

## Jersey's Deferred Prosecution Agreements Law: the practical implementation and Attorney General's guidance

Insights - 15/03/2023

Ogier partner James Angus advised, in consultation with the Government of Jersey, on the form and ambit of the Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law. Following its receipt of Royal Assent on 15 February 2023, this law is now in force with effect from 3 March 2023.

In this article, James Angus and senior associate Tom Hall share their insights on the practical implementation of Deferred Prosecution Agreements in Jersey. [\[1\]](#)

### | The DPA Law

As anticipated, the Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law (the **DPA Law**) as enacted passed the States with very few amendments. The amendments made were predominantly to remove wording relating to the legislation's prior draft status.

What was more eagerly awaited was the Attorney General's guidance on how Deferred Prosecution Agreements (**DPAs**) would be practically implemented in Jersey. The Attorney General's guidance was issued on 3 March 2023, [\[2\]](#) to coincide with the DPA Law coming into force.

### | Important reminders on the DPA Law

1. The DPA Law does not apply to individuals. It only applies to "an entity" which is defined as:

- a company
- a foundation
- an incorporated limited partnership

- a limited liability company
- a limited liability partnership
- a separate limited partnership
- any other body or person that has legal personality, but is not an individual or a corporation sole, whether established in Jersey or elsewhere

Importantly for the purposes of a jurisdiction like Jersey, we consider that the above scope would cover a corporate trustee who discovered potential criminal activity in relation to the operation of a trust (including, for example, AML failings)

2. The DPA Law only relates to certain "Specified Offences", which are set out in Schedule 1 to the DPA Law. Broadly speaking, these are "white collar crime" offences, which include, by way of example only, fraud, embezzlement, certain offences under the Companies (Jersey) Law 1991 and certain offences under the Proceeds of Crime (Jersey) Law 1999

3. The DPA Law requires the entity to self-report to the Attorney General in accordance with the DPA Law and the Attorney General's guidance

4. It remains at the discretion of the Attorney General whether the entity has satisfied the criteria for entering into a DPA, based on the DPA Law and the Attorney General's guidance. That will then be subject to discretionary approval by the Royal Court, in accordance with Royal Court's supervisory jurisdiction

5. The Royal Court will not sanction a DPA unless it is satisfied that it is in the interests of justice to do so and the terms are fair, reasonable and proportionate

6. If a DPA is entered into, it will be in lieu of a criminal prosecution, provided that the entity complies with the terms of the DPA throughout its term

7. If the entity breaches the terms of the DPA, then it renders itself liable to prosecution

## **The Attorney General's guidance**

A helpful starting point appears at the end of the Attorney General's guidance, in the Appendix. This provides a flowchart of how the DPA process will operate procedurally (assuming all applicable hurdles and tests are met along the way) from self-report to the expiry of the DPA itself and the entity successfully having avoided a prosecution.

Turning to the substance Attorney General's guidance, the following points are particularly noteworthy.

1. The Attorney General notes in the introduction that in a small jurisdiction such as Jersey, there

is a particular attraction to DPAs, in that, if successful, they avoid the reputational damage of a corporate conviction and the attendant time and costs of a prosecution and trial

2. The Attorney General notes in the fourth paragraph of the introduction that a DPA is "an exceptional criminal justice tool and is not a routine measure". An entity should not expect, just because it self-reports, that it will avoid prosecution. The Attorney General's guidance notes that all cases will be assessed on their particular facts, and will be considered by him on a case-by-case basis

3. The entity must make a self-report, the contents of which are private and confidential. While there is no specific form on which to make a self-report (though one may be produced subsequently), the Attorney General has set out at paragraph A9 the requirements for a self-report (and the evidential considerations for the entity when submitting its self-report at paragraph B10-B13), to be read in conjunction with Article 4 of the DPA Law. The AG provides at paragraph A8 the email address to which a self-report must be submitted

4. All DPA proceedings involve the entity being indicted for the specified offences, such that they are formally before the Court as a defendant. However, the indictment is deferred for so long as the DPA proceedings are live

5. The Attorney General has published indicative cost rates at paragraph C14-C15 for consideration of the self-report, although this is an estimate only. The estimate is in the region of £7,500 - £10,000, payable by the entity and non-refundable regardless of the outcome of the Attorney General's determination (see Article 5(3) and (6) of the DPA Law). It should be noted that the cost estimate given is on the basis of a "high quality" self-report, requiring little further liaison. Where a self-report is piecemeal, or leads to further investigation and liaison, the cost could be significantly higher

6. The Attorney General's determination of whether the self-report meets the DPA criteria is a balancing exercise assessing "the factors which would justify a prosecution and those that militate against it...[and] which matters are considered relevant and what weight is given to them are matters for the [Attorney General] and will be decided on case-by-case basis" (paragraph D16). As noted in our [previous article](#), we take the view that the concept of the public interest in a prosecution or a DPA will be a core consideration

7. If the Attorney General determines, having considered the self-report, that it is in the interests of justice to enter into a DPA, he will write to the entity to invite it to commence negotiations with a view to agreeing the terms of the DPA. If the entity wishes to enter into negotiations, the Attorney General will explain how those discussions are to be conducted, which will remain confidential

8. The DPA Law contains discretionary protections for the privacy of the entity involved in DPA proceedings, including the possibility that hearings will take place in private "to avoid a

substantial risk of prejudice to the administration of justice" (paragraph E26-E29). With that said, the "Statement of Facts" will be a full public record of the wrongdoing because "the public are entitled to a full statement of the facts in order to understand why the Entity is not being prosecuted" (paragraph F34)

9. It is noted that "The terms of a DPA will usually comprise a set of requirements and general terms which will usually include a financial penalty. Measures may also be included as a means of redress for victims, such as payment of compensation." (Paragraph F36). When considering the level of the financial penalty, "[p]revious sentencing decisions of the Royal Court and Court of Appeal will be of limited assistance, save where the conduct is directly analogous. Any financial penalty must be broadly comparable to a fine that the Royal Court could have imposed upon an entity if it had pleaded guilty to all of the offences in the indictment." (Paragraphs F42-F43)

10. Given the novel nature of the DPA regime, it is noted that it is likely that the financial penalties will be fixed with reference to other sources, "for example the JFSC guidance on civil penalties (or the UK FCA's civil penalty guidance). Examples of DPAs from other jurisdictions may serve as illustrations where the conduct alleged is similar to the offences in the indictment." (Paragraph F45)

11. The DPA must specify the end date, and the length of the DPA needs to be "sufficient to enable compliance with financial penalties paid in instalments, monitoring and cooperation with the investigations into individuals, including any criminal trials" (paragraph E38)

12. If the entity provides inaccurate or misleading information, or intentionally omits relevant information or evidence, the Attorney General may instigate fresh proceedings against the entity whether or not a DPA has been approved or expired (paragraph G58-G59) and Article 12(2) and (3) of the DPA Law). Where a DPA is approved by the Royal Court, the public "Statement of Facts" may be used in subsequent criminal proceedings as an admission in relation to the relevant conduct (paragraph G60). Where a DPA has not been approved, then certain information may be used in limited criminal proceedings (broadly the prosecution of separate offences involving misleading information or statements given by the entity), subject to the ordinary rules of criminal evidence and procedure on admissibility (see Article 15(5) of the DPA Law). This is intended as a measure of protection for an entity wishing to agree a DPA, it encourages the entity to be candid with the Attorney General without fear of that candour being used against it in circumstances where the protection of a DPA is not ultimately obtained

13. The Independent Monitor "represent[s] an essential aspect of the DPA process". Compliance with the DPA is placed on both the entity and its connected persons (as defined in Article 1(2) of the DPA Law). The Independent Monitor oversees the entity's compliance with the DPA (at its cost, which could be substantial) and will be required to submit reports to the Attorney General at an agreed frequency

14. If the Attorney General considers there are reasonable grounds to suspect a breach of the DPA while it is in force, he may make an application to the Royal Court. It is envisaged that such proceedings should be rare, and that minor or unintentional breaches could be addressed by a full written explanation and apology (paragraph J81). However, if breach proceedings are brought, the Royal Court must decide on a balance of probabilities whether the entity has failed to comply with the terms of the DPA. If it makes such a finding, it may invite the entity and Attorney General to agree remedial proposals or terminate the DPA (paragraph J83). It should be noted that termination of a DPA will lead to prosecution for the underlying offences the subject matter of the DPA, with the Statement of Facts admissible as admissions (paragraph K86). This is a strong incentive to meticulous compliance with DPA terms and the requirements of the Independent Monitor

15. If the DPA successfully runs its course, the Attorney General must discontinue the relevant criminal proceedings against the entity after which the entity cannot be freshly indicted for the same offences (unless it subsequently transpires that the DPA proceedings were vitiated by the entity having provided inaccurate, misleading or incomplete information). Again, this is a strong incentive to full and accurate disclosure by an entity.

## **What are the next steps?**

It bears repetition that the DPA is an entirely new concept in Jersey but has seen extensive application in jurisdictions such as the United States and the United Kingdom.

This will continue to be a new and developing area of law in Jersey for some time, as the Attorney General and Royal Court get to grips with the practical application of the DPA Law. We are likely to see the DPA Law and Attorney General's guidance put to the test before the Royal Court over the coming weeks or months, and we will be keeping a close eye on the outcomes.

While all DPAs will turn on their specific facts, and the UK is subject to its own statutory DPA regime and associated guidance, it appears likely – as the Attorney General acknowledges – that he may find illustrative precedent in DPAs concluded under other regimes when establishing a body of Jersey customary law on the matter.

## **How can Ogier help?**

If an organisation is considering making a self-report to the Attorney General under the new DPA regime, they should seek early, comprehensive legal advice in light of the attendant advantages and risks. This is particularly the case in relation to the content of self-reports, given the serious consequences of getting that process wrong.

Ogier's partner led white collar crime and regulatory team is on hand and particularly well-placed to offer detailed guidance, and liaison with the Law Officers' Department where

necessary.

Please contact James Angus and Tom Hall for further information or advice.

[1] For more information on Deferred Prosecution Agreements and the proposal of the legislation, read James and Tom's original briefing: [Deferred Prosecution Agreements: a high stakes bargain](#)

[2] [Attorney General's DPA Guidance](#)

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