

STATES OF JERSEY



DRAFT CRIMINAL JUSTICE (DEFERRED PROSECUTION AGREEMENTS) (JERSEY) LAW 202- (P.103/2022): COMMENTS

**Presented to the States on 6th December 2022
by the Children, Education and Home Affairs Scrutiny Panel
Earliest date for debate: 13th December 2022**

STATES GREFFE

COMMENTS

Introduction

The *Draft Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law 202-(P.103/2022)* (the ‘draft Law’) was lodged by the Minister for Home Affairs (the ‘Minister’) on 31st October 2022. An amendment to the draft Law was subsequently lodged by the Minister on 23rd November 2023. The Panel received a briefing on the draft Law on 4th November and subsequently asked a number of queries by email to clarify its understanding on a number of matters. The Panel agreed to produce a comments paper, to share some of the information and understanding with other States Members ahead of the debate.

Background

The Panel was further advised that the draft Law to introduce Deferred Prosecution Agreements (‘DPAs’) was part of a wider policy proposal to enhance anti-money laundering enforcement in Jersey.

The Panel was advised about various benefits for Jersey adopting a regime of DPAs. The possible benefits included:

- the potential for DPAs to be used to secure additional prosecutions and impose penalties for certain unlawful activity (as per Schedule 1, which details the ‘specified offences’). DPAs would not be used to replace existing prosecutions;
- that the self-reporting regime required the legal entity to provide the evidence, which would keep the requirements (e.g. time and cost) for the investigator and prosecution at a minimum and therefore reduce the cost to the taxpayer in the long run; and
- organisations would be strengthened through remedial actions to improve their policies and procedures, therefore, reducing any “weak links” found within the jurisdiction.

The perceived benefit of DPAs for organisations / legal entities, was that they would have an additional route available to them if certain criminal activity was detected. A DPA could provide a possible route to avoid a regular prosecution and associated reputational damage. It also provided the chance to cooperate with the prosecution and remedy any faults in procedures that were identified.

DPAs were introduced in the United Kingdom in 2014. The Panel understands that there would be a number of differences between the United Kingdom (UK) DPA regime and Jersey’s proposed DPA regime. Primarily, Jersey’s DPA regime would be front-loaded, specifically, a legal entity would have to self-report to the Attorney General in relation to the criminal offence before an investigation started. However, if an investigation had already started, the DPA process would no longer be an available option. In the UK, an entity could enter into a DPA after time and resource has been put into the prosecution case. The Panel understands that the reason for this different approach is to prevent additional costs to the taxpayer and to avoid protracted prosecution and investigation process. The requirement to self-report could incentivise an organisation to begin the DPA route of action early.

Consultation

The Panel asked about what public consultation had taken place to develop the policy and the draft Law. The Panel was advised that a public consultation on amendments under the *Proceeds of Crime (Jersey) Law 1999* was undertaken in January 2022. The consultation included proposals for a DPA regime, in addition to the introduction of the Failure to Prevent Money Laundering offence as some of the ways to support Jersey's enforcement effectiveness. The Panel was advised that no written responses were received for the public consultation, however, positive engagement was reported from industry representatives.

Specifically in respect of the draft Law, the Panel understands that there was consultation with the Law Society's Criminal Law subcommittee. Criminal law subject matter experts were sought, rather than finance experts, because of the legal understanding required. A few comments were received about some of the language used and the Panel was advised that most are reflected in the draft Law, as lodged.

Independent Monitor ('IM')

As described in the report accompanying P.103/2022, the IM would be nominated by the Attorney General and appointed by the Royal Court.

The Panel was advised that the role of the Independent Monitor (IM) would be a requirement in the Jersey DPA regime, whereas it was not a statutory requirement in the UK, where IMs have occasionally been appointed. The Panel was advised that a different policy approach has been adopted for Jersey as it is considered more appropriate and effective for an IM to be appointed to monitor compliance with a DPA and report to the Royal Court and the Attorney General, rather than the Attorney General monitoring a legal entity's compliance directly.

The Panel asked for some further details about the IM, including whether it would be an individual, or a professional engaged through a corporate or regulated body. It was confirmed that this could be either and would depend on the specific requirements of the DPA case, particularly, if specific knowledge was required. Regarding procurement of the IM, the Panel was advised that the Attorney General would publish a note to invite applications from professionals and companies who would like to be considered as a potential IM.

The Panel was advised that the Attorney General's guidance (referenced in Article 14 of the draft Law) would provide further clarity on the procurement of, and requirements for, an IM.

Costs

The Panel noted that the report accompanying the Proposition referenced that the legal entity 'might'¹ be required to cover the costs. In response to queries from the Panel about scenarios where costs would, or would not, be covered it was confirmed that:

¹ Draft Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law 202- ([P.103/2022](#)), (Report) page 9, paragraph 4.6

- Article 5(3) states that ‘An entity that submits a self-report **must** meet the costs incurred by the Attorney General in carrying out a determination under paragraph (1).’² The costs are non-refundable (as per Article 5(6) of the draft Law).
- It was also highlighted to the Panel that under Article 3(3)(f) of the draft Law the legal entity ‘may’³ be required ‘to pay any reasonable costs of the Attorney General in relation to the DPA proceedings.’⁴ The Panel is advised that is ‘may’ as the requirements under (a) to (e) of the Article will vary dependent on the circumstances of the case. However, the costs of the Attorney General and the remuneration of the IM would be clear when negotiating the DPA and the legal entity would need to consent to this in advance.
- The Attorney General’s guidance about the DPA process (which is still in the drafting stages and the Panel has not seen) will make it clear that the costs of the Attorney General will need to be covered by the legal entity.

The Panel also asked whether there was any further detail available about the level of cost with regards to the DPA process. This could not be confirmed and would depend on the complexity of the individual case. However, it was highlighted that, since the entity would have to agree to cover any additional costs before the AG would agree to the DPA, there would be an additional incentive for them to cooperate with providing evidence.

Amendment

An amendment to the draft Law has been lodged by the Minister, the [Draft Criminal Justice \(Deferred Prosecution Agreements\) \(Jersey\) Law 202- \(P.103/2022\): Amendment](#) (the ‘Amendment’).

The Panel understands that the proposed change of wording in Article 9(6) and Article 9(7) of the draft Law (originally relating to ‘information or documents’, and per the Amendment changed to reflect a ‘statement’), is because ‘information or documents’ has a wider scope. This might cause difficulties for the prosecution if any case relied on information that was provided by a connected person (as defined by the draft Law) to an IM.

The Panel was advised that the difficulty would arise because ‘information or documents’ go further than is necessary from a procedural perspective to protect a connected person’s right against self-incrimination.

The Panel specifically asked how the proposed Amendment to P.103/2022, i.e. use of the ‘statement’ from a connected person, compares to the corresponding part of the wording in the UK DPA law. It was clarified that the UK law was silent on the use of an IM and did not impose any duties on the legal entity or connected persons to provide information to them as there was, as referenced above, no statutory requirement to appoint an IM in the UK.

² Ibid, p.24 (emphasis added)

³ Ibid, p.23

⁴ Ibid, p.24

Conclusion

The Panel conveys its thanks for the briefing it received on this matter and, also, the follow up responses to queries. The Panel believes that the Proposition and the Amendment will enhance criminal justice and support the anti-money laundering and the counter financing of terrorism regulations that are already in place for Jersey.