



# Bill Essentials

The Criminal Procedure (Plea Discussion and Plea Agreement) Bill.

*An Act to establish a system of plea discussions and plea agreements and for matters incidental thereto*

11th Parliament

Introduced in the House of Representatives on February 23, 2017 by the Honourable Mr. Faris Al-Rawi, MP - Attorney General

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**BACKGROUND AND PURPOSE OF THE BILL**

1. **The Criminal Procedure (Plea Discussion and Plea Agreement) Bill, 2017** (“the Bill”), seeks to repeal **the Criminal Procedure (Plea Discussion and Plea Agreement) Act, Chap 13:07** (“the Act”) and provide for an extended system of plea discussions and plea agreements (referred to as plea bargaining<sup>1</sup> in other jurisdictions) in the criminal justice system.
2. A properly administered system of plea-bargaining can benefit all concerned. The defendant avoids extended pre-trial incarceration and the anxieties and uncertainties of a trial. The defendant may also gain a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realising whatever potential he may have for rehabilitation while the judges and prosecutors can save vital and scarce resources.<sup>2</sup>

**KEY FEATURES OF THE BILL**Application of Bill

3. **Clause 3** provides that the Bill does not affect the right of a person to plead guilty without entering into a plea agreement; neither does it affect the right of an accused to seek a sentence indication.<sup>3</sup>

Plea Agreement

4. **Clause 4** provides for the necessary requirements of a plea agreement. In this regard, the accused person must agree to :
  - (a) plead guilty to an offence which is disclosed on the facts and on which the charge against the accused person is based; and
  - (b) to fulfil any other obligations specified in the plea agreement.
5. In addition, the prosecutor agrees to take a particular course of action which may include :
  - (a) the **withdrawal or discontinuation** of the original charge or charges against the accused person or a co-accused.
  - (b) the **reduction of the charge** against the accused person or a co-accused to a lesser offence than that charged.
  - (c) an **undertaking not to institute charges** against family members or friends of the accused person in respect of the matter with which the accused person is charged;

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<sup>1</sup> An arrangement between prosecutor and defendant whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an agreement to drop other charges. (Oxford English Dictionary: [https://en.oxforddictionaries.com/definition/plea\\_bargaining](https://en.oxforddictionaries.com/definition/plea_bargaining) )

<sup>2</sup> **Blackledge v. Allison, 431 U.S. 63 (1977)** ; See also **Santobello v New York 404 US 257 (1971)**

<sup>3</sup>In practice, a sentence indication is a statement by the court that provides the accused with an idea of the type of sentence he/she is likely to receive if they were to plead guilty at any given stage of their proceeding. The accused may then decide whether to plead guilty or not guilty at this point depending on the severity of sentence.

- (d) an **undertaking to recommend summary trial** rather than trial by indictment.
- (e) an **undertaking not to oppose a request by an accused person** or his Attorney-at-law that a particular sentence be imposed.
- (f) an undertaking that a conviction pursuant to a plea agreement will **not be used as evidence of bad character at the trial for a specified offence** or for any other offence.
- (g) a recommendation to the Court that **the record of the plea discussion and the plea agreement be sealed**.

### Plea Discussion

6. **Clause 5** provides that a plea discussion may be held and a plea agreement concluded at any of the following stages but **before conviction**:
  - (a) before charges are instituted against the accused person;
  - (b) before the arraignment of the accused person;
  - (c) during committal proceedings;<sup>4</sup>
  - (d) at any time after committal of the accused person; or
  - (e) at any time before or during the trial of a summary or indictable offence.
7. **Clause 6** provides for the written permission of the Director of Public Prosecutions **before** entering a plea discussion.
8. **Clause 7** prohibits the use of improper inducements to encourage an accused person to participate in a plea discussion.

### Prohibition against Plea Discussions in Certain Circumstances

9. **Clause 8** prohibits a prosecutor from participating in plea discussions or concluding plea agreements that require the accused person to plead guilty to an offence that:
  - (a) is not disclosed by the evidence; and
  - (b) does not adequately reflect the gravity of the provable conduct of the accused person
  - (c) requires the prosecutor to withhold or distort evidence.

### Plea Discussion with Represented Accused Person

10. **Clause 9** prohibits a prosecutor from engaging in plea discussions with an unrepresented accused person unless the prosecutor informs the accused of certain rights including the right to be represented by at an Attorney-at-law.

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<sup>4</sup>In practice, Committal proceedings are presided over by a Magistrate in a Magistrates' Court. At this stage, a Magistrate determines based on the evidence adduced by the prosecutor, whether a prima facie case is made out against the accused person to justify his trial by a jury. A prima facie case is a case where there is strong material evidence to try a person for a serious offence, which falls under the umbrella of indictable offences.

### Conditions for Entering into a Plea Discussion with an Unrepresented Accused Person

11. **Clause 10** allows a prosecutor to initiate a plea discussion with an unrepresented accused in the following circumstances:
- (a) he desires to represent himself;
  - (b) he agrees to allow an independent third party, identified by the Court, to be present during the plea discussion; and
  - (c) the plea discussion being recorded.
12. Where the accused undertakes to represent himself, the Court must be informed and approves of the initiation of a plea discussion in the presence of an independent third party identified by the Court in writing.

### Prosecution's Duty to Disclose Evidence

13. **Clause 11** provides that where plea discussions are initiated before charges are laid, the prosecutor shall inform the accused person of the allegations against him and provide the accused or his Attorney-at-law with a written summary of the evidence against him.
14. Further, if a plea discussion is initiated after charges are laid but before the prosecutor tenders evidence implicating the accused person, the prosecutor is required to provide the accused person or his Attorney-at-law with a written summary of the evidence against him.

### First Appearance of the Accused Person

15. **Clause 12** states that upon the first appearance of an accused person before a Court, whether the accused is represented by an Attorney-at-law or not, **the Court shall advise** the accused person:
- (a) of his right to enter a plea discussion with the prosecutor and to be represented by an Attorney-at-law during the plea discussion;
  - (b) if the accused person cannot afford to retain an Attorney-at-law, of his right to apply for legal aid under the Legal Aid and Advice Act for the purpose of entering into a plea discussion; or
  - (c) of his right to enter a plea discussion with the prosecutor under section 10(1) if he does not wish to be represented by an Attorney-at-law.

### Victim Impact Statements

16. The use of victim impact statements has been recommended as a useful vehicle to enhance justice in adversarial criminal justice system<sup>5</sup>. Victim impact statements are written or oral information from crime victims, in their own words, about how a crime has affected them. Statements obtained from the victim before the initiation of proceedings

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<sup>5</sup> Seetahal S., Dana: *Commonwealth Caribbean Criminal Practice and Procedure*. (4<sup>th</sup> ed.) 2014 Routledge, pg 357

may form part of the victim’s evidence in court depending on if it admissible in a court of law. A judge may utilise information from these statements to help determine an offender's sentence or reach a verdict.<sup>6</sup>

17. Victim impact statements may include descriptions of:

- (a) Physical damage caused by the crime;
- (b) Emotional damage caused by the crime;
- (c) Financial costs to the victim from the crime;
- (d) Medical or psychological treatments required by the victim or his/her family; or
- (e) Other impact that the offence has had on the victim.

18. **Part III** of the Bill provides for the introduction and use of victim impact statements.

19. **Clause 13(1)** gives every victim the right to provide a victim impact statement and **Clause 13 (4)** provides that where a victim elects not to give a victim impact statement, the Court, at the plea agreement hearing, shall not draw any inference that the offence did not result in harm to the victim.

20. **Clauses 13-16** provide for the admissibility of different categories of victim impact statements to be made to the Court.

CATEGORIES OF VICTIM IMPACT STATEMENT	PROPOSED PROVISIONS
<b>Statements made by relatives</b>	<b>Clause 15</b> states a relative of the victim may provide the prosecutor with a victim impact statement on behalf of the victim at any time before a Court imposes sentence if the victim- <ul style="list-style-type: none"> <li>(a) has died;</li> <li>(b) is ill or otherwise incapacitated; or</li> <li>(c) cannot be found.</li> </ul>
<b>Victim under the age of fourteen (14)</b>	<b>Clause 16</b> provides that where the victim is a child; <ul style="list-style-type: none"> <li>(a) under the age of fourteen years, a parent or guardian or, where the parents or guardians cannot be located, a person who has custody of the victim or who is responsible for the victim’s care and support may make a victim impact statement on behalf of the victim; or</li> <li>(b) who has attained the age of fourteen years, the victim and one of his parents or guardians or, where the parent or guardian cannot be located, a person who has custody of the victim or who is responsible for the victim’s care and support may make a victim impact statement on behalf of the victim.</li> </ul>
<b>Victim impact statement by a business</b>	<b>Clause 17</b> provides if the victim is a business, a duly authorised representative of the business may provide the prosecutor with a victim impact statement.

<sup>6</sup> In the case of **O’s Case (1992) 14 Cr App**, the Court of Appeal in England has reasoned that in the absence of such evidence, the Court may be incited to come to its own conclusion about the harm done to the victim. The effect of this is that it may be prejudicial to the victim or he accused.

### Procedure at Plea Agreement Hearing

21. **Part IV** of the Bill would provide for the procedure to be followed in respect of plea agreements and plea agreement hearings.
22. **Clause 21** requires the listing of a matter for a plea agreement hearing within **twenty-eight (28)** days of the filing of the plea agreement.
23. **Clause 24** stipulates that a plea agreement hearing shall be held in open court unless, having taken all the circumstances into consideration, the Court considers that the hearing should be held *in camera*.
24. In addition, the prosecutor is required to disclose the following information to the Court in the presence of the accused person and his Attorney-at-law or in the presence of the accused person who has elected to represent himself:
  - (a) the substance of, and reasons for the plea agreement;
  - (b) if no victim impact statement is filed, whether the victim was informed of his right to make a victim impact statement; or
  - (c) if a victim impact statement is filed, whether the victim would like to read his victim impact statement in open court or have the statement read by the prosecutor or an officer of the Court.
25. **Clause 24(3)** provides that the Court shall make enquiries of the accused person in order to determine whether the accused person:
  - (a) understands the nature and substance of the plea agreement, including the recommended sentence;
  - (b) received legal advice before signing the plea agreement;
  - (c) understands the nature of the offence with which he is charged and to which he is pleading; and
  - (d) is aware of his rights.

### Plea Agreement Not Binding on the Court

26. Pursuant to **Clause 25** the Court may reject a plea agreement entered into between the prosecutor and the accused person if the Court considers that it is in the interest of justice to do so.
27. Further, where a Judge or Magistrate rejects a plea agreement, the Judge or Magistrate shall:
  - (a) in open court, inform the accused of his right to be tried again before another Judge or Magistrate;
  - (b) within seven (7) days of the rejection of the plea agreement, provide written notification to the Director of Public Prosecutions and the accused person of the reasons for rejecting the plea agreement; and

(c) list the matter for trial.

28. The rejection of a plea agreement by a Court shall not operate as a bar to the conduct of any subsequent plea discussions and plea agreement.

#### Withdrawal of Accused Plea Agreement

29. **Clause 27** provides for the procedure to be followed where an accused person withdraws from a plea agreement including sending the case back to the Magistrate's Court for the conduct of committal proceedings or listing the matter for trial in the High Court.<sup>7</sup>

#### Right of Appeal

##### **Accused**

30. **Clause 28** stipulates that upon notice of appeal to the Court of Appeal, the accused person may appeal to the Court of Appeal against the Court's rejection of a plea agreement.

##### **DPP**

31. **Clause 29** states that the Director of Public Prosecution may appeal to the Court of Appeal against the Court's rejection of a plea agreement.

#### Grounds for Withdrawal from Plea Agreement and Appeal by Accused person

32. **Clause 30** allows for the withdrawal from the plea agreement by an accused in circumstances where:

- (a) it was entered into because of an improper inducement;
- (b) it was entered into because of a misrepresentation as to the substance or consequences of a plea agreement; or
- (c) the prosecutor has breached the terms of the plea agreement.

#### Plea Agreement inadmissible in Criminal or Civil Proceedings

33. **Clause 33** specifies that evidence of the following matters is not admissible in civil or criminal proceedings against the accused person who entered a plea agreement or is a party to plea discussions:

- (a) an offer to enter a plea agreement or a statement made about the offer;
- (b) a statement made during plea discussions or a plea agreement hearing; or
- (c) a plea agreement or guilty plea, which is later withdrawn.

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<sup>7</sup> At present, the **Indictable Offences (Pre-Trial Procedure) Bill, 2017** was passed by the House of Representatives and is yet to be debated in Senate. This Bill seeks to abolish committal proceedings also known as preliminary enquiries.

Schedule

34. The Bill appendages new forms to the Schedule:

FORMS	APPLICATION
<b>FORM "1"</b>	This form is used if the person does not wish to be represented by an Attorney-at-law
<b>FORM "2"</b>	This form is used in respect of impact statement for companies. This allows the company to set out the impact that a crime has had on the business such as direct financial loss and wider impacts.
<b>FORM "3"</b>	This form applies where the person chooses to be represented by an Attorney-at-law.
<b>FORM "4"</b>	This form is referred to as the accused statement form. On this form the accused confirms and affixes his signature thereto, thereby indicating that he has been properly advised on any procedural or substantial matter that may directly or indirectly affect his interest.
<b>FORM "5"</b>	This form applies to the Attorney- at- law, after having properly advised his client, so declaring that the information provided by the accused was voluntary obtained, and that any statements obtained from the accused, are true and honest.
<b>FORM "6"</b>	This form is used where an interpreter is appointed by the court in respect of a plea discussions and plea agreement between made the state and the accused. The interpreter is required to declare that the statements obtained from individuals under the Act where required are true and best to his knowledge.
<b>FORM "7"</b>	This Form applies if the accused/defendant is not represented by an Attorney-at-law.
<b>FORM "8"</b>	This form is used to make an application for listing of plea agreement hearing.
<b>FORM "9"</b>	This form is used by the accused or the defendant to give notice of appeal.
<b>FORM "10"</b>	This form is used by the Director of Public Prosecution to give notice of appeal.

## COMPARATIVE LEGISLATION

THEMATIC SIMILARITIES AND DIFFERENCES	JAMAICA	NEW ZEALAND	BAHAMAS	SCOTLAND
	Criminal Justice (Plea Negotiations and Agreements) Act, 2010	Criminal Procedure Act, 2011	Criminal Procedure (Plea Discussion and Plea Agreement), Act Chapter 91	Criminal Procedure Act 1995
IMPROPER INDUCEMENTS	<p><b>Section 11</b> provides that a Judge or Resident Magistrate shall, before accepting a plea agreement make a determination in open court, that;</p> <p>(a) <b><i>no improper inducement</i></b> was offered to the accused to encourage him to enter into the plea agreement;</p>	<p><b>Section 13</b> provides that an accused person who enters a plea agreement shall be entitled to withdraw from that agreement before sentence or to appeal against a conviction based on the agreement where:</p> <p>(a) it was entered because of an <b><i>improper inducement</i></b>;</p> <p>(b) it was entered because of a misrepresentation as to the substance or consequences of a plea agreement; or</p> <p>(c) the prosecutor has breached the terms of the plea agreement.</p>	<p><b>Section 5</b> directs that a prosecutor who uses an <b><i>improper inducement</i></b> to encourage an accused person to participate in a plea discussion is <b>liable on summary conviction to a fine of twenty-five thousand dollars and to a term of imprisonment of five years.</b></p>	<p><b>Section 196 of the Criminal Procedure (Scotland) Act 1995</b> provides that: In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall consider: the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and the circumstances in which that indication was given.</p> <p>Notwithstanding this, <b><i>inducement or undue influence is generally inadmissible</i></b><sup>8</sup></p>
RIGHTS OF THE ACCUSED	Director of Public Prosecutions is required to, before commencing plea negotiations, <b><i>inform the accused of his right to representation by an Attorney-at-law and of his right to apply for legal aid</i></b> in respect of such negotiations	Where a defendant is unrepresented by a lawyer, the court must be satisfied that the defendant has been <b><i>informed of his or her rights to legal representation, including the right to apply for legal aid</i></b> under the Legal Services Act 2011;		

<sup>8</sup> See, for example, *Harley v HM Advocate* 1996 SLT 1075. See also *Walker and Walker*, para 9.14.

<p><b>BINDING NATURE OF PLEA AGREEMENT</b></p>	<p>Provisions of the plea agreement not binding.</p>			<p><b>Section 55 E</b> provides that where the prosecutor accepts a plea (by the person charged with the commission of an offence) of the special defence, the court must declare that the person is acquitted because of the special defence.<sup>9</sup></p>
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**Reference Material**

Legislation

- **Trinidad: The Criminal Procedure (Plea Discussion and Plea Agreement) Act, 1999**  
[http://rgd.legalaffairs.gov.tt/laws2/alphabetical\\_list/lawspdfs/13.07.pdf](http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/13.07.pdf)
- **Jamaica: Criminal Justice (Plea Negotiations and Agreements) Act, 2010**  
<http://moj.gov.jm/sites/default/files/laws/Criminal%20Justice%20%28Plea%20Negotiations%20and%20Agreements%29%20Act.pdf>
- **New Zealand: Criminal Procedure Act, 2011**  
<http://legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html>
- **Bahamas: Criminal Procedure (Plea Discussion and Plea Agreement), Chapter 91 A**  
[http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0032/CriminalProcedurePleaDiscussionandPleaAgreementAct\\_1.pdf](http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0032/CriminalProcedurePleaDiscussionandPleaAgreementAct_1.pdf)
- **Scotland Criminal Procedure Act 1995**  
<http://bit.ly/2mNWdbA>
- **Australia Criminal Procedure Act 2009**  
<http://bit.ly/2nnx5Ks>

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<sup>9</sup> Additionally in the Scottish case of **Thom v HMA 1976 SLT 232**, it was articulated that the Crown will be bound by the terms of an unequivocal agreement from the time when it is made, assuming fulfilment by the defence of the Crown’s conditions.

- **New South Wales Australia Crimes (Sentencing Procedure) Act 1999 No 92**  
<http://bit.ly/2mZKkvQ>

### Useful Articles

- **Roberts, Jenny, Effective Plea Bargaining Counsel, 2013**  
<http://bit.ly/2mZHkUp>
- **Verdun-Jones N. Simon , J.S.D And Tijerino, A. Adamira , M.A, Victim Participation In The Plea Negotiation Process In Canada: A Review Of The Literature And Four Models For Law Reform, 2002**  
<http://bit.ly/2mJjw4E>
- **Carol A. Brook, Bruno Fiannaca and Others, A Comparative Look at Plea Bargaining In Australia, Canada, England, New Zealand, And The United States, 2016, Vol. 72**  
<http://bit.ly/2mOaN33>
- **Plea Adjustment Regulations (Scotland)**  
<http://bit.ly/2mO36JW>
- **Plea Bargaining In Sentencing**  
<http://bit.ly/2nap2QK>



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