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Te Kāhui Ture o Aotearoa

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Fourth phase of monitoring the implementation of the OECD Anti-Bribery Convention in New Zealand

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on New Zealand's efforts to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**Convention**).

1.2 This submission has been prepared with input from the Law Society's Public Law Committee, Criminal Law Committee and Law Reform Committee.[1] It includes feedback about some of the concerns raised in New Zealand's Phase 3 Monitoring Report (**Phase 3 Report**)[2] and the Follow-up to the Phase 3 Report (**Follow-up Report**),[3] as well as recommendations in those reports.

1.3 The Phase 4 monitoring and evaluation process is expected to also pick up new aspects coming from the OECD's 2021 Anti-Bribery Recommendations (**2021 Recommendations**),[4] which elaborate upon compliance expectations surrounding the Convention. While New Zealand has not yet had the opportunity to address the 2021 Recommendations, our comments below briefly touch on a few of those particular new aspects.

2 Civil-based asset confiscation regime

2.1 The OECD Working Group on Bribery in International Business Transactions (**Working Group**) has recommended New Zealand consider issuing guidelines on how to quantify

1 More information about these committees can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 Organisation for Economic Co-operation and Development *Final Report on The Implementation and Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Transactions* (October 2013).

3 Organisation for Economic Co-operation and Development *New Zealand: Follow-up to the Phase 3 Report & Recommendations* (March 2016).

4 Organisation for Economic Co-operation and Development *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (November 2021).

the proceeds or benefits of a foreign bribery offence.[5] Although New Zealand has not issued any such guidelines, we do not believe they are necessary - for three main reasons:

(a) The Criminal Proceeds (Recovery) Act 2009 (**CPRA**) already provides a statutory framework for quantifying benefits. Section 53 of the CPRA states that the value of the benefit is presumed to be the value stated in the application filed by the Commissioner of Police under section 52 of that Act. Before that figure can be presumed, the Commissioner must prove, on the balance of probabilities, that the respondent has unlawfully benefitted from significant criminal activity, and specifically turn their mind to quantifying the value of the unlawful benefit.[6] Once the Commissioner has assessed the unlawful benefit obtained by an offender, the onus switches to the offender to rebut that presumption by proving the actual benefit – this requires more than a critique of the Commissioner's methodology, and the offender must put forward genuine evidence relating to the actual benefit obtained in order to successfully rebut the presumption.[7] The Court may also rely on sections 51, 53 or 56 of the CPRA in order to avoid making a forfeiture order.

(b) Civil forfeiture orders are made by the High Court. New Zealand Courts do not apply external 'guidelines' when enforcing legislation, so it is preferable for any relevant definitions of, or factors relevant to, quantifying the benefit to be set out in the legislation itself.

(c) The Courts are able to advance concepts such as "benefit" through case law, and have done so on occasion: for example, by finding that a "benefit" accrues each time money is laundered, even if there is no material increase in wealth, and the benefit is the value of the laundered proceeds at each stage.[8]

2.2 The Phase 3 Report also noted concerns about New Zealand never having confiscated the profits obtained from a bribe from a legal person.[9] We note the Solicitor-General has on one occasion sought a pecuniary penalty order for bribery under the Proceeds of Crime Act 1991 (the predecessor to the CPRA). In *Solicitor-General v Field*,[10] the High Court derived a list of unlawful benefits enjoyed by Mr Field for work done on his properties as having a benefit value of $27,480, and made a civil penalty order against Mr Field for that amount.

3 The "corruptly" intent requirement

3.1 The Phase 3 Report raised concerns about the inclusion of the term "corruptly" in section 105C(2) of the Crimes Act 1961, and recommended the Working Group should follow up the application of the "corruptly" intent requirement as case law develops.[11]

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5 Page 20 of Phase 3 Report, and page 15 of Follow-up Report.
6 *Cheah v Commissioner of Police* [2020] NZCA 253 at [44].
7 *Zhou v Commissioner of Police* [2023] NZCA 137 at [30].
8 *Solicitor-General v Beckham* [2015] NZHC 2816 at [61].
9 Phase 3 Report, page 20.
10 *Solicitor-General v Field* [2012] NZHC 2251.
11 At pages 9 and 10.

Recent cases which discuss the meaning of the term "corruptly"

3.2 We are not aware of any recent cases which discuss the term "corruptly" in section 105C. The leading authority remains the Supreme Court's decision in *Field v R*,[12] which was discussed in the Phase 3 Report.[13] While there have been some domestic bribery cases none of them has deeply examined the meaning of the word "corruptly". The closest example may be *Borlase v R*, concerning bribes and lavish hospitality used to obtain local government (Auckland Transport) roading contracts. In the first instance High Court decision, the meaning of "corruptly" was said to be "well settled" and the *Field* case succinctly summarised in the course of rejecting a defence challenge that section 105 (domestic bribery provision) imported an additional requirement to prove the payer intended to influence the official to carry out an improper act.[14]

3.3 On appeal, the New Zealand Court of Appeal[15] did not interpret "corruptly" any differently. That element would be established by evidence of the payment of a financial benefit knowing that its receipt is fundamentally inconsistent with the public official's duties; not requiring proof of dishonesty, but a conscious recognition by both payer and recipient that the benefits are being provided in connection with the official's duties.

3.4 The High Court has recently further considered the meaning of the term "corruptly" in section 105A of the Crimes Act (which provides for the offence of corruptly using or disclosing official information). In *R v Gallagher*, [16] the Court considered relevant case law, and found that:

(a) "Corruptly" in section 105A connotes the improper use by an official of information which belongs to a governmental body;[17] and

(b) The proper construction of section 105A required the Crown to prove the defendants had obtained an advantage or pecuniary gain.[18]

The Supreme Court's decision in Field v R

3.5 The Working Group's concerns about the use of the term "corruptly" appear to stem from the Supreme Court's comments in *Field v R,* that "corruptly" refers to "conduct which the legislature regards as corrupt".[19] The Working Group has reasoned that this means a New Zealand court would require the prosecution to prove the offender had knowledge that their conduct was considered corrupt by the foreign legislature.[20] The Working Group is concerned this gives rise to additional criteria for the "corruptly" intent requirement.

3.6 In the absence of any recent New Zealand authorities discussing ambiguities in the word "corruptly" in the specific foreign bribery provisions of section 105C, we doubt whether

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12 *Field v R* [2011] NZSC 129, [2012] 3 NZLR 1.
13 At pages 9 and 10.
14 *R v Borlase & Noone* [2016] NZHC 2970 at [82] to [87].
15 *Borlase v R* [2017] NZCA 514 at [19]-[20].
16 *R v Gallagher* [2021] NZHC 2508.
17 At [23], referring to *R v Leolahi* [2001] 1 NZLR 562 at [19].
18 At [60]. In a subsequent, related proceeding, *R v Gallagher* [2022] NZHC 300, the Court clarified the advantage does not need to be pecuniary.
19 At [66].
20 Phase 3 Report at page 10.

this reasoning is correct. The recent cases noted above in section 105 domestic situations do not suggest the Supreme Court intended to introduce additional criteria to the offence. Therefore, we encourage the Working Group to continue to monitor the application of the "corruptly" intent requirement as case law develops under section 105C.

4 Money laundering and anti-money laundering developments

4.1 Although provisions in the Crimes Act for money laundering offences are distinct, they often overlap with corruption and proceeds of crime recovery matters, and were the subject of some specific recommendations in the Phase 3 Report and Follow-up Report. As the Follow-up Report of 2016 noted, legislative change had removed the dual criminality element for money laundering offences in section 243 of the Crimes Act, including where foreign bribery is the predicate offence.

4.2 A recent case example in the CPRA jurisdiction[21] illustrates that the courts have no trouble finding that transferring bribery funds to New Zealand may amount to money laundering offences, at least for asset restraint interim procedures. Where the wife of a US/Venezuelan citizen facing bribery and money laundering charges in the USA transferred significant sums to New Zealand, mutual legal assistance protocols and the likelihood of money laundering offences being engaged in New Zealand would readily allow the Commissioner of Police to seek restraining orders locally.

5 Corporate criminal liability

5.1 Section 105C of the Crimes Act has been amended to create specialised corporate liability provisions for foreign bribery. We note that those provisions do not apply the 'identification theory' (which requires an assessment of whether the individual who committed the crime is the 'directing mind' of the company), because any employee's actions can potentially lead to criminal liability for the corporation.[22] These provisions address some of the concerns outlined in the Phase 3 Report about New Zealand's reliance on the identification theory.[23]

5.2 However, these amendments do not address the concerns raised in the Phase 3 Report about the use of shell companies to facilitate bribery, terrorism, and other illegal activity in New Zealand.[24] This is because section 105C(2A)(b) of the Crimes Act requires that the employee's illegal act be intended to "benefit the body corporate". Almost by definition, shell companies have no employees, and even if they do, no act 'by' a shell company is intended to benefit it. These provisions therefore appear inapplicable to shell companies in practice. The Working Group may therefore wish to consider whether the concerns in the Phase 3 Report could be addressed by introducing provisions modelled on the Health and Safety at Work Act 2015 (**HSWA**), which does not rely on the identification theory when imposing criminal liability on corporations.

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21 *Commissioner of Police v Rodriguez* [2019] NZHC 3265, and on appeal *Rodriguez v Commissioner of Police* [2020] NZCA 589.

22 See section 105C(2A).

23 At pages 13-14.

24 At pages 14-15.

6 Comments on the 2021 Recommendations

6.1 New sections were included in the 2021 Recommendations, covering key anti-corruption topics that emerged or had significantly evolved since 2009. Some are new and unexplored territory for New Zealand, and we add brief comments below on aspects that the Working Group monitoring team may wish to explore:

Addressing the demand side of foreign bribery cases

6.2 New Zealand has in recent years improved its training and awareness efforts amongst a range of public officials and departments, led by Ministry of Justice or Serious Fraud Office or Public Service Commission initiatives. Whether that is having the desired impact yet is hard to say, as some recent investigations into (for example) domestic customs/border control suggest there is more work to be done.[25]

6.3 The Working Group may like to evaluate any other steps that could be more effective as both public sector and private sector collective action initiatives.

Sanctions and confiscation and international co-operation

6.4 The Financial Action Task Force, in its AML/CFT Mutual Evaluation Report of April 2021,[26] generally found New Zealand to be in a strong position on asset recovery measures, including applying those to benefit foreign agencies using international mutual legal assistance provisions.

6.5 The *Rodriguez* case is an example of close NZ Police co-operation with overseas authorities using local CPRA process in furtherance of MLA international protocols. However, there may be a need for greater collaboration with private sector civil asset recovery initiatives in large cases, such as the 1Malaysia Development Berhad matter.

Non-trial resolutions

6.6 The use of various forms of non-trial resolution steps for criminal, administrative or civil cases is relatively new territory for New Zealand. The term "alternative dispute resolution" has more currency here as an umbrella description, including in criminal matters, instead of "non-trial resolutions."

6.7 More substantively, in both criminal and civil cases, settlement processes may not be an easy fit with a legal system where the independent courts ultimately control the sanction and punishment process, and where a law enforcement agency should act as prosecutor rather than having power to issue administrative penalties itself.

6.8 New Zealand has not yet explored the suitability of Deferred Prosecution Agreements or other non-trial resolutions to the extent other countries, including Australia, may have done.

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25 Media reporting at: https://www.rnz.co.nz/news/national/509182/auckland-airport-baggage-handler-jailed-over-role-in-19kg-meth-bust; https://www.nzherald.co.nz/nz/tongan-pablo-ringleader-of-corrupt-air-nz-baggage-crew-smuggling-drugs-from-los-angeles-into-auckland-revealed/VYBTUHIGHZFB3PPEML3N2T4TEU/.

26 Financial Action Task Force *Anti-money laundering and counter-terrorist financing measures – New Zealand, Fourth Round Mutual Evaluation Report* (April 2021).

Protection of reporting persons

6.9 A new Protected Disclosures (Protection of Whistleblowers) Act 2022 has come into effect since the Working Group's phase 3 review process. We are not yet aware of any empirical or official review of whether it has substantively improved whistleblowing safeguards for disclosure and investigation of serious wrongdoing. The new law does retain some limitations in its application to public sector resources, not neatly fitting across the interface with private sector funding or procurement processes.

6.10 The Working Group may wish to explore the extent to which the new legislation implements an effective framework for measures to protect confidentiality of reporting, anti-retaliation steps and other effective whistleblower remedies or incentive structures.

Incentives for compliance

6.11 Outside of the Crimes Act and the bribery provisions in the Secret Commissions Act 1910, no New Zealand law requires or incentivises a system of internal business controls, ethics policies, compliance programmes or audit checks and controls. Some large private firms may choose to implement some of these measures voluntarily, but only in regard to stock exchange listing expectations or overseas trading party expectations.

6.12 The Working Group may wish to examine whether New Zealand would benefit from a specific, modern anti-bribery statute which includes legal compliance obligations (similar to the UK's Bribery Act 2010, or the US Foreign Corrupt Practices Act 1977).

Data protection

6.13 New Zealand has enacted a new Privacy Act 2020, with improved data protection measures in some areas, including cross-border data transfers. This is generally considered a step forward on previous law, but some way behind the protections granted under the EU's General Data Protection Regulation regime.

6.14 We are not yet aware of any empirical or official studies covering how the enhanced privacy law may inter-relate with anti-corruption measures and international efforts to combat bribery or similar financial crimes.

7 Other matters to note

7.1 The Court of Appeal has (obiter) discussed the bribery offences and the Convention in *Kang v Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd*,[27] and "unhesitatingly" accepted it would not enforce the payment of a transaction procured by foreign bribery.[28] The Working Group may wish to review that judgment and comment on it (particularly the distinctions drawn by the Court between bribing current and former officials, and the distinction between "lawful lobbying" and foreign bribery).

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27 *Kang v Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd* [2022] NZCA 281.

28 At [54] – [55].

8 Next steps

8.1 We would be happy to answer any questions, or to discuss this feedback further when the Working Group's monitoring team visit New Zealand. Please feel free to get in touch via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

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