

# In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia

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**Abstract:** To help reduce the corruption in the criminal justice system, Indonesia should consider implementing a Deferred Prosecution Agreement (DPA) mechanism. DPA would not only aiming for punishment to corporations, especially in special and general deterrence, but also could accommodate in returning state assets from perpetrators. Indonesia could learn from the DPA models applied in the U.K. and U.S., as well as the proposed model in Australia. DPA models could be noteworthy in making the criminal justice process more effective, efficient, and less time-consuming, as well as resolving the problems of significant caseloads and ongoing corruption.

**Keywords:** Corruption; Corporation; Deferred Prosecution Agreement

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## 1. Introduction

In the Indonesian criminal justice system, the problem how to effectively prosecute and punish corporations for corruption has become an oft-debated topic over the past five years. Based on the 1955 Law on Economic Offenses, corporations can be named as perpetrators or subjects of crimes in Indonesia. Several other regulations also consider corporations as perpetrators of crimes. In recent years, Indonesian public prosecutors and the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK) have increasingly prosecuted corporations before the court. There have been several cases in which Indonesian courts decided that corporations were perpetrators of criminal offenses and punished them, primarily through the imposition of fines.

Deferred Prosecution Agreement (DPA) is not a familiar term in Indonesian law. Nevertheless, DPA schemes are commonly used in the U.K. and in the U.S. to overcome difficulties in enforcing prosecution of criminal acts by corporations, namely inefficiency, effort, and cost. Furthermore, processing corporations in the criminal justice system through prosecution does not assure that the corporation in question will not repeat the same offense in the future. DPAs can accommodate that possibility.<sup>1</sup>

This paper discusses the problem of handling corruption in Indonesia, focusing on corruption committed by corporations. More specifically, this paper discusses the possibility of introducing and applying a model known as the Deferred Prosecution

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<sup>1</sup> Topo Santoso, Febby Mutiara Nelson, and Arija Ginting "The Idea of Preventing Corporate Corruption Through Deferred Prosecution Agreement (DPA) in Indonesia" (ADVED 2017-3rd International Conferences on Advances in Education and Social Science, Istanbul, Turkey, 2017), <https://scholar.ui.ac.id/en/publications/the-idea-of-preventing-corporate-corruption-through-deferred-pros>.

Agreement (DPA) in Indonesia. Deferred prosecutions are a form of negotiated settlement. This paper will elaborate on legal frameworks and experiences from other jurisdictions which already apply such a model, such as the United Kingdom (U.K.) and the United States (U.S.). Australia is also exploring the possibility for a DPA approach for cases of corporate corruption.

The word 'corporation' is derived from the word 'corpus', meaning body. Although a corporation may in some sense be a body, it is an inanimate one. While a corporation can commit a crime, it can only do so through one or more of its employees, officers, or directors. Lord Chancellor Edward Thurlow is reported to have remarked in the 18th century that corporations "have no soul to damn or body to kick," reflecting the reality that a corporation cannot be imprisoned or punished in the same way an individual can.<sup>2</sup>

Deferred prosecutions are frequently used in the U.S. as an alternative to prosecution in cases of corporate crime. Since the early 2000s, DPAs have been used by prosecutors dealing with corporate crime and provide a middle ground between declining to prosecute and taking matters through lengthy criminal trials and appeals. The U.S. scheme has also assisted in compensating victims of alleged corporate offending.

In the U.K., the Crime and Courts Act of 2013 adopted the deferred prosecution approach to corporate crime but with significant differences from the U.S. model. The scheme became effective in February 2014. In late 2015, the U.K. Serious Fraud Office (SFO) announced the first DPA under the U.K. scheme, concerning a company's alleged failure to prevent bribery under the U.K. Bribery Act 2010.<sup>3</sup>

Conventionally, in both the U.K. and the U.S., when a prosecutor is confronted with evidence of a crime, there are two main alternative mechanisms: (1) decline the prosecution for reasons of evidentiary weakness or legal obstacle; or (2) negotiate a guilty plea on acceptable terms or proceed to trial. However, since the early 1990s in the U.S. and since 2014 in the U.K., prosecutors have increasingly chosen to deploy deferred prosecution agreements in cases of corporate criminal liability.

A DPA is a formal written agreement between a prosecutor's office and a corporation. It generally takes places with the following conditions: (1) the prosecutor files an indictment that lays out the criminal charges, which are held in abeyance and (2) the prosecution does not proceed, as long as the corporation abides by the terms of the agreement (such as restitution to victims, payment of fines, and implementation of corporate governance reforms, such as new and strengthened compliance procedures and controls aimed at reducing the risk of further criminal behavior). In addition, the company's compliance to the terms of the agreement is often overseen by an independent monitor who submits periodic reports to the prosecutor's office. Overall, the length of a DPA can be several years. Some have been considerably longer. If the process is regarded as a success, the previously filed criminal charges are dismissed.

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<sup>2</sup> See John Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *The Michigan Law Review* 79 No. 3 (The Michigan Law Review Association, 1981): 386–459. ("Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked.") (Quoting Edward, First Baron Thurlow).

<sup>3</sup> Serious Fraud Office (SFO), "SFO Agrees First UK DPA with Standard Bank," November 31, 2015, <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.

Therefore, this article explores the following research questions: how are DPAs applied in the U.K. and the U.S.? What does the proposed model for DPAs look like in Australia? What lessons can be learned from these jurisdictions, and how could they be applied in the Indonesian legal system?

## 2. Method

This paper results from research using a qualitative method to examine a phenomenon using textual descriptions or narratives. To obtain the required data, this paper uses the normative legal research method. The results of this normative legal research produce descriptive legal studies and achieve prescriptive studies, namely formulating and proposing guidelines and rules that must be obeyed by legal practice and legal dogmatics and are critical.<sup>4</sup> The relationship between the researcher and the object in the study is based on subject-subject relation, so the study results are inter-subjective.

As normative legal research, the data collection technique used in this research is a document study looking for legal materials.<sup>5</sup> Specifically related to the comparison method, comparison is carried out by reviewing and comparing legislation and history, as well as the method of implementing DPAs, in the U.K. and U.S., both of which have implemented the DPA mechanism in their criminal justice systems, including in the settlement of corruption. Comparison is a commonly used method in research. With online access to a variety of rules and academic articles from different law systems, material comparison can be done to analyze the enforcing of a rule to find out how other countries handle similar problems.<sup>6</sup>

The data collection techniques in this paper include secondary data collection using available data. The sources of research materials use available data, such as public documents and official records, which use pre-existing statistical data.<sup>7</sup> Singleton states that the advantage of using available data is that research can be carried out in research subjects who cannot be reached, reducing the researcher's mobility which affects the time and cost of research. Besides, the data collected is high in quality because usually, there is no bias from researchers or sponsors.

## 3. The Application of DPAs in the U.K.

Almost one decade ago, deferred prosecution came to the U.K. In May 2012, the Lord Chancellor and Secretary of State for Justice submitted to Parliament a Consultation Paper, entitled "Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements." The consultation paper invoked the use of deferred prosecution agreements in the United States and argued that "deferred prosecution agreements can make a valuable

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<sup>4</sup> Gijssels-Hoecke, *Apakah Teori Hukum Itu? (What Is Law Theory) [Wat Is Rechtsstheorie?]* (Bandung: Laboratorium Hukum Fakultas Hukum Universitas Katolik Parahyangan, 2000), p 114-115.

<sup>5</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*. (Jakarta: Universitas Indonesia-Press, 2010), p. 52

<sup>6</sup> Michael Salter and Julie Mason, *Writing Law Dissertations, Great Britain* (London: Pearson Education Ltd, 2007), p. 182-183.

<sup>7</sup> Royce Singleton, *et. al., Approaches to Social Research* (Oxford: Oxford University Press, 1988).

contribution to efforts to identify and address corporate economic crime." This was followed by enacting the Crime and Courts Act of 2013, which became effective in February 2014 and provided statutory authority to use deferred prosecution agreements. Section 6 (1) of the Act requires the Director of Public Prosecutions and Director of the Serious Fraud Office to issue a code to govern the use by prosecutors of deferred prosecution agreements.

The application of DPAs is seen as significant step in the U.K., particularly in terms of addressing corporate criminal liability. DPAs became available to prosecutors in the U.K. for the first time in Feb 2014 and were expected to be valuable tools for prosecutors looking to enforce the Bribery Act of 2010.<sup>8</sup> In the U.K., prosecutors must present evidence of guilt by the "controlling mind" of the organization, typically the board. The difficulty in the U.K. of attributing liability to individuals on this basis, the so-called "identification principle", especially in the context of big organizations, has made it hard for prosecutors to pursue convictions against corporations. The Director of the Serious Fraud Office ("SFO") has publicly acknowledged that the problem of corporate criminal liability in the U.K. needs to be settled for DPAs "to have maximum bite".<sup>9</sup>

Concerning bribery and anti-corruption issues in the U.K., the Serious Fraud Office is at the forefront. The SFO's role as a prosecutor is much more aggressive than its relatively small budget would suggest. As an indication of its desire to adopt a more proactive investigative stance, the Director of the SFO announced in a speech to British businesses on April 23, 2010, that the SFO was looking to implement "intrusive surveillance" techniques and other investigative tools more commonly associated with organized crime and terrorism investigations. The SFO's Director is confident about its future prospects and has recently commented on the SFO's approach to dealing with companies faced with the prospect of self-reporting compliance failures that have resulted in matters of bribery and corruption.

In the U.K., DPAs are negotiated after a company has self-reported to a prosecutor or when a prosecutor has proactively targeted a company for investigation. The identification principle does not, however, always burden the prosecution of companies under the Bribery Act. Section 7 of the Act outlines an offense aimed at companies that fail to prevent persons associated with them from bribing others on their behalf. There is a statutory defense to Section 7: if a company can prove that it has adequate procedures in place to prevent persons associated with it from bribing.<sup>10</sup> In other words, if a prosecutor can show that a person associated with a company has paid a bribe and the company's procedures to prevent bribery are not "adequate", the company has a problem. The legal basis for DPAs in the U.K. is set out in Schedule 17 of the Crime and Courts Act 2013.<sup>11</sup>

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<sup>8</sup> United Kingdom, "Bribery Act 2010," accessed November 20, 2010, <https://www.legislation.gov.uk/ukpga/2010/23/contents>.

<sup>9</sup> Green, David, "Ethical Business Conduct: An Enforcement Perspective," March 6, 2014, <https://www.sfo.gov.uk/2014/03/06/ethical-business-conduct-enforcement-perspective/>.

<sup>10</sup> United Kingdom, Bribery Act 2010, § 7.

<sup>11</sup> United Kingdom, "Crime and Courts Act 2013," sched. 17, accessed November 8, 2021, <https://www.legislation.gov.uk/ukpga/2013/22/contents>.

In the U.K., a DPA is a voluntary agreement between a designated prosecutor (the Director of the SFO and the Director of Public Prosecutions) and a corporate body. A DPA suspends criminal proceedings against the corporation, subject to compliance with certain conditions, which may include: (a) the payment of a financial penalty; (b) the payment of compensation to victims of the alleged offense; (c) disgorgement of profits made by the corporation from the alleged offense; (d) implementing a compliance program or otherwise making changes to an existing program; (e) cooperating with any investigation related to the alleged offense; or (f) paying any reasonable costs of the prosecutor concerning the alleged offense or the DPA. DPAs are available only to corporate entities, partnerships, and unincorporated associations; they cannot be used in relation to individuals. The U.K. government has emphasized that DPAs will not be used as a means for individuals to avoid prosecution. A corporation has no right to request or initiate the DPA process, and the designated prosecutors have complete discretion over inviting an organization to enter into a DPA. While the DPA is in force, the corporation is protected from further prosecution concerning the same offense. A breach of the conditions imposed under a DPA may lead to the recommencement of prosecution.<sup>12</sup>

The Crime and Courts Act of 2013, Schedule 17, and the Deferred Prosecution Agreements Code of Practice specify the following requirements for DPAs: (1) only the Director of Public Prosecutions and the Director of the Serious Frauds Office can enter into deferred prosecution agreements; and (2) such agreements can be entered into with a company, a partnership or an unincorporated association, but not with an individual. The legal standard for corporate criminal liability is much narrower in the U.K. than in the U.S., making it successful corporate prosecutions more difficult. In the U.K., a corporation is criminally liable for a crime with a *mens rea* ('guilty mind') element, such as fraud, only when the prosecutor can establish that the "directing mind and will" of an organization was responsible for the criminal wrongdoing. This is known as the "identification principle" and generally applies only to senior management of the corporation. In other words, unless a prosecutor in England can establish that senior management committed the crime, no crime is attributable to the company.

The 2012 Consultation Paper submitted to the U.K. Parliament approved that the corporate criminal liability standard had reduced effective prosecutions of corporations, stating that the "options for dealing with offending by commercial organizations are currently limited, and the number of outcomes each year, through both criminal and civil proceedings, is relatively low".<sup>13</sup> A prosecutor considering entering into a deferred prosecution agreement with a company must consider two preconditions: an evidential test and a public interest test. The prosecutor must be satisfied either that there is sufficient evidence to provide a realistic prospect of a conviction or reasonable grounds that further investigation would yield such evidence, and the prosecutor must also be satisfied that the public interest in a deferred prosecution agreement outweighs the public interest in a prosecution. The DPA Code of Practice lists factors to weigh in making this decision.

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

#### 4. The Application of DPAs in the U.S.

Prior to the introduction of DPAs in the U.S., prosecutors developed what were called 'pre-trial diversion programs'. When it was believed an offender's behavior had its roots in drug or alcohol addiction, mental illness, or similar issues, an agreement was often reached to divert the defendant from the criminal process to more appropriate social services programs.<sup>14</sup> If a defendant's issues were addressed effectively, the prosecution would be dismissed after an agreed period of time, as long as the defendant had not committed any other crime during the period of diversion. In the same way that the pre-trial diversion programs seek to rehabilitate individuals through reforming behavior to reduce recidivism, deferred prosecution agreements seek the structural reform of corporate organizations to enhance the prospect that the company will be a law-abiding corporate citizen. Since 2003, prosecutors in the United States have been able to enter into such agreements. In 2012, the head of the Criminal Division of the Justice Department described deferred prosecution agreements as a "mainstay of white-collar criminal enforcement".

According to Professor David Uhlmann from the University of Michigan Law School, the use of deferred prosecution agreements has "surged" to the point of being the basis for resolving corporate criminal prosecutions in two-thirds of all federal cases between 2010 and 2012.<sup>15</sup> Professor Brandon Garrett of the University of Virginia Law School recently published a book regarding deferred prosecution agreements based on a database he created to compile DPAs and non-prosecution agreements (NPAs)<sup>16</sup> from disparate sources.<sup>17</sup> Garrett found that there have been more than 250 such prosecution agreements over the past decade, before compiling a second and much larger archive of more than 2,000 federal corporate convictions (mostly guilty pleas) by corporations.<sup>18</sup> However, Garrett declared these data have real limitations because in many cases of corporation crime no charges are brought. There's no way to know how often prosecutors decline to pursue charges against corporation, usually they don't make those decisions public unless when they enter non-prosecution agreements.

In the U.S., it has been the rule for over a century that an organization commits a crime if even a single employee, acting within the scope of their employment, and at least in part for the benefit of the company, engages in criminal conduct. In other words, corporate criminal liability in the U.S. is based on a broad concept of *respondeat superior* ("let the master answer"), which attributes the crime of an employee to its modern master, the employer.<sup>19</sup>

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<sup>14</sup> As a comparison, in the Indonesian criminal justice system, diversion is applied for juvenile offenders as provided in the Law No 11 Year 2012 on Juvenile Criminal Justice System.

<sup>15</sup> David M. Uhlmann, "The Pendulum Swings: Reconsidering Corporate Criminal Prosecution," n.d., [https://lawreview.law.ucdavis.edu/issues/49/4/Articles/49-4\\_Uhlmann.pdf](https://lawreview.law.ucdavis.edu/issues/49/4/Articles/49-4_Uhlmann.pdf).

<sup>16</sup> Non-Prosecution Agreements ("NPA's"). The terms of an NPA can be identical to a DPA except no criminal charges are filed if an NPA is negotiated between a prosecutor and a company.

<sup>17</sup> See Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014), p. 7-8.

<sup>18</sup> These data can be found online, see Brandon Garrett and Jon Asley, "Corporate Prosecution Registry," University of Virginia, Law School, accessed November 5, 2021, [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/](http://lib.law.virginia.edu/Garrett/prosecution_agreements/).

<sup>19</sup> *Ibid.*

The coverage of this rule may cause a prosecutor to doubt whether to charge a company with the crimes of its employee, even if the crimes were committed by senior management, especially when doing so could result in collateral damage to innocent parties, such as employees who did not engage in wrongdoing, shareholders whose investment might be imperiled by a prosecution that causes reputational damage and a drop in share value. Prosecuting a corporation can scare away vendors or sources of finance and cause debarment or loss of licenses which may jeopardize a company's very existence.

What follows is three examples of how DPAs have or have not been applied in the U.S. Firstly, in the early 1990s, Prudential Insurance Company was found to have defrauded a large number of investors through its Prudential Securities subsidiary, by falsely describing the nature and risks associated with investments in real estate limited partnerships. The United States Attorney's Office for the Southern District of New York was preparing to prosecute the company. However, before the decision to indict, Prudential's lawyer pointed out that Prudential was owned entirely by its policyholders as a mutual insurance company. Prudential's counsel argued that prosecution of even the retail brokerage unit alone could destabilize the entire company, compromise its ability to pay benefits on policy claims, and harm innocent policyholders. Thus in 1994, the company entered into one of the earliest deferred prosecution agreements.

A second example is found in the DPA involving Roger Williams Medical Center in Providence, Rhode Island. In 2006, three executives at the hospital were indicted for bribing a state legislator to have the politician promote the hospital's interests in the legislature. Under the crimes of its executives, the hospital itself faced prosecution. Lawyers for the hospital argued that a conviction of the hospital could debar it from participating in federal health care programs, such as Medicare and Medicaid, which provided significant revenue to the hospital. If that occurred, the hospital would be forced to curtail its programs, resulting in a significant limitation on access to health care for many of the poorer residents of Providence. A deferred prosecution agreement was agreed upon, requiring the hospital to hire an ethics officer to strengthen its compliance procedures and training activities. Instead of a fine or other financial penalty, the hospital was required to provide US \$4 million in free health care to uninsured low-income residents of Providence.<sup>20</sup>

The third example does not involve a deferred prosecution agreement but is nonetheless relevant because it is frequently cited as an example of the adverse consequences that can occur when prosecution is chosen over the option of deferred prosecution. In 2002, the accounting firm Arthur Andersen was convicted of obstruction of justice for destroying documents related to its role as an outside auditor to Enron. This led directly to the firm's collapse and reduced the Big Five accounting firms to the Big Four. The Supreme Court's subsequent reversal of the conviction came too late to save Arthur Andersen, who had declared bankruptcy when it realized public companies would not retain an outside auditor to review their books and records when that auditor had been convicted of crimes committed while acting for a client.

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<sup>20</sup> *Ibid.*



There are two essential features of deferred prosecution in the United States. First, DPAs are an aspect of broad prosecutorial discretion. Whether to enter into such an agreement, its terms, whether an independent monitor is needed, and how long the agreement should be in place are regarded as within the traditional scope of prosecutorial power. In other words, if U.S. prosecutors possess discretion to decide whether to file a charge and/or engage in plea bargaining resulting in a guilty plea, they have a similar level of discretion to determine when and under what circumstances a prosecution should be deferred. The case for exclusive prosecutorial control when a non-prosecution agreement occurs is even more vital.

The second distinguishing characteristic of DPAs in the U.S. is achieving structural reform of complex corporate organizations. As Professor Garrett has written:

Prosecutors enter into [deferred prosecution] agreements that allow the company to avoid a conviction, but which impose fines, aim to reshape corporate governance and bring independent monitors into the boardroom...[t]his represents an ambitious new approach to governance in which federal prosecutors help reshape the policies and culture of entire institutions, much as federal judges oversaw school desegregation and prison reform in the heyday of the civil rights era in the 1960s and 1970s.<sup>21</sup>

Two examples demonstrate this aspect of DPAs. In 2008, global company Siemens entered into agreements with the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to resolve charges that the company and several of its subsidiaries had violated the Foreign Corrupt Practices Act, which prohibits the payment of bribes to foreign government officials to obtain or retain business. The agreements, which involved guilty pleas, required Siemens to subject itself to monitors in the U.S. and Germany for four years, during which time the monitors were tasked with evaluating the effectiveness of Siemens' internal controls, record-keeping, and financial reporting policies and procedures. During this supervision period, Siemens replaced most of its leadership, including its CEO, chairperson, general counsel, and chief compliance officer, and hired more than 500 full-time compliance staff. New policies, handbooks, and training were adopted. The German monitor, a former Minister of Finance, estimated that his supervision consumed two-thirds of a full-time job for him over four years. All this was in addition to the payment by the company of US \$1.6 billion in fines and penalties to authorities in the U.S. and Germany.

Another case involved pharmaceutical and healthcare company Bristol-Myers Squibb, who, in 2004, entered into a DPA following the disclosure of accounting fraud. The company paid a total of US \$750 million in penalties, restitution to victims of the fraud, and settlement of parallel shareholder litigation. A monitor, former federal judge Frederick Lacey, was put in place for two years. During his supervision of the company, Judge Lacey determined that he could not certify significant improvement in Bristol-Myers' compliance culture if the company's existing leadership was in place. Judge Lacey went to the board of directors and insisted that the CEO and General Counsel be fired. The board complied, prompting the *New York Times* to publish an article with the

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<sup>21</sup> Garrett, *Too Big to Jail...*, p. 6-7



headline "A Corporate Nanny Turns Assertive,"<sup>22</sup> referring to Judge Lacey's intrusion into the company's affairs.

The use of DPAs in the U.S. has not occurred without its critics. The criticisms focus primarily on the perceived undue leverage, bordering on coercion, that is exercised by prosecutors, as well as the lack of guidelines or protocols governing the deferred prosecution process and the resistance to judicial review. According to critics, this results in an unacceptable risk of prosecutorial abuse and unwarranted disparity in the treatment of corporate criminality. For instance, former U.S. Attorney General Dick Thornburgh has stated that DPAs "can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse",<sup>23</sup> while Judge Lewis Kaplan described the approach of one prosecutor's office to KPMG's deferred prosecution agreement as the government pointing "the proverbial gun to [KPMG's] head." Mary Jo White, a former U.S. Attorney and current Chair of the SEC stated, while in private practice, that it should be "the rare case where the government seeks a deferred prosecution agreement".<sup>24</sup> Referring to the breadth of corporate criminal liability, Ms. White said that "the law allows you to proceed against the company in virtually every case where you have a single employee who has committed a crime," and she feared "it is almost becoming an automatic reaction" when "prosecutors are thinking--before we close out this case that involves any kind of corporate crime, we should get something from the company," namely, a deferred prosecution agreement.<sup>25</sup>

Criticism of DPAs and NPAs has come from other quarters as well, they questioned whether such agreements reflect undue lenience toward corporate crime. Especially when no prosecution of individual corporate wrongdoers occurs, a company's deferred prosecution appears to these critics as an abdication of the prosecution's responsibility to apply the rule of law uniformly.

## 5. Comparison Between DPAs in the U.K. and the U.S.

The similarities in the deferred prosecution process in the U.S. and the U.K. are not surprising, as the U.K.'s adoption of deferred prosecution was consciously based on the U.S. model. The U.K.'s Crime and Courts Act and Code of Prosecution outline familiar features of DPAs in the U.S., especially the goal of achieving corporate culture reform through strengthened compliance procedures and the use of monitors to supervise this process. To its credit, the British model is more rule-based and formalized than in the U.S, as the U.S. does not have its own Code of Practice to guide prosecutors when they are exercising their extensive discretion to consider the use of deferred prosecution.

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<sup>22</sup> Stephanie Saul, "A Corporate Nanny Turns Assertive," *New York Times*, September 19, 2006, <https://www.nytimes.com/2006/09/19/business/19gent.html>.

<sup>23</sup> Walter Loughlin, "Deferred Prosecution and Corporate Criminal Prosecution: A Comparative Analysis," *JDSupra*, June 16, 2016, <https://www.jdsupra.com/legalnews/deferred-prosecution-and-corporate-35072/>, p. 6.

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*

The most significant difference between the U.S. and U.K. models is that deferred prosecution in the U.S. is entirely within prosecutorial control. In the U.K., no deferred prosecution agreement can become effective without judicial declaration. One may speculate about the reasons for the difference. It may partially stem from an attitude of ambivalence in the U.K. about prosecutorial discretion, together with a belief – or hope – that judicial control will reduce unjustified inconsistencies in DPAs. A perhaps more cynical view is that the SFO and Crown Prosecution Service (CPS) prefer to shift any criticism about the use of such agreements from prosecutors to the courts. Key differences between DPA application in the U.K. and the U.S. is as follows:

**Table 1.** Comparison Between DPAs in the U.K. and the U.S.

No	Issue	DPAs in the U.K.	DPAs in the U.S.
1	Individual or corporation subject	DPAs may be entered into only with organizations	DPAs may be entered into with organizations or individuals
2	Judicial approval	Prosecutors must attain judicial approval to initiate DPA negotiations, declare and/or alter a DPA. <sup>26</sup>	DPAs are often negotiated by prosecutors with limited (if any) judicial involvement.
3	Types of offenses	The availability of DPAs is limited to "scheduled offenses" set out in the Crime and Courts Act. <sup>27</sup>	DOJ has broad discretion as to the types of crimes for which DPAs may be used. <sup>28</sup>
4	Overseeing the usage of DPAs	The use of DPAs, particularly in the next few years, will be closely overseen by the designated prosecutors; <sup>29</sup>	Individual prosecutors have significant autonomy in how they approach and engage in DPAs
5	Power over DPAs	The U.K. has chosen to modify this approach by giving the judiciary much more of a role in the DPA process, though it remains to be seen how the judiciary will perform this role as a matter of practice.	Prosecutors in the U.S. have been criticized for wielding too much power over companies in the DPA process, with the prosecutor having almost sole responsibility for safeguarding the public interest.
6	Legal basis on which companies face criminal liability	It is challenging to establish corporate criminal liability in the U.K.	<i>Respondeat superior</i> liability in the U.S. makes it easy to prosecute companies based on the conduct of one or more employees at any level of seniority.

<sup>26</sup> United Kingdom, Crime and Courts Act 2013, § 45, sched. 17, pt. 1, para. 7. The legislation also promotes transparency (something the U.S. Department of Justice has been criticized for lacking), as the declaration of a DPA and the court's reasoning for entering into an agreement are made public.

<sup>27</sup> *Ibid.*, sched. 17, pt. 2.

<sup>28</sup> At this stage, the U.K. has not gone so far as to introduce non-prosecution agreements, which are a feature in the U.S.

<sup>29</sup> United Kingdom, Crime and Courts Act 2013, sched. 17, pt. 1, para. 3.

## 6. Proposed DPA Model in Australia

The mechanisms for implementing DPAs in U.S. and U.K. in cases of severe corporate crime now look likely to be followed by Australia. Australia is currently examining the possibility of adopting a DPA model suitable for the local context. This means even though with the same term (DPA) is used, the model is likely to be different.<sup>30</sup> Nonetheless, DPAs' usage in Australia will also be for purposes of effectiveness and efficiency in handling criminal cases.<sup>31</sup>

For the last five years, Australia has been analyzing how a DPA mechanism could be implemented to combat corporate crime. The proposed DPA model is important in developing a new enforcement mechanism for severe corporate crimes, such as foreign bribery, fraud, and money laundering. Corporate crime is estimated to cost Australia more than AU \$8.5 billion a year and accounts for about 40% of Australia's total cost of crime.<sup>32</sup> Corporate crime can also increase costs for individual businesses, expose a business to legal and reputational risks, create an uneven playing field, and distort markets. Introducing a DPA scheme would help Australian law enforcement work with businesses to deal with corporate crime, provide an incentive for companies to come forward, and give prosecutors an extra tool. A DPA scheme would also contribute towards Australia meeting its international obligations to combat corruption and related criminal conduct, and enable the Australian government to use DPAs in international settlements with multinational companies.<sup>33</sup>

Australian Commonwealth law enforcement faces challenges in effectively detecting, investigating, and prosecuting severe corporate crime. Investigation often takes several years because of the complicated data and negotiations required during the process. Additionally, evidence may be located outside Australia's jurisdiction, requiring mutual assistance processes. In the prosecution stage, the trial can be extensive as well as expensive. The Australian DPA scheme for severe corporate crime is likely to improve the law enforcement's ability to detect and go after corporate crimes and help to compensate the victims. Having the option for DPAs to hand would also avoid lengthy and expensive processes during investigation and prosecution and provide certainty for companies seeking to report and resolve corporate misconduct. Thus, it would be compatible with the federal government's policy to solve crime and ensure communities are strong and prosperous. Furthermore, a DPA scheme would minimize impacts on third parties, namely the employees, customers, suppliers, and investors of the company.<sup>34</sup>

As mentioned above, both the U.S. and U.K. have achieved substantial settlements and DPAs are said to be transforming corporate culture. There are two crucial features of DPAs: Where a company or company officer has engaged in serious corporate crime,

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<sup>30</sup> For example, in the U.S, DPAs are similar to NPAs (Non-Prosecution Agreements).

<sup>31</sup> Febby Mutiara Nelson, "Pengembalian Kerugian Keuangan Negara: Dapatkah Menggunakan Deferred Prosecution Agreement? (State Financial Recovery: Can We Use Deferred Prosecution Agreement?)," *Simbur Cahaya, Faculty of Law, Sriwijaya University* 2 No. 26 (January 17, 2020): 230–253, p. 241

<sup>32</sup> Hadeel Al-Alosi, "What Is White Collar Crime?" *Sydney Criminal Lawyers*, October 4, 2018, <https://www.sydneycriminallawyers.com.au/blog/what-is-white-collar-crime/>.

<sup>33</sup> KordaMentha, "Deferred Prosecution Agreement Scheme in Australia," accessed November 8, 2021, <https://www.kordamentha.com/insights/Deferred-Prosecution-Agreement-Scheme-in-Australia>.

<sup>34</sup> *Ibid*

prosecutors can invite the company to negotiate an agreement to comply with a range of specified conditions. These conditions typically require the company to cooperate with any investigation, admit to agreed facts, pay a financial penalty, and implement a program to improve future compliance. No prosecution will occur concerning the matters that were the subject of the DPA, as long as the company fulfills its obligations under the agreement. A breach of the terms of a DPA may result in a prosecution or renegotiation of the DPA terms.

The proposed Australian DPA scheme would not be applied to individuals, only for companies in the case of severe corporate crime<sup>1</sup> offenses, namely fraud, false accounting, foreign bribery, money laundering, dealing with proceeds of crime, forgery and related offenses, exportation and/or importation of prohibited or restricted goods, specific offenses under the Corporations Act, and other offenses where the DPA scheme would explicitly apply.

The Australian government is also examining whether a DPA scheme should include other types of crime. Crimes currently being explored for DPAs include environmental crime, tax offenses, cartel offenses, and offenses that fall under workplace health and safety legislation. The following model for a DPA scheme is proposed by the Australian government<sup>35</sup>

1. Initiation of DPA negotiations. The decision on whether DPA negotiations are to begin at the discretion of Commonwealth Director of Public Prosecutions (CDPP). The start of negotiations would involve the sending of a letter to the company accused of committing a crime, offering to begin DPA negotiations
2. Negotiation. CDPP and the company would determine the terms of a DPA. Terms would be adjusted to suit each case, but in general, the terms might include necessity for payments to financial penalties and DPA administration and an agreement to implement corporate compliance programs. The outcome of negotiations could be the CDPP resolving to take no action or to prosecute, either party abandoning negotiations, or the production of a final DPA for approval.
3. Approval. A retired judge would give their approval regarding the final terms of the DPA following an application made by the prosecution. The retired judge would consider whether the DPA was in the interests of justice and whether the terms were fair, reasonable, and proportionate. Approval means the DPA would take effect and be published on the CDPP's website, meanwhile disapproval means the parties would be able to renegotiate or terminate the negotiations.
4. Oversight and response to DPA breaches. If necessary, to ensure the company's compliance with the DPA, an independent monitor would be involved to report on company's outcome to CDPP. The CDPP might attempt to respond to DPA breaches by giving the company an opportunity to address the breach and/or renegotiate the terms of the DPA. If the breach cannot be resolved, the CDPP might resolve the matter by referring the breach to another party. At the current stage of development, it is undecided whether this would be the Director of the CDPP, a retired judge, or a court. If this other party determines that the DPA had been

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<sup>35</sup> KordaMentha, "Deferred Prosecution.."

materially breached, the CDPP might prosecute for the matters included in the DPA.

5. Conclusion of a DPA. Two options would exist for a DPA's conclusion: A material breach of a DPA, or fulfillment of the DPA terms, ensuring that the CDPP would not prosecute the company regarding the matters that were the subject of the DPA.

In the case of a material breach of a DPA, the Australian government proposes several options. If the breach is significant, the DPA could be terminated, and prosecution undertaken for the public interest. Additionally, the DPA could be terminated if further criminal offenses were committed by the company; if the breach is such that the integrity of the DPA scheme could be significantly compromised if prosecution does not take place; if parties disagree on a response to an otherwise minor breach; if there is pattern or continuity of minor breaches which, when examined cumulatively, reveal that the company is not sufficiently attempting to comply with its DPA obligations; or if the company does not otherwise appear to be committed to its DPA obligations.

Matters discussed by the company during DPA negotiations would not be disclosed, other than to relevant parties, or used for criminal or civil proceedings if the material was made purely to facilitate, support, or record DPA negotiations. Exceptions for this clause include if the company provided false, misleading, inaccurate, or incomplete information during the negotiations. If a company either breached the DPA or made an inconsistent statement with the disclosed material in other offense's prosecution, exceptions should be applied to. Generally, DPAs would be published in full, unless, for instance, where complete publication would bias court proceedings. The CDPP would publish details on how the company had fulfilled the DPA's terms and conditions at the end of the DPA process. The CDPP might also be required to publish details of any breach, variation, or termination of the agreement. DPAs may also possibly require conditions where company must make payments – for example, to restore profits from their misconduct or supply restitution to victims. Company might have to pay costs related with establishing and monitoring the DPA.

## 7. Indonesia's Criminal Justice System: Problems with Corruption

Indonesia's criminal justice system faces major problems. These include judicial corruption; case overload; slow and time-consuming processes; high costs; and inadequate mechanisms to include elements of community justice; The system is too rigid, formal, and technical, resulting in a lack of flexibility and responsiveness. This indicates the need to evaluate the system.<sup>36</sup>

The current administration, led by President Joko Widodo, has responded to this situation with a general policy contained in the country's National Medium Term Development Plan (*Rencana Pembangunan Jangka Menengah Nasional* or RPJMN) for 2019 - 2024, which emphasizes nine national development agendas (referred to as *Nawa Cita Phase II*). One of the nine points is the agenda of "A law system enforcement that is free of corruption, dignified and trustworthy". The emphasis is on law enforcement reform.

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<sup>36</sup> Evan Whitton, *Our Corrupt Legal System; Why Everyone Is a Victim (Except Rich Criminals)* (Sydney: Butterworth, 2010) as cited by Chairul Huda, *Penerapan Sistem Small Claim Court Dalam Sistem Hukum Nasional*. (Jakarta: BPHN, 2013), p. 5-6.

Empirically, the condition of the Indonesian criminal justice system examined through the caseloads in each sub-system. In 2021, the number of cases filed to the prosecutor's office was 149,476 cases, consisting of 147,624 public crimes (of which 94,461 that were submitted to court) and 1,852 special crimes (all were submitted to court).<sup>37</sup> Therefore, it remains 53,163 cases that have not yet been submitted to a court.

The type of criminal acts that have been filed to a court are as follows:

**Table 2.** Criminal Acts filed to an Indonesian court in 2021

Case Type	Remaining from 2020	Sub mission	Case Load	Concluded	Remaining	% of Concluded	% of Remaining
Private	17	4,857	4,874	4,858	16	99.67%	0.33%
Special Private	12	1,525	1,537	1,526	11	99.28%	0.72%
Criminal	10	1,605	1,615	1,605	10	99.38%	0.62%
Special Criminal	144	5,779	5,923	5,799	124	97.91%	2.09%
Religious Private	8	1,135	1,143	1,136	7	99.39%	0.61%
Military Criminal	0	210	210	210	0	100%	0%
State Administrative	8	4,098	4,106	4,099	7	99.83%	0.17%
<b>Total</b>	<b>199</b>	<b>19,209</b>	<b>19,408</b>	<b>19,233</b>	<b>175</b>	<b>99.35%</b>	<b>0.65%</b>

Source: Supreme Court of the Republic Indonesia Annual Report of 2021.

According to Supreme Court of the Republic Indonesia Annual Report of 2021, the Court's caseloads left 175 outstanding cases, of which 134 were criminal cases, representing 76.57% of the total cases.<sup>38</sup> Nevertheless, if the case data from 2015 to 2021 is traced, there can be seen an increase in the productivity ratio of concluded cases and remaining cases in each type of case tried by the Supreme Court. At the beginning of the period, there was a high level of awareness around the large load of cases that the criminal justice system must process in Indonesian, leading to a need to initiate ideas to reduce the use of penal means in tackling criminal acts. This was also considered in that context of the fact that the purpose of criminal law is generally to control crime so that it is within the limits of tolerance<sup>39</sup>, with the function of criminal law as an *ultimum remedium* (last resort) in overcoming social problems.<sup>40</sup>

<sup>37</sup> Data processed with reference from State Attorney of the Republic of Indonesia Annual Report 2021.

<sup>38</sup> Supreme Court of the Republic Indonesia "Supreme Court of the Republic Indonesia Annual Report of 2021: Acceleration of Modern Justice Implementation (*Laporan Tahunan 2021 Mahkamah Agung Republik Indonesia: Akselerasi Perwujudan Peradilan Modern*)" (Jakarta: Supreme Court of the Republic Indonesia, 2021), p. 68)

<sup>39</sup> Emile Durkheim, *The Normal and the Pathological*, in Marvin E. Wolfgang, ed., *The Sociology of Crime and Delinquency*, Second Edition (John Wiley & Sons, 1990), as cited in Mardjono Reksodiputro, *Kriminologi Dan Sistem Peradilan Pidana, Kumpulan Karangan: Buku Kedua*. (Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum Universitas Indonesia, 2007).

<sup>40</sup> Douglas Husak, "The Criminal Law as Last Resort," *Oxford Journal of Legal Studies* 24, no. 2 (2004), p. 207-235.

In addition to a high number of cases, Indonesia has been struggling with the problem of corruption since the fall of authoritarian President Suharto in 1998, after which the country entered the reformation era. Fundamental changes in governance took place along widespread democratic reform. However, corruption remains endemic in the judicial system and represents one of the most difficult challenge faced in Indonesia today. In 2006, the Indonesia Corruption Perception Index, issued by Transparency International, improved up by a trivial 0.2 points, from 2.2 to 2.4. This disappointing result places Indonesia in 130<sup>th</sup> position out of 163 countries, keeping company with other notoriously corrupt nations, such as Togo, Burundi, Ethiopia, Central African Republic, Zimbabwe, and Papua New Guinea. The relatively stagnant index score shows how ineffective and slow corruption eradication is in Indonesia, including in the criminal justice system, despite the best efforts of the Corruption Eradication Commission.

Indonesia has implemented a similar mechanism with DPA, a mechanism which prioritizing the returning of state loss due to national banking problems. During the Bank of Indonesia's Liquidity Assistance (*Bantuan Likuiditas Bank Indonesia "BLBI"*) case. Indonesia utilizes a noncriminal approach through the mechanism called *Master Settlement and Acquisition Agreement (MSAA)* dan *Master Refinancing and Note Issuance Agreement (MRNIA)*. BLBI itself is an aid scheme (loans) provided by Bank of Indonesia to the banks who experiencing liquidity problems during the 1997-1998 monetary crisis in Indonesia. This scheme is carried out in accordance with the Government of Indonesia agreement with IMF in overcoming the monetary crisis. In December 1998 Bank of Indonesia has disbursed BLBI in the amount of IDR 144,5 trillion to 48 banks whereas some of the funds were misappropriated.<sup>41</sup>

MSAA and MRNIA is the Government of Indonesia, which considered as civil law instrument that complies to Article 1338 of the Indonesian Civil Code,<sup>42</sup>it is not in the form of Statutory that involved the State Attorney and the Court. However, the use of MSAA and MRNIA indicate that there is a political will from the Government of Indonesia to prioritize the return of state loss, whereas this mechanism is similar to DPA. To help reduce corruption in the criminal justice system, Indonesia could look at implementing a deferred prosecution agreement mechanism. This would not only achieve the purpose of punishment of corporations, especially special and general deterrence, but would also assist in returning state assets from perpetrators.<sup>43</sup> Indonesia could learn from the DPA models already applied in the U.K. and the U.S., as well as the model being proposed in Australia. This model could be important in making the criminal justice process more effective, efficient, and less time-consuming, as well as resolving the problems of significant caseloads and ongoing corruption.

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<sup>41</sup> See Lifepal, "Negara Rugi Sampai 490 Triliun Lebih, Ini 5 Kasus Korupsi Terbesar di Indonesia", 30 March 2019 <https://lifepal.co.id/media/kasus-korupsi-terbesar-di-indonesia/> accessed 1 March 2022

<sup>42</sup> Tri Widya Kurniasari, "MSAA dan MRNIA bagi Recovery Dana BLBI, Sebuah Jalan Keluar atau Jalan Untuk Keluar," *Jurnal Masyarakat dan Budaya*, 8 no.1 (2006): 51.

<sup>43</sup> Prosper Maguchu. "Borders and Boundaries: Importing Asset Recovery" Duty Free" in Transitional Justice Processes." *Indonesian J. Int'l L.* 17 no. 2 (2019): 181-210.



## 8. Conclusion

Indonesia needs to consider deeply and seriously several issues before implementing a deferred prosecution agreement mechanism in its criminal justice system. These issues include whether only corporations can be the subjects of DPAs (as in the U.K.) or both corporations and individuals (as in the U.S.). The second issue that needs to be considered concerns the need for judicial approval to develop DPAs. The next question is about which offenses can be responded to with DPAs – for example, would DPAs be limited to corruption and money laundering, or would other economic crimes be included? Due to endemic corruption, it would also be essential for Indonesia to consider how to oversee and monitor the process and implementation of DPAs between prosecutors and corporations. Alongside this, the type of institution that can use DPAs also needs to be identified – is it only public prosecutors under the Attorney General’s Office, or would it include the Corruption Eradication Commission and the police? While there are many questions to be explored, DPAs could offer a valuable solution to many of the problems facing the Indonesian criminal justice system.

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