

The Criminal Justice (Miscellaneous Amendments - Deferred Prosecution Agreements) (Bailiwick of Guernsey) Ordinance, 2023

THE STATES, in pursuance of their Resolution of the 30th September 2022^a, and in exercise of the powers conferred on them by section 20 of the Administration of Justice (Bailiwick of Guernsey) Law, 1991^b, sections 53A and 54 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999^c, and sections 71A and 72 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000^d, hereby order:-

Amendment of the Administration of Justice Law of 1991.

1. (1) The Administration of Justice (Bailiwick of Guernsey) Law, 1991 ("**the Law**") is amended as follows.

(2) Immediately after Part I of the Law, insert the following part –

"PART IA

DEFERRED PROSECUTION AGREEMENTS

Deferred prosecution agreements.

5A. (1) Schedule 1 and Schedule 2, which make provision about deferred prosecution agreements, have effect.

^a Article X of Billet d'Etat No. XVII of 2022.

^b Ordres en Conseil Vol. XXXIII, p. 49; this enactment has been amended.

^c Ordres en Conseil Vol. XXXIX, p. 137; this enactment has been amended.

^d Ordres en Conseil Vol. XL, p. 131; this enactment has been amended.

(2) The States of Guernsey Committee for Home Affairs may by regulations amend Schedule 2 by either or both -

(a) adding an offence, or

(b) removing an offence.

(3) Regulations under subsection (2) must be laid before a meeting of the States as soon as possible after being made; and if at that or the next meeting the States resolve that the regulations be annulled, the regulations cease to have effect but without prejudice to anything done under the regulations or to the making of new regulations."

(3) At the end of the Law, insert the schedules set out in the Schedule to this Ordinance.

Consequential amendments.

2. In section 37(3) of both the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 and the Drug Trafficking (Bailiwick of Guernsey) Law, 2000^e, immediately after "concluded -" in each provision insert the following paragraph -

"(aa) if the proceedings are discontinued under paragraph 10 of Schedule 1 (Deferred Prosecution Agreements - General) to the Administration of Justice (Bailiwick of Guernsey) Law, 1991,".

^e Ordres en Conseil Vol. XL, p. 131; ; this enactment has been amended.

Citation.

3. This Ordinance may be cited as the Criminal Justice (Miscellaneous Amendments – Deferred Prosecution Agreements) (Bailiwick of Guernsey) Ordinance, 2023.

Commencement.

4. (1) This Ordinance shall come into force on the date specified for this purpose in regulations made by the Committee for Home Affairs; and different days may be appointed for different provisions.

(2) Regulations under subsection (1) shall be laid before a meeting of the States as soon as possible after being made and shall, if at that or the next meeting the States resolve to annul them, cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

SCHEDULE

SCHEDULE 1

DEFERRED PROSECUTION AGREEMENTS – GENERAL

Characteristics of a DPA

General characteristics of a DPA.

1. A deferred prosecution agreement ("DPA") is an agreement conforming to the requirements of this Schedule between His Majesty's Procureur and a person ("D") whom the Law Officers of the Crown are considering prosecuting for an offence specified in Schedule 2 (the "**alleged offence**").

Effect of DPA on court proceedings.

2. (1) On a DPA coming into force after having been approved by the Court under paragraph 7 –

- (a) if proceedings for the alleged offence have not been instituted, such proceedings must be instituted by presenting a charge in respect of the alleged offence to the Court, whereupon such proceedings shall be automatically suspended, and
- (b) if proceedings for the alleged offence have been instituted, those proceedings shall be automatically suspended.

(2) The suspension referred to in subparagraph (1) may only be lifted on an application to the Court by His Majesty's Procureur, and no such application may be made at any time when the DPA is in force.

(3) D may not be prosecuted for the alleged offence whilst proceedings are suspended under subparagraph (1).

Persons who may enter into a DPA.

3. (1) D may be an individual, a body corporate, a partnership or an unincorporated association.

(2) Where D is a partnership –

- (a) the DPA must be entered into in the name of the partnership (and not in that of any of the partners), and
- (b) any money payable under the DPA must be paid out of the funds of the partnership.

(3) Where D is an unincorporated association –

- (a) the DPA must be entered into in the name of the association (and not in that of any of its members), and
- (b) any money payable under the DPA must be paid out of the funds of the association.

Content of a DPA.

4. (1) A DPA must set out -

- (a) a statement and particulars of offence, as they would appear if the alleged offence were to be the subject of a count in an indictment, and
- (b) a statement of facts relating to the alleged offence, which may include admissions made by D.

(2) A DPA must specify an expiry date, which is the date on which the DPA ceases to have effect if it has not already been terminated under paragraph 8 (breach of DPA).

(3) The requirements that a DPA may impose on D include, but are not limited to, the following requirements -

- (a) to pay a financial penalty,
- (b) to compensate victims of the alleged offence,
- (c) to donate money to a charity or other third party,
- (d) to disgorge any profits made by D from the alleged offence,
- (e) to implement a compliance programme or make changes to an existing compliance programme relating to D's policies or to the training of D's employees or both, and
- (f) to co-operate in any investigation related to the alleged offence.

(4) A DPA may impose time limits within which D must comply with the requirements imposed on D.

(5) The amount of any financial penalty agreed between His Majesty's Procureur and D must be an amount that, in His Majesty's Procureur's assessment, would be neither unduly lenient nor manifestly excessive if imposed by a court on conviction of D for the alleged offence following a guilty plea.

(6) A DPA may include a term setting out the consequences of a failure by D to comply with any of its terms.

Code on DPAs.

5. (1) His Majesty's Procureur must issue a Code giving guidance on-

- (a) the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case, and
- (b) the disclosure of information to D in the course of negotiations for a DPA and after a DPA has been agreed.

(2) The Code issued under subparagraph (1) may also give guidance on any other relevant matter, including -

- (a) the use of information obtained by His Majesty's Procureur in the course of negotiations for a DPA,
- (b) variation of a DPA,

(c) termination of a DPA and steps that may be taken by a prosecutor following termination, and

(d) steps that may be taken by His Majesty's Procureur when His Majesty's Procureur suspects a breach of a DPA.

(3) His Majesty's Procureur must publish the Code in such manner as he or she thinks fit.

(4) His Majesty's Procureur may from time to time alter or replace the Code.

(5) If the Code is altered or replaced, His Majesty's Procureur must publish the new Code in such manner as he or she thinks fit.

(6) His Majesty's Procureur must take account of the Code in exercising functions under this Schedule.

Procedure

Court approval of DPA: preliminary hearing.

6. (1) After the commencement of negotiations between His Majesty's Procureur and D in respect of a DPA but before the terms of the DPA are agreed, His Majesty's Procureur must apply to the Court for a declaration that –

(a) entering into a DPA with D is likely to be in the interests of justice, and

(b) the proposed terms of the DPA are fair, reasonable and proportionate.

(2) The Court must give reasons for its decision on whether or not to make a declaration under subparagraph (1).

(3) His Majesty's Procureur may make a further application to the Court for a declaration under subparagraph (1) if, following the previous application, the Court declined to make a declaration.

(4) A hearing at which an application under this paragraph is determined must be held in private, any declaration under subparagraph (1) must be made in private, and reasons under subparagraph (2) must be given in private.

Court approval of DPA: final hearing.

7. (1) Subject to subparagraph (2), when His Majesty's Procureur and D have agreed the terms of a DPA, His Majesty's Procureur must apply to the Court for a declaration that -

- (a) the DPA is in the interests of justice, and
- (b) the terms of the DPA are fair, reasonable and proportionate.

(2) His Majesty's Procureur may not make an application under subparagraph (1) unless the Court has made a declaration under paragraph 6(1).

(3) A DPA shall only come into force when it is approved by the Court making a declaration under subparagraph (1).

(4) The Court must give reasons for its decision on whether or not to make a declaration under subparagraph (1).

(5) Subject to subparagraph (6), a hearing at which an application under this paragraph is determined may be held in private.

(6) If the Court decides to approve the DPA and make a declaration under subparagraph (1) it must do so, and give its reasons, in open court, and must set out the DPA in its judgment.

Breach of DPA.

8. (1) At any time when a DPA is in force, if His Majesty's Procureur believes that D has failed to comply with the terms of the DPA, His Majesty's Procureur must make an application to the Court under this paragraph.

(2) On an application under subparagraph (1) the Court must decide whether, on the balance of probabilities, D has failed to comply with the terms of the DPA.

(3) If the Court finds that D has failed to comply with the terms of the DPA, it may -

(a) invite His Majesty's Procureur and D to agree proposals to remedy D's failure to comply, or

(b) terminate the DPA.

(4) The Court must give reasons for its decisions under subparagraphs (2) and (3).

Variation of DPA.

9. (1) At any time when a DPA is in force, His Majesty's Procureur and D may agree to vary its terms if -

- (a) the Court has invited the parties to vary the DPA under paragraph 8(3)(a), or
- (b) variation of the DPA is necessary to avoid a failure by D to comply with its terms in circumstances that were not, and could not reasonably have been, foreseen by His Majesty's Procureur or D at the time that the DPA was agreed.

(2) When His Majesty's Procureur and D have agreed to vary the terms of a DPA, His Majesty's Procureur must apply to the Court for a declaration that-

- (a) the variation is in the interests of justice, and
- (b) the terms of the DPA as varied are fair, reasonable and proportionate.

(3) A variation of a DPA only takes effect when it is approved by the Court making a declaration under subparagraph (2).

(4) The Court must give reasons for its decision on whether or not to make a declaration under subparagraph (2).

(5) A hearing at which an application under this paragraph is determined may be held in private, but if the Court decides to approve the variation and make a declaration under subparagraph (2) it must do so, and give its reasons, in open court.

Discontinuance of proceedings on expiry of DPA.

10. (1) If a DPA remains in force until its expiry date, then after the

expiry of the DPA the proceedings for the alleged offence referred to in paragraph 2(1) are to be discontinued by His Majesty's Procureur giving notice to the Court that His Majesty's Procureur does not want the proceedings to continue.

(2) Subject to subparagraph (3), where proceedings are discontinued under subparagraph (1), fresh proceedings may not be instituted against D for the alleged offence.

(3) Subparagraph (2) does not prevent fresh proceedings from being instituted against D in a case where, after a DPA has expired, His Majesty's Procureur finds that, during the course of the negotiations for the DPA -

- (a) D provided inaccurate, misleading or incomplete information to His Majesty's Procureur, and
- (b) D knew or ought to have known that the information was inaccurate, misleading or incomplete.

(4) A DPA is not to be treated as having expired for the purposes of subparagraph (1) if, on the expiry date specified in the DPA -

- (a) an application made by His Majesty's Procureur under paragraph 8 (breach of DPA) has not yet been decided by the Court,
- (b) following an application under paragraph 8 the Court has invited the parties to agree proposals to remedy D's failure to comply, but the parties have not yet reached an agreement, or

(c) the parties have agreed proposals to remedy D's failure to comply following an invitation of the Court under paragraph 8(3)(a) but D has not yet complied with the agreement.

(5) In the circumstances mentioned in subparagraph (4)(a) -

(a) if the Court decides that D has not failed to comply with the terms of the DPA, or that D has failed to comply but does not take action under paragraph 8(3), the DPA is to be treated as expiring when the application is decided,

(b) if the Court terminates the DPA, the DPA is to be treated as not having remained in force until its expiry date (and subparagraph (1) therefore does not apply), and

(c) if the Court invites the parties to agree proposals to remedy D's failure to comply, the DPA is to be treated as expiring when the parties have reached such an agreement and D has complied with it.

(6) In the circumstances mentioned in subparagraph (4)(b), the DPA is to be treated as expiring when the parties have reached an agreement and D has complied with it.

(7) In the circumstances mentioned in subparagraph (4)(c), the DPA is to be treated as expiring when D complies with the agreement.

Use of material in criminal proceedings.

11. (1) Subparagraph (2) applies where a DPA has been approved by the Court under paragraph 7.

(2) Where this subparagraph applies, in any proceedings brought against D for the alleged offence, the statement of facts contained in the DPA is to be treated as an admission by D under section 2 of this Law (admission of facts).

(3) Subparagraph (4) applies where a prosecutor and D have entered into negotiations for a DPA but the DPA has not been approved by the Court under paragraph 7.

(4) Where this subparagraph applies, material described in subparagraph (6) may only be used in evidence against D -

(a) on a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information, or

(b) (subject to subparagraph (5)) on a prosecution for some other offence where in giving evidence D makes a statement inconsistent with the material.

(5) Material may not be used against D by virtue of subparagraph (4)(b) unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of D in the proceedings arising out of the prosecution.

(6) The material referred to in subparagraph (4) is -

(a) material that shows that D entered into negotiations for a DPA, including in particular -

- (i) any draft of the DPA,
 - (ii) any draft of a statement of facts intended to be included within the DPA, or
 - (iii) any statement indicating that D entered into such negotiations, and
- (b) material that was created solely for the purpose of preparing the DPA or statement of facts.

Final

Meaning of "the Court".

12. In this Schedule "**the Court**" -

- (a) subject to item (c), in relation to an alleged offence for which criminal proceedings have not been instituted under paragraph 2, means the Royal Court sitting as an Ordinary Court,
- (b) subject to item (c), in relation to an alleged offence for which criminal proceedings have been instituted under paragraph 2, means the court in which those proceedings were instituted, or, if those proceedings are transferred to a different court, the court to which those proceedings are transferred, and
- (c) in relation to a DPA in respect of which a declaration has been made or refused under paragraph 6 or 7, the

court that made or (as the case may be) refused the declaration.

References to His Majesty's Procureur.

13. (1) His Majesty's Procureur may, either generally or for the purposes of a particular case or class of cases, arrange for any of his or her functions under this Law, other than this power of delegation, to be exercised in his or her name by a Crown Advocate; and references in this Law to His Majesty's Procureur shall be construed accordingly.

(2) A function exercised by a Crown Advocate pursuant to an arrangement under subparagraph (1) is for all purposes exercised by His Majesty's Procureur; and every decision taken or other thing done by the Crown Advocate pursuant to the arrangement has the same effect as if taken or done by His Majesty's Procureur.

(3) An arrangement under subparagraph (1) for the exercise of a function by a Crown Advocate—

(a) may be varied or terminated at any time by His Majesty's Procureur, but without prejudice to anything done pursuant to the arrangement or to the making of a new arrangement,

(b) does not prevent the exercise of the function by His Majesty's Procureur while the arrangement subsists.

(4) This paragraph is without prejudice to any other enactment or rule of law.

Application.

13. This Schedule applies in relation to conduct occurring before the commencement of this Schedule as if an offence specified in Schedule 2 included any corresponding offence under the law in force at the time of the conduct.

Transitional provision.

14. (1) Conduct constituting an alleged offence that occurred before the relevant commencement day may be taken into account for the purposes of this Schedule.

(2) In subparagraph (1) the "**relevant commencement day**" means-

(a) in a case where the alleged offence is an offence that is specified in Schedule 2 when this Schedule comes into force, the day on which Schedule 2 comes into force, and

(b) in a case where the alleged offence is an offence that is subsequently added to Schedule 2, the day when the enactment adding that offence to Schedule 2 comes into force.

SCHEDULE 2

DEFERRED PROSECUTION AGREEMENTS - LIST OF OFFENCES

1. Conspiracy to defraud under section 12 or 13 of the Criminal Justice (Attempts, Conspiracy and Jurisdiction) (Bailiwick of Guernsey) Law, 2006.
2. Cheating the public revenue at common law.
3. An offence under any of the following provisions of the Theft (Bailiwick of Guernsey) Law, 1983^f -
 - (a) section 1 (theft),
 - (b) section 19 (false accounting),
 - (c) section 22 (suppression, etc. of documents), or
 - (d) section 27A (dishonestly retaining a wrongful credit).
4. An offence under any of the following provisions of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 -
 - (a) section 30 (offences in relation to exportation of prohibited or restricted goods),
 - (b) section 75 (untrue declarations, etc.), or

^f Ordres en Conseil Vol. XXVIII, p. 5; this enactment has been amended.

(c) section 77 (fraudulent evasion of duty, etc.).

5. An offence under any of the following provisions of the Forgery and Counterfeiting (Bailiwick of Guernsey) Law, 2006 -

(a) section 1 (forgery),

(b) section 2 (copying a false instrument),

(c) section 3 (using a false instrument),

(d) section 4 (using a copy of a false instrument), or

(e) section 5 (offences relating to money orders, share certificates, passports, etc.).

6. An offence under any of the following provisions of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 -

(a) section 18 (falsification, etc, of documents during investigation),

(b) section 61(1) (offences and penalties in cases of market abuse),

(b) section 67 (10) (false, deceptive, misleading particulars, information or documents),

(c) section 109(1) (offences as to false or misleading information, withholding information, etc.),

- (d) section 110(2) or (3) (misleading statements and practices - controlled investments).

7. An offence under section 201(4) or (5) (discretion to prosecute in cases involving fraud, etc.) of the Income Tax (Guernsey) Law, 1975.

8. An offence under any of the following provisions of the Banking Supervision (Bailiwick of Guernsey) Law, 2020 -

- (a) section 1(7) (prohibition of unlicensed deposit-taking business),
- (b) section 11(9) (power to issue directions), or
- (c) section 24(3) (control of advertising).

9. An offence under any of the following provisions of the Insurance Business (Bailiwick of Guernsey) Law, 2002 -

- (a) section 1(6) (general restriction on carrying on insurance business),
- (b) section 3(2) (restriction on carrying on domestic business),
- (c) section 16(8) (power to issue directions), or
- (d) section 64(13) (restriction as to insurance advertisements).

10. An offence under any of the following provisions of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 -

- (a) section 1(4) (restriction on acting as insurance manager),
- (b) section 2(2) (restriction on acting as insurance intermediary),
- (c) section 11(8) (power to issue directions), or
- (d) section 61(8) (regulations as to advertisements).

11. An offence under either of the following provisions of the Protection of Investors (Bailiwick of Guernsey) Law, 2020 -

- (a) section 1(4) (controlled investment business), or
- (b) section 30(8) (power to issue directions).

12. An offence under any of the following provisions of the Regulation of Fiduciaries, Administration Businesses, Company Directors, etc (Bailiwick of Guernsey) Law, 2020 -

- (a) section 1(3) (prohibition of unlicensed business),
- (b) section 11(8) (power to issue directions), or
- (c) section 24(3) (control of advertising).

13. An offence under any of the following provisions of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 -

- (a) section 38 (concealing or transferring proceeds of criminal conduct),

- (b) section 39 (assisting another person to retain the proceeds of criminal conduct),
- (c) section 40 (acquisition, possession or use of proceeds of criminal conduct),
- (d) section 41 (tipping off), or
- (e) any provision of Schedule 3, 4 or 5.

14. An offence under section 432 (fraudulent trading) of the Companies (Guernsey) Law, 2008.

15. An offence under any of the following provisions of the Fraud (Bailiwick of Guernsey) Law, 2009 -

- (a) section 1 (fraud),
- (b) section 6 (possession etc. of articles for use in fraud),
- (c) section 7 (making or supplying articles for use in fraud), or
- (d) section 10 (obtaining services dishonestly).

16. An offence under either of the following provisions of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003 -

- (a) section 1 (corrupt transaction with agents), or
- (b) section 3 (corruption by public officials).

17. An offence under any of the following provisions of the Criminal Justice (Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2006 -

- (a) section 12B (offence of failure to prevent facilitation of Guernsey tax evasion offences), or
- (d) section 12C (offence of failure to prevent facilitation of foreign tax evasion offences).

18. An offence under section 5A of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003.

19. An offence under any of the following provisions of the Disclosure (Bailiwick of Guernsey) Law, 2007 -

- (a) section 1 (obligation to disclosure knowledge or suspicion etc. of money laundering - financial services business),
- (b) section 2 (obligation to disclosure knowledge or suspicion etc. of money laundering - nominated officers in financial services business),
- (c) section 3 (obligation to disclosure knowledge or suspicion etc. of money laundering - non-financial services business), or
- (d) section 4 (tipping off).

20. An offence under any of the following provisions of the Sanctions (Bailiwick of Guernsey) Law, 2018 -

- (a) section 3 (contravention of sanctions measures),
- (b) section 14 (reporting obligations of relevant institutions), or
- (c) section 17 (failure to comply with requirement for information).

21. An offence under paragraph 7 (offences) of Schedule 4 to the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002.

22. An offence under either of the following provisions of the Transfer of Funds (Guernsey) Ordinance, 2017-

- (a) section 6 (offences: contravention of modified EU Regulation or Ordinance), or
- (b) section 7 (offences: obstruction and false information etc.).

23. An offence under either of the following provisions of the Transfer of Funds (Alderney) Ordinance, 2017 -

- (a) section 6 (offences: contravention of modified EU Regulation or Ordinance), or
- (b) section 7 (offences: obstruction and false information etc.).

24. An offence under either of the following provisions of the Transfer of Funds (Sark) Ordinance, 2017 -

- (a) section 6 (offences: contravention of modified EU Regulation or Ordinance), or
- (b) section 7 (offences: obstruction and false information etc.).

25. An ancillary offence relating to an offence specified in this Schedule; and for these purposes "**ancillary offence**", in relation to an offence, means -

- (a) aiding, abetting, counselling or procuring the commission by another person of the offence, within the meaning of section 1 of the Criminal Justice (Aiding and Abetting etc.) (Bailiwick of Guernsey) Law, 2007, or
- (b) attempting or conspiring to commit the offence, within the meaning of sections 1 and 7 of the Criminal Justice (Attempts, Conspiracy and Jurisdiction) (Bailiwick of Guernsey) Law, 2006, respectively."