

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[4] As per Schedule 17, section 12 *Crime and Courts Act* 2013 (UK).

[5] See section 2 of the Joint Code.

[6] See *Serious Fraud Office v. Standard Bank Plc* (as above).

[7] See section 6.1.2 SEC, Division of Enforcement, Enforcement Manual, June 4, 2015.

**Question 9: Should material disclosed during negotiations be available for criminal and/or civil proceedings?**

We consider that it is fundamental to the success of any DPA scheme that material disclosed during negotiations should be available for criminal and/or civil proceedings, subject to an individual's privilege against self-incrimination (as considered further below).

If such material were not to be available, a defendant could be inclined to disclose potentially harmful documentation to the prosecution authority, in the knowledge that such documentation would be unavailable for future prosecutions or civil actions.

However, this requirement needs to be balanced with incentivising a defendant to provide full and frank disclosure of such documentation. There is a risk that a defendant would avoid providing full disclosure, for fear this would provide the prosecuting authority with the necessary leverage to force the company into agreeing DPA terms, which it might consider disproportionate, or use the information in a prosecution. Ensuring there is judicial scrutiny of the terms of the DPA would go some way to alleviating this risk, and to providing transparency in the DPA process.

We would caution that allowing the subsequent use of material in a situation where corporations cannot claim privilege, but individuals may seek to claim privilege as a pre-condition to disclosure, may lead to complexities warranting closer examination. Such complexities would include, amongst others, the issue of an individual's assistance in helping the company negotiate and comply with a DPA.

**Question 10: What facts and terms should DPAs contain?**

The Law Society broadly agrees with the facts and terms to be contained in a DPA, as suggested in the Consultation Paper (section H).

In relation to the payment of financial penalties, the Law Society considers that guidelines should be issued in relation to the range of penalties which can be included for each offence under a DPA. This would bring transparency to the issue of penalties under DPAs, and give defendant companies a degree of certainty in this area.

We broadly agree with the UK position that financial penalties included in DPAs should be broadly comparable to a fine the Court would have imposed on a guilty plea (including any requisite discount).[8] We note this has received judicial support in the UK.[9]

We also consider that a prosecuting authority should have the ability to re-open DPA negotiations (once a DPA has been sanctioned by a Court) in circumstances where it becomes apparent to the prosecuting authority that a corporate defendant has provided incomplete information, which is material to the investigation. If a prosecuting agency wishes to re-open DPA negotiations, this should be by way of an application to the Court, to allow for judicial scrutiny of the facts, to determine whether the DPA should be re-opened.

**Question 11: How should funds raised through DPAs be used?**

The Law Society supports the proposition (evident in both the US and UK DPA schemes) that victim restitution should be a key feature of an Australian DPA scheme.

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[8] See section 8.3 of the Joint Code.

[9] See *Serious Fraud Office v. Standard Bank Plc* (as above).

We also agree that a proportion of funds recovered from corporate defendants should be recovered by prosecuting agencies, with the majority of funds forming part of consolidated revenue for the Commonwealth. The parameters of the recovery of funds by prosecuting agencies should be set by the Commonwealth Parliament. This would provide transparency as to how such funds are to be shared between prosecuting agencies.

As set out above (see answer to Question 9), judicial scrutiny of the terms of DPAs, especially the level of any penalties, combined with clear guidelines, will alleviate any perception of a conflict of interests on the part of prosecuting agencies, in the level of penalties they seek from corporate defendants.

**Question 12: What should be the consequences of a breach of a DPA?**

The consequences of a breach of a DPA should depend on the severity of the breach. Consequences should include either an increase in the level of penalties, introduction of an independent monitor, or a revocation after which the CDPP may direct the resumption of the investigation and/or prosecution of the corporate defendant. Also, if relevant to the prosecution of the primary offence, breach of a DPA could also be taken into account on sentencing.

The Law Society urges than any alleged breach of a DPA should be brought before the Court on application by a prosecuting authority, for judicial consideration. Prosecuting agencies should not have the power to unilaterally determine whether the terms of a DPA have been breached, and what the consequences of such a breach should be.

**Question 13: Should an Australian DPA scheme make use of independent monitors or other non-judicial supervisory mechanisms?**

We consider that the use of independent monitors can be a term to be included in the DPA, if a Court considers it appropriate to do so (for example if the Court considers the lack of a compliance culture in a particular corporate defendant to be particularly egregious). However, the Law Society does not consider that independent monitors should be appointed as a matter of course.

In addition, the imposition of an independent monitor could be considered, where a prosecuting agency makes an application that a corporate defendant has breached the terms of a DPA, and the Court considers it appropriate to impose a monitor.

If a monitor is to be imposed on a corporate defendant, the Law Society considers that clear guidelines for the use of monitors should be published by prosecuting authorities, so that both the monitor and the corporate defendant can be confident that the monitoring program will be effective, and achieve the ends sought by the imposition of the monitor under the DPA. Important considerations in the imposition of a monitor will include the duration of the imposition and the costs to the corporate defendant, as this will be in addition to any financial penalties already included in the DPA. The Joint Code provides useful guidance[10] regarding monitors, with which the Law Society broadly agrees.

[10] See section 7 of the Joint Code.

**Question 14: Do you have any other comments in relation to a potential Commonwealth DPA scheme?**

*Threshold Test:*

The prosecuting authorities need to consider what the threshold test for entering into DPA negotiations should be. If the threshold is set too high, then a DPA scheme may be unworkable, as prosecuting authorities will not be able to meet the evidential burden to commence negotiations. Conversely, if the threshold is set too low, corporate defendants may be faced with having to consider whether to risk entering into negotiations for a DPA, without a sufficient understanding of the prosecuting authorities' case against them.

As noted at the outset, consideration needs to be given to the incentives for each party to seek to enter into a DPA, and of fundamental importance to this issue, as far as prosecuting authorities are concerned, would be the threshold required to enter into DPA negotiations. We consider that far more thought and discussion needs to be had in relation to this central issue.

The success of such a scheme will depend greatly on the benefits both to prosecuting agencies and potential corporate defendants. In relation to prosecuting agencies, the threshold for entering into DPA negotiations will be a key factor. In relation to potential corporate defendants, the possible outcomes of any DPA negotiations will be key. The DPA scheme needs to be robust and transparent, otherwise it will not be used by prosecuting agencies or corporate defendants.

*Other matters:*

Finally, we consider that there are three important issues related to this discussion which merit further input from stakeholders, namely:

(1) while we acknowledge that there exists an offence under *Division 12* of the *Criminal Code Act* 1995 (Cth) of bribing a foreign official, whether an additional specific offence for failure by a company to prevent bribery (both domestic and foreign), similar to the offence set out at Section 7 of the *UK Bribery Act* 2010, should be created;

(2) whether a 'False Claims Act scheme' for Australia (as briefly discussed at page 8 of the Consultation Paper) should be created; and

(3) whether 'Facilitation Payments' should continue to be available as a defence to Australian companies under Division 70.4 of the *Criminal Code Act* 1995 (Cth). The Law Society would welcome the opportunity to comment on these important topics.

If you have any questions about this letter please contact Liza Booth, on 02 9926 0202 or liza.booth@lawsociety.com.au.

Yours sincerely,

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**President**