



The Law Society

# **Deferred Prosecution Agreements**

## Response to Ministry of Justice Consultation

July 2012



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## 1. Introduction

This response has been prepared by the Law Society of England and Wales (the Law Society) which represents over 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, governments and others.

This response has been prepared with assistance from the members of the Law Society's Criminal Law Committee, Money Laundering Taskforce and Company Law Committee.

The Law Society welcomes the opportunity to respond to the Ministry of Justice's consultation on the introduction of deferred prosecution agreements (DPAs) as a new enforcement tool to deal with economic crime committed by commercial organisations.

## 2. Specific consultation questions

### 2.1. **Do you agree that deferred prosecution agreements have the potential to improve the way in which economic crime committed by commercial organisations is dealt with in England and Wales?**

The Law Society agrees that these proposals have the potential to improve the way economic crime committed by commercial organisations is dealt with by:

- providing commercial organisations with an incentive to self-report with a reasonable level of certainty as to the likely outcome;
- reducing the costs of investigation and prosecution;
- reducing use of court resources;
- increasing public confidence in the accountability of commercial organisations;
- minimising damage to innocent stakeholders (such as staff) currently caused by drawn out investigations and court processes;
- increasing the ability to compensate victims of wrong doing by commercial organisations; and
- actively promoting enhanced business and regulatory practices in the future.

Realising this potential improvement will depend upon ensuring that:

- the process is transparent and has certainty;
- prosecutors and courts take a practical approach; and
- expectations for improvement are consistent with existing regulatory frameworks.

The Law Society sees two key risks to public confidence in the DPA process. Firstly, if the process is insufficiently transparent and seen as a way of letting individuals within commercial organisations 'get away' with criminal

activity. And secondly, if DPAs are only granted to larger commercial organisations, with smaller commercial organisations still facing the full impact of criminal investigations and prosecutions because they are seen as softer targets.

To mitigate these risks, clear and transparent guidance should be provided on when it is appropriate to prosecute individuals within a company when a DPA is considered. Further, the criteria for assessing when to grant a DPA should be scalable to all types of commercial organisations, both small and large.

## **2.2. Do you agree that deferred prosecution agreements should be applied only in cases of economic crime?**

The policy grounds for applying DPAs to cases of economic crime are the:

- complexity and cost of investigating and prosecuting cases of complex economic crime committed by commercial organisations;
- lack of success in prosecuting such cases leading to a loss of public confidence in the ability of law enforcement and the justice system to hold commercial organisations to account;
- potential for there to be a difference in culpability between individuals within the commercial organisation and the culpability of the commercial organisation as a separate legal entity; and
- likelihood that victims of crimes committed by commercial organisations will not have the resources to recover losses civilly without assistance from the State.

For these reasons, we believe that it is appropriate to apply DPAs to cases of economic crime committed by commercial organisations. Given the resources involved in monitoring compliance with a DPA, it may be appropriate to limit their use to cases of serious economic crime, although this is a matter which could be covered in guidance.

At this point the Law Society is not aware of any other categories of criminal conduct or potential defendants which pose the same challenges to existing prosecutorial tools and so justify the use of a DPA.

## **2.3. Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?**

The consultation proposes the following factors should be considered before entering into a DPA:

- the nature and seriousness of the offence;
- the level of premeditation and whether any attempt was made to hide the wrongdoing;

- how widespread within the commercial organisation the wrongdoing was and the seniority and number of the perpetrators;
- any losses to innocent third parties;
- the likely impact on the commercial organisation of prosecution and its financial health;
- any action being taken in relation to the wrongdoing in other jurisdictions;
- the action taken by the commercial organisation and commitment to resolving the issues, enabling recovery and restitution, and improving compliance; and
- previous convictions and previous DPAs.

We agree that these are generally the right factors to be taken into account by prosecutors.

Two further factors which may be relevant are:

- the ability of the commercial organisation to provide information to enable monitoring of the DPA; and
- the likelihood that the commercial organisation will abide by the DPA.

#### **2.4. Do you think that it would be appropriate to include any further components in a code of practice for DPAs for prosecutors?**

The consultation proposes the following issues should be covered in a code of practice for prosecutors:

- the circumstances in which a prosecutor could legitimately consider entering a DPA and the principles in applying such a decision;
- the permissible parameters for a DPA to cover,
- the circumstances when a DPA might be unsuitable;
- how legal professional privilege should be protected; and
- how to approach the decision to prosecute following termination of an agreement following breach.

We agree that these are relevant issues for inclusion in a code of practice and we agree that the code of practice should be publicly available.

We very much welcome the proposal to protect legal professional privilege, which helps to protect the fundamental human rights of privacy and access to justice for the participants in the DPA process.

There are three further areas which we believe should be included in the code of practice: namely the size of the commercial organisation, the prosecution of individuals and the interaction with the anti-money laundering consent regime.

Firstly, we recommend that the code of practice should provide guidance on how to take into account the practicalities of applying the DPA criteria to different sized commercial organisations. This will help ensure that large commercial organisations are not disproportionately favoured.

Secondly, when considering whether to enter into a DPA, the prosecutor is likely to also consider whether to prosecute any individuals within the commercial organisation. We accept that there is a tension between DPAs being seen to be a ‘get out of jail free card’ for individuals within a corporation and the policy objective of ensuring that criminal actions are uncovered and not repeated.

This may mean that prosecutors need to take different approaches to a DPA where there is evidence of lax or unenforced procedures where individuals engaged in criminal activity because it was part of the commercial organisation’s cultural norms; and situations where there is evidence that individuals have deliberately engaged in criminal activity in the face of policies and procedures which should have operated to restrict such conduct.

Ideally, however, the procedure should generally focus on encouraging individuals to be open in their disclosures. The code of practice should require the prosecutor to have regard to whether the individual has provided full and frank co-operation, when weighing up the individual’s culpability as compared to the commercial organisation’s culpability, and in assessing the overall public interest in prosecuting the individual.

The Law Society would welcome the opportunity to provide input into the code of practice as it is developed.

## **2.5. Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?**

We agree that the Sentencing Council is the right body to develop such guidelines. We would welcome further consultation during the development of the specific guidelines.

## **2.6. What do you think would be most useful in a guideline for DPAs?**

The consultation considers two types of guidelines; an overarching narrative guideline on the principles of a DPA, and offence-specific guidelines giving more detailed starting points or ranges for financial penalties and other conditions.

We can see the benefits and draw backs for each style of guidance. However we believe the guidance will be more effective the more certainty is provided. This is because the more certain the process, the more likely that commercial

organisations will engage with the process and the costs of instructing lawyers to assist them will be lower. Further, greater certainty will reduce public and market speculation as to possible penalties, thereby helping to achieve the policy objective of reducing collateral damage to innocent parties, such as staff and shareholders.

**2.7. Do you agree that the preliminary hearing should take place in private?**

We agree that holding the preliminary hearing in private would help to achieve the policy objective of limiting collateral damage to innocent parties. It will also mitigate the risk of the commercial organisation or specific individuals not being able to obtain a fair trial should the DPA be refused or individual prosecutions be pursued.

We believe that clear public guidelines for entering DPAs, court scrutiny and the final part of the proceedings being held in public will provide for sufficient transparency to counter concerns about the initial hearing being in private.

**2.8. Do you agree that the first test for a judge to apply at a preliminary hearing is whether a DPA is ‘in the interests of justice’?**

We agree that the test ‘in the interests of justice’ is sufficiently wide to consider whether the DPA is in the public interest, is upholding the rule of law and not abusing the processes of the court. We agree that the test applied by the court should be the same as the one which the code of practice requires the prosecutor to consider.

**2.9. Do you agree that at a preliminary hearing the judge should also apply a test as to whether the emerging conditions of a DPA are ‘fair, reasonable and proportionate’?**

We agree that the court should also apply the test of whether the emerging conditions of a DPA are ‘fair, reasonable and proportionate’ as this will help ensure that the DPA is consistent with the requirements of the Human Rights Act.

**2.10. Do you agree with the proposed possible contents of a DPA as outlined?**

The consultation proposes that a DPA should include the following features where appropriate:

- a financial penalty to be paid within a specified time;
- the disgorgement of profits or benefit within a specified time;
- reparation to victims within a specified time; and

- requirements for the creation of proper anti-corruption or anti-fraud policies, procedures or training when required; certification that these are in place; and periodic reports on compliance or appointment of an independent monitor.

It is also suggested that:

- where criminal investigations are to be undertaken against individuals within the commercial organisation, the commercial organisation will make available all relevant, non-privileged information and material to the prosecutor and provide access to witnesses; and
- where the management team were involved in the criminal activity, the commercial organisation will remove the relevant individuals from post or pull out of the market in which the criminal activity is admitted.

The Law Society broadly agrees with these contents, subject to some concerns around the implementation and monitoring of compliance programmes and the use of internal investigation material in the prosecution of individuals.

The compliance programme included in a DPA should be focussed on ensuring the commercial organisation complies with its legal obligations in the future in a sustainable and proportionate manner, rather than be used as further punishment. Gold plated compliance programmes risk creating situations where breaches of the DPA are inevitable. Where the commercial organisation is also regulated by an external body, it is important that the regulator is either used to set and monitor the compliance programme or is involved in the approval of the programme and the monitoring plan. Failure to involve the regulator risks the commercial organisation being subject to inconsistent or conflicting compliance standards, which in turn will impose excessive and putative regulatory burdens on the commercial organisation.

Turning then to the use of internal investigation material in subsequent investigations. The presumption of innocence until proven guilty and procedures to safeguard the human rights of suspects prior to charge are established and important features of the UK's criminal justice system. Internal investigations conducted by commercial organisations do not usually have the same safeguards in place, mainly because they are not designed for use in criminal proceedings. Employees will generally be required by their contract of employment to answer questions during an internal investigation and will not have the right to legal representation. Without such features being incorporated into any internal investigation under the DPA, the evidence is likely to be inadmissible and a subsequent prosecution of the individual open to challenge on human rights grounds.



**2.11. Do you agree that there should be a reduction principle, relating only to the financial penalty aspect of a DPA, and that the maximum reduction should be one third of the penalty that would have been imposed following conviction in a contested case?**

We support the inclusion of a reduction principle to ensure there is an incentive for self-reporting. We accept that a maximum reduction of one third of the penalty is consistent with current sentencing guidelines for discounts to be applied following a guilty plea by an individual.

However, there is some concern as to whether this will be a sufficient incentive for self-reporting in practice. There is very little case law or sentencing guidance at present as to the penalty levels which should be applied in relation to criminal conduct by a commercial organisation.

In the face of unlimited fines and a prevailing community attitude in favour of a tough stance on corporate misfeasance, even with a 33.3% reduction, the penalties may well be prohibitive for the continued survival of the commercial organisation and dwarf the anticipated legal fees to defend a charge should one ever be brought.

The proposed admissibility of admissions contained in the DPA in other civil proceedings, may effectively render a commercial organisation unable to defend itself against civil claims and may be evidence on which insurers seek to avoid paying out on cover. These potential costs will also be taken into account by the commercial organisations when assessing whether there is an incentive to self-report.

To ensure that the policy objective of limiting the collateral damage to innocent third parties is achieved, it may be appropriate to retain some flexibility on sentence reduction when it is incorporated within the legislation.

**2.12. Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?**

We agree that it is important that, following approval of the DPA, the final stage of the process should take place in open court, to ensure transparency and enhance public confidence in the process.

**2.13. Do you believe that it is right that the court should determine whether a variation to a DPA is appropriate, where a change of circumstances has occurred?**

The Law Society's preference is for the court to determine whether a variation in the DPA is appropriate. This avoids the risk of prosecutors and commercial

organisations going behind the original order and maintains the transparency in the process.

For administrative efficiency, it should be possible for the prosecutor and the commercial organisation to propose a variation to the court by consent.

We accept that there may be limited circumstances where it would make sense for the prosecutor and the commercial organisation to make minor and administrative amendments to the DPA by agreement without involvement of the courts. These powers should be clearly and restrictively defined by the court within the DPA and should be subject to guidance to prosecutors on drafting and exercising such powers.

**2.14. Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?**

See our answer to 2.14

**2.15. Do you believe that it should be possible for the parties to a DPA to be able to make amendments to it, within limits defined by that DPA?**

See our answer to 2.14

**2.16. Do you agree that there should be provision for formal breach proceedings and that it should operate as described?**

We agree that breach proceedings will be most useful when the majority of the terms of the DPA have been complied with and the pursuit of the original prosecution is unlikely to be cost effective.

The consultation proposes the following procedure for breach proceedings:

- a breach would be determined by a crown court judge, with a factual finding being proven to the criminal standard;
- the proceedings would focus on the conduct involved in the breach rather than the original offending; and
- a breach of a DPA would not amount to a conviction or be a criminal offence.

It is suggested that once a finding of a breach is made the court would be able to:

- impose a financial penalty;
- add or vary conditions of the DPA;
- extend the period of the DPA; and/or
- terminate the DPA.

Either party would be able to appeal a judge imposed determination of a breach to the Court of Appeal (Criminal Division).

We agree that the breach proceedings should operate as described.

**2.17. Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?**

The Law Society agrees that this approach is appropriate to support the transparency of the DPA process. However, we believe it would be appropriate for the Sentencing Council Guidelines to include information on the factors to be taken into account by the court in exercising this discretion, to promote certainty for commercial organisations. Further, the code of practice and prosecutor's guidance should make it clear that any decision to prosecute following an enforced termination of the agreement, must be made independently of the Judge's decision and be assessed against the factors considered for all prosecutions.

**2.18. Do you agree that the above proposals regarding admissibility are appropriate?**

The consultation proposes that for future criminal proceedings:

- the DPA and information provided by the commercial organisation should be admissible in principle in any subsequent criminal proceedings against that commercial organisation;
- in proceedings against the individual, information provided by the company should be admissible but admissions by the company should not be admissible;
- the unsigned DPA should not be admitted, but the prosecutor should be able to obtain evidence following enquiries based on such unsigned DPAs;
- pre-existing documents provided should be admissible, whether or not a DPA is signed; and
- documents created during the course of the DPA process would be treated as documents obtained under compulsion and have the same restrictions.

It is proposed that in civil proceedings:

- the fact and terms of DPA would be admitted via section 1 of the Civil Evidence Act 1995; and
- the agreed facts should be treated as true in a civil proceeding unless the contrary is proven.

Subject to our comments at 2.10 above regarding answers provided by individual employees during internal investigations, and at 2.11 on the cost

implications for firms in relation to civil claims, we agree with the proposals regarding admissibility of evidence in future proceedings.

**2.19. What are your views on the appropriate approach to disclosure in the context of DPAs?**

The Law Society agrees that common law principles regarding disclosure of evidence to the defence by the prosecution should be applied to the DPA process. We also support the proposal that onward disclosure should only be for the purposes of the DPA, or as required or permissible by law.

**2.20. Do you agree with our proposals regarding the susceptibility of judicial review of decisions made in relation to DPAs as outlined above?**

Given the judicial oversight already designed into the DPA process, the Law Society agrees that the DPA judgement should not be judicially reviewable. We agree that the existing ability to judicially review a decision not to prosecute should remain, even where a DPA is entered into.

**2.21. Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?**

Criminal conduct may come to the attention of senior management within a commercial organisation some time after it has occurred. Therefore we agree that DPAs will be most effective if they are available for conduct which took place before the commencement of legislation introducing them.

It would be appropriate for the code of practice to include guidance on how prosecutors should view self-reporting of criminal conduct which occurred prior to the existence of DPAs.