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Submission on
Proposed WA Procurement Debarment Regime
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Dr Fiona McGaughey
Professor Elise Bant
Ms Rebecca Faugno
Adjunct Professor Holly Cullen

Members of the
University of Western Australia Modern Slavery Research Cluster

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1. Introduction

We welcome this initiative from the WA Government. States exercise significant economic influence in their procurement practices and policies and as such can promote ethical conduct by Australian businesses. We note that international best practice in recent years has identified public procurement as an important measure in preventing foreign bribery,[1] protecting people's human rights, preventing exploitation, and ensuring safety at work.[2] As a recent report explains:

> Including requirements within public procurements that suppliers respect human rights can help prevent human rights abuses – including modern slavery, child labour, human trafficking, excessive working hours, and unsafe working conditions – from occurring within value chains. Such requirements are also a crucial part of human rights protection where public services are contracted out for private service delivery, for instance, in the health, education and criminal justice spheres.[3]

The authors of this submission are academics from University of Western Australia (UWA)'s Law School in the Faculty of Arts, Business, Law and Education, and are members of the UWA Modern Slavery Research Cluster. This submission draws on the expertise of some of our members and on research that we consider to be relevant to proposed WA Procurement Debarment regime. This expertise includes commercial, consumer, corporations and international human rights law.

In this submission, we note our support for the proposed regime and particular strengths in the current proposal (Section Two). In Section Three we outline key areas for improvement, listing a number of practical, evidence-based recommendations that would strengthen what is currently proposed.

2. Importance of the proposed regime

We welcome the proposed procurement debarment regime and commend the WA government for the initiative. It is hoped that this will set an example which the federal government and other states and territories will follow. Public confidence in the expenditure of public funds is essential – the public do not expect their taxes to benefit those who have

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[1] The 2018 Senate Economics Reference Committee's report into foreign bribery recommended the introduction of a debarment model to strengthen Australia's bribery framework: Senate Economics Reference Committee, *Foreign Bribery* (Report, March 2018), 169-175.

[2] Daniel Morris, *Driving Change through Public Procurement: a Toolkit on Human Rights for Procurement Policy Makers and Practitioners* (March 2020, Danish Institute for Human Rights) 6. < https://www.humanrights.dk/sites/humanrights.dk/files/media/document/dihr_toolkit_public_procurement_2020_webaccessible.pdf>

[3] Ibid.

committed criminal acts or engaged in unethical or harmful behaviours. Building protections into public procurement has been recognised as a key way to achieve this and to assist states in meeting their international human rights obligations.[4] Public procurement is a substantial component of economy and as such can be leveraged to encourage ethical behaviour.

Debarment regimes can also form important supporting mechanisms to pecuniary civil and criminal penalty regimes. There is always a danger that monetary penalties become simply part of the cost of doing business and may not provide the right kinds of incentives for systemic and long-term behavioural change. Debarment regimes provide the opportunity for transparent, expressive and powerful denunciation of egregious corporate misbehaviour. In this context, we note that the Australian Law Reform Commission's ('ALRC') Review into Corporate Criminal Responsibility strongly supports the reasoning behind the WA government's debarment initiative. Proposal 18 of its Discussion Paper 87 suggests the development of a national debarment regime, through consultation and agreement between commonwealth, state and territory governments.[5] Although the Commission's final report has not yet been released by the Commonwealth Government, and so we are yet to see whether this proposal was retained (and any recommendations on the form of such a regime), the initial proposal was notably well-received in submissions and in the ALRC's public consultations. A debarment regime may very usefully sit alongside a suite of non-monetary penalty options (such as disqualifying orders, community service orders, publicity orders and corrective activity orders), which are also the subject of detailed consideration and recommendations by the ALRC. In this context, and subject to the coherence issues discussed below, the WA regime could provide an important platform for development of this more nuanced approach to corporate regulation and the effective promotion of fair trade practices.

The proposed regime rightly identifies a broad range of commercial malpractice as attracting potential debarment. We particularly welcome the inclusion of the *Modern Slavery Act 2018* (Cth) ('MSA') in Category B of the proposed regime. The MSA is a very positive development but one of the key criticisms of the Act has been its lack of enforcement mechanisms and penalties for non-compliance. As such, the proposed debarment regime acts as an additional incentive for compliance with the MSA.

3. Recommendations

We have identified a number of areas that may be usefully strengthened in the proposed regime, for increased efficiency, transparency and impact. These are as follows:

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[4] Ibid.
[5] Australian Law Reform Commission, 'Discussion Paper: Corporate Criminal Responsibility' (ALRC Discussion Paper 87 (DP 87) November 2019.

i) Transparency and oversight

The introduction of a strong oversight mechanism across WA government, such as a Procurement Board, would ensure effectiveness, avoid inconsistencies and enable shared best practice. This kind of mechanism should include members with relevant expertise, including civil society representatives. Similarly, at a Departmental level, we recommend formation of a committee that would include standing members as well as rotating or *ad hoc* civil society representatives. An advisory or consultative committee of this kind would provide a stable foundation for clause 4.3 of the proposed regime, which provides: 'The Department CEO may consult with any State agency or third party for the purposes of carrying out his or her responsibilities under this Regime.' While currently expressed as an optional power, disbarment decisions would be strengthened, given greater legitimacy and transparency through this consultative mechanism. A committee along the lines we propose would provide expertise to the CEO in reaching their decisions and promote public confidence by ensuring that the discretion proposed for CEOs is informed by community values, understandings and insights.

Relatedly, the current proposal does not expand on the proposed oversight of decision-making, an important aspect for developing a strong and positive public profile but also to attract widespread corporate engagement. This oversight component could usefully be strengthened through the combination of Committee and Board mechanisms. All suppliers considered for disbarment would, on this approach, be deliberated by the Committee and Board, informed by relevant documentation and the bodies' joint judgement.

We discuss Supplier Undertakings in more detail in the following section, but with regard to transparency, we would like to note here our concern about the discretion conferred on the Department CEO (draft clause 10.5) to omit a Supplier from the public register if a debarment decision is stayed by the terms of a Supplier Undertaking. In the interests of promoting transparency and public confidence in the procurement process, as well as deterring wrongful conduct, we suggest that it is highly desirable that all debarment decisions be disclosed in the public register. Alternatively, we suggest that consideration be given to publishing a separate register listing suppliers and conduct the subject of Supplier Undertakings.

Finally, it is important that public and stakeholder expectations of robust decision-making are met. This is particularly the case if the criteria for debarment are included in guidance as well as in the statute. Stakeholders and the public will expect that statements in guidance will be followed by decision-makers, as noted by Martin CJ in *Save Beeliar Wetlands Inc v Jacob*.[6]

[6] *Save Beeliar Wetlands Inc v Jacob* [2015] WASC 482 [185].

However, in light of the successful appeal against that decision in *Jacob v Save Beeliar Wetlands*,[7] such expectation is likely to be defeated. The Court of Appeal decided that policies (including one set out in a Guidance Statement) were not mandatory relevant considerations for the decision-maker. The scheme of the statute in question did not include them either explicitly or by implication, in the view of the Court of Appeal. In other words, while there are benefits to including some criteria for debarment in guidance rather than the statute, for example to allow for development of the scheme to respond to evolving international standards, the statute must make it clear that these will be mandatory relevant considerations for the decision-maker. Otherwise, in addition to the distinction between Category A and Category B actions, there will be a distinction between statutory and non-statutory provisions.

ii) Consistency and improving effectiveness

(a) Part 6: Supplier Undertakings

The Supplier Undertaking provisions in Part 6 of the proposed regime require a delicate balance between the objectives of transparency, and promoting compliance and responsible supplier conduct. Draft clauses 13.3 and 13.4 give consideration to the nature of terms and conditions which may be included in a Supplier Undertaking. We suggest that the efficacy of the Supplier Undertaking regime could be strengthened in two further, critical ways. First, by improving transparency around Supplier Undertakings, as discussed above. Second, through the development of guidance as to the kinds of circumstances in which it may be permissible or appropriate to enter into a Supplier Undertaking. The draft regime envisages that by the time of entering into a Supplier Undertaking, the Department CEO has already made a decision that debarment is appropriate (draft clause 13.1). In other words, a serious offence or unethical or wrongful behaviour on the part of the Supplier must already have taken place. In these circumstances, a Supplier Undertaking represents a considerably less severe consequence for a Supplier than debarment. Entry into a Supplier Undertaking might be considered to undermine the objectives of the debarment regime by allowing the state to engage the services of the Supplier in spite of, and with full knowledge of, the infraction/s. The material adverse effect of this on the character, integrity or reputation of the State, and the public interest or public confidence in the State and/or its procurement system, could be equal to if not greater than the material adverse effect which would be considered to enliven debarment or suspension in the first place.

In considering the circumstances in which a Supplier Undertaking might be appropriate, we draw attention to the findings of the 2019 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Sector* on the use of Enforceable Undertakings by

[7] *Jacob v Save Beeliar Wetlands* [2016] WASCA 126.

Australian Securities and Investments Commission (ASIC).[8] ASIC as a public regulator serves a different function from the state government as a procuring body, and Enforceable Undertakings are a form of administrative action in lieu of court proceedings rather than undertakings in lieu of debarment or suspension. Nevertheless, the recommendations of the Royal Commission and the experience of ASIC are instructive in shaping guidance for the use of Supplier Undertakings. We make the following observations:

- Similar to the objectives of ASIC's Enforceable Undertaking regime, it could be said that an effective Supplier Undertaking regime is one which:[9]
    - promotes the integrity of, and confidence in, the state's procurement processes;
    - deters the specific Supplier from future instances of the conduct giving rise to the undertaking;
    - promotes general deterrence by making the business and broader community aware of the conduct and the consequences potentially arising from that conduct; and
    - provides an ongoing benefit by way of an improved compliance program.

- Drawing on ASIC's approach to Enforceable Undertakings, together with recommendations made in the Final Report of the *Financial Services Royal Commission*, the following further considerations might be useful in developing guidance as to the circumstances in which Supplier Undertakings are appropriate:
    - Enforceable Undertakings are used only if they are the most effective and appropriate outcome in the circumstances.[10] Effectiveness of Enforceable Undertakings takes into account 'the significance of the issues to the market and the community, the nature and seriousness of the alleged breach and the compliance history of the party'.[11] Commissioner Hayne also emphasised the critical importance of 'deterrence' as a factor to take into account in assessing effectiveness of undertakings.[12] Similar considerations could be applied to Supplier Undertakings.
    - Enforceable Undertakings are used in lieu of a civil order or administrative action, and not in relation to 'cases of deliberate misconduct, fraud, or conduct

[8] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol. 1, 440-446.
[9] ASIC, *Regulatory Guide 100: Enforceable Undertakings*, February 2015, 9, as referred to in the Royal Commission Final Report, ibid, 441.
[10] Ibid, 441.
[11] ASIC *Regulatory Guide 100* (n 9) 8.
[12] *Royal Commission Final Report* (n 8) 442.

involving a high degree of recklessness'.[13] As such, we suggest it may not be appropriate to use Supplier Undertakings in relation to egregious conduct, serious integrity offences or offences which would be likely to undermine public confidence in the integrity of the government procurement process.

- Commissioner Hayne emphasised the importance of including in Enforceable Undertakings specific admissions of breach of the law. Supplier Undertakings differ from Enforceable Undertakings in that for most conduct leading to debarment, there will already have been a judicial determination that the conduct in question was wrongful. However this will not be the case for all debarment or suspension decisions, and the inclusion of admissions in Supplier Undertakings may be helpful to avoid a situation where a Supplier considers the requirements in an undertaking as 'no more than the cost of doing business or the cost of placating' the government.[14]
- ASIC's Regulatory Guide 100 – *Enforceable Undertakings* (2015) sets out the following non-exhaustive list of factors to be taken into account in determining whether an Enforceable Undertaking is appropriate.[15] We suggest consideration be given to requiring similar factors be taken into account in deciding whether to enter into Supplier Undertakings:
    - Is the person prepared to publicly acknowledge ASIC's views about the conduct and the necessity for protective or corrective action?
    - Was the conduct that ASIC considers to be a breach inadvertent?
    - Was the conduct that ASIC considers to be a breach a result of the conduct of one or more individual officers or employees of the company?
    - What was the seniority and level of experience of the individual(s) involved in the breach?
    - Has the person cooperated with ASIC, including providing us with complete information about the underlying breaches and any remedial efforts?
    - Will the undertaking achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure?
    - Is the person likely to comply with the enforceable undertaking?
    - Has the person been the subject of complaints or previous ASIC enforcement action?
    - What are the prospects for a speedy resolution of the matter?

[13] ASIC *Regulatory Guide 100*, (n 9) 8.
[14] *Royal Commission Final Report* (n 8) 442.
[15] ASIC *Regulatory Guide 100*, (n 9) para RG 1.26, 10.

(b) Clause 18: The definition of 'Senior Officer'

Clauses 6.2 and 6.3 of the Draft define 'cause for debarment' by reference to conduct of 'the Supplier or a Senior Officer of the Supplier'. In terms of the individuals whose conduct might give rise to debarment, the clause 18 draft definition of 'Senior Officer' includes the first two limbs of the definition of 'Officer' in section 9(b) of the *Corporations Act 2001* (Cth).[16] However, limb (iii) from the *Corporations Act* definition, dealing with shadow officers, is omitted:

> *or* (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relations with the directors or the corporation).

A person meeting the definition of limb (iii) above could be exercising a degree of control over a supplier analogous to that of a person who satisfies sub-sections (a) to (d) of the draft definition of 'Senior Officer'. On this basis it would be appropriate and consistent for the wording in limb (iii) of the *Corporations Act* to be added to the definition of 'Senior Officer' in the regime. This would more closely align the definition with the position in corporations law and broaden the ambit of conduct which might enliven a debarment order. It would also be more consistent with the broad interpretation given to 'officer' in *Australian Securities and Investments Commission v King*.[17]

(c) Clause 5.2: The draft attribution rule

As noted above in Section 2, this WA Government initiative foreshadows reform proposals gradually taking shape at national level. The ALRC's report into Corporate Criminal Responsibility will provide a valuable companion piece to the initiative, not merely on the introduction of a debarment regime but with respect to some of its more specific features. As the ALRC has noted in its interim Discussion Paper, the attribution rules that apply to hold corporations responsible for misconduct are many and various, with dozens of different statutory rules that operate alongside the difficult, inefficient and often unprincipled operation of their common law counterparts. Wholesale reform in this field is required to hold corporations to account for serious misconduct. While this work is necessarily ongoing, the WA government initiative intersects with this broader reform agenda.

Here, we consider that the proposed regime could be strengthened considerably through review of its attribution mechanism. Clause 5.2 specifies when the act or omission of a Senior

[16] *Corporations Act 2001* (Cth).
[17] [2020] HCA 4.

Officer of the corporate Supplier is deemed to be an act or omission of that supplier. This is an attribution mechanism for conduct. It is unclear whether this attribution method excludes other attribution avenues (such as general law approaches, for example as found under the *Meridian* approach)[18]. As currently drafted, the attribution method is quite restrictive:

- it attributes the acts of a Senior Officer only, rather than taking the approach of other statutory attribution methods, such as the well-established 'TPA model', which attribute the conduct of employees and agents acting for and on behalf of the corporation;
- it provides that the act must have been done with the Supplier's 'knowledge or approval', thereby requiring some form of attribution rule for the corporate state of mind, but without indication of what that might be;
- it does not appear to capture the valuable concept of a culpable 'corporate culture', such as that outlined in Part 2.5 of the *Criminal Code (Cth)*.

Given the instrumental aims of this regime, we suggest that, to the extent that an attribution rule is necessary (which we question, as discussed below), it is highly desirable that it adopt a more generous attribution rule. Here, the ALRC discussion paper serves as a useful resource to develop attribution models suitable to achieve the WA government's reform agenda. However, whatever model is adopted, we suggest that it is highly desirable that the regime is able to capture cases where the problem lies in inherently defective *systems, processes and policies*, rather than in the *acts (or mental states)* of particular human officers, employees or agents of the Supplier. As evidenced in the Financial Services Royal Commission, particularly with large suppliers, it is all too easy for Senior Officers to decry any knowledge of or involvement in prolonged misconduct and blame 'administrative' or 'process' errors. These are precisely the sorts of cases of protracted corporate misconduct which need to be captured and subject to review through the proposed debarment regime.

However, we submit that there is a real question whether any bespoke attribution rule is necessary for the proposed regime at all. We note that for many if not all Category A cases, any attribution rule would already have been defined and satisfied under the source legislation or general law doctrine. It is unclear to us why, in that event, any further attribution rule is required – particularly one which may be (as here) more restrictively framed than under the source law. A key aim of the WA government's initiative is, after all, to promote good corporate practice: there seems little reason in that context to provide additional protective hurdles favouring corporations who engage in very harmful practices, or have repeatedly failed to comply with the law's requirements.

[18] See *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] 2 AC 500, 91.

Further, where the source legislation or law has omitted an attribution requirement, questions of the extent of corporate culpability or blameworthiness can be dealt with by allowing the supplier to bring evidence of its good corporate compliance practices. That is, it is quite legitimate to place the onus on the supplier who has engaged in misconduct to demonstrate its compliance culture and good corporate ethos. This protects the corporation from responsibility for rogue officers or other 'bad apples' in what is otherwise a tightly-run and compliant organisation. This is a common method of corporate regulation across many statutes and jurisdictions. Further, it is consistent with the overall approach taken by the proposed debarment regime. The conclusion that a 'cause for disbarment' has arisen is only the starting point for the process of review: the existing clause 5.3 then enables consideration of corporate systems and controls, in the manner proposed. It follows that it may be not only possible but highly appropriate simply to remove clause 5.2 from the regime as enacted.

Finally, it is anticipated that some form of secondary legislation and 'soft law' guidelines will be required to accompany the resultant legislation. Developing practical guidance and training for officers on the procurement regime, including developing expertise in identifying risks in specific sectors, is an important aspect of ensuring effectiveness of the regime.

iii) Equality and human rights

Public procurement regimes can offer significant protections for equality and human rights. There are important protections in the proposed regime but the regime would be rendered more effective through two amendments. First, it would be highly desirable to include additional Australian equality laws. Second, the *United Nations Guiding Principles on Business and Human Rights* ('UNGPs') provide the leading international framework and we suggest could usefully be used in the regime.

(a) Broadening the scope of equality and human rights promotion and protection

The proposed regime includes in Category B 'Non-compliance with gender nondiscrimination legislation and equality reporting requirements' and lists the *Equal Opportunity Act 1984* (WA) and the *Workplace Gender Equality Act 2012* (Cth). However, for more extensive protection, this list should include the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

There remains significant potential to maximise the proposed regime to not only use the regime negatively (for debarment) but also to use the regime positively. This could include, for example, the policy that suppliers from backgrounds traditionally underrepresented and

underpaid in employment would receive additional points in consideration of tenders.[19] This could include companies owned by Indigenous people, women, and people with disabilities. Further, suppliers making voluntary commitments to human rights – for example by demonstrating compliance with the UNGPs (discussed next) - could receive additional weighting in the consideration of tenders.

(b) Incorporating the UN Guiding Principles on Business and Human Rights. In finalising the regime, the drafters can be guided by the *UN Guiding Principles on Business and Human Rights* (UNGPs) which were unanimously endorsed by the United Nations Human Rights Council in June 2011 in a resolution co-sponsored by the Australian Government.[20] The UNGPs are the global standard for addressing and preventing negative human rights impacts associated with business activity. They reiterate that states have a duty to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. In particular, the UNGPs require businesses to carry out human rights due diligence. The UNGPs explicitly contemplate the use of public procurement to promote respect for human rights. According to Guiding Principle 6, governments 'should promote respect for human rights by business enterprises with which they conduct commercial transactions'. The commentary to Principle 6 notes that procurement activities provide states with unique opportunities to promote awareness and respect for human rights by those enterprises, including through the terms of contracts. Government suppliers should be aware of the need to respect human rights, ensuring that they and their suppliers comply with the laws of the jurisdiction in which they operate and the core international human rights treaties. As set out in the UNGPs, this can be achieved through suppliers undertaking human rights due diligence. The existing protections for human rights and equality in the proposed regime could be strengthened by reference to the UNGPs and the need for human rights due diligence.

iv) Scope of legislation covered

(a) 'Safety nets' to capture misconduct

In addition to the equality laws identified at (iii) above, there are other laws which would strengthen the debarment regime - and which could be strengthened by it. We have included some specific additions below but firstly acknowledge that the list of legislation is effectively considered illustrative, rather than exhaustive, allowing for problematic conduct not covered by the specific laws listed to be taken into account. Currently, clause 6 of the Draft defines a 'cause for debarment' as 'either a Category A cause for debarment or a Category B cause for

[19] Morris n 2, 13.

[20] See, eg, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>.

debarment'. Clause 6.2(a) lists exhaustively the relevant Category A provisions, followed by a 'safety net' or 'catch-all' provision in clause 6.2(b), which allows for other serious Supplier misconduct to be considered as grounds for debarment. A similar structure is followed for Category B causes under clause 6.3. These safety net provisions are very important, as means to ensure that the full range of potentially egregious misconduct in other countries, across common law, equity and under statute are all captured and to allow for significant shifts in regulatory methods and design, for example the development of new regulatory tools to address predatory digital commerce.

We observe that it would significantly undermine the purposes of the regime for (for example) instances of common law fraud to be excluded from it, or serious forms of equitable or statutory unconscionable dealing (which are not currently listed) or new forms of regulation that are designed to address very serious and novel forms of online or technologically-inspired misconduct. Currently, the safety net provisions are fairly restrictively framed. They require proof of (for Category A cases) 'conviction of any other criminal offence or had a civil penalty imposed'. We are unsure whether this would capture, for example, repeated cases of serious civil misconduct such as deceit or unconscionable conduct, which have not resulted in civil penalties because the claims were brought at general law or under a statute where civil penalties are unavailable. This risk of inadvertent omission is particularly (but not only) present where the relevant misconduct has been the subject of adverse curial decision in another other state or foreign jurisdictions. Again, we think that a history of extensive misconduct in another jurisdiction by a supplier may be grounds for debarment, or at least should be considered as part of the debarment regime. We think that this risk of omission of relevant misconduct would be best met by making the Category A and B lists illustrative rather than exhaustive, to ensure all forms of unlawful and unethical Supplier misconduct are potentially subject to this regime. However, given the current form of drafting, we suggest that the safety net provisions could usefully be amended to include in 6.2(b), after 'civil penalty imposed,' the words 'or contraventions of other, common law, equitable and statutory misconduct'. We consider that there is little danger of this amendment unduly broadening the range of relevant causes of debarment, because of the additional factors listed in (i)-(iv).

(b) Further, specified misconduct

Nonetheless, including specific laws within the regime can give substance to the regime and promote compliance with others laws aimed at improving ethical corporate behaviour – such as the Modern Slavery Act, referred to above. Other examples include laws relating to environmental protection and heritage protection such as the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* and laws relating to safety such as the *Electricity Act 1945 (WA)*.

A useful framework for deciding which legislation should be included as potentially grounding a debarment decision is the OECD Guidelines for Multinational Enterprises. The Guidelines include eleven thematic chapters which ground the OECD's responsible business policies. The proposed debarment scheme includes legislation covering many of the Guidelines' themes, notably employment and industrial relations, combating bribery, and consumer interests. Through mention of equality laws, it touches on the concerns of the human rights chapter but does not address the full range of human rights covered. The concerns of the environment chapter, which include the principles and objectives of the *Rio Declaration*, are not addressed at all by the proposed regime.

The OECD Guidelines on Multinational Enterprises, as the foundation of all the responsible business policies at the OECD, are relevant to public procurement. It notes that 'Governments are expected to lead by example by incorporating [responsible business conduct] standards in their purchasing policies, to safeguard the public interest and ensure the accountability of public spending'. The OECD is currently developing a compendium of good practices on responsible business conduct in public procurement. The final report will be published in October 2020, and will be relevant to the finalisation of proposed debarment scheme.

v) Other

Clearly, meaningful and cutting edge reforms of this sort will evolve over time, to respond to new challenges and opportunities. Here we identify some of the considerations that may inform future review and reform of the developing regime and its implementation. As for all recommendations and submissions, we welcome the opportunity to discuss these further with the WA government, as it finalises and implements its reforms.

At present, some of the practicalities of the process are not clear. For example, it is assumed the regime would apply to new and existing suppliers. One set of considerations then relate to the tendering process. Another consideration is how existing suppliers will be assessed. Will there be an audit or will cases be referred to the CEO, and if so, how and by whom?

Also, the regime might also take account of (or even foreshadow) the proposed reforms to prevent use of phoenix companies to undermine the procurement regime, or to avoid the debarment process. Misconduct can be repeated across companies connected through their directors, or indeed the directors' families and close associates. Recommendations to use unique number identifiers to prevent delinquent directors from evading regulation by closing down or re-branding one company and then duplicating that business in another guise should be considered, as noted in the ALRC discussion paper.

A final consideration is the importance of technology, which presents both an opportunity and a risk area for public procurement. Having a centralised Board to have general oversight of the decision-making can also help drive best practice across Departments by working towards shared systems for the procurement process that take a consistent approach to engagement with suppliers. In terms of risks, the public sector holds important and sometimes sensitive data and we are increasingly aware of the cyber-security risks inherent in IT procurement. Artificial intelligence and algorithms also pose human rights risks to the public if not properly understood and managed.[21]

4. Conclusion

First, this submission has highlighted the importance of the proposed debarment regime in improving public confidence in government expenditure. Second, we have made a number of constructive suggestions to strengthen the proposed regime. These relate to improving transparency through more explicit consideration of oversight regimes; ensuring consistency with other laws and principles and improving effectiveness. There is an opportunity to leverage the regime to improve equality and human rights and to expand the scope of legislation included.

In finalising the regime, the WA Government can benefit from several useful sources we have cited here. These include the ALRC Review into Corporate Criminal Responsibility and the final report which should be forthcoming; and the findings of the 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Sector. The recently published *Driving Change through Public Procurement: a Toolkit on Human Rights for Procurement Policy Makers and Practitioners* provides international best practice in public procurement. We also note the usefulness of global non-binding instruments, particularly the UNGPs and OECD Guidelines for Multinational Enterprises.

We commend the WA Government's leadership in this area and welcome the opportunity to engage in further discussions on this important and timely regime.

ENDS

Contact details:
Dr Fiona McGaughey: fiona.mcgaughey@uwa.edu.au
Prof Elise Bant: elise.bant@uwa.edu.au
Ms Rebecca Faugno: rebecca.faugno@uwa.edu.au
Prof Holly Cullen: holly.cullen@uwa.edu.au

[21] Morris n 2, 49.