THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

Law Reform Committee

JOINT RESPONSE OF THE CRIMINAL BAR ASSOCIATION AND LAW REFORM COMMITTEE OF THE GENERAL COUNCIL OF THE BAR OF ENGLAND AND WALES TO THE MINISTRY OF JUSTICE CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATION: DEFERRED PROSECUTION AGREEMENTS.

1. The Criminal Bar Association ("CBA") and Law Reform Committee of the General Council of the Bar of England and Wales ("LRC") welcome the opportunity to respond to the Ministry of Justice consultation on Deferred Prosecution Agreements ("DPA").

2. Before responding to the specific questions, the CBA & LRC wish to make the following more general points.

3. The current proposals fail to address which defendants are likely to be selected for such agreements, what tools are currently available to deal with the crimes they commit and how effective those tools are. The CBA & LRC find it remarkable that in a paper specifically dealing with economic crime there is not a single reference to the Financial Services Authority ("FSA"). Nor indeed does it refer to powers of prosecution held by Local Authorities or BIS. Each of these organisations is used to balancing the different enforcement tools in their arsenal, including civil recovery actions, often choosing to pursue a regulatory/supervisory outcome initially in the hopes of resolving the offending behaviour without resorting to criminal prosecutions. The threat of prosecution however remains in the background as an encouragement to companies to cooperate. These are precisely the scenarios that the proposed DPAs also seek to address, using many of the same techniques.

4. There is, however, no discussion in the paper as to how these models currently deal with economic crime nor how the different regimes would work alongside the introduction of DPAs. For example, there is no reference to the Compliance Code, the Enforcement Concordat or the FSA handbook to mention just a few. It therefore seems to the CBA & LRC that the current proposals are premature in that there has not first been an assessment of where the current mischief, if any, actually lies. It appears that, particularly, in light of the recent RBS and LIBOR scandals a wider look at economic crime is required, which addresses alternatives to prosecution but also whether clear wrongdoing can be prosecuted at all under the current provisions.

5. The CBA & LRC are well aware of the some of the difficulties and costs involved in prosecuting economic crime and welcomes the opportunity to consider whether the availability of additional powers will strengthen the criminal justice system; however, the Government's paper does not contain sufficient information on which such an assessment may appropriately be made. A proper review of the current regimes for dealing with economic crime should be conducted, addressing the different tools available to the prosecuting authorities and the degree to which they are working effectively. It is only then that the need for DPAs can be properly assessed and correctly structured to produce the best outcomes. Further, the use of DPAs in the United States also needs to be properly considered both with regard to its success in fighting serious financial crime and in bringing those responsible to justice.

6. The impact of DPAs cannot be evaluated in a vacuum and the funding of prosecution agencies is a very important consideration in assessing the likely success of such a tool. There is a concern that the principal purpose behind the proposed introduction of DPAs is cost saving. Reference is made in the Consultation Paper[1] to the general length and cost of fraud proceedings as if these difficulties will be avoided by its introduction. This is troubling as, ideally, the DPA process is designed to uncover greater levels of fraud through self reporting and result in more trials of the individuals responsible. Far greater funding may be required rather than less.

7. This is not the message that is being relayed by such comments or by current cutbacks. The Serious Fraud Office ("SFO") is the principal agency charged with

[1] at paragraph 41

fighting large scale financial crime. Its budget has been significantly and systematically reduced over the last five years at a time when economic crime is on the increase[2]. It is clear that any non-prosecuting measures such as DPAs, with self reporting at their heart, are only as effective as the willingness and capacity of the State to prosecute complex crime where necessary. As Lord Woolf, former Chief Justice, recently commented "unless people are convinced that the SFO can provide an answer to matters that it's investigating and that it means business, all the other changes being made in the regulatory world will be as nought"[3].

8. Several paragraphs are devoted in the Paper to the success of DPAs in the United States; however, there appears to have been little real scrutiny of the correlation between the reduction in individual prosecutions and the implementation of a DPA and whether, in reality, the device has acted as a pragmatic alternative to individual accountability. It is clear that there are increasing concerns about its use in the US as identified in paragraph 63.

9. With Maxim Healthcare Services, for example, the organisation agreed that it had conspired to defraud US Government health programmes of $61 million between 2003 and 2009; yet, only nine employees, none of them higher than regional manager level, were prosecuted.

10. DPAs have been regarded as particularly useful in cases involving corruption by subsidiaries/agents outside the jurisdiction where breaches of the Foreign Corrupt Practices Act (FCPA) were established by the existence of an office in the US. In 2011 only one new corporate prosecution was brought as a result of an FCPA inquiry. There were four DPAs directly connected to this type of conduct (Johnson & Johnson, Tyson Foods, Maxwell Technologies and JGC of Japan).[4] However, it is of note that there appear to have been no individual criminal prosecutions (by DOJ) or even civil claims (by SEC) of present or former company officers/employees from those companies during that period. It is clear that the DPA was regarded as the only form

[2] It is down from in excess of £50 million in 2008 to an estimated £36.8 million in 2012 (SFO Performance Report 2011)

[3] Financial Times 12th June 2012 'New SFO Chief outlines planned shake-up'.

[4] Jurisdiction in relation to Magyar Telekom in late 2011 was established only by use of two e-mails transmitted to and stored on servers in the US.

of accountability held to be necessary by the prosecuting agencies in these circumstances. As one commentator put it in 2011 "the high percentage of corporate FCPA enforcement actions that do not result in related enforcement actions against individuals legitimately caused one to wonder whether the conduct given rise to the corporate enforcement action was engaged in by ghosts."[5]

11. Consequently, there are increasing concerns in the US that DPAs have come to be used by the DOJ as an alternative sanction whereby individual prosecutions can be minimised or avoided altogether. Similar views are now prevalent in the UK, partially, because of the acceptance by the FSA of a financial penalty from Barclays Bank as a consequence of recent accepted LIBOR manipulation whilst at the same time there appeared to be a relatively confused and predominantly media induced response by the SFO on the subject of individual prosecutions. Measures must be put in place which answer these concerns and ensure that such consequences are prevented. If not, the public will lose confidence in a justice system in which it would appear that money could provide a means by which individuals avoid prosecution.

12. We are of the view that the purported advantage asserted in the Paper that a DPA will lower the hurdles needed to be established when proving "directing mind or will" is misconceived. Quite properly a DPA is based upon a decision to lay charges. In order to lay charges a prosecutor must have satisfied themselves as to evidential sufficiency, this will include evidential sufficiency as to all of the elements of the offence which, as the paper identifies, often includes establishing that the "directing mind or will" of an organisation was at fault. Those individuals responsible will have to be identified as part of this exercise in the vast majority of cases. A DPA will not alleviate a prosecutor of that burden[6].

Q1: 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?

As mentioned above, the CBA & LRC are concerned that there has not been an adequate assessment of the current options available to prosecuting authorities. It is

[5] Professor Koehler of Butler University (see www.fcpaprofessor.blogspot.com; www.fcpaprofessor.com)

[6] At paragraph 26

only then that the need for DPAs and how they are to be structured can be properly assessed. DPAs, if modelled according to need, may provide a useful tool to address economic crime. We simply do not feel that this assessment can yet be made.

Q2: Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?

As with all new schemes, it would be sensible to pilot it with economic crime, with the potential of rolling it out to other areas. Health and Safety offences may be suitable for similar proposals but again a proper assessment of the current enforcement options for dealing with such crime and how effective they are would be needed to ensure that any such DPA regime was fit for purpose.

Q3: Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?

The CBA & LRC agree with the factors set out in paragraph 94 but considers three further factors to be of paramount importance in the decision making process:

(i) whether the activity was self reported by the company. The prosecuting authority should be reluctant to agree to a DPA with a company where serious fraud, although not hidden, has not been declared to the authorities. One of the fundamental reasons for introducing DPAs is to encourage such self reporting[7];

(ii) whether the individuals responsible for the criminality are being prosecuted. It is essential in order to maintain confidence in the Criminal Justice System that a DPA is not seen to be a mechanism by which individuals avoid prosecution as a consequence of a company self-reporting, paying a substantial penalty and submitting itself to re-structuring. As was stated above, this would create the impression of an unregulated financial sector and a two tier justice system where money is able to prevent proper accountability;

(iii) the degree to which the wrongdoing is widespread within the sector as well as within the particular organisation. Dealing with economic crime may require a message to be sent out to others within the relevant sector.

[7] Paragraph 14 Consultation Paper

Q4: Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs?

A section providing a uniform set of rights and responsibilities relating to the individual should be incorporated in the Code of Practice. At the moment, it appears that these vary depending upon the prosecuting authority. The SFO has the power to obtain compulsory statements in accordance with s.2 and s.2a Criminal Justice Act 1987[8] whereas the Crown Prosecution Service does not. Paragraph 30 clearly envisages that DPAs are a tool made available to several agencies and there needs to be consistency of approach to avoid confusion for both investigators and those affected.

Q5: Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?

The Sentencing Council appears to be the organisation best equipped to structure the guidelines in consultation with the relevant prosecuting authorities, ACPO etc.

Q6: What do you think would be the most useful in a guideline for DPAs?

Paragraph 99 provides two options in the alternative. It is our view that the guidelines should incorporate both any overarching principles and offence specific guidelines. This will provide the best possible assistance as it is likely that the guidelines will need to be used to cover a wide spectrum of difference scenarios.

Q7: Do you agree that the preliminary hearing should take place in private?

Yes. The fact that a company is considering entering into a DPA could be commercially sensitive and have an impact upon their share-price. A company may be deterred from trying to negotiate a DPA if it knows that at an early stage that fact would become public knowledge. We consider that reporting restrictions would not meet those concerns, especially if hearings are to be listed at a designated court where

[8] The FSA also has investigatory powers under Part IX of the Financial Services & Markets Act 2000 which include the power to compel the production of information & certain individuals to answer questions. The Insolvency Service has similar powers under Part VI Insolvency Act 1986

it would be easy to identify or at the very least speculate as to why a company was appearing before that particular court. Any court hearing where it is not certain that a DPA will be finalised should be conducted in private so as to encourage frank and open dialogue between the parties before the Judge. For the parties to have reached the stage at which they approach the court to approve a DPA their relationship will be less adversarial than usually experienced in the criminal courts and one would expect a "cards on the table" approach. We therefore envisage that the role of the judge will be more akin to that of an inquiry judge as opposed to a judge presiding over a criminal trial. The Judge will be expected to scrutinise the basis for and proposed terms of the DPA. Therefore, questions may well be asked which would elicit responses inadmissible in any subsequent trial. The discussions may also involve matters of a commercially sensitive nature. That said, we do not consider that it will always be necessary for there to be more than one hearing. If the terms are agreed and the Judge has considered all relevant matters a further hearing would be unnecessary. In those circumstances the hearing ought not to be in private.

Q8: 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"?

The consultation paper recognises that judicial scrutiny of proposed DPAs will require significant judicial (and court administration) resources. DPAs are likely to be used in serious and complex cases (the paper refers to cases prosecuted by the SFO; costing £1.6m and taking 8 years). The amount of preparation and reading time required to enable judgement to be given on whether a DPA is in that specific case "in the interests of justice" should not be underestimated. The judge should be provided with more than an "outline of agreed facts" but with a detailed investigation report or case summary which also contains details about the relevant company's history including any previous failings. If a Judge is to be asked to assess the interests of justice the parties should have a duty to be frank and bring to the Judge's attention all matters relevant to the decision. If all that the Judge is provided with is agreed facts, draft indictment and DPA conditions, but for the most obvious case it will be difficult for a Judge to assess the public interest.

We agree, however, that the first test for a judge to apply at a preliminary hearing is whether a DPA is "in the interests of justice".

Q9: 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"?

Yes.

Q10: Do you agree with the proposed possible contents of a DPA as outlined?

Yes. We suggest that provision is also made as to costs.

Q11: Do you agree that there should be a reduction principle, relating only to the financial penalty aspect of the 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 agree that there should be a reduction principle. We also agree that the discount should be limited to one third. Initially we considered that the penalty should be reduced by more than one third to encourage companies to enter into DPA and to reflect the extent of their co-operation compared to the company who waits until the first hearing in the Magistrates' Court to enter a guilty plea. We concluded however that the true reduction or discount which a DPA attracts is the fact of deferred prosecution, which one would hope will lead to no prosecution at all if the company complied with the terms of the agreement. That is the advantage to the company as opposed to a reduction in penalty. As such we do not consider that limiting the discount to one third would discourage companies from seeking a DPA. Following conviction a court can order the defendant to pay the reasonable costs of the prosecution. We assume that the terms of a DPA will include provision as to costs. The prosecution costs will be greatly reduced if the DPA is on the table at an early stage. A great deal of time and resource is spent by prosecutors collating evidence which does not add to the narrative of the case but is nonetheless necessary to prove their case at trial (e.g. obtaining witness statements which deal with the production of evidence, searches of premises, continuity of exhibits). This evidence must be in place at the time of committal from the Magistrates' Court. In the event of a DPA such evidence will not need to be formalised and served. Consequently one would expect the level of prosecution costs a defendant company is ordered to meet to be significantly reduced.

Q12: Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?

Yes. We agree that in order for the public to have confidence in a DPA the final hearing should take place in public. The agreed facts should be opened by the prosecutor and a reasoned judgment should be given as to approval of the DPA. We also propose that a recording of the earlier proceedings should ordinarily be made available but the parties would be entitled to make submissions as to the publication of any information stated at the earlier hearing which remained commercially sensitive or potentially prejudicial to forthcoming trials of individuals directly connected with such criminal activity.

Q13: 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?

Yes. The court must be involved in such a process in its role as an independent arbiter detached from the negotiations. This is also necessary to ensure transparency and that the interests of justice are served throughout the currency of a DPA not just at its outset. The court would need to satisfy itself as to the existence and significance of the change in circumstances and whether it was self inflicted before considering whether any substantive variation was justified and its proportionality.

Q14: Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?

Yes but only on the basis of the 'second approach' stated in Paragraphs 129 and 130 of the Consultation Paper, that is, in the event of a failure to comply with specific terms/conditions which is agreed and accepted in full by the organisation the prosecution can impose more onerous obligations or financial penalties upon it, the parameters of which were clearly set out in tables within or appended to the DPA.

Q15: 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?

This is agreed but only if the amendment is restricted to providing the organisation with a limited amount of additional time to fulfil its obligations under the agreement. It would not be appropriate to allow the parties the scope to make amendments which

may involve the removal or significant alteration of a substantive term/condition. This would risk the manipulation of the DPA process by both sides acting together bearing in mind the, possibly, significant political decision behind the acceptance of a DPA in the first place. If such changes were possible there would be a real danger of an agreement initially reached with considered judicial approval being fundamentally altered at a later stage for similar political reasons without judicial control. Such an agreement has the potential to become something far removed from where it began. There would be a real temptation for both sides having reached agreement as to a package of onerous conditions which satisfied public concern waiting until time had passed before agreeing to a relaxation of those terms. With such inherent dangers, mere notification of the decision to the court would be no safeguard to the public interest and represent nothing more than confirmation of a flawed decision. It would be pointless unless the court was required to assess whether changes were justified and proportionate. Further, the prosecution would be fulfilling a quasi judicial role which has always been considered inappropriate in this jurisdiction.

Q16: Do you agree that there should be provision for formal breach proceedings and that it should operate as described?

Yes but with the caveat that an adverse finding should constitute a criminal offence. A corporate organisation has to appreciate from the outset that the prosecuting authority is following an exceptional course in choosing not to prosecute in this particular instance. Any wilful deviation from the terms agreed must be punished. Unless the organisation realises that the prosecuting authority will bring the case to court in such circumstances, it almost invites non-compliance. Mere financial penalties are rarely sufficient to achieve such a goal and it requires the threat of prosecution, extremely negative publicity and moral censure. It is suggested that a potentially serious breach would result in the prosecution being revived. However, there may be many reasons for this not happening in a given situation. For example, a company may have paid a substantial penalty but proved resistant to changes within its organisational structure. Whilst such a breach would be serious, it would be unlikely to warrant the prosecution being re-instigated with the attendant substantial delays and costs. Companies are unlikely to be unduly concerned by further financial penalties and such limited action would fail to send out the appropriate message to other potential or existing offenders.

Q17: Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?

Yes. This should be at the discretion of the judge but only if there has been a finding of significant non-compliance with the terms of the agreement.

Q18: Do you agree that the above proposals regarding admissibility are appropriate?

Yes but as we identified at Q4, confusing differences currently exist in relation to the powers of the prosecuting agencies and a uniform approach needs to be adopted which clarifies the individual's rights and responsibilities. This clearly impacts upon issues of admissibility.

Q19: What are your views on the appropriate approach to disclosure in the context of DPAs?

Disclosure during voluntary negotiations concerning a possible DPA need not be as rigorous as the initial stages of a prosecution. It is agreed that a process identical to that advocated in the Attorney General's Guidelines on Pleas Discussions in Cases of Serious or Complex Fraud would be appropriate at a non charge stage. This does not necessarily require the handing over of unused material but does involve a statement of case which provides an accurate summary of the prosecution evidence. It is clear from paragraph D3 of that document that such a statement should be as objective as possible and not overstate the strength of the prosecution case.

Q20: Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?

Yes.

Q21: Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

Yes. The benefits of self reporting criminal conduct should be available as soon as possible. DPAs operate as a sanction for a corporate organisation and should be regarded in the same way as other criminal sanctions. Sentencing Council Guidelines are applicable to all sentences passed after they come into effect and are not dependent upon the dates when the offences were committed.

Q22: Do you agree with the proposed process for DPAs as outlined in this chapter, and do you have any suggestions for improvements or amendments to it which would support the overall policy objectives?

It is difficult to determine whether DPAs can be reasonably improved upon without a proper evaluation of: -

(a) the effectiveness of the combined powers currently available to the FSA/SFO as stated in response to Q1, and

(b) the failings and limitations of the operation of the system in the US with: -

- DPAs, effectively, replacing all individual prosecutions or, certainly, of key high level personnel, and
- Purely expedient DPA agreements being reached in FCPA cases where an inquiry has already begun. One criticism is that DPAs are simply accepted by certain companies in such situations rather than an assessment made as to whether they are legally culpable or as to whether they should contest proceedings because it is regarded as easier and, arguably, more cost effective not to do so.

The use to which financial penalties are put should also be addressed. If funding remains a significant bar to the prosecution of individuals in reasonably lengthy trials then some of the fines should be used for that purpose.

Q23: Do you have any further comments in relation to the subject of this consultation?

They have been expressed above.

Q24: Do you have any comments in relation to our impact assessment?

No

Q25: Could you provide any evidence or sources or information that will help us to understand and assess those impacts further?

No

Q26: What do you consider to be the positive or negative equality impacts of the proposals?

These proposals will represent a significantly negative impact upon equality unless proper financial resources are invested in the investigation and prosecution of those responsible for the criminality underlying a DPA. If not, the perception will continue that those predominantly responsible for serious fraud in the United Kingdom, namely, white, middle class, affluent, males can buy their way out of prosecution whereas different rules apply to the socially disadvantaged.

Q27: Dou you have any suggestions on how potential adverse equality impacts could be mitigated?

The individuals who have committed fraud must be held accountable. The DPA must not be the end result but the means to the end.

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For the Criminal Bar Association & Law Reform Committee

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