SENATE

Thursday, June 29, 2017

The Senate met at 2.30 p.m.

PRAYERS

[MADAM PRESIDENT *in the Chair*]

REVOCATION OF APPOINTMENT

Madam President: Hon. Senators, I have received the following correspondence from His Excellency the President, Anthony Thomas Aquinas Carmona O.R.T.T., S.C:

"THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency ANTHONY THOMAS AQUINAS CARMONA, O.R.T.T., S.C., President of the Republic of Trinidad and Tobago and Commander-in-Chief of the Armed Forces.

/s/ Anthony Thomas Aquinas Carmona O.R.T.T. S.C.
President.

TO: MS. AYANNA LEEBA LEWIS

WHEREAS by the provisions of paragraph (e) of subsection (2) of section 43 of the Constitution of the Republic of Trinidad and Tobago, the President, in exercise of the power vested in him and acting in accordance with the advice of the Prime Minister, is empowered to declare the seat of a Senator to be vacant:

NOW, THEREFORE, I, ANTHONY THOMAS AQUINAS CARMONA, President as aforesaid, acting in accordance with the advice of the Prime Minister, in exercise of the power vested in me by the said

paragraph (e) of subsection (2) of section 43 of the Constitution of the Republic of Trinidad and Tobago, do hereby declare the seat of you, AYANNA LEEBA LEWIS, to be vacant, with effect from 29th June, 2017.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's, this 29th day of June, 2017."

SENATOR'S APPOINTMENT

Madam President:

"THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

APPOINTMENT OF A SENATOR

By His Excellency ANTHONY THOMAS AQUINAS CARMONA, O.R.T.T., S.C., President of the Republic of Trinidad and Tobago and Commander-in-Chief of the Armed Forces.

/s/ Anthony Thomas Aquinas Carmona O.R.T.T. S.C.

President.

TO: MS. ALLYSON WEST

In exercise of the power vested in me by paragraph (a) and subsection (2) of section 40 of the Constitution of the Republic of Trinidad and Tobago, I, ANTHONY THOMAS AQUINAS CARMONA, President as aforesaid, acting in accordance with the advice of the Prime Minister, do hereby appoint you, ALLYSON WEST, to be Senator, with effect from 29th June, 2017.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's, this 29th day of June, 2017."

OATH OF ALLEGIANCE

Senator Allyson West took and subscribed the Oath of Allegiance as required by law.

PAPERS LAID

1. Ministerial Response of the Ministry of Finance to the Fourth Report of the Public Accounts (Enterprises) Committee, Second Session (2016/2017), Eleventh Parliament on the examination of the Audited Accounts, Balance Sheet and other Financial Statements of The CEPEP Company Limited for the financial years 2009 to 2014. [*The Minister of Labour and Small Enterprise Development* (*Sen. The Hon. Jennifer Baptiste-Primus*)]
2. Ministerial Response of the Ministry of Finance to the Third Report of the Public Administration and Appropriations Committee, Second Session, (2016/2017), Eleventh Parliament, on an Examination of the System of Inventory Control within the Public Service. [*Sen. The Hon. J. Baptiste-Primus*]
3. Response of the Registration, Recognition and Certification Board to the Third Report of the Public Administration and Appropriations Committee, Second Session, (2016/2017), Eleventh Parliament, on an Examination of the System of Inventory Control within the Public Service. [*Sen. The Hon. J. Baptiste-Primus*]
4. Response of the Office of the Parliament to the Third Report of the Public Administration and Appropriations Committee, Second Session, (2016/2017),

Eleventh Parliament, on an Examination of the System of Inventory Control within the Public Service. [*The Vice-President* (*Sen. Nigel De Freitas*)]

PUBLIC ACCOUNTS COMMITTEE REPORTS

(Presentation)

Sen. Rodger Samuel: Madam President, I have the honour to present the following reports:

Special Audit—Public Transport Service Corporation

The Eighth Report of the Public Accounts Committee for the Second Session, (2016/2017), Eleventh Parliament on the Examination of the Report of the Auditor General on a Special Audit of the Public Transport Service Corporation (PTSC).

Ministry of Health

The Ninth Report of the Public Accounts Committee for the Second Session, (2016/2017), Eleventh Parliament on the Examination of the Report of the Auditor General on the Public Accounts of the Republic of Trinidad and Tobago for the Financial Years 2014 and 2015 with specific reference to the Ministry of Health.

URGENT QUESTIONS

San Fernando Magistrates' Court

(Access for Disabled Persons)

Sen. Wade Mark: Thank you Madam President. To the hon. Attorney General and Minister of Legal Affairs, in light of the recent reports that a differently-abled man had to be physically lifted into the San Fernando Magistrates' Court, what measures are being implemented to ensure that all courts are accessible to persons with disabilities?

The Attorney General (Hon. Faris Al-Rawi): Thank you, Madam President. Madam President, I reached out to the Judiciary upon receiving this question as approved. I can confirm that the Judiciary has indicated that it intends to continue its exercise of retrofitting all courts in the progress that they are making so far, for accessibility issues, both in terms of circulation issues and also technological assistance issues, elevators, ramps, et cetera; the circulation issues being also something to be factored in the circulation in the environment and in the courts themselves.

I can indicate that this has been an exercise which regrettably did not have the force of momentum that it should have had in the period 2010 to date, with only a few courts getting there, the High Court in particular under order of court itself but that we intend to pick up that purpose and in particular at San Fernando, as a special point of focus.

Sen. Mark: Madam President, could the hon. Attorney General indicate to this Senate which courts in the Republic of T&T have been retrofitted thus far?

Hon. F. Al-Rawi: Regrettably, Madam President, that would be a very difficult question to commit to the Senate right now. Had the question been posed that way or, perhaps, as a regular question, I can certainly get the proper details, with respect to all of the many courts.

One would appreciate that there are 14 Magistrates' Courts, three out courts and then there are divisions of the High Courts as well. So it would be irresponsible of me to hazard a guess just on the floor of this Parliament in that fashion.

Sen. Mark: Could the hon. Attorney General indicate whether there is a programme of work scheduled by the Judiciary to address this very vexing problem affecting disabled citizens.

Hon. F. Al-Rawi: I am informed by the Judiciary that that it is in fact the case. I can speak with certainty, with respect to the San Fernando Magistrates' Court which has laid in a state of extreme disarray for a very, very, long time.

Added to that, the intention to treat with the St. Joseph's Convent building which was acquired in 2010, and which has laid unused now for seven years, that being the intended site for the Family Court. So there is actually quite a lot of material. In fact, we have just discovered that a property was purchased in Siparia many years ago for a court as well, which has only just turned up onto the system as being a property in potential development point. So there is quite a bit of work yet to be done.

Trinidad and Tobago Police Service
(Kidnapping Prevention Measures)

Sen. Wade Mark: Thank you Madam President. To the hon. Minister of National Security: In light of concerns of a resumption of kidnappings, can the Minister advise whether the Trinidad and Tobago Police Service is properly equipped to prevent and solve such cases of kidnappings?

The Minister of National Security (Hon. Maj. Gen. Edmund Dillon): Thank you Madam President. Madam President, the Commissioner of Police has informed me that the Anti-Kidnapping Squad, the Cyber Security Unit, the Inter Agency Task Force, the Criminal Investigation Department, working together with the Strategic Services Agency are prepared to treat with issues pertaining to kidnapping in Trinidad and Tobago.

Sen. Mark: Madam President, could the hon. Minister indicate to us whether the Commissioner of Police has advised him the status of Mr. Gregory Laing who was kidnapped at around 3:30 this morning in San Fernando? Could he advise us whether the police—[*Interruption*]

Madam President: Sen. Mark, I would not allow that question.

Sen. Mark: Well, may I ask another question?

Madam President: Yes.

Sen. Mark: Could the hon. Minister advise us that the various forces that he has outlined that the Commissioner of Police indicated to him, are prepared to deal with any eruption of kidnappings in the country? Could the hon. Minister indicate to this House whether those units are properly resourced by the State at this time?

Hon. Maj. Gen. E. Dillon: Madam President, I thought I just answered the question, based on the advice of the Commissioner of Police, the unit, as I mentioned before, the Anti-Kidnapping Squad, the Cyber Security Unit, the CID and the Inter Agency Task Force, and I also added into that the Strategic Services Agency, are prepared to treat with the issues of kidnapping in Trinidad and Tobago.

CRIMINAL PROCEDURE

(PLEA DISCUSSION AND PLEA AGREEMENT) BILL, 2017

The Attorney General (Hon. Faris Al-Rawi): Madam President, as I rifle through the procedural paper, may I please be reminded, Madam President, as to whether we actually moved to the committee stage yet? We have not. Thank you.

Thank you, Madam President. Madam President, in accordance with Standing Order 66(1), I beg to move that a Bill to establish a system of plea discussions and plea agreements and for matters incidental thereto be committed to a committee of whole Senate forthwith to be considered clause by clause.

Question put and agreed to.

Bill committed to a committee of the whole Senate.

Senate in committee.

Mr. Al-Rawi: Madam Chair, may I just for the sake of order, having come several

days after our last sitting, just remind what material we ought to have before us. Apart from the Bill, I believe, there were circulated amendments firstly from Sen. Ramdeen and secondly from Sen. Mark. Are there any further amendments circulated?

Madam Chairman: No. I am not in possession of any.

Sen. Dr. Mahabir: Madam President, we did not get those amendments either. We were out of the Chamber last week so maybe they were circulated but not to us who are in the Chamber today.

Sen. Small: We were absent.

Madam Chairman: Senators Mahabir and Small, I will give it to you now.

Mr. Al-Rawi: Madam Chair, several Members of the Government Bench. I have mine, but several Members of the Government Bench do not appear to have circulated amendments either.

Madam Chairman: All right. May I see by a show of hands Members, Senators, who do not have the proposed amendments which were circulated? May I just see by a show of hands, please? Okay. Let us just hold on. Let everybody get their documents and then we will begin the discussions. Is everyone in receipt of the amendments, proposed amendments? Sen. Ameen you have not gotten? Can I just see if there is anyone else? Sen. West, Sen. Cummings. Okay. Could I just see by a show of hands, please, those who still have not received? So one, two, three, four, five Senators. Yeah. Members, we are about to begin.

Hon. Senators, may I just point out that there are 38 clauses in the Bill and one Schedule. Okay?

Sen. Mark: Thank you, Madam Chair. Madam Chair, I just wanted to stir the

imagination and memory of the Attorney General somewhat. When we were winding up the last rounds, in terms of our debate, you did indicate to us that, in the other place, several amendments were circulated and he did accept some and he did not accept others. He went on to indicate that those that he did not accept, he was able to circulate in writing a rationale for those that he did not accept.

Madam Chairman: That is in the other place?

Sen. Mark: Yes. And he promised, in his contribution, that he would provide us with that copy of the document that, you know, he had circulated elsewhere and I do not know if the hon. Attorney General is in a position to provide us with that document. So that in going through the discussion we could understand his rationale for not accepting, you know, some of these amendments. I do not know if he can probably make it available to us.

Mr. Al-Rawi: I thank Sen. Mark for reflecting indeed what was said. Madam Chairman, I have to confess that when we re-looked at the list of 25 amendments proposed by my learned colleague, Sen. Ramdeen, and separating out observations made by Sen. Chote from that, by Sen. Mark, we had in fact traversed the very issues in the House of Representatives and in fact we had provided the Leader of the Opposition and all Members of the House with a gratuitous copy of what our views were on those as a result of which we then progressed with the committee.

I have, in fact, requested that it be circulated. I wish to apologize that I could not do it sooner. I must confess that I did not finish till very late last night, after 11.00 p.m. in the House, and then we have been sitting almost every single day between the two Houses in preparing multiple debates. So there is a listing, the vast majority of which we have dealt with in the other place, albeit not here.

So it will be circulated very shortly.

Madam Chairman: All right. When you say very shortly, can you just tell me—

Mr. Al-Rawi: Well it ought not to interrupt our progress through the clauses. Remember Madam President, what I am offering is something which is gratuitous as an aid just to allow Senators to see positions in advance of where we get—it is not the usual practice, so that is done, but I am very happy to facilitate it because it helps us to better enable ourselves in our considerations.

Sen. Mark: Madam Chair, the only reason I sought to solicit the support of the Hon. Attorney General is that it would probably save us some time in going through this exercise. But if it is that it will be circulated and there is no time frame and it is being done, as you said in a gratuitous manner, well then we will have to go through the burden.

Mr. Al-Rawi: Last comment on my part. Madam Chairman. Forgive me, the pause is that I cannot remember which House I am sitting in at times. The position of the Government is that we do not propose, we had not proposed to circulate any amendments of our own volition. We certainly have received the views of Hon Senators and we are prepared to distinguish our positions. The large volume of difference, if any, between us, is really on a matter of policy, not so much language or otherwise. So, I think that we can traverse the regular course and I think we can get through a fair amount of progress if we were to commence so that at least we do not hold back the sitting unduly.

Madam Chairman: All right. So we will begin.

Clause 1.

Question proposed: That clause 1 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have a proposed amendment to clause 1. Would you like to just indicate your reasoning, your rationale?

Sen. Ramdeen: Hon. Attorney General, I think that by now we have become accustomed to having the proclamation clauses there, because one understands that there is a certain degree of operationalization that needs to be done before these Bills can be put into effect. The concern that we have is that there have been a number of pieces of legislation that have been passed with proclamation clauses and are yet to be proclaimed and I think the time is coming close to where we are passing a lot of legislation but the time period for the proclamation is becoming quite lengthy, if I can put it in those terms.

So I was wondering whether we could put a date so that we would understand that these very important pieces of legislation will come into effect at that time. Obviously, it will be based upon your knowledge of how far you have reached, in terms of operationalization, putting into effect what the foundation for what needs to be done in order to get this in there. So that the purpose for doing that is simply to be able to tie us down, as a—not to tie down the Government, but basically to set an outside time frame for us to be able to know that the laws that we are passing are going to have some effect, because they are going to be brought into effect on or before a particular date.

Mr. Al-Rawi: Yes, I thank the hon. Senator for raising a very real issue—the fact that successive governments have fallen into difficulties in proclaiming laws, as opposed to just passing them. By my estimation, I think we have one particular piece of law which we have passed, which is yet to be proclaimed. That is following upon the instructions of the Cabinet arising only just today.

Whilst I do appreciate the anxiety which we should move ourselves with, and the anxious scrutiny we should have to date, the Government is not in a position to include a date for proclamation. We prefer to stay with the standard formula, that the Cabinet take that decision, lest we find ourselves in difficulties in the laws as expressed. So most respectfully, we cannot. We do not propose that we amend the clause as suggested.

Question put and agreed to.

Clause 1 ordered to stand part of the Bill.

Clause 2.

Madam Chairman: So, Senators Mark and Ramdeen, you have proposed amendments.

Question proposed: That clause 2 stand part of the Bill.

Sen. Mark: Thank you, Madam Chair. Madam Chair, we are very concerned, gravely concerned, over this term or word that has been added to the legislation, in several parts of the legislation but we are dealing specifically with clause 2. And again, we have in our jurisprudence, the practice has always been, and I think it has been made very clear, that the judges rules and directions to police in this country is that if you hold someone, you better charge that person or caution that person and have that person released. But it is unusual, and we are in 2017, and we live in a democratic state, and we have a very corrupt element within the police service, which sometimes do the political bidding of parties. And, therefore, we have to be very cautious that we put into our legislation this concept, Madam Chair, of a suspect. So the police can arrest or can bring somebody in, Madam Chairman, and in the absence of whistle-blowing legislation, this can be used as a political

weapon.

Madam Chairman: Okay, so—

Sen. Mark: So what I am arguing is that, in our modern jurisprudence, there is no room or place for this particular position that the Government is insisting is a policy position. And apparently, Madam Chair, he is saying it is not negotiable, because it is a policy position. And we want to make it very clear, Madam Chair that we cannot support a concept, a term, a word, in this context, in the way that is being proposed. There are many dangers associated with that. And Madam Chairman, we are not in Nigeria.

Madam Chairman: Okay, Sen. Mark, I think you have proposed your amendment.

Sen. Mark: So, I want to make it very clear that we will not support the inclusion of this concept, this term, this word, in our legislation, and we are calling on the Government to delete it wherever it may appear.

Sen. Dr. Mahabir: Okay. Thank you very much, Madam Chair. Madam Chair, I understand Sen. Mark's concern but this is addressed to the hon. AG, through you, because what it says is that:

"'suspect' means a person whom a police officer, with reasonable cause…"

And I need for my own clarity to know whether "with reasonable cause" has an established definition in court processes or whether reasonable cause simply is an arbitrary phenomenon.

Mr. Al-Rawi: Thank you, Madam Chairman. Firstly, in response to Sen. Mark. The Government proposes to maintain the application of plea bargaining through the judicial process which we have constructed, that is through a plea discussion

and a plea hearing before a court of law, in respect of which there is a right of appeal and in respect to which there are procedures for certification of positions, including the videotaping of evidence, the certification in writing by both represented and unrepresented persons in both categories, "suspect" and "accused".

We propose to maintain to that position because firstly, it is something which is found in the existing law, as it is applied in practice in the Office of the DPP.

Secondly, insofar as it forms part of the laws of many of the Commonwealth jurisdictions to which we have looked for guidance and thirdly insofar so as feel that there is proportionality in the management of this position. So we beg to differ with approach. We do accept that there is no perfect system. Some of the observations raised by Sen. Mark are indeed perhaps quite real at times. I do not seek to distance myself from the concern but I think that we have provided for it, adequately.

With respect to the enquiry on the part of Sen. Mahabir, I can say that the rationale for including the definition as it is here that a suspect is tied to a policeman's view, which is reasonable, that is something which has been the feature of much interpretation over the years in the judicial process. And a reasonable cause, a reasonable understanding is something, which if it is unreasonable, can be treated with by way of a claim against the police.

I must remind that there is also caveat in this legislation for the use of what we call an improper inducement where the court must be satisfied that there is no improper inducement. And that is a fairly broad categorization as well.

Where policemen find themselves out in the cold, usually finds footing in

malicious prosecution or false imprisonment claims frequently brought against the State in the person of the Attorney General as the defendant. So there is ample judicial understanding of this term and we prefer to leave it open so that the courts have flexibility to develop themselves as the common law often does.

Sen. Richards: Thank you. Through you, Madam Chairman, in furtherance to Sen. Mark's and Sen. Mahabir's concerns, because I am not a legally trained mind, if the AG could just differentiate between what in some jurisdictions is used as "a person of interest" as opposed to "suspect", and if they can be used interchangeably, in terms of legal understanding in this case?

Madam Chairman: Okay. Sen. Chote, you have a question as well?

Sen. Chote SC: I do but it is a general question because I had, in my presentation I had made several suggestions. Some were stylistic but some were substantial. So I just wanted to propose those amendments.

Madam Chairman: To the term "suspect"?

Sen. Chote SC: No, not to the term "suspect" but simply with respect to clause 2.

Madam Chairman: Okay. So let us just deal with—I am trying to just deal with the amendment as circulated by Sen. Mark, specific and then we will come back.

Sen. Ramdeen: Attorney General, I was wondering, because I have now been passed the responses and in relation to—I understand your policy position. I understand that on the last occasion you told us the Government is not prepared to move on the policy positions.

Now, I just want to say that while we understand the policy positions and what the policy positions are based upon, I think it is important for us to have an open mind in the committee stage.

Mr. Al-Rawi: And we do.

Sen. Ramdeen: Yes, I am just saying because, at the end of the day, while it is appropriate for us to get as much assistance as we can from third parties, the responsibility for what goes into the Bill rests with us as a Parliament and therefore, whatever may be the policy positions that may have been advanced by stakeholders in consultations and what advice you would have gotten in your position as Attorney General or the government prior to you, I think it is important for us to objectively look at those positions and see whether as a Parliament, it is in the best interest while we are passing it. So I would just hope that we can have an open mind about it, so that at the end of the day, whatever we do, in relation to "suspect" it can be—

What I wanted to ask is that when Sen. Sturge made his contribution, I thought that it was very useful or, perhaps, more than useful, properly grounded in relation to the Judges' Rules as to the way in which the Judges' Rules treat with someone who is a suspect or who is someone that the police has reasonable cause to believe has committed a crime. And the way in which the Judges' Rules has laid down the manner in which the police treats with someone who they have reasonable cause to believe has committed a criminal offence, I was wondering, if in your deliberations as Attorney General in bringing the legislation, whether that was actually considered at all, in relation to making "suspect" a part of this law and whether the consequences of the Judges' Rules have been considered.

Mr. Al-Rawi: I am very grateful, Sen. Ramdeen, for the reminder of Sen. Sturge's point. We in fact raised this issue with the drafter of the Bill, Mrs. Elder, who really, coming out of the observations in the House of Representatives,

preferred to amplify the treatment of "suspect" away from just the definition of what an accused person was. Because if you recall the Bill in the House, really started off with a definition of an accused person, which included a suspect. And then the treatment in the Bill did not disaggregate the two into the limbs as we have now in the Bill that is before the Senate, as amended in the House.

Our enquiries of our own—our consultations, et cetera—certainly did include reflections upon the Judges' Rules and all of the feedback that we have gotten so far, in relation to it is that we would not be colliding with those rules. Again, for the reasons that I have expressed in the opening salvo on the expression.

I would just like to add, Sen. Ramdeen, the Government's mind is entirely open because policy does not necessarily mean prescription. One can prescribe policy in a number of different ways. So our minds are certainly well open to entertaining the honourable Senate and all contributions made in respect of any improvements on this Bill.

Madam Chairman: Attorney General, have you addressed Sen. Richards?

Mr. Al-Rawi: Sorry, you invited me to respond to Sen. Ramdeen first.

Madam Chairman: I am trying to close off—

Mr. Al-Rawi: Yes, Ma'am, I can now. With respect to the enquiry as to "person of interest" versus "suspect", we prefer to stay with the term as is used the local arena. The Criminal Law Act would also have had, in section 3, treatment of this terminology, so we try to keep it in tandem with the statute and common law practice in the sense of the terminology used.

Sen. Chote had raised a number of concerns—are you all there yet?

Madam Chairman: No, we are not going to deal with that. We are dealing

specifically with the—

Mr. Al-Rawi: With that circulated.

Madam Chairman:—proposed amendment as circulated by Sen. Mark.

Sen. Solomon: Thank you. Hon. Attorney General, my concerns with "suspect" is founded in that period of time where a person is first arrested by the police and not yet charged. And that time period is always a very vulnerable time period, in particular for the suspect and open to a lot of intimidation and malevolence by police officers to put pressure on these persons and give them the impression that they may have to, as I would say, make up stories to get themselves out of an immediate situation.

And I would submit that the Judges' Rules are wholly inadequate for a lot of these initial arrests and interrogations and detentions, and also needs a lot of tightening up. And that is the danger with this. It is that you are empowering a situation of vulnerability, where police officers who may be open to abuse, malevolence, maliciousness, political influence, inducements, where they can give the person the impression that their life is about the end, their liberty is about to end if did not either make up stories or give evidence or—

Madam Chairman: Okay, Sen. Solomon, I think the point has been made.

Sen. Solomon: Madam Chair, I just want to close to say that it is extremely important that if you are doing this sort of stuff—in the United Kingdom they had PACE. In 1984, the Police and Criminal Evidence Act and that governs the detention, and this needs to be—particular attention needs to be put in relation to the Judges' Rules and this piece of legislation. I would urge the Attorney General to reconsider this.

Mr. Al-Rawi: May I ask a bold, square question? Is the thought process behind the statement just made, Sen. Solomon, that the Government should consider removing the inclusion of a suspect from this?

Sen. Solomon: Changing the definition or removing it, yes.

Mr. Al-Rawi: So, in removing the definition of "suspect", the proposal on the part of the Opposition is treat only with persons who have been charged and who are accused and do not consider suspects. Is that it?

Sen. Solomon: I would say, yes. Yes.

Mr. Al-Rawi: If that is the case, then, most respectfully, we are not prepared to agree to that position for the number of reasons, most important of which lies in the architecture of the Bill itself, which provides for judicial scrutiny.

Clause 4, in particular, of the Bill which treats with what an agreement actually is, how discussions happen, and then the entire judicial supervision, including improper inducements, cause us to form the view that we think they were on safe ground, with respect to the inclusion of suspects.

Question, on amendment, [Sen. Mark] put.

Sen. Mark: We want a division on that.

The Committee divided: Ayes 4 Noes 16

AYES

Mark, W.

Solomon, D.

Ameen, K.

Ramdeen, G.

NOES

Baptiste-Primus, Mrs. J.

Rambharat, C.

Moses, D.

Hosein, K.

West, A. Miss

Henry, Dr. L.

Singh, A.

Coppin, W. M.

Cummings, F.

De Freitas, N.

Baksh, A. Miss

Dookie, D.

Mohammed, I.

Small. D.

Ramkissoon, M. Miss

Richards, P.

The following Senators abstained: Dr. D. Mahabir, T. Shrikissoon, Miss S. Chote SC, S. Creese, Miss J. Raffoul.

Madam Chairman: Hon. Senators, in respect of the amendment as proposed by Sen. Mark, four Senators agreed with the amendment, 16 voted against it and there were five abstentions. So the amendment is not allowed.

Question negatived.

Madam Chairman: We continue now with the amendments proposed to clause 2 by Sen. Ramdeen.

Sen. Ramdeen: I wanted to go to the definition of "improper inducements".

Madam Chairman: No, Sen. Ramdeen, let us go according to how you filed it. So your first amendment, proposed amendment, is to deal with "offence".

Sen. Ramdeen: Attorney General my simple explanation for this is that I do not think that it is necessary. I think it is otiose. The offence could only be a criminal offence. I do not think that there is any need for us to put that—

Mr. Al-Rawi: Thank you, Sir. If I can just put it on the record. The rationale for, yes it is supposed to be criminal offence. But when we went to the Interpretation Act, and we looked to what the meaning of an offence was, it included administrative fines. So to exclude that aspect of it we erred on the narrow definition of a specific statement that it is a criminal offence and that is the reason why we put it in.

Madam Chairman: All right. Sen. Ramdeen, with respect to "plea agreement", your proposed amendment.

Sen. Ramdeen: That too AG, I think it is self-explanatory from the proposed amendment.

Mr. Al-Rawi: We ran into recent litigation concerning the inclusion of broad definitions substantively intended to articulate, included in the text of definition clauses like this. For instance, in the Anti-Terrorism Act and the prevailing view coming out of it is that we ought to carve it out and put it as we have with the definition in clause 4. So clause 4 is where we have a full definition in the body of the law for "plea agreement" and that is why we have preferred to say that way. That is the advice coming also from the CPC Department, relative in particular to Helen Xanthaki's book, *Drafting Legislation: Art and Technology of Rules for*

Regulation and what they call Thornton's Ten Commandments of Drafting that you ought to carve this away from a broad definition usage in a clause such as this, an omnibus clause definition and instead leave it as a stand-alone.

Sen. Ramdeen: But AG is it necessary, having regard to the fact that under section 4, you already have a specific definition of what a plea agreement is. The fact that you come—is it serving any purpose in having it as a plea agreement? That basically is the issue. Is it serving any purpose of saying that a:

> "'plea agreement' means an agreement made between the prosecutor and the accused person or suspect under section 4…"

—when under section 4, you defined typically as to what a plea agreement is, and there can be no issue, with respect to that.

Mr. Al-Rawi: Sure. That is again coming out of the current standard as to how we draft because where a term is used, "plea agreement", throughout the Bill, "plea discussion" or "plea agreement", the cross-reference to the clause is usually required, just out of an abundance of caution, for drafting.

What I was looking at, in my response, was in the draft as circulated, the proposals on your part that the definition be modified, because it was suggested that the plea agreement, there was a deletion and then an improvement of words. So it was in respect of that, that I was responding.

Sen. Ramdeen: But you are prepared to leave it as is?

Mr. Al-Rawi: Yes, please.

Sen. Ramdeen: With respect to "prosecutor", AG, I know you have said this is because of the advice and the policy position that has been taken. I understand, well having read the material, this came out of Mrs. Elder's contribution with

respect to the fact that we should not include police officers. I was wondering, in terms of whether we have the resources to implement this kind of legislation, having regard to the statements that you made. I think it is 95 per cent, in terms of the statistics, that prosecutions are done by the police officers. And what are the difficulties that will be encountered where you have, how many Magistrates' Courts in the different parts of the country. And the first responders, if we can use that word, in relation to suspects and accused, are going to be the police officers.

Very rarely, at the Magistrates' Court are you going to have State Counsel, unless a State Counsel has been assigned to a particular matter, or the seriousness of the matter requires State Counsel there. And whether the DPP's office will be in a position to implement this type of legislation with the far-reaching tentacles of the definitions as to suspect and accused persons, and whether there is going to be enough of a relationship between the TTPS and the Office of the Director of Public Prosecutions to make what we pass here effective so that there could be some results out of it. That is the concern.

Mr. Al-Rawi: It is a very wise observation. Certainly, it touches on the pulse of the true functionality of everything, be it abolition of preliminary enquiries with DPP stepping in, or the utilization of plea agreements, as we proposed.

I should say that we are not only agitating the build-out of the DPP's office, in terms of the numbers, because the next stage for a further 32 to 40 lawyers is due to kick in in September, but we are also providing—we are just awaiting the DPP's (a) nomination of a further 40 lawyers, if I remember the number correctly; (b) his confirmation of new Port of Spain offices, San Fernando offices and Tobago offices, all of which have been selected by him for moving. But more

importantly in the work that we are doing to improve the prosecutorial arm, one of the proposals for management of prosecution on the part of the State is to have a seconding of TTPS attorneys across to the Office of the DPP to further improve the relationship between the prosecutorial arm of the police and the inspection by the DPP's office.

I must add that in particular there is a natural association between the TTPS and the DPP's office and some of this road can be made little bit easier to walk, once the DPP actually appoints his deputies and allows the positions to fold in terms of that. This is one of the reasons why we put in that proclamation clause. These are very anxious discussions that we are having with the DPP's office with a proposal to try and make this thing come alive through the provision of resources and coordinated working relationships between the TTPS and the DPP's office.

Sen. Ramdeen: Can I ask whether it has been considered that if we do not go all the way of making a TTPS officer of the First Division someone who can conduct or fit into the shoes of a prosecutor in a sense under the Act, whether we cannot facilitate a hybrid position of having a TTPS officer above the rank, subject to the approval of the Director of Public Prosecutions?

Mr. Al-Rawi: It is an interesting thought, again driven by a resource consideration. The difficulty that we had, in terms of a policy balance, was that there was such fierce opposition when it came to the improper inducement argument that the TTPS was, and this is the argument coming forward, I do not see it now in the position that I hold. But there was such fierce opposition and allegation against the TTPS being involved particularly on the "improper inducement" end and for that reason the recommendation coming out of the 2014

workshops and move its way forward was that there be a complete move away from the TTPS, and this in fact was endorsed by the DPP himself in the period 2014 come forward. So there were multiple stakeholder submissions on that basis, which the Government's policy chose to solidify.

Sen. Ramdeen: That is why I was just wondering, the halfway position of not giving them the authority to do it.

Mr. Al-Rawi: May I put it this way? Insofar as we are experimenting, if I can use it that way, with a solution which has not really been utilized, the 1999 come forward position, it may very well be that if the resource allocation demonstrates that we ought to amend the definition at a subsequent date, it would still be open.

In the period whilst we build out the capacity in the next couple of months, as the case management centres come alive in the different parts of Trinidad and Tobago that is where we are really going to know what the resource positions look like because we have also asked the TTPS to hire up its attorneys as well. There is an open capacity for attorneys to take position in the TTPS that has not been filled, notwithstanding the availability of the budget for it and the positions being open and existing.

Sen. Dr. Mahabir: Thank you very much, Madam Chair. Madam Chair, clause 3 of this Act says:

"This Act applies to both summary and indictable offences."

And I want to link this with the suggestion of Sen. Ramdeen. I have total sympathy with the point raised by Sen. Ramdeen, with respect to the fact that this particular Bill, the objective hon. Attorney General, is to really expedite justice. You want to make sure that there is a very swift process by which we can bring

justice to the people of Trinidad.

And I am simply wondering, what is the problem, from your perspective, with simply appending to Sen. Ramdeen's suggestion the rank of the officer of the First Division of the Trinidad and Tobago Police Service, approved by the Director of Public Prosecutions.

You see, my view is that once that particular officer is approved and has been subject to the scrutiny of the DPP then that officer in place in the Summary Courts, will in fact achieve the objectives that you want to achieve. So I want clarity again from you as to what is the mischief by having one of these police prosecutors approved by the DPP in the current Bill as we are debating.

Mr. Al-Rawi: It ties in to our move to remove the offence which exists in section 5 of the existing Act for an "improper inducement".

Under the existing law one of the strong points of opposition was that the criminalization of an improper inducement, the provision of an offence, a term of imprisonment and a fine dissuaded prosecutors, as defined, including police officers, from utilizing the process.

The second limb of strong opposition and mischief was that there were police officers involved, per se. The mere fact that they were involved fell into odium. And from that perspective the recommendations coming out of the umpteen policy discussions and workshops, et cetera, including from the international fulminations, which one could argue are divorced from realities of our resources because we are talking about resource allocation. I accept that that is bona fide point. But, from a policy perspective the request was to remove police prosecutors entirely, of whatever rank, because the allegation is that they all fit into

the same barrel.

3.30 p.m.

From that perspective, we propose specifically, in the national prosecution agency that we are building out right now, to actually have a degree of overlay—DPP's office overlaying the prosecutorial arm of the TTPS where they stand together. So that may be something which we look at, at a subsequent point. It is not uncommon to come as we have—and you will see in September—to layer and fix certain things as we will in the Children and Family Division Court or the Children Act as we have spotted the other day in section 59 of the Children Act. We are going to have to come back at a second pass at a couple of these things, but for now we would need to have a bit more consultation on that concept and we have got to err on the side of the policy as approved by the Cabinet.

Madam Chairman: All right.

Question, on amendment, [Sen. Ramdeen] put and negatived.

Madam Chairman: Sen. Chote, you wanted to raise some issues with clause 2?

Sen. Chote SC: Yes, Madam Chairman. Thank you very much. I had suggested some stylistic changes in terms of 2(b) to say "indictment is preferred" and includes "a defendant" and "court" meaning "a summary court", but the substance of my suggestion or proposal was in relation to "improper inducement" paragraph (c), where I am proposing that after the word "suspect" we insert the words "by any person". So it would read: "the coercion of an accused person or suspect or by any person".

With respect to (c)(i), I am respectfully proposing that after the word "charge" we insert the words "or cause a charge to be laid". So it would be—(c)(i)

would be:

> "to lay a charge or cause a charge to be laid of the type described in paragraph (a) or (b); or"

—and so on. With respect to paragraph (d)—[*Interruption*]

Mr. Al-Rawi: Could I ask that we take them one by one if that is possible?

Madam Chairman: Are the amendments interrelated that you are proposing, or can we deal with what you have proposed for (c) now, Sen. Chote?

Sen. Chote SC: Certainly, we can do it that way.

Madam Chairman: All right. I actually would have preferred that we go through what Sen. Chote is proposing and then we will deal with it. It makes to me—it will flow a little easier. So, Sen. Chote just continue.

Mr. Al-Rawi: Madam Chair, if I could explain why, because it is not in writing.

Madam Chairman: No, I am writing it. So let us just hear Sen. Chote out, and then we will decide. Let me just hear what is the proposed amendments. Okay? Sen. Chote.

Sen. Chote SC: With respect to the paragraph (d), I am proposing that after the word "prosecutor" we insert the words "or anyone acting on his behalf or anyone involved in the investigation of the matter". So (d) would read:

> "the misrepresentation of a material fact by the prosecutor or anyone acting on his behalf or anyone involved in the investigation of the matter either before a plea discussion is entered into or during the course of the discussion;"

With respect to (e), I am respectfully proposing after the word "not" that we insert the words "capable of being fulfilled". So it would read—(e) would read:

"(e) an offer or promise, the fulfilment of which is not capable of being fulfilled by the office of the Director of Public Prosecutions; or"

So, in addition, we remove the words "the function of". And with respect—if I may go on to page 4—

Madam Chairman: Okay, all right. Let us stop there and let us deal with the amendments proposed by Sen. Chote to clause 2 on page 3 of the Bill. Attorney General?

Mr. Al-Rawi: You would have to assist me, Madam Chairman.

Madam Chairman: Not a problem. So the first amendment Sen. Chote—you will let me know if I am going correctly is —paragraph (c):

"the coercion of an accused person or suspect by anyone to enter into a plea discussion including a threat—"

So you are including the words "by any person". Those are the words that are being included after the word "suspect".

Sen. Mark: Just repeat that for us.

Madam Chairman: The coercion of an accused person or suspect by any person.

Sen. Mark: And you were saying something else there as well?

Madam Chairman: No, I continued it. Attorney General?

Mr. Al-Rawi: Yes, Madam Chairman. Okay. So with respect to the proposal for an improvement under the definition of "improper inducement" at paragraph (c), I see it here. So include after "suspect", "by anyone or any person".

"coercion of an accused person or suspect by any person to enter into…"

Madam Chair, in reflecting upon this coming out of the debate, I had a chance to speak with the CPC's department, and the advice coming out of the CPC's

department was that the words were actually inclusive, that there was no need for an expressed utilization "by any person" as it is understood in the interpretation of legislation, that it applies to all persons unless prescribed otherwise so that there is a general aspect.

I do catch the mischief that Sen. Chote is raising. I recall from the debate the reflection that you may have a senior officer giving instructions to a junior officer who just performs a function and, therefore, the senior officer may be the person who has the culpability for giving the instructions. But I think that that is safely balanced by clause 7 of the Bill, which allows for a wide utilization of improper inducement where there is a general prohibition in respect of which a number of remedies are available albeit on the common law side to discourage that position.

So the advice coming from the CPC's department in summary is: one, that the words are to be construed as expansive in an interpretation sense; two, there would only be narrowly construed in the event that you put words to limit those aspects; three, that the contradiction against "improper inducement" is one, when you look to clause 7, which is expressly frowned upon albeit not to the sense of what section 5 had which was a criminalization of it, but to the extent that there are common law remedies for somebody who acted in that way once the court has made those observations. So, in those circumstances, the proposal is to not include the words "by any person". That was (c)(i). I did—

Madam Chairman: No, that is "(c)" and then "(c)(i)" will be:

> "to lay a charge" and insert the words after "charge", "or cause a charge to be laid".

Mr. Al-Rawi: Okay. The position in respect of that is that police officers are no longer involved in the plea discussion. A plea discussion actually happens when the DPP gives written and expressed consent for a plea discussion and the DPP's office is involved there.

The definition of an "improper inducement" again, includes any coercion of an accused person or suspect, and it in fact includes a threat to do things. So when we look to the definition, the cohorts around the crime, those matters for which you can actually find grounding even in the Interpretation Act where a threat or a conspiracy to take you there can actually be implied, and I am using very broad senses here.

The CPC's department in discussions after the contribution that we heard from Sen. Chote give the view that again the balancing act was that the threats were, in fact, included. If you cause a charge to be laid, what I understood behind that mischief was, again, the senior officer speaking to the junior officer, but this must be something which the accused in fact is presented at the plea hearing stage. So all discussions and, particularly, where the judge begins to traverse the accused or suspect who is now charged, those matters have to come to the satisfaction of the court that there was no improper inducement present.

So I do not respectfully think that it needs to be amended. I am open to persuasion otherwise if I have got it wrong, Sen. Chote.

Sen. Chote SC: With all due respect, hon. Attorney General, I think that you have. Madam Chairman, (c)(i) talks about laying a charge. Laying a charge in criminal procedure is do a particular thing either or orally make a complaint before a court or to file a document setting out what the offence is that the person is

charged for. Now, I do not think that you have addressed the issue or the defect in this aspect of the proposed legislation, because it may be someone who is unrelated to the—I suppose the discussions between the prosecutor and the suspect or the accused person—but it may be someone who before those discussions were engaged, had used the opportunity to coerce the person by suggesting that they should enter into such discussions and suggesting that a charge may be laid as a result of that.

Mr. Al-Rawi: Sure.

Sen. Chote SC: So, I do not think it is sufficient to say that that person has a remedy if things go wrong. Why not say that it is wrong in the first place?

Mr. Al-Rawi: But, respectfully "(c)" reads with the chapeau adding into subparagraph (i):

> "the coercion of an accused person"—or suspect—" to enter into a plea discussion including a threat—
>
> (i) to lay a charge of the type described in paragraph (a) or (b);"

That is a threat by anyone. It is not limited to officer X necessarily. I see Sen. Ramdeen does not necessarily agree, but the way I read it from an expansive view of it was that it really did include anyone who cause you to do it because it is the coercion on the suspect.

If we look at, for instance, the issues which have come up in the anti-gang cases where people have come to the court and brought claim and they are met with a defence and then they enquire of the officer who laid a charge: "Well, what is your reasonable belief to have laid the charge?" And it may or may not have been the case that that: "Well officer X told me—my superior told me to lay the

charge." That is good enough. Do we need to respectfully deal with the person who caused the charge to be laid? The fact is that it is:

"the coercion of an accused person to enter into a plea discussion including a threat"—which he may have received—

"(i) to lay a charge of the type described in…(a) or (b);"

It is whatever is offered to him. It is not necessarily driven by who offered it. Who gave the threat is irrelevant to the fact that he was coerced.

Sen. Chote SC: Well, hon. Attorney General, with all due respect, I do not see that your response is addressing the concern which I have. If we may take it from the top, "improper inducement" talks about, first of all:

"(a) the laying of a charge not believed to be supported by provable facts;"—right?

Mr. Al-Rawi: Yeah.

Sen. Chote SC: Madam Chairman:"(b) the laying of a charge that is not usually laid with respect to an act or omission of the type attributed to the accused…"—suspect, or person or suspect.

And (c) talks about something different:

"(c) the coercion of an accused person.."

—or suspect, and you do not agree with my initial suggestion, so I will continue reading:

"to enter into a plea discussion including a threat—

to lay a charge or cause a charge to be laid…"

We are now talking about persons who may have contact with a suspect before the laying of the charge, and before the plea discussions have begun. In fact, it may be

the coercion by these persons which may lead the plea discussions to begin in the first place.

Mr. Al-Rawi: Sure.

Sen. Chote SC: So it is for the protection of the suspect who is in custody that I am respectfully proposing that the words "or cause a charge to be laid" be inserted.

Mr. Al-Rawi: Sen. Chote, I am concentrating on the word "threat" because it is not that a charge has to be laid. There can be a threat of a charge being laid, or cause to be laid. I understand what you are saying, Sen. Chote. You are saying that the suspect comes in the door, meets Mr. A. Mr. A gives him some coercion. He then comes into contact with Mr. B, and Mr. B is now doing the event, but his mind may be operating on the interaction with Mr. A. I understand that. So the question is, in the submission that you have put, youare saying that an "improper inducement" includes:

> "the coercion of an accused person or suspect to enter into a plea discussion including a threat—
>
> (i) to lay a charge, or cause a charge to be laid..."

—"or cause a charge to be laid" is in reference to the Mr. A who instructed Mr. B, or that the mind of the accused or suspect was operating on the fact that somebody else would come and lay a charge. But I do not see that we advance the position by "or cause a charge to be laid". I just do not see it.

Sen. Chote SC: Well, hon. Attorney General, I do not think that I can explain it more plainly, so I thank you for considering my proposal.

Madam Chairman: Okay, so let us just deal with the proposals.

Mr. Al-Rawi: I think Sen. Ramdeen had a view as well on this.

Sen. Ramdeen: I think that I understand the mischief that Sen. Chote has advanced in terms of putting in some type of definition of who is supposed to be doing this inducing. Because while, perhaps, I might not borrow the same words "by any person", I think that it makes, respectfully, a nonsense of all of these provisions if we do not define who is going to be doing the inducing. Because one can—if you have anyone, like you have explained, doing the inducement, one can see that—perhaps we are looking too much on the prejudicial side of what can happen to an accused person. But if you look at it from the other side, which is if an accused person wants to set aside a plea agreement—look at it from the other side—it could be anybody who has no authority to do anything, because you test these definitions by taking them to the extreme. If somebody who is totally unconnected with a prosecution tells someone: "If you do this, this would happen."

Mr. Al-Rawi: Or if you do not.

Sen. Ramdeen: It cannot be that it is an open-ended position that I, as an accused person, could walk into a police station, John Brown tells me do this and this would happen, and that could be used as an improper inducement. It just does not make any sense. Legislatively, I mean, not with any disrespect at all. We must be able to say who is doing these things—all of these misrepresentations, promise and offer, all these things. They must be circumscribed in some way.

Mr. Al-Rawi: Madam Chair, may I, with the intervention of Sen. Ramdeen, asked of Sen. Chote, because I am trying to understand, not only the mischief, but the remedy to the particular mischief. What I understood from Sen. Ramdeen's reflection upon our discussion, was that if we flipped it on the other side—and we

are looking to who caused the improper inducement—that the inclusion of the words or "cause a charge to be laid" would be to limit the class of persons who may have been involved in the improper inducement, not just anyone.

Legislatively, I quite prefer leaving it as wide as possible to be tested, because I could not contemplate all the circumstances of an improper inducement now. So the rational standing behind the submission that I have made is in fact to encourage a very open door that it is in fact anyone, because it is for the court to step in to the objectivity or pseudo objectivity of the accused person who makes the allegation that: "I am the victim of an improper inducement because John Brown said if I did not do this, this would happen, or if I did this, this would happen." Because the law being read as a whole from a legislative interpretation perspective—the law must be read as a whole and then the specific sections go in there.

When we look to, not only the definition of "improper inducement" but we go to clause 7 and we look to what the judge considers in the plea discussion and plea—what the judges considers about the plea discussion at the plea agreement stage, it is for the judge to come to the view that there was not an improper inducement in the very broadest sense where the accused comes before the court and at that point—and even on the appeal because the Bill provides for an appeal where you have entered into a plea agreement that you do not agree with or you want to set it aside—where they come and say in the broadest sense possible: "Look, I was guilty or an improper—I was the victim of an improper inducement." So it is precisely because the view is to keep it as wide as possible to take care of all of the circumstances that we have not sought to treat by narrowing it down, at

least this on the reflection as given.

Madam Chairman: Hon. Senators, I think there has been enough discussion on these two proposed amendments. I am going to put it.

Sen. Mark: Madam Chair, please—

Madam Chairman: Let me say something before I allow you Sen Mark. We have had—Sen. Chote has raised an issue, the Attorney General has answered. Sen. Ramdeen has raised an issue on the same matter that Sen. Chote has raised, the Attorney General has answered. So it is within my discretion to kind of determine how far the discussions have gone and whether we shouldput it to the vote, but I will allow you now. I am cautioning Members that we are trying to allow full discussion, but at some point we will have to close the discussions and put the issue to a vote. Okay? Sen. Mark.

Sen. Mark: Madam Chair, I would like to suggest that on the matters that we are dealing with, with the leave of the Attorney General, sometimes we would want to reflect on these things, because it is law that we are making and people's lives could be impacted negatively and, therefore, what I am suggesting is that is it possible that we can stand down clause 2 and go on to another clause because Sen Chote is making some submissions that I want to reflect on. Sen Ramdeen has made some and also the Attorney General. So these are matters that are weighty and hefty and we do not want to be—this could be a section 34, you know.

Madam Chairman: All right. Sen. Mark, Sen. Chote has already—we are on page 3 and we have to deal with some other proposed amendments by Sen. Chote. Okay? So we have not really moved on to take the vote as yet, but I am trying to do this in a systematic way so that all Members can follow and we can do it and

get through it. [*Crosstalk*] Just one sec. So that is the position. Attorney General, Sen. Mark was asking whether you want to defer clause 2.

Mr. Al-Rawi: Madam Chair, I would not choose to answer that immediately and forgive me for not answering your question. I am wondering in terms of the useful time, if you would just permit me a small bit of latitude. The Parliament must end for its compulsory recess next Friday. We have two Bills yet to do: preliminary enquiries and the bail, the improved access to bail. There are some very important observations and I do not want hon. Senators to think that we are not open-minded in the improvements being suggested, but somehow I get the feeling that more ample discussion may be useful.

I am wondering, subject only to the availability of hon. Senators in the course of next week and their willingness to take a little extra load in terms of a few extra days, whether—I am laying my cards on the table, because we run the risk of having the work of the Parliament in this year come to naught because we stopped specifically to allow the Law Association to give us comments which they did not under their insistence—but I am wondering, subject to the availability of hon. Senators next week, where we would try to persuade Members to come and sit more than twice, whether we could have gone to a Special Select Committee to work out some of these issues, report by Tuesday. [*Crosstalk*] Well, we have Friday and Monday that we can easily use. If not, we can go through. We can continue to go through clause by clause.

But, you see, this Bill came through several iterations and we have had a lot of consultation, in particular, with the Opposition in the House. We are now in a different House, so I cannot bring that experience with me to this House. But the

observations being made by Senators impact upon drafting interpretation and the different styles. So I am just throwing it open to you, Madam Chair, with that indulgence. And now to answer your question, yes we can stand down clause 2 if you wish.

Madam Chairman: Having heard what the Attorney General has just proposed, and bearing in mind that it is close to four o' clock—we have beenat this since 2.30 p.m. and we are still on clause two—I am going to stand down the committee for 15 minutes. I would ask that there be some discussion, and when I come back we will decide how we are going forward, but I do not think I should be part of the whether we are sitting and whether we are not sitting at that sort of thing at this stage.

Mr. Al-Rawi: Agreed.

Madam Chairman: Okay? So I will suspend the committee for 15 minutes and return.

3.56 p.m.: *Committee suspended*.

4.11 p.m.: *Committee resumed.*

Madam Chairman: Hon. Senators, I understand that a little more time is needed so I will return at 4.30. All right? So we are suspended until 4.30.

4.12 p.m.: *Committee suspended*.

4.30 p.m.: *Committee resumed*.

Sen. Khan: Madam Chairman, we met and the decision is that we will continue the Committee of the whole.

Madam Chairman: Sure. So, hon. Senators, when we left off we were dealing with page 3 of the Bill and with some proposed amendments to clause 2(c), which

had been proposed by Sen. Chote. I think we have spoken about (c) and then (c)(i). Could we move on then to—

Mr. Al-Rawi: Madam Chair, on (c)(i), just to conclude the discussion, because I had a chance to speak with Sen. Chote in the break, we are prepared now, having a little bit more reflection and some time to discuss, to actually insert the words, "or cause a charge to be laid", as proposed by Sen. Chote. [*Desk thumping*]

Mr. Al-Rawi: So that would be in the first line at (i).

Madam Chairman: But what about by any person, (c) itself.

Mr. Al-Rawi: No, Madam Chair, for the reasons offered, but with respect to (c)(i), after the word "charge", appearing in the first line, insert the words, "or cause a charge to be laid".

Madam Chairman: Okay. All right. So let us move on to (d). Now, Sen. Chote has proposed as follows to (d), "the misrepresentation of a material fact by the prosecutor", and to insert these words now, "or anyone acting on his behalf or anyone involved in the investigation of a matter". Of "a" matter or "the" matter, Sen. Chote?

Sen. Chote SC: "the" matter.

Madam Chairman: Attorney General.

Mr. Al-Rawi: Madam Chairman, we considered this position because we have specifically defined the prosecutor as the person who is acting in the matter, specifically, that we were looking to that improper inducement as it found itself in a plea agreement. And because we are looking at it in terms of a narrow scope, that prosecutor, we prefer to leave it as it is. So, first, before I conclude though, if I could just understand, in (d) the proposal is, the misrepresentation of a material

fact by the prosecutor or anyone acting on his behalf, or anyone involved in the investigation either before a plea discussion is entered into or during the course of the discussion.

Madam President: Yes.

Mr. Al-Rawi: Just hold one moment, please.

Sen. Ramdeen: AG, based on the basis upon which we rejected the proposed amendment to (c) before we get to (c)(i), the first one which was by any person, the basis upon which you did not accept that was that we wanted to stretch it as wide as possible to capture as much people as possible by. So if we use that reasoning in relation to the proposal by Sen. Chote, why do we want to narrow it to only a prosecutor when you may have other persons who may not fall within the definition of prosecutor, which is exactly the reason why we had rejected "by any person" in (c)? Why do we not want to allow the net to be cast as wide as possible by "anyone acting on his behalf", is what I have? The proposed amendment by Sen. Chote will achieve what you want it to achieve by (c) first.

Mr. Al-Rawi: Okay. The original reflection on the inclusion of "by any person" in the chapeau to paragraph (c) was that, from our view, the definition was wider as opposed to including it. The prescription that we are putting now when we are talking about the focus point of prosecutor, when we are dealing in (d) with the issue of the prosecutor, the prosecutor is the person who is authorized by the DPP to enter into this plea discussion, and, therefore, plea agreement as it is presented to the court. That prosecutor has to stand by the matters in the plea discussion, now plea agreement.

And when we look to section 25, clause 25 of the Bill, we have actually

included a fairly broad power that 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. So we have a very wide position which is a general overarching discretion of the court, even outside of the parameters of an improper inducement which is just one of the reasons that you can actually set aside a plea agreement or have a court not agree upon it. So because of the breadth of section 25, clause 25(1) of the Bill, we felt that there was no need to necessarily be completely prescriptive in the general description of an improper inducement as we have set it out in clause 2.

Sen. Chote SC: Hon. Attorney General, if I may—Madam Chairman, I beg your pardon, what I am trying to suggest by this proposal is that we put some depth to the section. You have already made it clear that as a matter of policy, there will be no criminalization of impropriety. Now I ask myself, how does it serve the interest of justice to allow one segment of the process which may result in a plea bargaining agreement to be sullied and only be found out when the person goes before a court? Why should we not consider having a depth of legislation so that it constrains people from seeking to abuse the powers granted under the legislation in the first place?

It is of no comfort to me to say that you can always make a complaint afterwards. There is no guarantee that your complaint is going to be accepted or taken on board, but the point is when you give great power to persons in circumstances like these, which will determine the liberty of the citizen of this country, I think that we owe it to the citizens to ensure that the legislation that we create has depth and that we cover all reasonable prospects of abuse that we can

see, and the legislation is worded in such a way to avoid or prevent that abuse.

Mr. Al-Rawi: May I respond, Madam Chairman?

Madam Chairman: Yes.

Mr. Al-Rawi: It is not that we say, and I want to be clear about this, that there is no criminality for an improper inducement because the common law still applies, misbehaviour in public office, perverting the course of justice, breaches under the JLSC rules, for which there are matters that can be prosecuted against the officers who are members of the JLSC; all of them at the DPP's office falling under that rubric. So that section of the law still exists. What we have come into in not criminalizing the improper inducement position is the significant voices, are the significant voices that have brought us to the position where it was advanced that you should not expressly criminalize improper inducement. So that is just on point one.

On point two to create the depth, well, we are allowing an improper inducement to be very broadly categorized. Secondly, it includes all threats, so it does not have to be an act, it could be a threat of something which had not yet materialized. But, thirdly, is it not true to say that any remedy for an improper inducement is always in arrears? Because it is only when you come to the point of having been duped, so to say, that you make the complaint. So prescribing that there is depth to say, let us take care of all opportunities, is always found out in arrears. You always complain about it after the fact and then seek a relief. So you will always be in that situation where you say, well, what I thought was going to be the case or what was operating in my mind should not have happened, and I want this thing not to prevail, and worse yet, I want somebody to be penalized for it, or

to be held accountable for it. So I think that we are in fact achieving, or leaving room for that to be achieved by operation of the common law, and by the fact that when we get to clause 25 of the Bill that it is the court that has the widest discretion in 25(1).

Sen. Chote SC: Madam Chairman, finally, I do not, with all due respect, once again think that the hon. Attorney General has really addressed the concerns which I have. What I am trying to put across, as plainly as I possibly can, is that in the definition of an improper inducement you want to say that a prosecutor, as you describe him later on in the definition, or any person acting on his behalf, because the prosecutor may be an attorney-at-law authorized by the DPP. If that attorney-at-law authorizes someone to make a misrepresentation of fact to the suspect or the accused then that person will be caught. But if the improper inducement—if we do not add this in, then all that the accused person could go and say is, well, so and so misrepresented something to me. Well, there is nothing here which says that he was protected from that in the first place. Is he now going to bring a private complaint after he entered a guilty plea to institute proceedings against this nameless third party?

Mr. Al-Rawi: Because that belies the fact that the prosecutor owns the plea agreement, because it is the prosecutor who is authorized, the prosecutor who conducts the plea discussion, the prosecutor who takes the plea discussion to the plea agreement, the prosecutor who appears before the court and makes the representations before the court that these are the material facts, there were no threats, there was no coercion, there was no improper inducement. It is for the prosecution to own that responsibility. So, to say that the person is without

remedy, the prosecutor has got to be the person who owns the material.

Madam Chairman: Could I just—Sen. Sturge wants to make an intervention. Sen. Sturge.

Sen. Sturge: Yes, I have three points, Madam Chairman. The first thing deals with the issues being raised by Sen. Chote, quite rightly, because the legislation as it stands—the clause, sorry, it is specific to the prosecutor, and if one understands how interrogation goes, and so on, the material misrepresentation may come before the prosecutor enters the picture. So that if you want to capture both the prosecutor and anyone else in terms of what is proper drafting, I think the better thing to do will be to strike out the words, by the prosecutor, in (d). So if you have the misrepresentation of a material fact, either before a plea discussion is entered into or during the course of the discussion, then it does not limit you to the prosecutor. It can extend to persons acting or purporting to act on his behalf, and so on. So you get the widest possible interpretation and you catch the widest possible mischiefs, instead of enumerating all of the persons who can be caught by deleting the words, by the prosecutor.

Madam Chairman: Well, Sen. Chote's suggestion is not to delete, it is to include, to insert words after.

Sen. Sturge: I appreciate that, and that is what I am dealing with. What I am saying, I understand Sen. Chote is, in essence, dealing with the widest number of persons who can be captured, and I understand the rationale for it, but what I am saying is instead of enumerating we can achieve all of that by simply deleting the words, by the prosecutor. That is the first thing. The second thing is—

Madam Chairman: So you are proposing an amendment on an amendment kind

of thing? You are proposing that further words be taken off from the clause, correct?

Sen. Sturge: Yes. Milady—sorry.

Madam Chairman: It is okay.

Sen. Sturge: Madam Chairman, I just wish to respond to certain issues raised by the hon. Attorney General. The hon. Attorney General made mention of the need not to criminalize, and he has stated, in essence, that there will still be sanctions in criminal law by the charges of misbehaviour in public office and conspiracy to pervert the course of justice. If these two common law charges are available and, therefore, the prosecutor is criminalizing in any event, then why not make it specifically criminalized in statute? Because if you are saying the prosecutor entering into an improper inducement can still be charged under the common law charges of misbehaviour or conspiracy to pervert the course of justice, then why not include in the statute—since common law already exists—the charge, the criminal sanction, which exists already in the existing law?

And, secondly, or lastly, on that issue, if you are specifically decriminalizing the behaviour of the prosecutor by this statute then one may wonder what one is doing with respect to the common law charges of misbehaviour and conspiracy. One may say by implication it does not arise, and with the rules of the canons of interpretation, one may say, well, this deals specifically with improper inducement. So if you are dealing with an improper inducement, although it is common law misbehaviour or common law conspiracy to pervert, the very fact that they have left it out, it means that these two offences, the behaviour of improper inducement therefore cannot apply to the common law misbehaviour or conspiracy to pervert

by implication.

Madam Chairman: Attorney General.

Mr. Al-Rawi: Madam Chairman, I thank Sen. Sturge for his contribution there, good fulminations. We are expressly removing, by way of repeal, section 5 of the existing law which provided an expressed criminal sanction for an improper inducement. We are specifically not bringing on to this, by removal of section 5, a reading down of the common law. If we had amended the statute there is always the implied repeal that can happen or the reading down of other statutes by a subsequent amendment. So a statute which steps forward and amends X in this way, which did not expressly treat with earlier laws, because it had failed to for some reason or the other, maybe read down by that, but that is applicable in terms of interpretation to statutes.

The common law itself, as I understand it, is not to be read down by the repeal of a particular offence in a statute. In fact, this aid of the common law still stands. And you did ask a very, very good question, well, why if it is there in common law not do it, because if there is a criminal sanction why not just bring the elephant into the farm as opposed to having it in the room. Well, the fact is that there still is process to get to, the common law offences, and that in and of itself was good enough for those many contributors to have said, look, one of the dissuasive aspects of the criminalization in section 5 was expressed criminality. So there is a hurdling and, therefore, there is a rationale because it is now one stage removed.

But if I go to Sen. Chote's position, a prosecutor is defined as somebody who is expressly authorized by the DPP to enter, and that includes, yes, an

attorney-at-law who may be authorized by him. So, therefore, the words, "or anyone acting on his behalf", there can be no implied agency in respect of how that prosecutor manages, it must be expressed agency. So those words do not take us into an improvement when I think about it, because the inclusion or anyone acting on his behalf would take us away from the expressed provisions that we have provided where the prosecutor must be the prosecutor authorized expressly in writing by the DPP and no one else. Anyone else who would have acted that way is not allowed under agency because he does not have expressed approval. So that would be ultra vires, if I could borrow the expression there.

The question is in relation to an inclusion of, or anyone involved in the investigation. So that is stepping behind the prosecutor's ownership of the position and going now into the investigative aspects. But what we seek to do in terms of a certainty of this law is to hold the prosecutor responsible for these matters, because if you turn it on its head and I include, "or anyone involved in the investigation", then any mere allegation takes us forward. But when you jump to clause 30 of the Bill and you look to the manner in which you may have grounds for withdrawal from plea agreement and an appeal by an accused person:

> "The Court may, upon application by an accused person, allow the accused person to withdraw from the plea agreement at any time before sentence, or to appeal against a conviction or sentence based on the plea agreement if—
>
> …it was entered into as a result of an improper inducement;"

Stick a pin—that is where Sen. Chote's argument comes alive, well, let us deepen the definition of improper inducement.

"(b) it was entered into as a result 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."

So the question is in 30(a), tied back into improper inducement, whether we want now to include, "or anyone involved in the investigation". So that is the misrepresentation of a material fact by the prosecutor or anyone involved in the investigation, and our position is that we want to hold this on to the prosecutor who, if he accepts something that he should not have accepted, would in fact not have a defence against those common law offences which may meet him for perverting the course of justice or misbehaviour in public office, where he turns around and says, well, hold on, it was John Brown who really did that and not me, and the law recognized that John Brown may be culpable. So, from our perspective we do not propose to move any blame away from the prosecutor, it would be to open the door a little bit too wide to defences available to the prosecutor when called to answer for allegations for breach of the common law.

Sen. Chote SC: Madam Chairman, if I may—

Madam Chairman: Just one second. Sen. Mahabir, you had signalled to me that you wanted to make a point.

Sen. Dr. Mahabir: Yeah. I wanted to make on this particular point, and I simply wanted to enquire of the AG, and it is building on the point of Sen. Sturge and Sen. Chote, whether he is envisaging a situation where the prosecutor will not, under any circumstance, have anyone acting on his behalf with improper inducements. So are you saying it is not going to be possible at all, AG, that the prosecutor who takes ownership is not going to have this particular individual who is going to offer

the improper inducements. And if it is you can give me the assurance that it is not in the realm of possibility then I say, well, okay, the words "anyone acting on his behalf" become superfluous. But if it is at all possible that the prosecutor can have an individual who is offering these improper inducements, then I see absolutely no harm within the public interest for including anyone acting in his interest.

Mr. Al-Rawi: Clause 6 of the Bill expressly states:

> "A prosecutor shall not enter into a plea discussion or conclude a plea agreement unless the prosecutor first obtains the written permission of the Director of Public Prosecutions."

And a prosecutor is defined, in clause 2, as—and that is on page 4:

> "the Director of Public Prosecutions or an Attorney-at-law authorized, in writing, by the Director of Public Prosecutions to engage in a plea discussion or conclude a plea agreement;"

This is a very square responsibility on that prosecutor. There can be no delegation of that authority to your clerk, to your servant, to anybody else. You are the attorney-at-law on record on this matter and you take the responsibility and liability for plea discussions, for the material advanced into a plea discussion, taken to the court in a plea agreement, put before the court, and you have that point. And that is why I feel a sense of comfort that the common law remedies, or common law offences of misbehaviour in public office, perverting the course of justice, coupled with the JLSC's ability in respect of discipline of its officers, if it is DPP's officers, or another form of disciplinary measure, for instance, under the Legal Profession Act, where you can be disbarred for certain circumstances, either for breach of Part A or Part B of the Fifth Schedule of that particular Act, allows

for a suite of remedies to pinpoint the person. So, specifically, because there can be no escape around prosecutor and it is tightly managed is why I do not think, respectfully, that we need to broaden it into a conversation about agency.

Sen. Chote SC: Hon. Attorney General—Madam Chairman, I beg your pardon, with all due respect, even the language which is being used by your good self to defend the position that the subclause remains unamended does not sit well with the intent and purpose of the law, and references to other sections within the Bill to answer or to address the difficulty contained in this subsection do not advance us anywhere. The fact of the matter is, you have not been able to squarely address Sen. Mahabir's question as to whether it is outside the realm of contemplation that the event which he described may occur. I think anyone with common sense will accept that such a situation may occur.

So what I am proposing to do, Madam Chairman, I am withdrawing my proposal of all these other words being added in and instead I am proposing that the words, "by the prosecutor", be removed, because I think Sen. Sturge's approach fits in more neatly with the language of the Act, and it goes with the intent of the Act, as you have set it out, which is to say, make it as wide as possible. So if, Madam Chairman, you would permit me, I will withdraw my initial proposal for the amendment and ask that this be substituted.

Mr. Al-Rawi: Madam Chair, I am just considering the proposal.

Madam Chairman: And in the meantime, I will just put it, what it is so that all members will just take note. So that subclause (d), we are on page 3, will be the misrepresentation of a material fact, and you are deleting the words, "by the prosecutor". Okay? That is what you are proposing?

Sen. Chote SC: Yes, Madam Chairman, thank you very much.

Mr. Al-Rawi: Madam Chair, we would very pleased to delete the words, "by the prosecutor". [*Desk thumping*]

Sen. Chote SC: Obliged, thank you. I just wanted to make an enquiry, Madam Chairman, because I had been going through my proposals and we sort of got stuck when we got to (c) and (d), I not know if I had finished my—

Madam Chairman: No, what I am trying to do is to go page by page.

Sen. Chote SC: I see.

Madam Chairman: So we are still on clause 2, and we are dealing with page 3.

Sen. Chote SC: Thank you very much.

Madam Chairman: Which is still dealing with clause 2. We still have another proposed amendment from you which is in respect of subclause (e). Sen. Mark, you wanted to say something on clause (d)?

5.00p.m.

Sen. Mark: Madam Chair, it is not beyond the realm of possibility for anyone, whether prosecutor or somebody acting on behalf of the prosecutor or anyone acting as I said on behalf of the person, I would like to ask the Attorney General, what was the reason submitted by the team in 2014 that decided to remove the word "fraudulent" in (d)? We are dealing with the current legislation and we are amending this. So in other words—

Mr. Al-Rawi: So you are looking at the existing law?

Sen. Mark: Yes.

Mr. Al-Rawi: I understand, I could answer.

Sen. Mark: What I am saying is that we are in the real world and there is always a

possibility, and that is what I am—

Mr. Al-Rawi: Through you, Madam Chair, the "fraudulent" brings a higher burden rather that bare misrepresentation, so we are actually allowing for a wider turpitude on the part of the prosecutor. So misrepresentation is an easier, larger basket rather than qualifying it with fraudulent, and that is the answer.

Sen. Sturge: Can I ask, what would be the point in just using a term that is not necessarily criminal in a statute dealing with criminal law?

Mr. Al-Rawi: Because this is vitiation of an agreement. The consequences of vitiation of an agreement at law, does not need to be necessarily a criminal matter. There are misrepresentations, there is a mistake of fact, and they are qualified usually by the usual equities of delay and acquiescence, et cetera. So we were looking at it more from a contractual perspective rather than a criminal perspective.

Madam Chairman: We will be moving on now, Members, to paragraph (e). Senator Chote's proposed amendment is as follows:

"an offer or promise, the fulfilment of which is not..."

And you are including the words:

"capable of being fulfilled by the Director of Public Prosecutions"

Sen. Chote, did you keep the words "office of the Director" or you took those words off as well?

Sen. Chote SC: It would have to be removal of the words "office of" as well, because the prosecutor would be the Director of Public Prosecutions or the attorney-at-law authorized by him.

Madam Chairman: So that the proposal, I would read it again:

"an offer or promise, the fulfilment of which is not capable of being fulfilled

by the Director of Public Prosecutions.

Yes, Sen. Chote?

Sen. Chote SC: That is so, Madam Chairman.

Madam Chairman: Is there anything you wish to say on the proposed amendment, Sen. Chote?

Sen. Chote SC: Again, it is to keep with what seems to be the intent and policy of the Government in proposing this legislation, which is to say to make it as wide as possible and to capture as many fact situations that we can. So an offer may be made to a person which the Director is not capable of fulfilling, for example, a plane ticket to another country and so on, and this would cover that.

Mr. Al-Rawi: Madam Chairman, I understand and thank Sen. Chote for the observation. We went back to section 83 of the Interpretation Act and looked to the definition of "function". When we looked to the definition of "function", function speaks to jurisdiction, power and duty, which is why we had elected to use the word "function"; (a), your jurisdiction speaks to the fact that you have the locus to actually offer the thing which you have. Your power is the ability to carry it out or to make it actually happen, making the capability come into effect, and your duty, whether you had a duty to do it. So the drafters directed me to section 83 and to the specific interpretation of the word "function", because function was intended to speak to those multiple aspects. So I wonder if Sen. Chote's view is qualified at all by that response. Function, therefore, actually treating with capability in and of itself.

Sen. Chote SC: To some extent, but I still see that we need to remove the words "of the office of the Director of Public Prosecutions", because as you say, if you

want to hold the prosecutor liable, you want him to own it, as people say nowadays, then a reference to the function of the office of the Director really is—

Mr. Al-Rawi: Sen. Chote, I agree with you.

Madam Chairman: So the proposed amendment, Sen. Chote, is as follows:

> "an offer or promise, the fulfilment of which is not the function of the Director of Public Prosecutions"

So we are taking out the words "of the office of", correct? We are deleting those words.

Sen. Chote SC: Yes, Madam Chair.

Madam Chairman: Sen. Chote, we turn to page 4.

Sen. Ramdeen: Madam Chair, I understand the rationale, but I was wondering because I have a few amendments in addition to "improper inducement". I was wondering if we do not want to complete that before we go on to the rest of the other parts of the definition section.

Madam Chairman: We dealt with your amendments.

Sen. Ramdeen: Not in the notice, outside of the notice, that I wanted to suggest to the AG.

Mr. Al-Rawi: Sure.

Madam Chairman: On page 3?

Sen. Ramdeen: On page 3, yes. AG, I wanted to suggest that in (a) we take off "not believed to be supported by provable facts" and simply put what is the position in relation to the malicious prosecution test, which is what has to be satisfied in any event, that is, the laying of a charge without reasonable cause. I think that would make more sense having regard to the law, because basically that

is—as you said to Sen. Mahabir, I think that covers the duty that a police officer has to discharge in relation to this. So I was suggesting that, but I also want to suggest in relation even before we get to "without reasonable cause", that we adopt what we have done in relation to (c)(i), which is "the laying of a charge or causing a charge to be laid without reasonable cause". So that captures and brings us in sync with what you have done in relation to the suggestion by Sen. Chote about (c)(i). So I think that will strengthen us there.

Mr. Al-Rawi: I think that that is a good proposal, I would be happy to accept it. So it would read:

> "the laying of a charge or causing a charge to be laid without reasonable cause;"

We would have to make an adjustment to (b) as well of the causing of a charge.

Sen. Ramdeen: I do not understand what is the mischief, because I do not understand what is being caught by (b):

> "the laying of a charge that is not usually laid with respect to an act or omission of the type attributed to the accused person or suspect;"

And the difficulty I have is that I do not know what is the mischief that—I do not know if it is the drafting, but I do not know what it is that we are trying to capture.

Mr. Al-Rawi: Because it may be—in the improve language of (a), it may be that (b) is in fact—

Sen. Ramdeen: I would suggest that we take out (b).

Mr. Al-Rawi: Just a moment. Sen. Ramdeen, we will be prepared to agree to the deletion of (b). Madam Chair, may I through you bounce that off of Sen. Chote as well?

Sen. Chote SC: Agreed.

Mr. Al-Rawi: Thank you; (a) would read:

> "the laying of a charge or causing a charge to be laid without reasonable cause;"

Madam Chairman: Members, may I turn the page to page 4?

Sen. Sturge: Madam Chairman, I just had one observation, under (f), and I am borrowing on—

Sen. Ramdeen: In relation to (c), you have not agreed with the amendment that was proposed, but I want to ask whether you would not want to consider that in (c) you have:

> "the coercion of an accused person or suspect to enter into a plea discussion including a threat—"

Why have we limited it only to the plea discussion and not "and a plea agreement"? Because I can envisage a situation where an accused person could be forced to enter into a plea agreement without having any plea discussion at all.

Mr. Al-Rawi: You have to have a plea discussion to have an agreement.

Sen. Ramdeen: Not if you are doing it unlawfully. Let us take an example. Suppose a prosecutor comes and says to an accused person, "if you sign this, this is the position", without any discussion?

Mr. Al-Rawi: That is still a discussion, because the agreement is only an agreement—hold on, let us look before clause 25 for a moment to consider what you are saying before I answer. I see what you mean.

Sen. Ramdeen: I think on a purposive instruction, AG, I understand. Perhaps it might not be the best example, but I am saying there can be a situation where

someone can sign a plea agreement and there be purposively no discussion.

Mr. Al-Rawi: Sen. Ramdeen, you are right. I have just jumped to Part IV, clause 19, and what happens is, we have a discussion and then we describe a plea agreement concluded. So we actually do have the position— I just want to check the Schedules. That would be Form 7. I think you are right.

Sen. Ramdeen: So we can add "or plea agreement" right after the word "discussion"?

Mr. Al-Rawi: Yes.

Sen. Ramdeen: And I just wanted to ask you, AG, whether you would not—

Madam Chairman: Just one second, Sen. Ramdeen. So we are now moving to (c):

> "the coercion of an accused person or suspect to enter into a plea discussion or plea agreement including a threat—"

Mr. Al-Rawi: "or conclude a plea agreement". So to enter into a plea discussion and it should be "or conclude a plea agreement".

Madam Chairman: Sen. Sturge, you wish to say anything or can we move on?

Sen. Sturge: I had an observation under (f) so—

Sen. Ramdeen: AG, but I am not finished with (c). I was wondering, AG—

Madam Chairman: Sen. Ramdeen, can you address me.

Sen. Ramdeen: I am sorry, Madam Chair, I apologize. Madam Chair, through you, in relation to (c), after we make that amendment you then define—you narrow the compass by saying "including a threat", and then we limit it further by defining "in two circumstances". I was wondering, AG, whether the mischief that we are trying to achieve is not to capture any threat, and the fact we have now narrowed

the threat to (a) and (b) may leave out—I cannot direct my mind now to conceive what may be the other. Any other threat that is not covered by (i) or (ii) will not be captured by this section.

Mr. Al-Rawi: Sen. Ramdeen, so yes we would first of all need to delete the reference to "or (b)" in (i) of (c), in light of the deletion of paragraph (b). But you are now coming to deal—

Sen. Ramdeen: I have not worked out what—

Mr. Al-Rawi: No, I understand. You are coming with what is the provision for a catch-all for any other threat that we may not have contemplated. I understand.

Sen. Ramdeen: Your drafters may want to consider whether we put something—

Mr. Al-Rawi: Madam Chair, if you could just give us a moment to think on that?

Madam Chairman: Sure. In the meantime let me just ask, Sen. Chote, your initial proposed amendment to (c), because at the end, I am going to have to put all the amendments that have been proposed, are you withdrawing that amendment? Because Sen. Ramdeen has now made a proposal that the Attorney General has said he would accept subject to the agreement.

Sen. Chote SC: Just to be clear, is that the proposal of the insertion of the words "by any person"?

Madam Chairman: Yes.

Sen. Chote SC: If I am prepared to withdraw that?

Madam Chairman: Yes.

Sen. Chote SC: Yes.

Mr. Al-Rawi: Madam Chairman, may I, through you, enquire whether, if we think about paragraph (c) as drafted and as amended, we note that the language is

really:

> "the coercion of an accused person or suspect to enter into a plea discussion or conclude a plea agreement including a threat—"

So it was not intended to be an exhaustive list, and I have just double-checked to see whether we are read down by the *ejusdem generis* rule, and we are not.

Sen. Ramdeen: I think that is what happened.

Mr. Al-Rawi: As I understand the *ejusdem generis* rule, it is in a different formulation of words that that applies, where we have specifically circumscribed the type of examples. But it was intended, and as explained to me by the CPC's department, that "including" really was for all other circumstances. As explained to me, the *ejusdem generis* is that you have a specific circumstance and then you give general words about it, whereas this is the converse.

Sen. Ramdeen: No, but you see, AG, the problem with that reason is that what we are circumscribing is the coercion. The *ejusdem generis* would come if you are dealing simply with the particularities of (i) and (ii).

Sen. Chote SC: Madam Chairman, I am wondering if I could just perhaps suggest that a simple punctuation mark might assist us with the reading of the wording of the subsection. So if we put a comma after "discussion", it would make it clear that it is wrong to coerce an accused person or suspect to enter into a plea discussion or to conclude a plea agreement. I am not sure if I used the words in the right place. Then the coercion would include a threat to do these two things which are set out, but it would not necessarily exclude other forms of coercion.

Mr. Al-Rawi: I think that that would be very helpful. If I may just on a lighter note, that when Sen. Prescott SC sat in that very chair, it was very often his use of

semicolons and colons that saved us from a lot of difficulties. So I thank you, Sen. Chote, through you, Madam Chair.

Madam Chairman: Okay, so could I just ask where that comma is going to be?

Mr. Al-Rawi: Yes, Ma'am. It would go after the word "agreement" that we have just inserted. So the clause would read:

> "the coercion of an accused person or suspect to enter into a plea discussion or conclude a plea agreement,"

We continue with the words in (i) we delete "or (b)".

Madam Chairman: That is fine, we have all of that. So we move down now to (f). Sen. Sturge, you wanted to suggest an amendment?

Sen. Sturge: I wanted some guidance on why the word "continued" was used at the last line of (f), particularly keeping in mind the case law. Because if this section only bites if there is a repeated or a continued denial of guilt, then it in essence permits, in the face of someone saying—

Mr. Al-Rawi: We can delete it.

Sen. Sturge: You can?

Mr. Al-Rawi: Yes.

Sen. Sturge: Thank you.

Mr. Al-Rawi: The word "continued".

Sen. Dr. Mahabir: Madam Chair, can I come in here on this same subclause? Hon. Attorney General, it starts with "an attempt", an attempt, one attempt to persuade the accused person to plead guilty, notwithstanding the accused person's or suspect's continued denial of guilt. I am just wondering where an accused person has been saying day after day after day, I am saying "attempts"—

Mr. Al-Rawi: I am told that legislatively the singular includes the plural.

Sen. Dr. Mahabir: So an attempt means many attempts?

Mr. Al-Rawi: Actually what happens is that each attempt stands on its own, so that is why when somebody commits a certain larceny that you have multiple counts that may happen.

Sen. Chote SC: If I could just add so that it would be clear as well. An attempt may also involve a cause of conduct, so it is covered.

Mr. Al-Rawi: Thank you, Sen. Chote.

Madam Chairman: So we turn to page 4. And as we turn to page 4, if anyone has a proposed amendment, could we do it chronologically please. Any proposals on page 4 for amendments?

Sen. Dr. Mahabir: Can I come in here, Madam Chairman?

Madam Chairman: You may.

Sen. Dr. Mahabir: On page 4, under plea discussion, AG:

> "'plea discussion' means a discussion held between a prosecutor and an accused person or a suspect for the purpose of arriving at a plea agreement;"

I would have thought you would add "and an accused person or a suspect or his legal representative".

Mr. Al-Rawi: Well, it is the suspect who has to be there. Whether he has counsel or not, it is still him. So we are dealing with the person who is the victim of it, because he is the person who has to actually physically enter into the agreement. Whether represented or not he still signs, and the forms reflect that.

Sen. Dr. Mahabir: And if he cannot sign, if he cannot read, if he is unable?

Mr. Al-Rawi: There is an interpreter's clause and then there are rules and Judges

Rules that apply when someone is incapable of signing; has no hands, cannot write, all of those circumstances, deaf, mute.

Sen. Chote SC: My proposal is with respect to the last item on the list. I am proposing that the word "relative" be removed and that we simply say "appropriate person". That we remove "relative" and we say "appropriate person", and then instead of restricting the appropriate person to family relationships, we would allow someone who does not have any family here, as sometimes happens, to be considered. When I had made my contribution, I had made it in the context of it would exclude any inappropriate person.

Mr. Al-Rawi: I catch you. Through you, Madam Chair. Actually this amendment to the definition of "relative" came from the Leader of the Opposition, and we looked at it and there was a concern that it was too narrow. In particular (vi), which appears on page 5 came up for consideration:

> "any other person who the Court determines to be of sufficient proximate relationship (whether by blood or otherwise) to be considered a member of the victim's immediate family;"

So I accept that (vi) seems to be working our way out of a definition of a relative. The literature which we looked at coming out of Canada, Australia and other jurisdictions and the DPP rules in England, which gave us this concept of a victim impact statement being tied to a "relative", really drove this definition. So it was intended to tie into Part III of the Bill. I understand the reflection to be that we may be excluding someone who the court may otherwise be prepared to have come to the court, and really I think whilst it may be inelegant that (vi) of "relative" definition part (a) really deals with it. Because the attempt was really not to allow

just anybody to come in.

I do not mean to use this term badly, but any busybody or person who rolls up to the court and says, "I have an interest", to come in, but really to try an put circumstances around the nexus of the persons who are most affected, as opposed to persons who may come in for a public interest perspective and say, "Well, look I have a genuine right. I am the promoter of Arrive Alive"—no offence to that excellent lady who is—"and therefore I want to deal with this person's conviction for recklessness or causing death by dangerous driving." So I think it was that that we were really intended to drive by putting this relative definition in. I do not know if I have persuaded you that as inelegant as it is that (a)(vi) may take care of the concern?

Sen. Chote SC: Not entirely, but I was wondering if we could not say then, "any appropriate person who the Court determines", instead of saying "any other person"?

Mr. Al-Rawi: Sure. I wondered whether, through you, Madam Chair, we would not be tripping on what "appropriate" means.

Sen. Chote SC: Certainly it would mean something. You have left it wide open here, "any other person". Any other person could be a friend.

Mr. Al-Rawi: So would we be inserting after the word "other", "appropriate"? So as opposed to "any other person", "any appropriate person"? Sure.

Sen. Sturge: Is it 5(b)?

Madam Chairman: Page 5 and (vi) at the top.

Mr. Al-Rawi: The definition of "relative".

5.30 p.m.

Madam Chairman: Sen. Chote, any further proposals for amendment?

Sen. Chote SC: With respect to that—

Madam Chairman: With respect to page 4.

Sen. Chote SC: With respect to page 4, no, Madam Chairman.

Madam Chairman: All right. On page 5, any proposed amendments?

Sen. Chote SC: Milady, I beg your pardon, I do not have a proposed amendment, but I have a question with respect to the exclusion of the State as a virtual complainant.

Mr. Al-Rawi: We looked at that. I thought that was a very interesting reflection. I went back and considered, for instance, the claim against the Jamaat Al Muslimeen where the State suffered damages and, you know, wanted to come up. But then what struck me, through you, Madam Chair, what struck me was the inequality of arms insofar as the State has alternate remedies as it comes to damages, because the only circumstance that I thought that the State could really involve itself in, with that inequality of arms, was the pursuit of damages, that it would be rather unequal in the brace to allow the State to come in and deal beyond a prosecutorial function with a victim impact event. So from that perspective, I thought that we should perhaps keep the limit where it was. I thought it was a very novel suggestion; however, it did cause me some concern as to what a response could be.

Madam Chairman: So, hon. Senators, I think I can now, I now have to go through each amendment, put it to the committee and then I would put the entire clause as amended to the committee and this is clause 2. So, I ask you to bear

with me because there are several amendments.

So the question is, that clause 2 be amended as proposed by Senator Ramdeen. So that clause 2 be amended at page 3 of the Bill.

"Improper inducement' includes—

the laying of a charge or causing a charge to be laid without reasonable cause;"

So, we are deleting the words, "not believed to be supported by provable facts".

Question, on amendment, [Sen. Ramdeen] put and agreed to.

So this particular amendment is accepted, at (b) by deleting "(b)", sub (b).

Question, on amendment, put and agreed to.

At (c):

"the coercion of an accused person or suspect to enter into a plea discussion or conclude a plea agreement,"

Question, on amendment, put and agreed to.

This amendment is accepted in (i), (c)(i), "to lay a charge" and you insert the words "or cause a charge to be laid". Oh, I am sorry, "to lay a charge", and you are inserting the words "or cause a charge to be laid" and then you are deleting "or (b)". You are deleting the "(b)". Yeah? Are you taking out the "or" too? "or (b)". Okay.

Question, on amendment, put and agreed to.

Then (d), the misrepresentation of a material fact, you are deleting the words "by the prosecutor".

Question, on amendment, put and agreed to.

In (e), you are deleting the words "of the office".

Mr. Al-Rawi: Yes. That is correct.

Madam Chairman: "ofthe office of"? So you are deleting the words, "the office of". So it will read:

"an offer or promise the fulfilment of which is not the function of the Director of Public Prosecutions;"

That is how the clause will read.

Mr. Al-Rawi: Yes.

Question, on amendment, put and agreed to.

Madam Chairman: In (f), you are deleting the word "continued".

Question, on amendment, put and agreed to.

Madam Chairman: And then we go to page 5, (vi), you are deleting the word "other" and you are placing it with the word "appropriate".

Question, on amendment, put and agreed to.

Question put and agreed to.

Clause 2, as amended, ordered to stand part of the Bill.

Madam Chairman: So, hon. Senators at this stage, I can see the looks that I am getting, we will suspend and we will resume at 10 minutes past six.

5.36 p.m.: *Committee suspended.*

6.10 p.m.: *Committee resumed.*

Madam Chairman: Hon. Senators, we are just awaiting the Attorney General's technocrats.

Clause 3.

Question proposed: That clause 3 stand part of the Bill.

Madam Chairman: There is one amendment circulated and that is by Sen. Ramdeen. Sen. Ramdeen.

Sen. Ramdeen: Thank you, Madam Chair, through you to the Attorney General. Before I get to the proposed new subclause I wanted to propose, AG, is it necessary for us to have 3(1), or is it just as a matter of completeness?

Mr. Al-Rawi: Well, the Leader of the Opposition proposed 3(1) in those specific terms. I think that as a matter of completeness, it does make it abundantly clear, just in case there was any doubt.

Sen. Ramdeen: I had proposed, AG, the insertion of a subclause 3(3), save as expressly agreed as the Director of Public Prosecutions in a plea agreement. Nothing in this Act affects the powers conferred upon Director of Public Prosecutions under section 90 of the Constitution, to preserve the power the Director had indicated in the Joint Select Committee that the power that he exercises now. I think we should expressly preserve that power in the Act, because this Act actually deals with the power to enter into a plea agreement which is a power that the Director of Public Prosecutions has stated openly that he exercises on this section 90 powers. As you have indicated before, I think it is a matter of completeness just for us to confirm that nothing is taken away from him to do that.

Mr. Al-Rawi: Through you, Madam Chair, just give me a moment. I personally have no difficulty with the recommendation, Sen. Ramdeen. The caution coming from the drafters is that the supreme law is the supreme law and

that statute cannot erode the powers of the DPP particularly in section 90 of the Constitution. So from the CPC's perspective, there was the view that it could be viewed to be superfluous. I personally do not think that it will take us in any direction otherwise, because this sort of law could not derogate from any of the powers or circumscribe the powers of the DPP. I do not know if that flavours the fulminations on your team, through you, Madam Chair.

Sen. Ramdeen: I thought that would have been the answer to it. I just think that it is something that we should perhaps express to preserve, but I hear the argument that the supreme law would—nothing could override the section 90 powers, so it really is a matter for you.

Mr. Al-Rawi: Could we perhaps—

Sen. Chote SC: Madam Chairman, if I could just put in my usual two cents, with your leave. I do not see that it fits easily with what subclause (2) is doing. Subclause (2) is talking about the preservation of the other opportunities that an accused person has to plead guilty without entering into a plea bargain or to plea-bargain outside of the Act. So to put in section to say that section 90 of the Constitution is preserved really bears no logical or contextual link with what is contained in subclause (2). That is just my thinking.

Mr. Al-Rawi: Appreciated. Madam Chair.

Madam Chairman: Sen. Ramdeen, are you—

Sen. Ramdeen: Yeah. I can withdraw it. I am fine.

Madam Chairman: You would. Great. All right. So you withdraw. And new subclause 4(3). Sen. Ramdeen.

Mr. Al-Rawi: That is in clause 4.

Madam Chairman: Oh. I apologize. Yes.

Question put and agreed to.

Clause 3 ordered to stand part of the Bill.

Clause 4.

Question proposed: That clause 4 stand part of the Bill.

Madam Chairman: Now with respect to clause 4—[*Interruption*]—just one second, Sen. Ramdeen. Sen. Mark has proposed an amendment and Sen. Ramdeen has an amendment as well. So, we will deal first with Sen. Mark's proposed amendment.

Sen. Mark: Yes. Madam Chair, consistent with our earlier recommendation in terms of an amendment to clause 2, we are just consolidating our position in clause 4, and we have already submitted our arguments as to why we would like the word "suspect" to be removed wherever it appears in clause 4, so I do not need to detain you any longer. You know what my arguments are.

Question, on amendment, [Sen. Mark] put and negatived.

Madam Chairman: Sen. Ramdeen.

Sen. Ramdeen: AG, I just want to ask you—

Madam Chairman: Before you go into your proposed amendment, you have 4 sub (3), but I think it should 4(c).

Sen. Ramdeen: Yeah. AG, is there a clause in your clause 4 as proposed in the Bill that requires the prosecutors to take into consideration the interest of justice? A purpose for the amendment, AG, perhaps I can say so, is that I

wanted to include what is in (i), (ii), (iii) as the factors that a prosecutor ought properly, in addition to what you have put in in your subclause, to take into consideration in entering into a plea agreement in the public interest, of course.

Mr. Al-Rawi: To answer your question squarely whether there is an interest of justice consideration on the part of the prosecutor, no, there is not an expressed statement to that effect. I note the language that is being proposed that it is the introduction of the interest of justice to enter into a plea bargain. I just wonder whether this can potentially collide in that one-off opportunity that a prosecutor might have where the interest of justice does not meet with these factors and I accept that they are not exhaustive factors because you have used the word "including" in the chapeau of the subclause (c) that is proposed. We had really sought in dealing with this to just really bring the matters before the court at the plea agreement stage when we get to clause 19 move onward, but that we really leave it up to the court to look to the interest of justice factor and not so much the prosecutor.

Sen. Ramdeen: Well, I want to suggest, AG, that the prosecutor in discharging his function as a Minister of Justice as he is mandated to so do in our system, in our criminal justice system, that I think to shore up the fact that in discharging those functions there are certain things that he ought mandatorily to take into consideration, and the fact that we have listed them and they not being exhausted, it creates two options.

One, it provides a safeguard to the prosecution and to the accused person that these factors are factors that ought properly to be taken into consideration,

some may weigh against, some may weigh for, but it also provides in being non-exhaustive in the prosecution going outside of the those factors that have been considered there to make a decision, as you have indicated, perhaps in a one-off case to still have a plea agreement entered into that may not be covered by these factors.

So, I am not suggesting in any way that the powers that are given to a prosecutor are circumscribed in a way that prevents him from entering into a plea agreement, but it is more for the purpose for suggesting that there are these factors that ought properly to weigh in the mind of the prosecutor in determining whether to enter into a plea agreement or not, is that it provides a certain degree of a safeguard to both the prosecution, because some of the factors would weigh in favour of the prosecution, some of the factors would weigh in favour of the defendant. And I think the added advantage of having it is that it allows, as we did with the sentencing guidelines, one of the things that we had discussed was that the fact it is in the statute, it opens the eye of prosecutor and it does not leave it to the prosecutor to say, "Well I will consider a, b, and you leave out c".

Mr. Al-Rawi: I do understand, through you, Madam Chair, the intent. What concerns me here is about the fit in the plea agreement, because clause 4 is really intended to speak to a plea agreement, who enters into it, that it is between the prosecutor and the accused person or suspect, and really it is intended to be that the accused agrees to a particular course and that the prosecutor agrees to particular course. The clause itself does not speak to the

quality of mind of either of the parties to the agreement, to the accord, either on the part of the accused person or suspect on the one hand, or on the part of the prosecutor. I am just wondering whether introducing the interest of justice argument here may take us into a zone which may tend to fetter the use of this type of position by putting the qualities of that.

Sen. Ramdeen: All right. Can I suggest this, AG? Can we take out the interest of justice and leave that concept out and say that in determining whether to enter into a plea agreement the wholesale putting the factors and leave out anything to deal with the interest of justice that may or not circumscribe actions of the prosecutor or the accused. This is not to affect the state of mind of the accused. This is really to ensure that the prosecutor—remember at the end of day, AG, your policy position which you have indicated openly is that you are not going to compromise on the criminality aspect.

Having accepted that, I think we should then consider the other ways outside of criminality that we can actually, this is not in any way going to impede a prosecutor, it is actually going to assist the prosecutor in coming to a decision and ensuring that certain material, it may be that you do not want to put in all, but it actually lays down some factors that the prosecutor would want to take into account. And like I said, you can leave out the interest of justice.

Sen. Chote SC: Madam Chairman, if I may respectfully suggest, I think Sen. Ramdeen's suggestion that "in the interest of justice" should be included is one that he should not resile from, he should hold on to it, because I think that is the fundamental thing in all of this. If I could just suggest that maybe Sen.

Ramdeen could think about, "for the purpose of this Act a plea agreement is an agreement made in the interest of justice between the prosecutor and the accused person". So it does not take away from what the legislation intends to say, but it also reminds the parties that such an agreement must be made in the interest of justice before it can be brought to a court and accepted.

Mr. Al-Rawi: I think that suggestion, I think that it—my difficultly with what Sen. Ramdeen, through you, Madam Chair, was proposing was the prescriptive approach, and I was wondering whether that should be subsidiary, for instance, rules committee or other aspects or practice directions. But I think that it is gives a very useful qualification to the quality of the agreement and allows for a little bit more safeguard for the courts. I think that it is a very useful combined submission on the part of both Senators.

So, Madam Chair, "for the purposes of this Act, a plea agreement is an agreement made"—we can go right there—"in the interest of justice", and I think that that is a very useful improvement, and it actually ties into the language of clause 25 which comes later which speaks to the interest of justice.

Madam Chairman: May I ask, Sen. Ramdeen. Sen. Ramdeen.

Sen. Ramdeen: I am sorry, Chair.

Madam Chairman: That is all right. The amendment that you circulated, are you withdrawing it? And now we will propose the amendment that I have just—

Sen. Ramdeen: Can I just clarify, now that we are inserting it there, AG, what are you doing with the factors?

Mr. Al-Rawi: The factors recommended in the proposals offered by the

Opposition?

Sen. Ramdeen: "Umm hmm."

Mr. Al-Rawi: I propose to leave it out and I will say why. There is actually a code for prosecutors which operates in Trinidad and Tobago which speaks in detail to this. I found the reflections very useful and good fulminations for us, but it struck me that this was more of a subsidiary type of factor which should be particularized in rules or regulations or practice directions. And I have just found, thanks to our team here, the code for prosecutors which actually is published and in force right now. So, I was hoping that we would catch the flavour of the elements by including "in the interest of justice" as proposed by Sen. Chote, because that would allow for the court to grow the area up and not to be, how should I say, prescriptive just by the statutory point.

I do accept that putting down statutory posts helps to cause the court to reflect upon factors, but if we go to clause 25 we will see:

> "…the Court may reject a plea agreement entered into between the prosecutor and the accused…if the Court considers that it is in the interest of justice to do so."

So, I think that we can perhaps bridge the gap between the two by the words as proposed by Sen. Chote.

Sen. Ramdeen: I will reformulate my amendments to insert after the words "for the purposes of the Act, in the interest of justice". So that will be the reformulated amendment, Madam Chair.

6.30 p.m.

Mr. Al-Rawi: Sure, I would have no objection to either place for the inclusion. So, instead of after the word "made", it can come after the comma, after "Act,". Is that what you are saying Sen. Ramdeen?

Sen. Ramdeen: I had thought that—Sen. Chote, is that what you are saying?

Sen. Chote SC: "Made".

Mr. Al-Rawi: No, we were looking at "made". After the word "made".

Sen. Ramdeen: Well, I will go with what Sen. Chote suggested, which is to insert after the word "made", "in the interest of justice".

Mr. Al-Rawi: Okay.

Madam Chairman: Sen. Ramdeen, what I am asking you is, what you had circulated here—

Sen. Ramdeen: I withdraw that amendment and propose—

Madam Chairman: Yes. So, hon. Senators, the question is that clause 4 be amended as follows:

> By inserting the words—I will read it:
>
> "For the purpose of this Act, a plea agreement is an agreement made"—new words—"in the interest of justice."

So, you are inserting those words and that will be the amendment to clause 4.

Sen. Chote SC: As far as Sen. Ramdeen is concerned, Madam Chairman, or generally?

Madam Chairman: I thought generally, because Sen. Ramdeen has withdrawn the amendment that he had circulated. Is there that you have another amendment to propose?

Sen. Chote SC: Yes, please, if I may? Clause 4(b)(iii). This was the one when I had been speaking I thought that this was capable of abuse, so I am respectfully proposing that after the word "suspect", we add the words "where there is evidence to sustain a charge against such persons;".

Madam Chairman: Attorney General.

Mr. Al-Rawi: Sorry, would you mind just repeating that for me please?

Madam Chairman: It is clause 4(b)(iii)—

Mr. Al-Rawi: So, it is after the word "suspect"—

Madam Chairman:—and it continues.

Mr. Al-Rawi: Yes.

Madam Chairman: After the word "suspect", I believe you would have to take off the semicolon, and it will be "where there is evidence to sustain such charges against such persons;"

Sen. Chote SC: "sustain a charge against such persons;".

Madam Chairman: "such a charge".

Sen. Mark: "sustain a charge".

Madam Chairman: But it talks about an undertaking not to institute charges.

Sen. Chote SC: So, it would be "charges against such persons". Right?

Madam Chairman: Yes. Attorney General, yes.

Mr. Al-Rawi: So it would read that:

> "the prosecutor agrees to take a particular course of action including—
> an undertaking not to institute charges against family members or friends of the accused person or suspect where there is evidence to sustain such

charges against such persons;"

Madam Chairman: Yes.

Mr. Al-Rawi: Sure, it is agreeable.

Madam Chairman: Sen. Sturge.

Sen. Sturge: Am I allowed to make a point on (vii), or are we—

Madam Chairman: We are still on (iii). We are on (b)(iii).

Sen. Sturge: Oh, I see.

Madam Chairman: So, the Attorney General has indicated that he is amenable to that amendment.

Sen. Chote SC: Thank you, Madam Chairman. Oh, sorry, we now turn to page 7 and, Sen. Sturge.

Sen. Sturge: Subclause (vii), I am undertaking that a conviction pursuant and so on—no, I am not clear about a number of things with respect to (vii). But in any event, I am wondering whether or not this should be removed, because this is not an undertaking a prosecutor can give, that a conviction pursuant to the agreement will not be used as evidence at any trial. That is a decision for a court. The way it is worded, I do not know whose trial, if it is the trial of the accused or suspect who is the subject of this part, or it is wide enough to cover any other trial, trial of someone else. If it is a trial of someone else, and that is open to inference on the wording of this clause, then one would be depriving those other persons from properly representing themselves, because one is entitled as it is, to make reference to the character, or the bad character of this witness when they come to trial to defend themselves, and he is giving evidence

against them. So, this is not an undertaking that a prosecutor can give, so I am wondering whether this clause should be removed.

Mr. Al-Rawi: Very interesting submission, particularly as it relates against whom the bad character evidence is going to be used. I think you could understand the natural nexus to the accused himself. Well, particularly there, but in the broader section I wonder—it should certainly include where we just dealt with the family in subclause (iii). May I, through you, Madam Chairman, ask for Sen. Chote's view on this as well?

Sen. Chote SC: Madam Chairman, I agree with Sen. Sturge, because the law as it stands is that the Evidence Act has been amended to permit applications to the judge to permit bad character evidence into the course of a trial, and the bad character does not always have to come from the accused person. It may be the bad character of a witness or more than one witness for the prosecution. So, I agree. How this is worded, first of all, it does not take into account that it is a judge that has to make a ruling, and it seems to be carving out the judge's discretion, or carving away the judge's discretion. And, secondly, it is unclear.

Mr. Al-Rawi: I was just asking, where the—refreshing my memory as to where the recommendation had come from. It had come about out of the workshops and consultations as a proposed inducement for people to actually use the system. One of the reasons why they should use this. But, I am very cautious about the consequence that really this ought to be a judicial function.

Sen. Chote SC: Well, it is not that it ought to be a—sorry, Madam Chairman, through you, if I may. It is not that it ought to be a judicial function. It is a

judicial function according to another piece of legislation.

Mr. Al-Rawi: Yes, which we would be impliedly affecting by virtue of this. Because this would be subsequent law. I would have no objection to moving it out of an abundance of caution.

Madam Chairman: So, we are proposing that subclause (vii) be deleted. Okay?

Sen. Chote SC: Madam Chairman, are we moving on to (viii)?

Madam Chairman: Yes.

Sen. Chote SC: Madam Chairman—

Mr. Al-Rawi: I am sorry, Madam Chair, just with the indulgence of the Senate, I am just taking a quick consultation with the technocratic team. Yes, thank you, and I apologize, Madam Chair, I believe you were allowing Sen. Chote to raise subclause (vii), is it?

Madam Chairman: Subclause (viii).

Mr. Al-Rawi: Subclause (viii)?

Sen. Chote SC: Well, I suppose (viii) would now become (vii)?

Mr. Al-Rawi: The consequential amendments will follow.

Sen. Chote SC: Yes. I think what you want to say in this one, hon. Attorney General, through you, Madam Chairman, is a promise to proceed summarily rather than indictably, is that the intention?

Mr. Al-Rawi: Yes, it was. Yes, we can reformulate.

Sen. Chote SC: I think perhaps it should—I propose that it be amended to read "a promise to proceed summarily rather than indictably".

Mr. Al-Rawi: Yes, so that we can strike the words "by complaint rather than by information", and insert instead after the word "proceed", "summarily rather than indictably".

Madam Chairman: Yes. I would just read it. "A promise to proceed"—you are deleting the words "by complaint" and you are saying "a promise to proceed summarily rather than indictably". So, you are taking off the words "by information". Correct?

Sen. Chote SC: Yes, Madam Chairman.

Mr. Al-Rawi: Thank you.

Madam Chairman: Members, can I now put the amendments to Sen. Ramdeen?

Sen. Ramdeen: Sorry, Madam Chair. Madam Chair, through you, to the Attorney General. In clause 4, you have the second to last line, "summary trial rather than trial by indictment". It should be "trial on indictment", as I understand it, on page 6, AG. The second to last line.

Mr. Al-Rawi: Sorry, forgive me.

Sen. Ramdeen: Second to last line on the bottom.

Mr. Al-Rawi: I see, on (iv), apologies. And then:

"an undertaking to recommend summary trial rather than on indictment;"

Thank you Sen. Ramdeen, through you, Madam Chair.

Madam Chairman: Members, I will now put all of the amendments to clause 4, and I ask all Members if they can just pay attention so we can get through this. So, clause 4, the question is that clause 4 be amended as follows:

"For the purpose of this Act a plea agreement is an agreement made in the interest of justice between the prosecutor and the accused person or suspect."

So, you are inserting the words "in the interest of justice", and then when you go down to (b)(iii), you are adding the words, "where there is evidence to sustain such charges against such persons".

Mr. Al-Rawi: Yes.

Madam Chairman: And then in (iv), you are deleting the word "by" and substituting "on".

Mr. Al-Rawi: Yes.

Madam Chairman: You are deleting sub (vii) completely, and then in (viii), "a promise to proceed summarily rather than indictably". So, you are deleting the words, "by complaint" and "by information".

Question put and agreed to.

Clause 4, as amended, ordered to stand part of the Bill.

Clause 5.

Question proposed: That clause 5 stand part of the Bill.

Madam Chairman: Sen. Ramdeen has circulated an amendment. Sen. Ramdeen.

Sen. Ramdeen: I was wondering, AG, having regard to the way in which—through you, Madam Chair—the clause is drafted, a plea discussion may be held and a plea agreement concluded at any time before the conviction, all of the (a), (b), (c), (d) and (e) would be caught if the clause stops with a full stop after

"conviction". Because all of these circumstances as defined by (a) or (e) cannot happen at any time before conviction—or they all happen before conviction.

Mr. Al-Rawi: Yes. Through you, Madam Chair, say that the view in the House between the respective benches was that the need to cleave the suspect—that is the person before charges are instituted—was the issue. And because we are talking about a plea discussion as opposed to the agreement, we did have to factor specifically for 5(a) which is before charges are instituted.

Sen. Ramdeen: Well, if we do that, could we then, before conviction, including (a) and then having regard to the fact that you are not moving on suspect, then we would not have to have (b), (c), (d) or (e). Because once you include (a), you catch suspect and then everything else that comes after, if he is charged, you are already caught before conviction, and if he is not charged, you are caught by (a).

Mr. Al-Rawi: Yes, so we could simplify the language. Yes.

Sen. Ramdeen: And take out (b), (c), (d) and (e).

Mr. Al-Rawi: Yes.

Madam Chairman: Attorney General, you are in agreement with deleting (b), (c), (d) and (e), right?

Mr. Al-Rawi: Yes, Madam Chair.

Madam Chairman: Sen. Mahabir.

Mr. Al-Rawi: Thank you, Sen. Ramdeen.

Sen. Dr. Mahabir: Thank you, Madam Chair. I too had a concern similar to Sen. Ramdeen. But my concern is linked with 5(a), which the hon. Attorney

General is keeping, but also the link with what occurs on page 31 on Form 7. You see on Form 7, page 31, and I am linking it to 5(a), "I, Justice of the Peace for the County of"—whatever—"hereby certify that the above plea agreement was signed by the Prosecutor…and the accused/defendant..."

But, I am seeing that in 5(a), a suspect is going to enter into a plea agreement, and this particular suspect, once he enters into an agreement under Form 7, he has no legal representation. So, is it fair that a suspect, 5(a), will sign a form, page 31, 7, without legal representation? I would have thought that in the interest of justice that you would have had, "an accused/defendant and his attorney." You see, I am seeing no attorney present here.

Mr. Al-Rawi: We have a separate form for that. What we have done is that we have provided a form for a suspect, and where the suspect does not want to be represented, as he is entitled to, we are putting the caution that a JP must be there. And it must be recorded as well. And, when we have a suspect who is represented, we have a separate form where the suspect and the attorney participate.

Sen. Sturge: Madam Chair, with respect to what the Attorney General just indicated, even if the Justice of the Peace is present during that process, a Justice of the Peace is not legally trained, and cannot provide the kind of assistance or advice detailed as a lawyer can. So, I am wondering perhaps—given that when persons are in custody, legal aid lawyers are, as a right, sent to visit these persons in prison,—whether we should remove Justice of the Peace and put attorney-at-law, so that they are on even terms.

Mr. Al-Rawi: I thank, through you Madam Chair, Sen. Sturge for the observation. It is true that duty counsel are appointed on the first call. But, they do not stay for the entire time, and that was the problem that we had with the utilization of duty counsel under the amendments to the Legal Aid and Advice Authority legislation that happened. We looked back at this and we really reflected upon the Judges' Rules, and that is how we came up with the Justice of the Peace. You are right, they are not legally trained. At best, there are witness on forms which have fallen into odium. I mean, written statements and confessions before JPs, et cetera. So, the idea with this is that the judge would have at the plea agreement stage, much more care to exercise with the unrepresented person and the interrogation. But, I did not see that we could have put the duty counsel in there, because there are lacuna in how that system operates.

Sen. Sturge: I see.

Madam Chairman: Sen. Ramdeen, just to clean up the matters, will you withdraw?

Sen. Ramdeen: Madam Chair, through you, can I withdraw my proposed amendment to clause 5 and propose—

Madam Chairman: That they had been circulated?

Sen. Ramdeen:—as circulated.

Madam Chairman: Yes.

Sen. Ramdeen: And propose that in clause 5, we delete items (b), (c), (d) and (e)?

Madam Chairman: Yes.

Sen. Ramdeen: And merge subclause (a) into 5, so that it would have one singular clause?

Madam Chairman: Sure. So, let me just read how the clause should be read now:

> "A plea discussion may be held and a plea agreement concluded at any time before conviction, including before charges are instituted."

Mr. Al-Rawi: Yes.

Madam Chairman: Yes? So, you are going to take off that dash and you are going to take off the (a) as well, and then you are going to delete (b), (c), (d) and (e).

Mr. Al-Rawi: Yes.

Madam Chairman: So, hon. Senators, the question is that clause 5 be amended as follows:

> By deleting (b), (c), (d) and (e).

—and to allow the clause to read as follows:

> "A plea discussion may be held and a plea agreement concluded at any time before conviction, including before charges are instituted."
>
> *Question put and agreed to.*
>
> *Clause 5, as amended, ordered to stand part of the Bill.*

Clause 6.

> *Question proposed*: That clause 6 stand part of the Bill.

Sen. Ramdeen: Madam Chair, through you, to the hon. Attorney General. I

was just wondering, when you go back to the definition section, clause 2, and one reads that the definition of "prosecutor" means the Director of Public Prosecutions, or an attorney-at-law, authorized in writing by the Director of Public Prosecutions to engage in a plea discussion, or conclude a plea agreement, and then we come back to clause 6, is it that it is envisaged that by virtue of the definition you have the authorization of the Director, unless the Director is doing it himself?

Mr. Al-Rawi: It appears to be superfluous.

Sen. Ramdeen: Well, it does.

Mr. Al-Rawi: So, it invites a consideration that you have two forms of written permission. But prosecutor itself says that that is the person. The preference in drafting is that the substantive clause 6 really ought to exist the way it does. The definition, even though when read with 6 is superfluous, is true. But, I think that the definition can be cleaved insofar as prosecutor is used elsewhere in the Bill. It is meant to take care of the use of the definition of "prosecutor"—the use of the term "prosecutor" wherever it appears. But, you are correct that 6 does say, "written permission", and for you to be there in the definition in the first place you need written permission. So, even though it appears superfluous, I still think it is necessary.

Sen. Ramdeen: As you please.

Mr. Al-Rawi: And at worse, it is just—worst-case scenario, it is just superfluous.

Question put and agreed to.

Clause 6 ordered to stand part of the Bill.

Clause 7.

Question proposed: That clause 7 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have circulated amendments?

Sen. Ramdeen: Madam Chair, I know that the AG's position, this is one of his policy positions, and I wanted to just flag an issue that I think requires some consideration by us all. When the 1999 Act would have been passed, and an offence would have been created by that Act, there is, by virtue of the most recent Supreme Court decision in Miller, which is the Brexit appeal to the Supreme Court. There were 11 Supreme Court judges in that matter, and the core argument there, AG, was that where statute overrides the common law, the common law is eclipsed. That goes all the way back *AG v De Keyser's Royal Hotel* in 1923.

I am wondering whether we have properly considered that these common law offences for which we are, as a policy position taking as being offences that are available to a prosecutor being someone who is in a public office, are we properly considering that those offences may have been eclipsed when the 1999 Act would have been enacted, because it would eclipse the power under the common law, and then now what we are doing is that we are removing the 1999 Act, and whether the common law power to go after these offences will revive, because the Act has now been repealed? No, it is quite a serious matter.

Mr. Al-Rawi: No, I am admiring the sophistication of the argument.

Sen. Ramdeen: No, it is quite a very serious argument, because I am not sure

that having eclipsed the common law powers that the common law automatically revives.

Mr. Al-Rawi: Yes. I do, through you, Madam Chair, think that it is a very useful consideration. Out of caution we should consider it. My own view, when I asked for the counterbalance, because this was raised in the debate, and the question was, well, what is the foil to the counterfoil to this form of turpitude, was the argument of the common law. But, I would think that if statute had eclipsed common law, it was specifically in relation to an offence now described under statute.

Sen. Ramdeen: Well, before you just push that further, it would have to be that the statute would have been creating an offence, the facts of which would be overridden by what the offence would have been under the common law. So, the actus reus for that offence would have to be the same as the actus reus for the offence when the 1999 Act would have been enacted. So, let us say we have not passed this legislation and someone would have been charged under the 1999 Act, and then for some reason on the indictment you charged the person under the Act and under the common law, then you can raise an argument, a very strong argument, that you cannot proceed under the common law, because that the common law no longer exists.

Now, we have a very strange situation where we have created an offence. That offence has to be overriding what you would have been charged with under the common law. And now we are removing that statute and we are putting back in place a statute covering the same ground, but we are not creating an

offence, and one wonders whether—let us just try and look into the future—somebody is charged for misbehaviour in public office, or perverting the course of justice for an offence of entering into a plea agreement by virtue of whether it be coercion or one of the prohibitions that we have engaged, that person is able to go to court and raise an argument that you cannot charge me under the common law, because the common law does not exist anymore. Parliament has eclipsed that. That cannot revive, and therefore that is the end of it, so you cannot charge me.

Now, that leaves you in the position where you have to consider whether the disciplinary powers of the JLSC under the regulations and under the Act is really enough to be able to say that, our safeguard against persons performing an illegal act and coercing somebody entering into a plea agreement unlawfully is something that you are able to say, I rest my case on the fact that I have an alternative, but that alternative is very weak.

Sen. Chote SC: Madam Chairman, if I may? These deep legal arguments, I am not sure if I have got it right, but my understanding is, under the old legislation particular offences were created. I would imagine that those offences were alive along with a slew of common offences, which are still live, such as attempting to pervert the course of justice, and whatnot. So, the creation of the offences under the previous legislation does nothing to permit someone to now argue in a criminal court, that it is an abuse of process to prosecute him for a common law offence, because a repealed statute had created statutory offences. Essentially, that is what we are addressing, if I understand it. So, I do not see that there is

any difficulty at all with respect to, you know, whether offences need to be set out in the Act. I think clearly you can still prosecute people for a variety of common law offences.

Mr. Al-Rawi: Madam Chair, Sen. Chote took the words out of my mouth. I was going to put it in summary as—I would have viewed it as the common law offences running concurrently with the offence under section 5 of the 1999 Act, and that in any event if an argument that there was an eclipse happening, it would have to be if the offences were so stated as to be on exactly similar terms. Because it is still open to the person who is laying the charge to describe the elements of the crime within terms which were beyond section 5.

So, the misbehavior in public office, and the conspiracy to pervert the course of justice, or perverting the course of justice could have been described in other ways, so that we are beyond the strictures of a like offence, similar to section 94 of the Summary Offences Act. So, I do think that it is a good consideration of quite a novel argument, and I thank Sen. Ramdeen for raising it. But I think that we can perhaps posit for the record, as we have in the case *Pepper v Hart* has called for any aid in interpretation that we consider the offences to have run common law and statutorily side by side.

7.00 p.m.

Sen. Sturge: Well, I am wondering for the avoidance of doubt, since there may be some ambiguity in what the true legal position is, and perhaps we can insert a clause that this is without prejudice to charges being brought at common law for misbehaviour in public office or perverting the course of justice. So that it is very clear.

Mr. Al Rawi: That would in and of itself, through you, Madam Chair, take me back to the realm of how large section 5 caused a dissuasion in the existing law. Because it is true, it may be viewed to be—how should I say—a sleight of hand, to on the one hand acknowledge that the common law offences exist and not state them expressly. But I prefer to omit it.

Madam Chairman: So hon. Senators, I think we have had enough discussion on this clause—[*Interruption*]

Sen. Mark: This one? I would like to say something on this. If you would allow me, Ma'am?

Madam Chairman: Sure.

Sen. Mark: I do not understand why the Attorney General, who understands that in what he calls the common law realm, people can be charged if they commit offences. And we would like to explicitly state in the current legislation that we are dealing with, or Bill, those offences, so that it could serve as a reminder, Madam Chair, to those who are playing with people's rights and life, that if they violate or they engage in what the amendment is proposing, that there are consequences to be had. I do not see what is the harm in incorporating these amendments into the legislation.

Madam Chairman: So you are speaking on behalf of Sen. Ramdeen's amendment.

Sen. Mark: Yeah, I am supporting these amendments, Ma'am.

Madam Chairman: All right. Attorney General.

Mr. Al Rawi: Thank you, Madam Chair. I thank Sen. Mark for reviving the advocacy behind the particular recommendation that we criminalize this—

[*Interruption*]

Mr. Ramdeen: AG, just before that. I just want to ask you this so you can answer both at the same time, because the answer might be the same. We are saying that if you conduct yourself improperly as a prosecutor, you can go under the common law and charge them and you are accepting that that is the position? Right. If that is so, why are we saying that no proper inducement should be used, because in any event, if you use an improper inducement, you are not going to use the Act to provide the basis to charge the person at common law?

Mr. Al Rawi: I can answer that. So, firstly in respect of Sen. Mark, the policy position that we are taking is in line with the policy as developed between 2014 to now, that clause 5 has originally casted with the statutory offence for improper inducement, was a dissuasion to the use or proper utilization of the Act itself. But in particular, the reason why we are putting in 7, "No improper inducement", bare, hanging, no sanction, is specifically to bring it to life in clauses 25 and 30 later on, where we allow the court the ability to set aside or reject the plea agreement in clause 25 as we do, or set it aside in clause 30 as we do as well. So it was for a different purpose. It was to provide the anchor in clauses 25 and 30 to allow the court to set aside or to allow a—how should I say—relief for the accused or suspect who is now in the realm of the plea agreement.

Question, on amendment, [Sen. Ramdeen] put.

The Committee divided: Ayes 8 Noes 14

AYES

Mark, W.

Solomon, D.

Ameen, Miss K.

Ramdeen, G.

Samuel, R.

Sturge, W.

Shrikissoon, T.

Richards, P.

NOES

Khan, F.

Baptiste Primus, Mrs. J.

Rambharat, C.

Moses, D.

Hosein, K.

West, Miss A.

Henry, Dr. L.

Singh, A.

Coppin, W. M.

Cummings, F.

De Freitas, N.

Baksh, Miss A.

Dookie, D.

Mohammed, I

Dr. D. Mahabir and Miss S. Chote SC abstained.

Amendment negatived.

Question put and agreed to.

Clause 7 ordered to stand part of the Bill.

Clause 8.

Question proposed: That clause 8 stand part of the Bill.

Sen. Chote SC: Madam Chairman—

Madam Chairman: Yes.

Sen. Chote SC: It is a question really that I have for the hon. Attorney General. It is important that the accused person, whether he or she is represented or not, should know what is the strength of the evidential material which would be encouraging him to enter into this kind of discussion. So I am not sure—I have not thought it out well enough to make a proposal to say that there should be full disclosure before this process begins, or at least certainly before it is concluded. But I was wondering whether you would be minded to put something in, put a clause in or a phrase or subsection, to say that full disclosure should be made before these discussions are embarked upon.

Madam Chairman: Well, before you answer, Attorney General, I think Senator Ramdeen also has circulated a proposed amendment to clause 8. Senator Ramdeen.

Sen. Ramdeen: No, no. I had asked for it to be deleted.

Madam Chairman: That is the amendment. So you need to just explain.

Sen. Ramdeen: AG, what I wanted to, perhaps, if you do not, which I suspect, you do not agree that it should be deleted. I am looking at the way in which it is phrased:

"(b) …in the discretion of the Director…charge is justifiable having regard to—"

I was wondering whether it is—I understand you have the administration of justice there and then we had used the term of "the interest of justice". I was wondering whether we should keep "the interest of justice" instead of "the administration of justice", having regard to the fact that we are using that in 25 and we have also used it in the clause that we inserted before.

Madam Chairman: Sen. Ramdeen, if I could just interrupt. So you are not asking for it to be deleted.

Sen. Ramdeen: No. In the first instance, I am asking for it to be deleted. If the AG does not agree for it to be deleted, which I indicated he may not be minded to. We have used the term "the interest of justice" in clause 4 and we have also used "the interest of justice" in clause 5 and I am wondering if we should not simply keep the terms singular. So that we—

Madam Chairman: So where you have "administration of justice" you want to put "interest of justice"? Okay, Attorney General.

Mr. Al-Rawi: So, yes, we propose to maintain clause 8because we want to put the prohibition in certain circumstances. As to the redrafting, that is potentially available in 8(b)(i), if I could just read aloud, Madam Chair, to make sure I got it right. So:

> "A prosecutor shall not initiate or participate"—et cetera—"to an offence that—
>
> (b) does not adequately reflect the gravity of the provable conduct of the accused person or suspect…"

Sen. Ramdeen: AG, can you—I was wondering, before we actually even go further than that, this concept of provable conduct, I do not know, I mean, Sen.

Chote and Sen. Sturge would be more knowledgeable than myself on these issues, but I do not understand where the concept of "provable conduct" comes in because we are taking out—

Hon. Senator: It should be admissible evidence.

Sen. Ramdeen: We have taken out "provable facts" at page 3 in the definition of "improper inducement" because we had—

Mr. Al-Rawi: So it came from section 7 of the existing Act, which is where the prohibition against plea discussions arrived and it is specifically stated as:

> "…inadequately reflects the gravity of the provable conduct of the accused person unless, in exceptional of circumstances, the charge is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society or the protection of the accused;"

So we had lifted it from the 1999 legislation.

Sen. Sturge: Madam Chair, with respect to the issue raised by Sen. Chote, I am wondering, with respect to 8(a), if we can perhaps, to address that issue after the word "evidence", insert the words "available at the time of the initiation of such discussion". Because what one has to take into account is what is the mindset of the accused or the suspect when one initiates a discussion with him, a plea discussion.

So if one is initiating a plea discussion with a suspect, not only must there be full disclosure, but his mindset and whether he ought to proceed to embark upon any discussion would be based on the evidence available at the time. So he may start off or if it is not amended and you say it is not disclosed by the evidence, the evidence at what stage. Because they may not have sufficient evidence or any

evidence at all when they initiate the plea discussions, but by the time or later down they may have such evidence and therefore he would have been induced at a time when he ought not to have been induced.

So that, to protect against such a situation, I agree with Sen. Chote, there ought to be full disclosure, but the full disclosure must come at the time when you initiate the discussion because that is what informs his mindset. So I simply included some words which will mean that it would read, "is not disclosed by the evidence available at the time of the initiation of such plea discussion".

Mr. Al Rawi: Madam Chair, if I may address Sen. Chote's general enquiry and also the recommendation raised by Sen. Sturge. The issue of where we treat with disclosure is certain, we must treat with disclosure and we have in clause 11 of the Bill which is at page 10.

In clause 11(1), we treat with the disclosure before charges are laid and 11(2), we treat with disclosures after charges are laid. But then there is a circumscribing of disclosure in subclause (3), which again comes from law. And again, the whole administration of justice, interest of justice argument.

So disclosure is treated with in clause 11. Insofar as the thought is related to evidence and the qualification that it perhaps should be evidence available at the time. I would have thought it perhaps a better fit that we have as wide a description as we do in (a) that that is an offence that is not disclosed by the evidence, because to limit it to a particular point in time, may unwittingly cause us to be out of the system for undue purpose.

Sen. Sturge: Hon. Attorney General, whilst I understand what you are saying, the reason why the time is important is, you are going to make an offer of a plea

discussion with someone where the evidence against him might be entirely weak. For him to make a viable determination as to whether he should take the bait, so to speak, and engage in those discussions with you, he ought to know what evidence is available at that point in time. So it has to be the evidence that is available at that point in time. Because, if there is no evidence available, and, as I understand it, proceeding on what you have said with respect to the clause 11 disclosure, I am not convinced that the clause 11 disclosure is, in any event, full disclosure.

Mr. Al Rawi: It is not. Because of the application of clause 3 where there is a discretion to withhold all of the evidence in certain circumstances—well, not all, some of the evidence in certain circumstances. So you are right. I had hoped to persuade consideration of clause 8together with clause 11, as we must read the two clauses together, and the hon. Sen. Sturge is correct, Madam Chair. There is not a blanket. You must disclose all evidence, particularly because the whole balancing rights and the ability to come out of the plea agreement is definitely there. But then again when you go to the plea agreement section, in section 4, you must put all of these matters before the court, because the court is then seized in the plea agreement of all the particulars disclosed then as it relates to the plea discussion.

So we preferred to maintain the balance as we did, 8 simply saying you shall not enter in some circumstances. Clause 11 certainly saying that, even before:

> "If plea discussions are initiated before charges are laid, the prosecutor shall inform the suspect of the allegations against him and"—further—"provide the suspect or his Attorney-at-law with a written summary of the evidence against him."

Albeit that subclause (3) of 11 does certainly say:

"Nothing contained in…(1) or (2) is to be construed as requiring the prosecutor to disclose—

(a) all of the evidence…or

(b) the names of witnesses or any other information…

if the prosecutor is reasonably of the view that such information should not be disclosed at that stage and the suspect or accused…is not thereby misled or prejudiced."

Sen. Sturge: I understand, but I have no difficulty with not disclosing the names because there is good reason having regard to the climate in which we live. But I have looked at the other pieces of legislation, similar pieces of legislation under jurisdictions, the US for instance, the UK and I believe even in Jamaica. Plea discussions and plea agreements and legislation of this type is premised on the basis that there is full disclosure.

So, I do not believe it could be right for us to be proceeding along the old common law rules of disclosure that gives a prosecutor, the prosecutor himself the discretion to withhold and for him to decide, in his opinion, what is material evidence that should be available to you or not. It should be, as far as possible, you withhold information that protects your informants or your witnesses and so on, but outside of that—or information that would lead to the identification of who the informant or witness is. But outside of that, in keeping with all jurisdictions that proceed on this basis there is no reason why we should continue to go with the old common law rules of disclosure and every reason why disclosure should be full. So that when you make a decision to initiate discussion you are informed fully, rather than it is partial disclosure and you are in essence in a position where

you may make a decision that is not based—

Madam Chairman: Sen. Sturge, just a second, I think you—yes, Sen. Solomon.

Sen. Solomon: Just to add to that, Attorney General. If you could imagine that you are advising a suspect and the prosecutor is giving the impression that there may be evidence that he is holding but not disclosing, it may lead the suspect or defendant into a false sense of security or insecurity that there is something else they may have if he does not take the agreement. So the flip side is what is not said can lead to fear, inducement, vulnerability, you can see the threat there.

Sen. Chote SC: Thank you, Madam Chairman. I am not sure whether the requirement for full disclosure should come in 8 or 11. But there are two important reasons for me thinking that there should be full disclosure. One, this legislation has to be married with the Criminal Procedure Rules, in particular, rule 7(3)(i) which unfortunately I did not walk with on this occasion, but which deals with disclosure. And on the last occasion, I believe Sen. Heath had made a very valuable point to say, that if you want to encourage persons to engage in plea bargaining so that the system of justice can move expeditiously, you really need to show them, having regard to our culture, we need to show the suspect or the accused person that his back is close to the wall, if not against the wall, that the prosecution has good strong evidence against him, otherwise he is not going to bite. That is the reality. He will think that perhaps he can stay in the system and play it and have his case thrown out.

So it is in the interest of the prosecution, I think, to have full disclosure so that the suspect or the accused person will think, listen, there is no point in me wasting anybody's time in the face of this kind of evidence. And I thought that

that was a powerful point made on that occasion. So I do agree with Sen. Sturge that there must be full disclosure. We cannot get around it because if we do not say that in this piece of legislation then we will be at variance with the test or the requirement set out in the Criminal Procedure Rules, which will just be confusion.

Mr. Al-Rawi: Madam Chair—

Madam Chairman: Attorney General.

Mr. Al-Rawi: Thank you, hon. Senators, for enlarging the thought around this. First of all, I would like to respond by saying that there is something else in the mix that we need to consider, which is persons testing the waters as to the strength of the prosecution's case. It fits in to whether your back is close to the wall or against the wall, true. But in this particular system we may very well find persons utilizing the system to simply poke holes—I cannot say fishing expedition because you are entitled to full disclosure at stages. The only place where we have a limitation on disclosure is because of the stage at which that disclosure is being made and that is not at the plea agreement stage before the court.

The judge still has to test the level of disclosure, but the disclosure that we are optimizing here is in fact the current disclosure, which is the common law disclosure, the standard in common law. What we are being asked to consider, and usefully so, is putting a statutory provision now to say, let us move away from the common law and let us give full disclosure at statute now. And my fear with having two systems of disclosure afoot, is that we may unwittingly be opening a system for abusing the process by treating with disclosure differently from the common law position. That is just one of the things in the pot.

I did catch Sen. Sturge saying that okay I can understand the rationale in 11

where you are prescribing against the names of witnesses, but this door of saying that all the evidence supporting the case does not necessarily need to be disclosed. It is really in effect putting into statute what the common law position is.

Sen. Sturge: No, no, that is not what I was saying. I was saying what you can keep out are the names, so any evidence that would lead to the accused discovering who the persons are, who the witnesses providing this information are. But I am saying that all of the evidence available at the time ought to be disclosed and I understand what, My Lady, through you, I understand what the Attorney General is saying in terms of two disclosure regimes. But as it stands now, when we deal with absolute immunities and conditional immunities for persons of this nature who are providing information going to testify, there is full disclosure in that regime.

So although we still operate under the common law, when you have an accomplice vel non giving evidence, the DPP engages in what is full disclosure, he gives you everything he has. And that is why I am saying it is necessary in this Bill that we, in essence, put in statutory form what already exists with respect to accomplices vel non, which is full disclosure.

Mr. Al-Rawi: Madam Chair, it is a very useful position to consider, but now we are going into the vel non category which can obviously find immediate similarity to this because we are in the similar circumstance of the DPP engaging via written and expressed approval under clause 6 of the permission to enter, et cetera. But the caution that I really have here in not accepting the submission is that whilst we put a positive obligation with the you "shall" for disclosure, "a written summary of the evidence" and disclose. It may be argued that that disclosure is in fact now an

absolute one as opposed to the cautionary one that we come up with in 11. So the intention behind crafting clause 11 as it fits into our fulminations on the other clause that we are really looking at, is to try to cast as careful a word smiting over what the common law position is right now and to achieve the balancing between the two particular pots.

Sen. Sturge: But the common law as it is right now is full disclosure when you are dealing with, because this is an accomplice vel non. If you are bargaining with someone, you are bargaining with him, most likely, for him to give evidence against someone and therefore you are saying this is what we have against you, we are going to use you, we are going to give you a deal and this is what we will give you in exchange for X. And if you are going to bargain with that someone, under the common law, the accused persons who are going to be charged on the basis of his evidence are entitled to full disclosure already. So that it is not two different regimes. I am not saying full disclosure, full stop, applying across the board. We will still maintain the common law rules of disclosure with respect to everyone else, but when we are dealing with plea discussions, we ought to have full disclosure and therefore the statute should be on similar terms with the common law.

Sen. Chote SC: Madam Chairman, through you if I may, hon. Attorney General, the more I look at this clause 11 the more I become concerned. If I may take it step by step. I know I am jumping ahead but that is because we sought to knit it back to 8. We are talking about if plea discussions are initiated before charges. So we are talking about the suspect situation, pre charge.

"…the prosecutor shall inform the suspect of the allegations against him…"

Now, all that means in criminal law is that you tell the person that it is alleged that on so and so date and so and so time we have reasonable grounds to suspect that you committed whatever offence it is. So those are the allegations as they operate within the context of the criminal law. And then the prosecutor has to give him or his attorney at law a written summary of the evidence against him.

7.30 p.m.

Now, disclosure requires the provision of relevant material to someone who is charged, an accused person, which may not be evidence against him. So let us say, you have the situation where a witness says that, "I saw X entering a room, and I saw him touch the window and push the window open and enter the room", and thereafter whatever crime is committed. When they test for fingerprints, there are other fingerprints on the window, or whatever that was pushed. Now, that is exculpatory material which is disclosable in law, and I think in fairness to the suspect he ought to know that this is in the possession of the State, because otherwise this is a charter for a prosecutor to hide exculpatory evidence, if we say that all you have to give him is a summary of what you have against him.

In fact, that is to mislead him into an agreement and that would be improper. At this stage, quite frankly, I do not know how it can be fixed, but I respectfully ask, through you, Madam Chairman, that consideration be given to looking at this whole issue of disclosure fully and thoroughly.

Mr. Al-Rawi: Madam Chair, I thank, through you, hon. Senators for their reflections on a very important clause; 8 and 11 are tied inextricably, and operate in tandem when they are to be construed. It may be that a disclosure of evidence which favours the defence or injures the prosecution might be the formulation of

words. So that we are actually contemplating a written summary of evidence, including evidence that may favour the defence or injure the prosecution, and then prescribe the circumstances where that may be withheld for proper reasons as (3) tries to carve out, at least certainly with respect to the names of witnesses. Would you, Madam Chair, just give me a moment to consult with the CPC team?

Sen. Sturge: But before doing so, hon. Attorney General, through you, Madam Chair, the formulation just presented by the Attorney General is actually the common law on disclosure. So the common law on disclosure is that you present to the person any evidence that may assist his case, or destroy the case for the State, but if you leave it as narrow as that, that is not full disclosure. It also may be apt to mislead and it does not necessarily force the prosecutor to give all that he has, and the prosecutor would be the one under common law who makes the determination as to whether that evidence is capable of undermining his case, or assisting the case for the defendant, and that is the problem with common law disclosure. So that is why we are asking for full disclosure, so that we take away from the prosecutor the ability to make that decision.

Madam Chairman: Attorney General, should we stand down clause 8?

Mr. Al-Rawi: Madam Chair, it may be useful if we just fleshed it out just for a little bit.

Madam Chairman: All right. Well then, we will take the Leader of Government Business; we have the Procedural Motion to take.

Senate resumed.

PROCEDURAL MOTION

The Minister of Energy and Energy Industries (Sen. The. Hon. Franklin

Khan): Thank you, Madam President. Madam President, in accordance with Standing Order 14(5), I beg to move that the Senate continue to sit until the completion of the business at hand, inclusive of the matter on the adjournment.

Question put and agreed to.

Committee resumed.

CRIMINAL PROCEDURE (PLEA DISCUSSION AND PLEA AGREEMENT) BILL, 2017

Mr. Al-Rawi: Madam Chair, could I suggest, or rather could I ask through you, we are on clause 8 and I am wondering—I am so sorry. We are on clause 8 and the discussion that we are having in relation to the disclosure of evidence, the extent of evidence to be disclosed really will tie in to clause 11. I wonder if hon. Members can agree that we can treat with the observations as to the extent of disclosure in 11, because the architecture of the Bill is that we treat with prohibitions in 8 and then we make it mandatory to treat with the disclosure of evidence in 12. The two are to run in tandem. Is there anything else that hon. Members have that hold them back from making a consideration on clause 8 as it is now?

Sen. Mark: Madam Chair, with the greatest respect to my hon. colleague, could I suggest that we stand down both 8 and 11 because of the interconnected nature of both, and we go on to 9 and 10 and leave 8 and 11 until we are able to arrive at and show some consensus. So if I can respectfully suggest, Madam Chair, that we stand down clauses 8 and 11 and we proceed to 9 and 10, and thereafter we could go on to 12.

Mr. Al-Rawi: I have no objections.

Madam Chairman: So, hon. Members, we will stand down clause 8. When we come to clause 11, I will stand it down.

Sen. Mark: Yes. Thank you.

Clause 8 deferred.

Clause 9.

Question proposed: That clause 9 stand part of the Bill.

Sen. Sturge: Madam Chair, if we can perhaps insert the words:

"shall not initiate or engage in a plea discussion with the accused person or suspect in the absence of his Attorney-at-law"

So that, between the words "not" and "engage" we put "initiate or".

Mr. Al-Rawi: Sure. That is agreeable to the Government, Madam Chair. After the word "not" appearing in the third line, and before the word "engage" insert the words "initiate or".

Sen. Ramdeen: Madam Chair, through you, to the Attorney General. AG, how is it that we envisage that the representation of a suspect or an accused by an attorney-at-law is going to come to the knowledge of the prosecutor? Because in clause 10, the—

Madam Chairman: Sen. Ramdeen, you are asking an operational issue at this stage, or is there another amendment? Sen. Sturge just put forward an amendment to the clause. Is there something specific you want to raise?

Sen. Ramdeen: Yeah. What I want to raise is that you have the right to tell the accused he has the right to an attorney, but the flip side of that is that this particular clause requires the prosecutor to do something, or not do something based upon the fact that the man has an attorney, but we have put nothing in the law that requires

the prosecutor to make any enquiries. So that, how is it that we envisage that this is going to work where the obligation under clause 9 is not—

Mr. Al-Rawi: Understood. I think it works as a matter of flow because it is an absolute prescription against engagement and, therefore, he would have to initiate a process of asking, and then certifying, and then recording that. So it would be a matter of recorded evidence. So the prosecutor will say, well I interviewed you, you do not have, and then he records his steps along the way because that must come to the attention of the court.

Sen. Ramdeen: We have a form that engages 9?

Mr. Al-Rawi: Yes.

Madam Chairman: So I shall now put the question on the amendment. Hon. Senators, the question is that clause 9 be amended as follows:

By including the words "initiate or" after the word "not".

So it will read as follows:

"When an accused person or suspect is represented by an Attorney-at-law, a prosecutor should not initiate or engage in a plea discussion with the accused person or suspect in the absence of his Attorney-at-law."

Question put and agreed to.

Clause 9, as amended, ordered to stand part of the Bill.

Clause 10.

Question proposed: That clause 10 stand part of the Bill.

Sen. Chote SC: Madam Chairman, I am sorry, if I may? Two things concern me with respect to this particular clause. One, we have someone who is unrepresented but who may fall into the category of being an accused person, and that accused

person may be vulnerable for one reason or the other, whether it may be some mental disability, whether the person might be a juvenile and that kind of thing. So, I do not know how that special category of person may be protected because they are not referred to, or there is nothing which specifically refers to any added cautions to be taken when you are dealing with a vulnerable accused person.

The second thing is where you have an accused person who is unrepresented, having regard to what has been happening in the courts, we see that the mental health, the psychological and psychiatric evaluations of suspects and accused persons ought to be done at the earliest possible opportunity. And certainly, if the person is unrepresented there ought to be some provision that before he enters into this kind of discussion with a prosecutor, that he should have a psychological and psychiatric evaluation. I am respectfully proposing that a subclause, however it is worded, that something be included to this clause to provide for the mental health aspect, and also that there be some provision for the protection of vulnerable accused persons like juveniles.

Mr. Al-Rawi: Madam Chair, thank you. The juvenile one I think I can answer quickly because the Children Act provides for child advocates to be present at any point in time during the juvenile's detention. So that one is taken care of by the operation of Act No. 12 of 2012.

The issue of competence is a very good one. It is certainly something that we can look at. When we dealt with—I forget which Bill it was now—jury, judge only—we did include the concept of competence, a satisfaction as to competence by a simple inclusion there. I am wondering where that can fit into this if we are going to consider it.

Sen. Chote SC: Or perhaps if I could, Madam Chairman, suggest, "a prosecutor may only initiate a plea discussion with an accused person who is competent", perhaps, and then I do not know if there may be some explanation of what "competence" means in the context of the Bill.

Mr. Al-Rawi: Or if we were to include that the prosecutor is satisfied that the person is competent, requiring a further step.

Sen. Chote SC: Madam Chairman, how will the prosecutor know?

Mr. Al-Rawi: Exactly.

Sen. Chote SC: You see, and the prosecutor has no power over an accused person. So it really has to be the legislation that gives the power.

Mr. Al-Rawi: How about if we look at (c) on page 9? Here is where we put in the final caveat.

> "the Court has been informed of the matters set out in...(a) and (b) and approves of the initiation of a plea discussion."

We can include "competence" here. So the Court has been informed of the matters set out in (a) and (b) and is satisfied as to the competence of the accused or suspect?

Sen. Chote SC: Well the thing is, it is coming at the end when it should come before, because when he is being informed of certain fundamental things having to do with the plea discussion, he is indicating that he wants to represent himself, he is indicating that he is agreeing to plea discussions. To me, the test for competence must be before he does all of those things.

Mr. Al-Rawi: Remember that the court has to approve of the initiation of the plea discussion, so they all come to the court's attention. Ultimately the safeguard is to

make sure that this person was compos mentis, not of any diminished capacity, and that therefore the agreement cannot be vitiated by an incompetent circumstance. So the sweep-all provision in (c) was really put in there to make sure that the court, which has the overriding supervision of the initiation of the plea agreement—plea discussion, sorry—is satisfied. So I was wondering in the construct of this, in the flow of this, whether we could include the concept of competence in paragraph (c).

Sen. Chote SC: Hon. Attorney General, through you, Madam Chairman, we cannot do that because we will be wasting time. If we have someone who is not competent, or who is a vulnerable accused person for whatever reason, we would have the prosecutor going through the steps set out in (a) and (b), going before a court and then the court having to say, "Oops, doesn't appear as though this man is competent, or I have reason to believe that he should have a psychiatric or a psychological evaluation". It will be a waste of time.

Sen. Sturge: I was wondering, I see in sub (c) that "the court approves of the initiation of a plea discussion", but from the way it works, this approval comes after the fact, is that right?

Sen. Chote SC: Yeah.

Sen. Sturge: The thing is if this person is not competent, I wonder if one can rely on his evidence in any event. So it is time wasting.

Mr. Al-Rawi: So first of all, it is the accused person. So a person who has been charged, the person is before the court.

Sen. Sturge: It has to apply to a suspect also, I imagine?

Mr. Al-Rawi: Yep. So just dealing with 10. So in 10 we specifically deal with an accused person who is unrepresented. We cleave each one of the categories. So in

subclause (2) we deal with the suspect. Right? So in 10(1) in subclauses (a) and (b), you are before the court, you have been charged, you have been brought before the court, there is a plea discussion to be had and, therefore, there is an opportunity to tell the court, look this is a plea discussion just about to have, this man is unrepresented and the court must give its positive positioning.

So whether it comes before or after, the point of competence is still there because we are still going to engage in time, nonetheless, to have a competence issue put before a court. So I do not think that (c) coming last in the line pre-empts the fact of—well sorry, avoids wasting time, or putting it forward avoids wasting time, because to get to the court being invited to consider whether a plea discussion should happen, you are going to have material in any event to get there. So I thought if we were going to treat with "competence" at (c) at least insofar as we are dealing with an accused and not yet treating with suspect which comes in subclause (2), that we could not disturb the flow as it is set out here. If we come down to subclause (2), the question is whether that is similarly safeguarded.

Sen. Chote SC: Madam Chairman, if I may? Hon. Attorney General, what we are trying to say is that the way subclause (c) is worded, it does not bear out, or it does not have the meaning that you would like it to have.

Mr. Al-Rawi: Of a prior involvement and competence satisfaction.

Sen. Chote SC: Yes. If subclause (c) said that before the steps taken in (a) and (b) are engaged upon, the court must satisfy itself that the accused person is competent, and then you can put in the part about approving the initiation of the plea discussion. I am not a draftsperson, but I think that certainly it must be made clear.

Sen. Dr. Mahabir: Can I come in here at this point?

Mr. Al-Rawi: Sen. Chote?

Madam Chairman: Sen. Mahabir is asking—[*Interruption*]

Mr. Al-Rawi: Sorry. Madam Chair, if I could just clarify? So from a process view, somebody is accused, they are charged, the police are dealing with them, sorry, now a prosecutor approved by the DPP is dealing with them, the issue comes up, look you are unrepresented, how do you know you are unrepresented? Well, I have told you, you have certain rights to be represented. Please sign this form, telling me that in fact you do not want that. If we were to then go and say, well okay I have got the form saying I do not want to be represented. I now can prove to somebody else that you said you do not want to be represented and I have given you the positive obligation discharged that I told you that you could be. The next step then ought to be, knock on the door of the court and say, hello, here are the forms. This person is about or proposing to enter into plea discussion, but we need the court's positive approval for this, and the satisfactory markers to cross over would be competence in particular and the court's approval for that process. Is that correct?

Sen. Chote SC: That is so.

Mr. Al-Rawi: Okay. Madam Chair, I am asking our drafters to try and reformulate that clarity that should be poured into subparagraph (c) to capture that in the meanwhile.

Madam Chairman: Sen. Mahabir wanted to speak.

Sen. Dr. Mahabir: Yes. Thank you, Madam Chair. I think this is a critical issue. I raised it earlier with respect to an accused person who only has a justice of the

peace to assist him while he enters into this agreement, and I will raise it again. You see, it is important that we satisfy ourselves, that the individual who chooses to be unrepresented has the mental capacity to make that decision. And so, I, like Sen. Chote, would like to see this up front. So that under (a), I would recommend, Attorney General, 10(a), "the accused has been subject to a psychiatric evaluation'. So it would read:

> the prosecutor shall not initiate a plea discussion with an accused person who is not represented by an Attorney-at-law unless—
>
> (a) the accused has been subject to a psychiatric evaluation.

That would give me the comfort that in the absence of an attorney, at least there is another line of defence for him. He has been evaluated by the relevant specialist, and so we know for sure that this accused person or the suspect has the mental capacity to make the decision that he does not wish to be represented by an attorney. So I put it for your consideration, the accused has been subject to a psychiatric evaluation.

Mr. Al-Rawi: We are going a step further. We are asking that to be done by a judicial officer.

Sen. Dr. Mahabir: Okay.

Mr. Al-Rawi: So we are on the same page but we are putting it in the sanitizing light of a court's discretion and consideration. So that is what we are looking at in making clear the language to (c). The flow of it, to get to the point of saying somebody wants to be represented or not still has to be traversed, and the way that you tell a court that somebody does not want to be represented is to certify in writing, I told them they have a right; they said they do not want to do this; they

have signed this; the justice of the peace; they take it before the court; the court says okay I have evidence that somebody is saying they do not want to be represented; they then ask the person, do you want to be represented; and then they go through these steps on competence to make sure this person has the capacity, or is not under any other disturbance to fetter the consent.

Sen. Mark: Madam Chair, this entire clause, there are some areas that are scary and I want to bring to your attention those areas that have me a bit concerned. And through you, I would like to ask the Attorney General, in clause 10 when we go the subclause (b), there is roman (ii), it reads:

"(ii) he agrees to the plea discussions being recorded;"

But there is no provision that tells me, Madam Chair, how is this recording going to be facilitated. Is it going to be videoed; is it going to be in writing; it is going to be both? Remember this is coming against the background where we are being told in clause 10 that the person has voluntarily said they do not want to represent themselves, or they want to represent themselves.

Well I agree with Sen. Mahabir, that person needs psychiatric help because I cannot see a sane person saying that. That person is mad.

Madam Chairman: Sen. Mark.

Sen Mark: Or needs psychiatric aid, Madam. And Madam Chair, I would also like to ask the Attorney General to have a provision in this clause specifically dealing with the whole issue of legal aid for those persons who cannot afford a lawyer. That must be included here. I am asking the Attorney General to consider this. And, Madam Chair, when we go to the forms you would see in clause 10(b) it talks about Form 1, and then when we go to subclause (2)(b) it talks about Form

1A. I would like you to join me and look at Form 1 and what Form 1 says and we believe ought to be expanded.

Madam Chair, and through you, to the Attorney General, where in this form that this person who says he wants to represent himself in plea discussions? There should be a provision in this Form 1 and Form 1A indicating that—I do not know, the people will deal with the language—that person has not been not threatened. There must be a provision here that indicates that before that person signs, he knows that there is a provision that talks about that—is that here?—of his own free will.

8.00 p.m.

Madam Chairman: But your point is noted, Sen. Mark and the Attorney General, I am sure will address it. Right?

Sen. Mark: Thank you, Madam Chair.

Sen. Sturge: Madam Chair, I just—

Mr. Al-Rawi: Could I just inch my way forward to address some of the proposals that are coming, Madam Chair, if that is okay? Sorry, Sen. Sturge. We are proposing to include language of this type just for general consideration. So this is to take care of the lack of full description in paragraph (c) which will have to be repeated into subclause (2) when we come to that.

So we are proposing that the court: one, has been informed of the matters set out in paragraph (a) and (b); two, is satisfied that the accused is competent to enter into plea discussions and conclude a plea agreement, and three, approves of the initiation of a plea discussion. So that the court would have to traverse all of those elements for an unrepresented person. We can take that, substitute paragraph (c)

which is on page 9, (b), in the middle of the page, substitute it with those words, and then look for a similar reflection into subclause (2).

Relative to the observation by Sen. Mark of the person not having been threatened or coerced, the form, in fact, says: "of my own free will and volition", which actually puts that in there. We are looking at including in subclause (1)—right. In reference to the recommendation that subclause (10) also include the reference to if you cannot afford that there is legal aid. That is specifically treated with in clause 12:

> "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…
>
> …right to enter into a plea discussion…
>
> if the accused person cannot afford…Legal Aid…
>
> …right to enter into a plea discussion with a prosecutor…"—et cetera.

So that is taken care of in clause 12 specifically. Because that is when you are first coming to the court that the court tells you all of these things. It therefore leaves only open—

Sen. Mark: So what about the suspect, AG?

Mr. Al-Rawi: So it therefore only leaves open now the treatment of "suspect" in subclause (2) but I did truncate, Sen. Sturge. At this moment, Madam Chair, I do not know if this may be an appropriate time for him to re-join?

Madam Chairman: Sen. Sturge.

Sen. Sturge: Yes, I was wondering—and it may very well deal with Sen. Mahabir's issue—after the words, the opening words in clause 10(1):

> "…not represented by an Attorney-at-Law…"

Perhaps, we could insert a clause:

> Unless the prosecutor first notifies the Legal Aid and Advisory Authority and the Authority provides a duty counsel for such accused person.

So that basically, we are not at the stage where he is first brought to court, we are even before that. So before you initiate the plea discussion, the prosecutor, who stands to benefit by this discussion, has to contact—since he is unrepresented, contact the Legal Aid and Advisory Authority and the Authority provides a duty counsel.

Mr. Al-Rawi: So, on the Legal Aid and Advice Act, actually I have just pulled it up, so section 4A of that provides for "Duty Counsel". This is the amendments we had put in in 2012.

> "The Director shall prepare and maintain panels of Attorneys-at-law…known as Duty Counsel who are willing to—
>
> (a) provide legal representation for a minor as soon as possible after the minor is detained on suspicion of having committed an offence; or
>
> (b) provide legal representation for persons detained on suspicion of having committed a capital offence or such other indictable offence as the Minister may, by Order, subject to negative resolution of Parliament, specify."

So the duty counsel, we have the opportunity in 4A of the Legal Aid and Advice Act, to traverse the matters described and we can probably enter into an amendment of that order to match up with this and we could perhaps give that undertaking. Would that help us at all in that regard?

Sen. Sturge: It would, yes.

Mr. Al-Rawi: Yes. Madam Chair, so what we would specifically propose is that the Government look at the Order produced under the Legal Aid and Advice Act, particularly section 4, and then we would include the matters for which plea discussions may be contemplated, an unrepresented accused. So we can specifically treat with that to make sure that duty counsels are available as a necessary safeguard. I thank Sen. Sturge for raising that.

Sen. Mark: And Madam Chair, before you proceed, may I just indulge you, again, for a few seconds? I did ask the Attorney General to clarify when we talked about being recorded, in what form? Is it going to be video recording, Ma'am or writing, or both? I would like him to clear the air on that for me. And, as I am on this point, Madam Chair, may I ask you—

Madam Chairman: Sen. Mark has asked about being recorded on page 9, what form of recording? Is that going to video recording?

Sen. Mark: Is it going to be video recording or in writing or both?

Mr. Al-Rawi: The truth is that we had not condescended to say either one really because of technology being specific. The intention, as we are, in fact, outfitting right now. We have started already. We have 14 video recording suites and they are all being utilized as a mandatory rule for recording. So the intention is that they are video recorded, but I do not know the functionality of these things on a continuous basis so we had opted for recording. The point is that there should be—I can appreciate the argument that even an audio recording can be doctored so, too, can a video recording but we had not specified specifically video or not, but it will certainly be recorded. That is one of the safeguards specifically for this person

who is a suspect and not yet before the court.

Sen. Chote SC: I am sorry, Madam Chair, but are we looking at—

Mr. Al-Rawi: Page 10, roman (ii), top.

Sen. Chote SC: Page 10. No, 9?

Madam Chairman: It is clause 10(1)(b) on page 9.

Sen. Chote SC: Right, so what we are looking at there is someone—

Mr. Al-Rawi: I see. I was looking at the other one, apologies.

Sen. Chote SC: Yes, someone who has already been charged. So I think the mischief that Sen. Mark is trying to address is where you have someone, who still may not have spoken to an attorney-at-law, is being recorded as making any admissions of guilt and that being able to be used against him at any time thereafter, if he enters into the plea discussion or if he says at a later stage, he does not wish to plead guilty. So I am thinking that, perhaps, how we could address that issue is that we can say: one, he desires to represent himself, and two, he wishes to engage in plea discussions full stop. So you take out the whole possible prejudice, possible self-incrimination, possible breach of constitutional rights by simply saying that the person has indicated that he wishes to engage in plea discussions.

Mr. Al-Rawi: That would be very agreeable.

Sen. Chote SC: Thank you.

Mr. Al-Rawi: Perhaps would you mind assisting us with the language to roman (ii) just one more time?

Sen. Chote SC: He agrees—

Madam Chairman: Where are you?

Sen. Chote SC: Sorry, I beg your pardon, Madam Chair. We are at page 9,

10(b)(ii) and—well (ii) would read, we would delete the words "agrees to the plea discussions being recorded" and we would instead have: he agrees to enter or he wishes to enter into plea discussions. So we take off everything after "he" and you say: he wishes to enter into plea discussions.

Mr. Al-Rawi: I am just worried about the word "wishes".

Sen. Chote SC: I know, I know.

Sen. Dr. Mahabir: He agrees. He agrees.

Mr. Al-Rawi: Would agree be any different?

Sen. Chote SC: No, because you see when you agree to something, you are giving away your right. When you agree, you must make sure that the person is in a position to agree. He has indicated his willingness to enter into plea discussions.

Mr. Al-Rawi: Would it help us that (c) as redrafted is all subject to the court's approval?

Sen. Chote SC: No, because you see, hon. Attorney General, (2)—

Mr. Al-Rawi: We could use "desires" as we have in roman (i).

Sen. Chote SC: Yes.

Mr. Al-Rawi: Yes.

Sen. Chote SC: He desires to enter into plea discussions.

Mr. Al-Rawi: Madam Chair, my only question here, the rationale for including the recording was as a safeguard to both parties: the victim and—sorry, the accused and the prosecution to make sure that nothing untoward can be alleged. Sen. Ramdeen had raised very usefully the whole reliance upon confessions, et cetera. So I am wondering, even though the right and the reflection on self-incrimination may arise, insofar as it is subjugated to the due process of the court,

because the court is specifically the one to—all you are doing is you are indicating your position, then you have got to go to court, the court then establishes your competence. Do you think that we would lose anything by having that potential safeguard there?

Sen. Chote SC: Madam Chair, to the hon. Attorney General, certainly we would. We would be taking away the persons, the accused person's right to silence which is constitutionally protected because he would be giving an indication with respect to his liability for the criminal offence for which he is before the court. He would also be giving an indication which derogates from his right to incriminate himself. Now, my understanding is, as far as possible we want to keep within the constitutional remit and I do not see how we are doing that.

Mr. Al-Rawi: Accepted, accepted, yeah.

Sen. Mark: May I just add, Madam Chair, through you to the Attorney General? Attorney General, if you go to 10(1)(a) and you look at roman (i), right, could you not incorporate the point that Senior Counsel is advancing, Sen. Chote there, as well as the right against self-incrimination? Because you remember—

Mr. Al-Rawi: That is a constitutional right so there is an expression of that already in the Constitution as the supreme law.

Sen. Mark: Yeah, but you would not want that because you need to inform. "Remember ah lot ah people not too enlightened as us" so you need to inform these people of their rights.

Mr. Al-Rawi: Let us also put on—it is important to bear in mind that clause 33 specifically treats with evidence.

"Evidence of the following matters is not admissible in civil or criminal

proceedings against the accused person who entered into a plea agreement or is a party to plea discussions:

(a) an offer to enter into a plea agreement or a statement made in connection…

(b) a statement made during plea discussions or a plea agreement hearing; or

(c) a plea agreement or guilty plea, which is later withdrawn."

So this is the safeguard against any potential affection, adverse affect to your right against self-incrimination.

Sen. Ramdeen: AG, I do not think that that will take care of the mischief. This is about evidence that can—

Mr. Al-Rawi: But I do agree with Sen. Chote that we can remove the recording aspect from roman (ii).

Sen. Ramdeen: No, I think the point that Sen. Mark is making—Sen. Chote's point is on a substantive issue. The point that Sen. Mark is making is that before an accused person enters into, the purpose that you are having roman numeral (i) in 10(1)(a) is because purpose of this is to underpin—

Mr. Al-Rawi: I see, I catch you now. So putting forward the expressed obligation to inform of your right against self-incrimination.

Sen. Ramdeen: Yes, procedurally.

Mr. Al-Rawi: Yeah, we could do that.

Sen. Mark: And may I just say one more thing, Madam Chair, with the leave of the hon. Attorney General, 10(1)(a)(ii) on page 9 of the Bill I have here, may I read it, Madam Chair?

"that he may elect to have a third party of his choice present during the plea discussions;"

I want to just make a slight amendment for the consideration of the Attorney General. After the word "present", I want to add or include: before entering any plea discussion and delete the words "during the". "Yuh following, Madam Chair?" So we are saying that the person may elect to have a third party of his choice present during the plea discussion, right, we would like to have: before entering any plea discussion.

Mr. Al-Rawi: So it is the prosecutor's obligation that we are spelling out here. The prosecutor has to inform the suspect the right to be represented by an attorney-at-law, that he may elect to have a third party of his choice present, and I think we would have to add in the right against self-incrimination here as well.

Sen. Solomon: And a legally appointed attorney. Legal aid, if he cannot afford an attorney.

Mr. Al-Rawi: Yeah, so clause 12 is at first hearing so we can do the legal aid.

Sen. Solomon: And AG, also in terms of juveniles and mentally handicapped persons, you need some sort of protection: social worker or guardian. [*Interruption*] Through you, Chair, sorry. Through you, Madam Chair, the safeguards for the vulnerable suspects and accused.

Mr. Al-Rawi: Just for clarity, Madam Chair, through you, I am proposing that we include the following positive obligations in the various places where we treat "accused" and "suspect": the right to be presumed innocent; the right against self-incrimination and the legal aid position. So that we include that into 10(1)(a)(i) onward, that we include those positive obligations. That we, at paragraph (b),

would change the wording of roman (ii) to say instead: he desires to entire into plea discussions and delete the words there following up to word "and" and then, in subclause (2)(a), with respect to "suspect", that we would include the similar expression of rights that the prosecutor must inform about. So that would be: presumed innocent, legal aid, right against self-incrimination.

Sen. Solomon: Yeah.

Mr. Al-Rawi: Where we are getting to now is what Sen. Mark and Sen. Daniel Solomon both raised:

> "that he may elect to have a third party of his choice present during…plea discussions;"

We can also—well, what we wanted to put there was the fact that the person knew that that person could be there for the entire time. Nobody could put them out, et cetera. May I just enquire through you, Madam Chair, what the further mischief here is? Because this is where the prosecutor tells the suspect what he is entitled to, it is not the fact of it happening just yet. I am trying to figure out the language that was suggested about the agreement.

Sen. Mark: Oh yeah. What I was saying, AG, is that how it was reading here is that the individual in question, if he does not have an attorney, he could elect to have a third party of his choice present and how it was reading is that this could take place during the plea discussions. And I wanted to make sure that the language is very clear that the person would be able to be entitled to this particular third party before entering into any plea discussions. So he must know that it is not during that period that he is going to be having a third party being present, he must have that third party being present before he enters into any plea discussions. That

is the point I was trying to make here.

Mr. Al-Rawi: Bear in mind that what we are doing is we are saying because these persons are unrepresented, they have to go to the court to get permission. So for the accused, you to go to court. The problem with the suspect is that the suspect is not yet charged, so I catch your point further. So you are saying that even before a discussion is entered, that a third party could be there?

Sen. Mark: Yes.

Mr. Al-Rawi: Okay, I understand.

Sen. Solomon: And if I may, hon. AG, through you, Madam Chair, is that when you are dealing with vulnerable suspects in particular, they would require, for instance a juvenile would require some sort of parent or guardian to be there prior to plea discussions being engaged.

Mr. Al-Rawi: But that is in the Children Act for sure.

Sen. Solomon: Yeah, and we need to make sure that also within the mental health guidelines as well that they may not be initially discovered as having some sort of mental health illness, they may have a keen eagerness to talk and please the prosecutor or the police. Those safeguards need to be put in place and I think Sen. Chote had rightfully mentioned that previously. So I just want you to be aware of that. Those rights would need to be regurgitated here as well. Thanks.

Madam Chairman: Attorney General, should we stand down—

Mr. Al-Rawi: Yes, please, Madam Chair. I am asking my team to come up with the appropriate language to treat with clause 10. Just one moment, please.

Madam Chairman: Hon. Attorney General, I think we should stand down clause 10.

Mr. Al-Rawi: Thank you, Madam Chair. The drafters were just asking for instructions on the positions.

Madam Chairman: Sure. So clause 10 is stood down.

Clause 10 deferred.

Clause 11.

Question proposed: That clause 11 stand part of the Bill.

Madam Chairman: Hon. Senators, according to the earlier deliberations, we will stand down clause 11.

Clause 11 deferred.

Clause 12 ordered to stand part of the Bill.

Clause 13.

Question proposed: That clause 13 stand part of the Bill.

Sen. Chote SC: Madam Chair, if I may? 13(1), may I respectfully propose that the words "has the right to" are excised and replaced by: every victim may, by the word "may".

Mr. Al-Rawi: Agreed.

Madam Chairman: Hon. Senators, the question is that clause 13 be amended as follows: that 13(1), the words "has the right" be deleted and substituted with the word "may".

Mr. Al-Rawi: And it will be in subclause (2) as well.

Madam Chairman: So it will read:

"Every victim"—may—"provide an victim impact statement…"

And then in clause 13(2).

Mr. Al-Rawi: After the word "victim".

Madam Chairman: After the word "victim".

Mr. Al-Rawi: Delete "of his right".

Madam Chairman: Right, delete the words "of his right".

Sen. Chote SC: Madam Chairman, may I suggest that "he may"?

Mr. Al-Rawi: That "he may provide".

Madam Chairman: In clause 13(2), delete the word "shall" and substitute the word "may".

Mr. Al-Rawi: No, no.

> "Before a plea discussion is concluded, the prosecutor shall inform the victim…"—that he may—"provide…"

So deleting the words "of his right to".

Madam Chairman: Correct, sorry, my apologies. [*Interruption*] Just one, let me just get it please.

> Before a plea discussion is concluded, the prosecutor shall inform the victim that he may provide.

Correct?

Mr. Al-Rawi: Yes, Ma'am.

Madam Chairman: Yeah, that he may provide a victim impact statement. Yes?

Sen. Dr. Mahabir: Madam Chair, I rather like how it was stated in 13. This is the first piece of legislation that I am seeing which really puts victims at the centre of the law and I thought that a victim who has the right may not necessarily exercise the right.

Mr. Al-Rawi: So may I put it this way? "May" and "has the right to", effectively it is the same thing.

Sen. Dr. Mahabir: But you see, if he has the right, it shows that the victim has rights too, you know.

Mr. Al-Rawi: But Sen. Chote's position is, in fact, I think preferably in terms of the caution because then you are talking about "a statutory right" versus a right per se as a constitutional right.

Madam Chairman: So Hon. Senators, the question is that clause 13 be amended as follows: 13(1) will now read:

> Every victim may provide a victim impact statement explaining the physical or emotional harm, financial loss or other impact that the offence has had on the victim.

Clause 13(2):

> Before a plea discussion is concluded, the prosecutor shall inform the victim that he may provide a victim impact statement and of the restrictions specified in section 14 with respect to the content of the victim impact statement.
>
> *Question put*: That clause 13, as amended, stand part of the Bill.

Sen. Chote SC: Madam Chairman.

Madam Chairman: Sen. Chote, yes.

8.30 p.m.

Sen. Chote SC: Madam Chairman—

Madam Chairman: Sen. Chote, yes.

Sen. Chote SC: I do not mean to—I am sorry, I just got distracted. It is (c), 13(3)(c).

Mr. Al-Rawi: The victim's right to read, that he may read.

Sen. Chote SC: Yes.

Madam Chairman: Just a second please.

Mr. Al-Rawi: Apologies. Well, (c) should read that the victim may read. So the victim is informed of—that is an odd construction. That is a difficult one to recast. May I ask through you, Madam Chair, whether insofar as it is discretionary with me whether the use of the language is still as offensive even though it says "a right to read"? Because you may elect or not elect. Or we can amend this way, Madam Chair. If you look to the chapeau, that is in subclause (3), we could delete the word "of" and now say, "(a) of". We put in, instead of the word "the", so now we will insert the word "of". So we will insert the word "of the". Madam Chairman, "of" in "(a)"; "of" in "(b)" and "that". So it will go:

"the victim is informed—

(a) of the substance and reason"—so that will read there

(b) of the date of the plea agreement"—that will read as it goes—

(c) that he may read"—so delete the "victim's right to".

So subclause (3), delete the word "of" in the chapeau before the "—"; insert in paragraph "(a)" before the word "the" the word "of" at the beginning of the subparagraph. Similarly, insert in subparagraph "(b)" the word "of" before the word "the" at the beginning of the subparagraph; and in subclause "(c)" delete the words at the beginning of the paragraph "the victim's right to" and insert instead "that he may". Would that work Sen. Chote, through you, Madam Chair?

Madam Chairman: Yes. So may I put the question now, please?

Sen. Solomon: Madam Chair, if I may. Hon Attorney General, 13(4)—

Mr. Al-Rawi: Sorry. In "(c)" Madam Chair, we need to delete in the second line

after the word "the court or", we need to delete that word "to". Okay? Sorry.

Madam Chairman: Sen. Solomon.

Sen. Solomon: Thank you, Madam Chair, if I may. Hon Attorney General, subclause (4):

> "(4) If 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."

Are we not here also in the danger of usurping the court's jurisdiction and the court's power to make decisions? Also, that clause appears to me to be somewhat superfluous.

Mr. Al-Rawi: I wonder whether the word "shall" would be read as "may" [*Laughter*] when interpreted by the court.

Sen. Solomon: Madam Chair, I do not know that we should be interfering with the court's power and discretion. We are here in Parliament to make inferences and not to make inferences by victim statements that are or are not apparent.

Mr. Al-Rawi: Madam Chairman, I am torn. There is persuasion in the argument that shall may interfere with the court's discretion, but really there is also prudence in stating expressly that you do not want to necessarily have someone form an adverse inference that you have elected not to do something.

Sen. Ramdeen: I think AG that we should have some—as difficult as it might be, I think we should have some confidence in the judges that administer these criminal trials.

Madam Chairman: Sen Ramdeen. Sen. Ramdeen, you can rephrase. Put that another way please.

Sen. Ramdeen: AG, I trust the judges. This is a matter with admissibility, in relation to evidence that is before the court, and I think the courts are competent to deal with a matter like this, especially something as fundamental as this, because this is simply a matter of whether you are admitting evidence that is prejudicial to the accused. I do not think any court needs to be told in a statute as to how to exercise that inference.

Mr. Al-Rawi: Sure. Appreciate your views. I did not quite catch it.

Madam Chairman: Attorney General.

Mr. Al-Rawi: May I through you, Madam Chairman, invite my colleague, Sen. Chote. Any reflection on the submission that subclause (4) may intrude upon judicial discretion and can be excluded?

Sen. Chote SC: Madam Chairman, quite frankly, I have no view on the matter. [*Laughter*]

Mr. Al-Rawi: It is a safe view, Sen. Chote. **Sen. Solomon:** Through you, Madam Chair, hon. Attorney General—

Madam Chairman: Sen. Solomon, just one second, the Attorney General is—

Sen. Al-Rawi: I do not mind listening because it can allow me to think as well, through you, Madam Chairman.

Madam Chairman: Yes, Sen. Solomon.

Sen. Solomon: The fact that—it is not only the fact that the victim did not give a victim impact statement. It is also that it did not result in any harm to the victim, and that is going further and that is actually inferring the fact that the victim did not have any harm come to him or her, that the court shall not draw on any inference, and that in itself is something I think the court is quite competent to do

on its own. It really should be deleted in my humble submission.

Sen. Dr. Mahabir: Madam Chairman, I endorse that position. I see no benefit in having subclause (4) there.

Mr. Al-Rawi: Madam Chairman, if I could just put onto the record, I welcome the submissions of my learned colleagues. The rationale for including this was borrowed from the Jamaican experience, their legislation, which actually provides for this positively, and really it was to take into account the experience in other parts of the Commonwealth, Canada, et cetera, where it also appears. But really it was because of the novelty of the law, because we are introducing for the first time, this whole concept of a victim impact statement. And, therefore, even though there is a statement that appears on the face of it to interrupt judicial discretion, I am wondering if really we should err on the side of caution. Sen. Ramdeen has made a very useful observation that it is a matter of evidence and that the court ultimately determines evidence. So I am quite frankly torn, Madam Chair.

Madam Chairman: But we need to have—a decision has to be made.

Mr. Al-Rawi: Just give me a moment.

Madam Chairman: Is it that I should stand it down?

Mr. Al-Rawi: I just require 30 seconds.

Madam Chairman: Sure.

Sen. Ramdeen: AG, just consider also, I know that we have—this particular aspect of having a victim impact statement, though this might be the first statutory introduction of it into our law, we have victim impact statements in the criminal law already. So the courts without this—

Mr. Al-Rawi: Madam Chair, we are prepared to delete it.

Sen. Solomon: All right. Thank you. Much obliged.

Madam Chairman: Hon. Senators, I would now put clause 13 to the Chamber. The question is that clause 13, be amended as follows, 13(1):

> "Every victim may provide a victim impact statement explaining the physical or emotional harm, financial loss or other impact that the offence has had on the victim"

The words "has the right" are being deleted and substituting with "may". 13(2):

> "Before a plea discussion is concluded, the prosecutor shall inform the victim that he may provide a victim impact statement…"

So the words "of his right to" are deleted and substituted with the words "that he may". 13(3) is amended as follows:

> A prosecutor who concludes a plea agreement with an accused person or a suspect shall ensure that the victim is informed—
>
> (a) of the substance and reasons
>
> (b) of the date of the plea agreement
>
> (c) that he may read his victim impact statement in Court or have his victim impact statement read.

And subclause (4) is deleted.

Mr. Al-Rawi: Madam Chair, we just of course changed the marginal reference to say "victim impact statement" deleting "victim's right to make a". It would just say "victim impact statement".

Question again put and agreed to.

Clause 13, as amended, ordered to stand part of the Bill.

Clause 14.

Question proposed: That clause 14 stand part of the Bill.

Madam Chairman: Sen Ramdeen, you have proposed and circulated an amendment?

Sen. Ramdeen: AG, for the same reasons that I advanced in relation to deleting clause 13(4) was the basis upon which I did not see it necessary for us to provide for the victim impact statement not including (a), (b) and (c). In any event, the court before whom this evidence is going to be adduced, for whatever purpose, will have an overriding discretion to delete any evidence that is more prejudicial and probative under the general principles and, therefore, that is the basis upon which I had advanced that these are really matters that we should leave to the discretion of the court and not micromanage that process.

Sen. Chote SC: Sorry. Madam Chairman, I think that this clause appears in legislation in almost all the jurisdictions that I can think about that I have read about, because it involves the protection of the person who has pleaded guilty at the sentencing stage from having the course of justice in a sense perverted or turned aside or misdirected by the inclusion of these facts.

By the Legislature saying that these things shall not be included in the victim impact statement ensures that they will not be included and there will not be a weighing-up of whether they should be or not with reasons having to be given for whether they should be included and that being a possible ground of appeal and all kinds of things. So I think that this clause is in accordance with similar legislation in other territories, and I support it.

Mr. Al-Rawi: I wholeheartedly agree with the submission. It is the exact view that we hold. Just to avoid difficulties with the administration of justice, statutorily

setting out what the prohibitions look like to avoid the prosecutor falling into difficulty as they prepare the statements and have supervisory effect.

Sen. Dr. Mahabir: Madam Chair, I need to come in here, because I support Sen. Ramdeen's point on this. Again, it is for the first time I am seeing victims being included in the law. And when I see 14(a), a restatement of the facts of the offence, you see, I am just wondering, if a victim who has been raped, for example, cannot restate some of the facts, what kind of impact statement is going to be made? So are we actually determining what kind of trauma and pain the victim has suffered if the victim holds the view that in the event of an armed robbery or a rape, you cannot restate some of the facts of the case? I would think that the victim impact statement should be left up to the victim as far as is possible. It is a victim impact statement. It is not a statement from anybody else. It is the first time the victim has been given a voice and that we would like the victim impact statement to really capture in totality the impact on the well-being and the welfare of the victim to give a more balanced view of what their situation is like and what kind of decision the court will make.

So I would raise for your consideration the removal of at least (a), because there has to be some restatement of the facts of the case. If a gun is put to your head, that is a fact of the case. If any heinous thing is done to you, it is a restatement of the facts of the case to say that it shall not include a restatement of the facts; it means it should not include a restatement of all facts. I would recommend the removal of 14(a).

Sen. Chote SC: Madam Chairman, if I may. The crucial word here is "impact", so you do not need to restate the evidence to say what impact the offence had on

you. You may speak about your trauma; you may speak about medical bills; and you make speak about disability as a result and that kind of thing. That is the purpose of a victim impact statement. We cannot in this piece of legislation elevate a victim's—or the facility that is being given to a victim in this piece of legislation. We cannot elevate it to equate with the due process constitutional rights which an accused person has under the Constitution. If we do that then we are opening a can of worms.

Sen. Ramdeen: AG, just before you answer, I want to ask this. When this provision is put into the law, how is the victim going to know what he has to put in and leave out of the victim impact statement?

Mr. Al-Rawi: Because the prosecutor supervises the process. So it is through the prosecutorial arm.

And to answer Sen. Mahabir and to adopt the submissions of Sen. Chote, the case law is also pellucidly clear on this. *R v Gabriel* being the leading case on it really speaks to this. There has been a lot of judicial consideration and development over the years as to what a victim impact statement does—stress being on "impact"—having adopted everything that Sen. Chote has said as well.

Question put and agreed to.

Clause 14 ordered to stand part of the Bill.

Clause 15.

Question proposed: That clause 15 stand part of the Bill.

Sen. Dr. Mahabir: Madam Chairman. Clause 15(b). It says that a relative of the victim may provide the statement if the victim is ill or otherwise incapacitated. I would like for the Attorney General to indicate to me whether "otherwise

incapacitated" includes a victim who has been traumatized and is terrified and is suffering some kind of post-traumatic stress syndrome, or does "otherwise incapacitated" simply mean that he is ill and unable to come to the place where he has to make the statement. Because, if not, I would like to include a traumatized victim in there who has elected not to give a statement and a relative may give it on his or her behalf.

Madam Chairman: Sen. Ramkissoon—just a minute AG. Sen. Ramkissoon you wanted to raise something?

Sen. Ramkissoon: Yes, thank you, Madam Chair. In relation to this clause, we are asking for relatives to be invited to make an impact statement, and how we define it. After much discussion on clause 14, I am not exactly sure howAny relative—because we opened up the arm of relative to any other person or any appropriate person. So I want to know how is this really intending to play as a suitable impact statement. I know it is a little different to what Sen. Mahabir has raised.

Mr. Al-Rawi: Sure. To answer Sen. Mahabir, "otherwise incapacitated" is intended to be as wide as possible to encapsulate everything lest we unduly prescribe it by language which cuts down the effect of it, because obviously a court is going to have to consider the appropriateness of the person who is now coming forward to say I am a relative within the definition of clause 2 of the Bill, and you ought to consider me, because that is why we put in the word "appropriate".

To answer Sen. Ramkissoon, yes we have opened it. It is ultimately going to be for a court to decide whether this is an appropriate person to come forward in all of the circumstances. And the intention is really to facilitate the voice of a

victim where that voice may have been silenced or unavailable. So there must be a sufficient nexus in the court's mind. This is nothing something which is without judicial precedent. There is judicial precedent for this in a number of jurisdictions, which we can lean to for interpretation as to the appropriateness.

Sen. Ramkissoon: Madam Chairman, through you, after looking at what is expected in the victim impact statement, I am not really seeing the need or how—I know you said it is based on the courts, but how this will really be done or achieved by a relative, because we are asking for physical or emotional harm, financial loss or other impact that the offence has on them.

Mr. Al-Rawi: It can be treated with, for example, by a parent speaking to the effect on a child, a child speaking to the effect on a parent.

Sen. Ramkissoon: And that is in clause 16.

Mr. Al-Rawi: Yeah, but what we are speaking here is that it may be made by a relative. So we are providing in clause 15 the springboard from which the relative may act. So this is the locus. You are creating the capacity for them, the jurisdiction for them to enter the court process. They borrowed from the definition in clause 2. If we did not have this, they would not have what we call in law locus. They do not have the position to come to the court.

Sen. Ramkissoon: Okay.

Question put and agreed to.

Clause 15 ordered to stand part of the Bill.

Clause 16.

Question proposed: That clause 16 stand part of the Bill.

Sen. Ramkissoon: Thank you, Madam Chair. Through you, I raised during my

debate about the child as it is defined in the Children Act as 18 years and under. Why did we go with 14 years? Well it repeats at (a) and (b), if we want to go with one age.

Mr. Al-Rawi: Specifically to treat with the categorization of how evidence is treated within those age categories, which is also treated within the Children Act. So in the Children Act, we speak to the age categories for the mind of the child in these very circumstances. So it is to make it pari materia, equal material, with the Children Act.

Sen. Ramkissoon: I looked at the Children Act and I did not see 14 years pull out, but I did see in the Bail Act where we had—I know we did not debate that yet—but the existing one has 14 years. A child is defined as 14 years. I know we have removed that and a child is defined as 18 years.

Mr. Al-Rawi: Now we are treating with evidence. We are treating with the rules of evidence in relation to age, and this is how our law treats the evidence, not the fact that you are a child, but the categories of ages. You will see it as well when we treat with the other legislation, not on all fours, but when you are looking to what was called YODA, the Young Offenders Detention Act, now the child rehabilitation legislation is treated with similarly where we categorize.

Question put and agreed to.

Clause 16 ordered to stand part of the Bill.

Clause 17 ordered to stand part of the Bill.

Clause 18.

Question proposed: That clause 18 stand part of the Bill.

Madam Chairman: Sen Ramdeen, you circulated an amendment?

Sen. Ramdeen: I had circulated an amendment that asked that those first two subclauses (1) and (2) be deleted, but having regard to the position that you have taken and the committee has taken with respect to 14, then I think I will withdraw that proposed amendment.

Mr. Al-Rawi: Thank you.

Sen. Chote SC: Madam Chairman, thank you. What I am proposing is that certain words be added to subclause (4); that after the word "so", that the words "and in any event, before it is filed with the court." I am asking for that addition to ensure that before the documents are filed with the court and before the convict is required to make his plea in mitigation or whatever, he has an idea of what the victim impact statement contains, so that when he comes before the court no time will be wasted by having him asking for time to consider the victim impact statement to get the victim there and all of those things. If he has the material beforehand then expedition will be paramount.

Mr. Al-Rawi: May I?

Madam Chairman: Yes.

Mr. Al-Rawi: A very strong suggestion in line with some of the work that we have been doing in other parts of the law in this Senate. I am just wondering about the consequence where it could not be done. That is the caveat to the rule. So as soon as is reasonably practicable, but once we qualify it and "in any event before it is filed with the court"—the question is whether we are going to be tripping upon a lockout because it was not done.

Sen. Chote SC: Well, if it was not done then it would not be filed in the court and this would not arise.

Mr. Al-Rawi: No. So in the circumstance where we cannot find the person, et cetera, because after receiving the victim impact statement the prosecutor shall serve the victim impact statement on the accused person or his attorney- at-law as soon as—I see. So the fact that they are participating in a process means that they are in contact with each other so it would make it reasonable to assume that the service could happen. Just give me a moment.

Madam Chair, so I was looking at the process flow of clause 18, if Sen Chote will help me with this, through you. Madam Chair, 18(1):

"The prosecutor shall ensure"—you comply with—"section 14.

(2) If a victim impact statement contains material... not permitted"—redact—

"(3) A victim impact statement shall be filed with the Court at the time of the filing of the plea agreement."

And then we go to (4) which says:

"After receiving the victim impact statement, the prosecutor shall serve the victim impact statement on the accused person or his Attorney-at-law as soon as it is reasonably practicable."

The language being cautioned here is that you must do so in any event before you file it with the court.

Sen. Chote SC: Yes, because I could see how the thinking went, because as lawyers we are used to filing and then serving, but I am just saying that in this case we may be defeating the purpose that we want from this aspect of the law. So I am respectfully suggesting that we qualify it.

Mr. Al-Rawi: Yes. Madam Chair, I would be happy to agree to the amendment.

Madam Chairman: Hon. Senators, the question is that clause 18 be amended as follows: In 18(4) by including the words after "so", removing the "." and continue "and in any event before it is filed with the court."

Question put and agreed to.

Clause 18, as amended, ordered to stand part of the Bill.

Madam Chairman: Hon. Senators, at this stage, we will take a break. I will suspend for 15 minutes, so we will resume at 9.15 p.m.

8.59 p.m.: *Committee suspended.*

9.15 p.m.: *Committee resumed.*

Madam Chairman: Welcome back, everyone. So we will now resume the Committee proceedings.

Clauses 19 to 23 ordered to stand part of the Bill.

Clause 24.

Question proposed: That clause 24 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have circulated proposed amendments to clause 24.

Sen. Ramdeen: I withdraw my amendment. I was wondering if that was necessary, AG, in relation to (e)(v)—

Madam Chairman: No, Sen. Ramdeen, please.

Sen. Ramdeen: I am sorry, Madam Chairman.

Madam Chairman: You are withdrawing your amendment?

Sen. Ramdeen: No, I am asking the AG if he considers that it is necessary in (3)(e).

Mr. Al-Rawi: [*Consults with technocrats*] **"**Before accepting or rejecting a plea agreement, the Court shall make enquiries of the accused person…whether the accused person"—so it is no. It is meant to be conjunctive so that all of the conditions (a), (b), (c), (d), (e) and (f) apply.

Sen. Ramdeen: Madam Chairman, through you, to the Attorney General, having regard to what we have put in, in the earlier clauses, with respect to the right to not self-incriminate, I was wondering if we should not add that to the list of rights that you have at (e).

Mr. Al-Rawi: I had lifted presumption of innocence from this clause into the other one. Just give me a moment on that. "Testify in his or her own defence or remain silent", do you think that we should express the right differently, because the right to remain silent is technically a right not to incriminate yourself?

Sen. Ramdeen: It is a little bit different, you can have the right to silence and—

Mr. Al-Rawi: I have no objection to putting it expressly as per the Constitution.

Sen. Ramdeen: Yeah, I think we should put it in. I think it is different because you have the right to remain silent or you have the right to say something, you can say something and not incriminate yourself.

Mr. Al-Rawi: Let us add it in. We can perhaps put it in between (i) and (ii), and renumber, consequentially, Madam Chairman?

Madam Chairman: Sure. So:

"is aware of his rights, including the right to—

(i) plead not guilty;"

and then you want to put in a new (ii)?

Mr. Al-Rawi: Well, actually, we could put the right against self-incrimination as

(i) itself. So, perhaps we put a new (i) including the right to not incriminate himself or the right against self-incrimination?

Sen. Ramdeen: Yeah, let us put it.

Mr. Al-Rawi: Well, it is a right to not incriminate himself.

Madam Chairman: Okay. So:

"…including the right to—

(i) not incriminate himself;"

Correct?

Mr. Al-Rawi: Yes, and then the renumber will happen consequentially, and "and" is needed at the end of (vi).

Madam Chairman: So, hon. Senators—

Sen. Mark: Before we go, Madam Chairman, if you go to Sen. Ramdeen's amendment you will see where he is asking that we insert a new (g). Let me just go back.

Sen. Ramdeen: It "was not".

Sen. Mark: Yeah. Under 24(3), we have (e), and then we have Roman right down, then we go to (f), he is proposing a (g), and to read, it was improperly induced—

Sen. Ramdeen: It "was not".

Sen. Mark:—was not improperly induced to enter into the plea agreement". So I was just proposing that we will deal with that one time.

Madam Chairman: So that will be a (g), so you are proposing a (g) at 24(3)(g)? Correct?

Sen. Mark: Yes.

Madam Chairman: And the 24(3)(g) will read, "was not improperly induced to enter into the plea agreement".

Sen. Mark: Yes.

Madam Chairman: Attorney General?

Mr. Al-Rawi: I am okay with the concept. I am just looking at the wording to make sure that we have got it right.

Sen. Mark: Okay, no problem.

Mr. Al-Rawi: Because the court really should make an enquiry as to whether there was an improper inducement or even coercion. But, insofar as we have termed coercion inside of—[*Interruption*] Yes. So I think it should go in, and let us just see how we can express the language. So:

> "Before accepting or rejecting a plea agreement, the Court shall make enquiries of the accused person in order to determine whether the accused person"—

We really want to say, was improperly induced into entering the plea agreement. So perhaps we can use that language as a new (g). And then that would take care of the difficulty that we had in the "and", so we could delete the "and" from (vi) and then leave (f) as it is.

Madam Chairman: So you are taking off the "and"?

Mr. Al-Rawi: Take off the "and". In (f), remove the full stop and insert a semicolon, put the word "and" after that, and then a new (g).

Madam Chairman: Well, remember it would be re-lettered appropriately because you had put in a new (i).

Mr. Al-Rawi: No, that was (i) in (e), so this is now a (g).

Madam Chairman: Sorry, yes.

Mr. Al-Rawi: So, from the chapeau, the chapeau would read, before accepting or rejecting a plea agreement the court shall make enquires of the accused person in order to determine whether the accused person was not—[*Consults with technocrats*]

Sen. Ramdeen: Why do you not just say, "was improperly induced".

Madam Chairman: Was not.

Mr. Al-Rawi: Was not improperly induced.

Sen. Ramdeen: The enquiry that the court is making is whether they were improperly—you could have it improperly induced or not improperly induced, it does not make the enquiries either in the positive or the negative.

Mr. Al-Rawi: So, the drafters have provided the language to catch it, so the court shall make an enquiry—I am translating the chapeau—the court shall make an enquiry as to determine whether the accused person was offered an improper inducement.

Madam Chairman: So it will be "and" (g).

Mr. Al-Rawi: Yes. So we could go, "was offered an improper inducement". I think that that would catch it. I thank Sen. Mark and Sen. Ramdeen because I think that this further strengthens the odium that we were trying to protect against.

Madam Chairman: "Was offered" not "was not".

Mr. Al-Rawi: "Was offered". So the court is making an enquiry as to whether the accused was offered an improper inducement.

Madam Chairman: Okay.

Mr. Al-Rawi: And what we could do is to further qualify it to the two stages of,

was offered an improper inducement to enter into plea discussions or conclude a plea agreement, so at both stages. So, "was offered an improper inducement to enter into plea discussions or conclude a plea agreement", Madam Chairman.

Madam Chairman: Sen. Ramdeen, you have a further amendment, clause 24, at 24(5)?

Sen. Ramdeen: My proposed amendment, AG, was to—I know that the victim impact statement is going to be prepared by the prosecutor because your subclause (5) allows the accused person, with leave of the court, to cross-examine the victim on the victim impact statement and I was wondering if circumstances arise where the prosecutor may also want to challenge anything that is in the victim impact statement, if we should make provision for that.

Mr. Al-Rawi: I actually was torn myself, not only on that point of either party but whether any re-examination would have been necessary. Some of the literature that we looked at and the direction sort of said, well, look, it will be unfair to put the person through the ordeal, but I was not wedded one way or the other. I was looking to the propriety of the case. I welcome views across the Benches. Perhaps Sen. Chote, through you, Madam Chair, may have a view on this. That is the accused, either party, with the leave of the court, the right to cross-examine, because I think that the qualification "with the leave of the court" is safe enough.

Sen. Chote SC: I agree, unless you want to say something to the effect of, to the extent—well, in the interest of justice or where the court deems fit, or something like that, but it is the same effect.

Mr. Al-Rawi: I am wondering if I can use, as opposed to accused person, would either party really capture—so far we have been using prosecutor and accused.

Sen. Ramdeen: Do you want to spell it out, there are only two parties.

Mr. Al-Rawi: Yeah.

Sen. Ramdeen: It cannot be anybody else.

Sen. Chote SC: Madam Chairman, I do not follow that at all, because as I understand it the victim really is the prosecutor's witness—

Mr. Al-Rawi: We were just literally discussing that.

Sen. Chote SC:—so you cannot cross-examine your own witness.

Mr. Al-Rawi: Your own statement and your own witness, unless the person was deemed to be a hostile witness and you would have to—yeah. So, insofar as the prosecutor has prepared the victim impact statement I think we may—unless there was a re-examination that was really necessary.

Sen. Ramdeen: Is it that he is really being called as the witness for the prosecution. Why do we not take out the word "cross-examine" then, and let them just question them?

Mr. Al-Rawi: This came from the Opposition Bench downstairs. I think it is useful to put in the "leave of the court to cross-examine the victim", and insofar as we really have the prosecutor preparing, redacting, et cetera, the statement, I think that we would be safe to leave it as it is.

Sen. Ramdeen: But if the prosecutor wants—if through some reason, after the cross-examination, like in our civil jurisdiction with re-examination because something arises as a result of the cross-examination that the prosecutor wishes to clear up, or get some further information on, how is that going to be accomplished?

Mr. Al-Rawi: I do not know if that is cross, per se.

Sen. Ramdeen: No, no, I am not saying—I am saying outside of the word "cross-

examination", if a situation arises where the victim says something that the prosecutor may want to clear up for some reason, then this does not make any provision for that.

Mr. Al-Rawi: It is true, but I am wondering if, insofar as that falls to be persuasive evidence at best or a reflection that it could not be done by way of submissions.

Sen. Chote SC: Well, may I respectfully suggest, first of all I am a little uncomfortable with cross-examination at this stage. I was wondering, it is just a thought, that perhaps we should say, an accused person may with leave of the court ask questions of the victim on the contents, or about the contents of his victim impact statement. If we put it in the context of cross-examination and re-examination as it operates in the trial courts, what we will have is an extremely hostile environment where victims may have to endure the very same trauma that we are hoping that they have to avoid by use of this piece of legislation, first of all.

And, secondly, if that happens what you are going to see is the prosecutors are going to stand up and re-examine for an hour to show how traumatized the poor victim had been by the whole affair, and the process becomes skewed and ripe for appeal. So I am respectfully suggesting that the accused person should be given the opportunity to ask questions, certainly, but whether we should use the word "cross-examine", I am not so sure, one, because it makes it too adversarial and, secondly, because re-examine spins out from that, and you do not want that.

Mr. Al-Rawi: Madam Chairman, the Judiciary's perspective on this was very much of that offered by Sen. Chote. In fact, the original version of the Bill excluded cross-examination clean. Arising out of the debate in the House the

Opposition had asked us to consider the cross-examination, and a number of Commonwealth jurisdictions have the cross-examination so described; Ireland, in particular, jumped out at us; a number of the jurisdictions. Jamaica as well has it. I do find it very interesting, however, the sort of hybrid newness of "may ask" questions, because it is not cross-examination per se, and it may therefore give an indication as to what Parliament intended in terms of the severity of putting the witness through it.

But I think in counterbalancing it against the rights of the accused to deal with something which may be deemed to be adversarial, or impact upon the court's consideration of the plea agreement that there is definitely a balance to be had. This proposal for amendment in fact came from the Opposition. I am wondering, through you, Madam Chair, what the view in light of Sen. Chote's submission is.

Madam Chairman: Sen. Mahabir.

Sen. Dr. Mahabir: Madam Chairman, I am just wondering whether the removal of the word "cross-examine" and the insertion of the words "question the victim". I know it will imply something substantive, but whether simply changing "cross-examination" with "question" so that with leave of the court question the victim, and that seems to convey the intent of ensuring that the accused has his right protected, but, at the same time, the adversarial nature of the situation is minimized. So I am just recommending "question" versus "cross-examination".

Mr. Al-Rawi: My only fear from a legislative perspective is that in a court context the introduction of language, which is short of examination, cross-examination or re-examination is a departure from the norm, so a court is going to have to consider what Parliament in its wisdom intended in questioning or

asking questions, and then they would look to what we have had to say or be called upon to decide.

So, insofar as we had proscribed an effect to the extent that the court allows, we had limited by that language the manner in which cross-examination could potentially be handled, so I am wondering about—I find it novel and very interesting, Sen. Chote's and Sen. Mahabir's submissions. I am wondering if in terms of precision we should keep to cross-examination as it is carefully dealt with to the extent that the court allows. I think from the perspective of a re-examination that we should certainly move away from it for the reasons that Sen. Chote has put forward. So I am wondering if we should leave the clause as is.

Madam Chairman: Sen. Ramdeen.

Sen. Ramdeen: Madam Chairman, I think the difficulty with introducing any other term, except what we are accustomed with in adversarial proceedings, is that it leaves the door too wide upon and there would be no limitation. The fact that you have, with leave of the court, like in JR proceedings, you will have to say what paragraph and what it is you want, so that it will be court-controlled in any event. So I think we can leave it as is.

Madam Chairman: So will you withdraw your amendment?

Sen. Ramdeen: I will.

Madam Chairman: Hon. Senators, the question is that clause 24 be amended as follows. In 24(3)(e), to include under (e), is aware of his rights, including the right to, (i), to not incriminate himself. Go down, everything will be renumbered accordingly, but at (vi) to remove the word "and", and then to introduce at (f), the word "and" at the end, and then introduce (g), was offered an improper inducement

to enter into plea discussions or conclude a plea agreement.

Question put and agreed to.

Clause 24, as amended, ordered to stand part of the Bill.

Clause 25.

Question proposed: That clause 25 stand part of the Bill.

Sen. Mark: Madam Chair.

Madam Chairman: Yes, Sen. Mark.

Sen. Mark: I did not circulate an amendment but I just would like, through you, to raise this matter again with the Attorney General, and I am looking at 25(2). Here it is, Attorney General, a court is finding and determining that there was improper inducement offered to a suspect, or a suspect and/or an accused person, and the court is rejecting the plea agreement, but nowhere in this clause am I being told that the court through the judge can impose a jail term and heavy fines on the perpetrators of this crime. And, you know, you ask yourself the question, is this thing going to work, because it seems to me that where people are guilty of breaking the law, it does not appear that there will be any sanctions or penalties. And, Madam Chair, I cannot understand, as a lawmaker, taking part in an exercise in which I am seeing before me, the court is determining a matter, and yet still there is no provision in the law that gives the court the power to impose, what I call penal sanctions. And this is what I would like the Attorney General to clear up for me, please.

Madam Chairman: Attorney General.

Mr. Al-Rawi: Eighteen-minute breaks revive the soul, Madam Chair. I do hear Sen. Mark loud and clear. I think the answer to the position is that it is from this

point where a court makes a determination that there is an improper inducement that the common law relief that we are looking to rely upon really has a springboard. So whilst there is no expressed provision, as there was in section 5 of the 1999 Act for a criminalization, it is from this point here in fact that we now have a court making a determination of an improper inducement, having done the enquiry, as we have usefully added in clause 24 above, and that the second stage of affairs can move from those who are willing to take it forward. So the point is noted, but, respectfully, I do not think that we can add it in, bearing in mind the policy point that we have adopted so far.

Sen. Mark: You see, Madam Chair, if may again be allowed, we are talking about the prosecution involved here, that is the DPP, and the DPP or his representative is prosecuting a case before the court, and the court finds that the DPP or its agents engage in improper inducement, how can we sit here knowing that it is the prosecution, in this case the DPP office, that is engaged in this thing, and we are expecting the judge to tell the DPP to take action against itself? We have to impose action on the DPP as a Parliament. So I am just making a point.

9.45p.m.

Madam Chairman: Sen. Mark, I think your point has been made. Sen. Ramdeen is it the same point?

Sen. Ramdeen: No, it is not. AG, can I suggest, having regard to your policy position on an administration of justice point, can we not have a subsection that says:

> Where a court makes a determination in accordance with subsection (2) that the court defers the matter to the Commissioner of Police for the appropriate

action to be taken.

So that we do not get into the realm of interfering with your policy position. I hear Sen. Mark, I hear you on the policy position, but I think it is useful, the fact that it is referred to the Commissioner of Police. You cannot refer it to the DPP, because there is a problem there, but the investigative arm of the State is really the Commissioner of Police, and I see nothing wrong if the Commissioner of Police gets the matter. It happens all the time in High Court matters, in civil matters, something is wrong, there is some fraud or something, it is referred to the Registrar to the Commissioner of Police for appropriate action to be taken. It has its safeguard. There is an independent institution that is investigating it and it also has the safeguard that if nothing has gone wrong, then nothing will come out of it. But at least from our point of view, without trespassing upon your policy position, the fact that the court refers the matter to be investigated I do not think that that will trespass upon the policy position taken by you.

Mr. Al-Rawi: Thank you, a very useful submission taking into account the existing practice which happens. The odium at this stage which we seek to keep under control is the mere fact that a court has been invited to physically take a step which is a part of the court record, which has now become public that it has referred a matter to the Commissioner of Police, which in and of itself could cause the difficulties that we are seeking to move away from in the repeal of section 5.

In keeping with the philosophy of using the implied sanction, the common law, whatever it may be, that use of the Registrar's referral via the judge's referral to the Registrar is still an aid to operation here, but at least the judge would have had a finding. I think it is from that point that we prefer to take it in stages

therefore, and while it is a very useful submission I prefer, in keeping with the policy position that we have, that respectfully I disagree with adopting it for now. But it is a very useful submission.

Dr. Mahabir: The point is a valid one, AG. What harm would it do to your policy, hon. AG, if you were to add after "agreement":

and undertake other appropriate action as it sees fit.

So you broaden the remit of the court. In addition to rejecting the plea agreement and undertake other appropriate action, which is wide and broad and gives the court latitude to do what Sen. Ramdeen says ought to be done.

Mr. Al-Rawi: Because the court has that in any event, I do not need to express it. It has the jurisdiction to act that way.

Sen. Sturge: Madam, if the Attorney General is saying that the court has its jurisdiction the court may very well look at these proceedings and the court will say expressly that we have decided not to impose any sort of sanction. The court might be very well saying that because of the policy of the Government—the policy of the Government is not to visit the prosecutor with criminal sanctions, and thereby the court may say, well, because that is the policy behind the legislation then, although the Attorney General is saying the court has that power, the court may very well say well since it is not intended for the prosecutors to be penalized in criminal law then I am not going to refer the matter because that is not the policy behind the Act. I am not going to refer it to the police.

Mr. Al-Rawi: I think the converse could be equally argued because there is no prescription against it. So that there is nothing to stop the court from, in fact, making the referral which happens on a daily basis, in particular in criminal

matters.

Question put and agreed to.

Clause 25 ordered to stand part of the Bill.

Clause 26 ordered to stand part of the Bill.

Clause 27.

Question proposed: That clause 27 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, I believe you have circulated an amendment.

Sen. Ramdeen: My amendment treats with 27(1)(b), where what I think we want to do is to prevent someone from jumping the queue and listing the matter back for trial in the High Court. I am not familiar with what is the position under the Criminal Procedure Rules, but if there is a listing judge or a case management judge under the Criminal Procedure Rules, I think it would be better to send it back there. Because you can have a situation where an accused person will embark upon this procedure to jump the queue and then once you are at the head of the queue you reject the plea agreement and then your matter is fixed for trial in any event. So I am just saying perhaps the wording of it might not be totally in sync with what may have been the mischief behind the particular section, but I would have thought that we would not want people to abuse the legislation by going through that mode.

Mr. Al-Rawi: Thank you, Sen. Ramdeen. The clause is articulated against clause 22(1)(b). So in clause 22:

> "If a plea agreement is filed at any time before an accused person is committed to stand trial in the High Court, the Magistrate shall—
>
> (a) cease conduct of the committal proceedings if proceedings have

commenced;

(b) transfer the matter to the High Court for a plea agreement hearing;..."

If I understand the submission, and please correct me if I have got it wrong, the submission is that the jumping of the queue may happen and that you may in fact be still in the Magistrates' Court undergoing some form of committal proceedings. It would be premature of me to suggest that committal proceedings may be put out of the law very soon, because I cannot be presumptuous about that, but the point is useful. So if I have got it right, instead of listing the matter for trial in the High Court—

Sen. Ramdeen: You have raised an interesting point. If you stop the committal proceedings, you go up and it comes to an end, in the case of the Magistrates' Court—

Mr. Al-Rawi: So we have (a)—so (a) still kicks in. The judge may send the case back to the Magistrates' Court for the conduct, and then (b) or list the matter for trial, assuming that you are, in fact, at the High Court level.

Sen. Ramdeen: That presumes that you would have finished your committal proceedings and embarked upon a plea agreement after you have been committed.

Mr. Al-Rawi: Yes.

Sen. Ramdeen: So you can embark upon the committal, you can be committed, embark on the—I am committed to stand trial from the Magistrates' Court to the High Court, I have to wait five years to get an indictment. I tell you I want to enter into a plea agreement, the DPP has to file—you reach up to the High Court, I then pull back on the plea agreement and then you have to list me for trial. So I am still

able to beat the system.

Mr. Al-Rawi: I see.

Sen. Ramdeen: I think what would be appropriate is if the legal research team could find out under the Criminal Procedure Rules if there is a listing judge, or what is the mechanism under the criminal procedure, because there must be someone who does the criminal case management. That would be the most appropriate person to determine, for it to go back before and that person then decides how they treat with it from there. An independent judicial officer who would know what the position is. If he forms the view that it was done, having regard to whatever submissions may be made or looking at the facts of the case, to beat the system, then he will take the appropriate action. We are not prescribing what is to be done.

Mr. Al-Rawi: What I am cautious to do is not bind—I accept the point. I think the point is well thought out. I am cautious not to bind myself to an existing rule which can be subject of amendment by the Rules Committee. So I am wondering if we should make a reference to treatment via the rules, not necessarily listing per se. I do not need to be specific about which rule applies, but perhaps we can just have look at a formula of words to avoid the potential abuse of the system.

Sen. Ramdeen: I am concerned about just listing it for trial.

Mr. Al-Rawi: [*Interruption*] I am being reminded, through you, Madam Chair, that one of the provisions that we specify is that the DPP must file a draft indictment together with the plea agreement, so there would already be an ability for that. You would not technically be waiting for an indictment to come in which is as yet in limbo, that already in that plea agreement your indictment is there.

Sen. Ramdeen: A draft.

Mr. Al-Rawi: Yes, it still needs to be formalized, but the gap between the formalization of the draft indictment and an indictment, I am wondering how that plays into the submission that you have given in the example.

Sen. Ramdeen: I do not know how that is going to play, because right now the position is that when you are committed, depending on what you are committed for, you are lasting a long time, four, five years, six, seven years sometimes before you even get the indictment.

Mr. Al-Rawi: Madam Chair, could I ask whether Sen. Chote has any views on this. So the mischief we are looking at is the jumping of the queue, where you are listed for trial, listing the matter for trial in the High Court. Yes, the case progression officers. Sen. Rambharat was just, through you, Madam Chair, referring to the fact that under the Criminal Procedure Rules there are case progression officers.

Sen. Ramdeen: So why do we not send it back there?

Mr. Al-Rawi: Insofar as rules are subsidiary, do I really want to use the terminology of the Criminal Procedure Rules because they change from time to time. If I send it back to the High Court to list for trial, it still has to go and hit a case progression officer in accordance with the rules.

Sen. Ramdeen: Not if you say to send it back for trial.

Mr. Al-Rawi: But what we are doing is listing. We list the matter for trial, because to list it you have got to go through the case progression officer. So it is the equivalent of the Registrar getting involved in that process.

Sen. Chote SC: Madam Chairman, if I may, first of all a judge cannot list a matter

for trial, and with the introduction of the rules the way in which matters will be listed will not come within the jurisdiction of the judge. So I am respectfully suggesting instead—

Mr. Al-Rawi: Refer the matter?

Sen. Chote SC: The judge may adjourn the matter for a date to be fixed for trial, because the judge cannot fix a date for trial for another judge.

Mr. Al-Rawi: How about refer the matter for listing by the High Court?

Sen. Chote SC: I am thinking that perhaps you need something stronger than that, simply because the bureaucracy would operate in such a way that unless clerical officers do not get a directive to do something it is not likely that they will do so. So, "adjourn the matter for a date to be set for trial", is within the lingo, the existing lingo. So I am suggesting that something along those lines be used.

Mr. Al-Rawi: I think that that could work, those exact words, because it would fit within the construct of how the court system operates, and it would imply a process to happen.

Sen. Sturge: The correct process, if I may suggest, is that it be referred to the Registrar. The Registrar is the one who would determine whether it goes on a cause list or for case management. So at that stage if you use the words "refer to the Registrar" and whatever words you deem appropriate thereafter, that should cure it. So you are not bound by the language of the Criminal Procedure Rules with respect to the case progression manager and so on. The Registrar is the person who determines what is put on a cause list or a trial list, and so on.

Mr. Al-Rawi: Sure. Shall we look at it, through you, Madam Chair, together then? So as opposed to "list the matter for trial"—well either "refer the matter to

the Registrar for listing of the trial".

Sen. Sturge: For listing. "For listing" would take care of it because he may determine that it should not be put on a trial list but put on a cause list, and thereafter the judge on the cause list would determine whether it should be put on the trial list or whether it should be sent for case management.

Sen. Chote SC: I am a little afraid of that. I am a little afraid that sending it off to the Registrar and just saying this is a reference we put back on a list could result in somebody's file sitting in a draw for years, for two years, as occurred with quite a number of people a few years ago.

Mr. Al-Rawi: Or 12.

Sen. Chote SC: So I would suggest that we use the word "adjourn" so that it is still considered to be within the jurisdiction of a judicial officer to deal with. The practical listing of the matter would fall under the authority of the Registrar. So I do not know how to combine those two things, but I think that perhaps we need to have both of those things in whatever new version of 27(1)(b) we may have.

Sen. Sturge: If I may suggest it might be easily cured, so that it does not sit in a draw for two years, if you say "refer to the Registrar for listing within thirty days", you give a time frame so that he or she has to list it within a stipulated timeframe.

Mr. Al-Rawi: Then Sen. Ramdeen's mischief crawls in, which is the jumping of the queue.

Sen. Sturge: Well jumping of the queue would relate to a trial, but if he is listing he has to first list it to a cause list or a case management hearing, which is not a trial, and at that stage the judge would determine—once it is listed on cause list it comes before a judge, or listed on a case management hearing it comes before a

judge, and the judge determines whether it goes on a trial list and who should have priority in front of him and so on.

Mr. Al-Rawi: I am attracted to the concept of adjourning before the judge that has the file, because you have got to come back up on an adjourned date with some result, and therefore you do not escape judicial attention. You get to knock on the door, the judge can give a reason. So I find it very attractive to keep it before the judge and have the matter adjourned for listing. I think that the Judiciary can then take care of the consequences as to how this mapping would actually work. So perhaps we can use instead of "list the matter for trial in the High Court", "adjourn the matter for listing of the trial in the High Court".

Sen. Sturge: Should it not still be within 30 days to take care of what—

Mr. Al-Rawi: I think at that point, bearing in mind the difficulties in the listing per se, the time frames, the fact is that either party still has the right to knock on the door of the judge to say, "Well, what is going on?" And certainly the judge cannot just adjourn without a date. The judge would have to at least return to give some form of indication. So I think that that could take the hybrid of the two things.

Sen. Sturge: As it happens judges do sometimes adjourn for a date to be fixed by placing it back on the cause list. There is no determinative date when it is put on the cause list. So if you stipulate 30 days, you are not saying 30 days for trial. If you are saying it is adjourning, it is adjourning and if you want "before a judge", but at least you give a time frame, the judge at that stage, if not the Registrar—since the Registrar is problematic—can determine, well it is now before me. It now has to come before me within 30 days, I have to put it before in 30 days, and

on that day I will determine if I put it on a cause list, a status hearing or a trial.

Mr. Al-Rawi: Sure. I think that that fits in with the philosophy that we have used in prescribing dates in this Bill. You would see 14 days and seven days, et cetera. So can we get the language, through you, Madam Chair, that Sen. Sturge is suggesting?

"adjourn the matter for listing before a judge within thirty days"

Or whatever quantity of time the Attorney General might think best.

Madam Chairman: So the proposed amendment is—

Mr. Al-Rawi: Perhaps, "adjourn the matter for listing within thirty days" and then that can just simply take care of it.

Madam Chairman: So take off the words "before a judge"?

Mr. Al-Rawi: Yes, Ma'am.

"If an accused person withdraws from a plea agreement, fails to enter a plea agreement at the plea agreement hearing, in the High Court the judge may"— skip (a)

"(b) adjourn the matter for listing in the High Court within thirty days."

Madam Chairman: Sen. Ramdeen, are you therefore going to withdraw your proposed amendment to clause 27, so that I can put the new amendment?

Sen. Ramdeen: Sure.

"If a case is sent back to the Magistrates' Court under subsection (1) committal proceedings shall commence before a new Magistrate as if the plea agreement had not been entered into."

Where you have a jurisdiction like Mayaro, Rio Claro, where you have one

magistrate, when the matter is sent back there what is going to happen with that case?

Mr. Al-Rawi: The Chief Justice will have to find a new magistrate to treat with it.

Sen. Ramdeen: That might be so, but I think that to protect at least the process at least we should put like a 30 days for that to happen, because if we do not do that then you can see a situation arising where—

Mr. Al-Rawi: I fear that it may enlarge the very problem that we are seeking to move away from.

Sen. Ramdeen: How?

Mr. Al-Rawi: So if you put 30 days and a magistrate is not available because the magistrate is on that circuit for that particular point in time—

Sen. Ramdeen: I do not see that there is any—the only sanction that can arise out of that, is that the matter cannot be listed within 30 days before a new magistrate and the accused person could then bring JR proceedings and forced whoever it is, the Registrar, the Chief Justice, whoever, to list the matter. The fact that there are jurisdictions in our country where you have only a sitting magistrate, it is administratively problematic, as we have it now, for the Chief Justice to take a magistrate from somewhere and bring them to a jurisdiction.

Take, for example, Mayaro. You have one sitting magistrate, you have one court. So when is this matter going to be listed or heard if it has to jurisdictionally go back to that court?

Mr. Al-Rawi: Unless you agree to transfer the jurisdiction, which is possible.

Sen. Chote SC: Madam Chairman, could I just suggest then, if we are looking at the question of jurisdiction, maybe what we should say is:

"if a case is sent back to the Magistrates' Court under subsection (1) committal proceedings shall commence before a new magistrate in any jurisdiction"—we can say that—"as if the plea agreement had not been entered into".

But if we do not want to say that, the fact of the matter is it often happens after an appeal is heard and a matter has to be retried before a different magistrate, that arrangements are made for magistrates to go to jurisdictions where there is only one sitting judicial officer, perhaps for two afternoons or so consecutively, to deal with these matters. So it is not a fact situation which is unknown to the law or unknown to criminal practice and procedure. Of course if you say "in any jurisdiction" it makes it a whole lot easier.

Mr. Al-Rawi: I would believe that because it is something which is sorted out on a normal basis, either transfer of jurisdiction or a judicial officer is put to, of necessity, deal with the matter, I think that we could leave it as it is. So, Madam Chairman, if I could in summary then say that clause 27 would be amended, subject to the Senate's views in 27(1)(b)—

Madam Chairman: Let me put it, Attorney General.

Hon. Senators, the question is that clause 27 be amended as follows:

At 27(1)(b) to replace the words "list the matter for trial in the High Court" with the words "adjourn the matter for listing in the High Court within thirty days".

Question put and agreed to.

Clause 27, as amended, ordered to stand part of the Bill.

Clause 28.

Question proposed: That clause 28 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have circulated an amendment.

Sen. Ramdeen: AG, my amendment only goes to the time period. I thought that the 14 days were a little bit inadequate or too short for an accused person. I think the new period under the Summary Courts Act too was 28 days, so I think we can go with 28 days.

Mr. Al-Rawi: I have no objections to the amendment.

Question put and agreed to.

Clause 28, as amended, ordered to stand part of the Bill.

Clause 29.

Question proposed: That clause 29 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you proposed an amendment.

Sen. Ramdeen: AG, it is the same—

Mr. Al-Rawi: Madam Chair, similarly agreed that "fourteen" in subclause (2) be deleted and substituted with "twenty-eight".

Question put and agreed to.

Clause 29, as amended, ordered to stand part of the Bill.

Clause 30.

Question proposed: That clause 30 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have an amendment circulated.

Sen. Ramdeen: Madam Chair, I had looked at the form that you have in relation to section 30 and I was wondering whether it is prudent for us to allow the accused to appeal based on the grounds that you set out in (a), (b), and (c) or on any other ground. I did not quite understand the rationale of limiting the grounds of appeal

to (a), (b) and (c) alone. I understand why you have (a), (b) and (c) but without at this hour being able to formulate to you what may be other grounds upon which there may be an abuse of process—these are obviously statutory because of what the Act provides that there may be another ground or there may be other grounds upon which one would want to challenge the entering into the plea agreement. I just cannot formulate it now.

Madam Chairman: The amendment that you circulated—we are on clause 30, correct?

Sen. Ramdeen: Correct.

Madam Chairman: So you circulated an amendment for 30 sub (2) to delete "fourteen" and substitute "twenty-eight", and then to insert after clause 30 sub (2) a new subclause 30(3). You are not dealing with those amendments?

Sen. Ramdeen: No, the AG is not going to consider—because of the policy position I will not pursue the 30 subclause (2) amendment.

Madam Chairman: Which is to substitute "fourteen" with "twenty-eight"?

Sen. Ramdeen: No.

Mr. Al-Rawi: He means the introduction of the criminalization by the insertion of a new 30(3) which is the second item.

10.15 p.m.

Madam Chairman: Okay. But you do understand that I am trying to follow the format that you have presented, the amendments?

Sen. Ramdeen: Why I did not go to 30(2) as yet, Madam Chair, is because I am dealing with 30(1).

Madam Chairman: But you have not circulated an amendment to 30(1)?

Sen. Ramdeen: I know, I have not circulated an amendment. I am suggesting to the AG, through you, Madam Chair.

Madam Chairman: I know, I am just trying to—I just want everybody to know that I am—

Mr. Al-Rawi: We understand, following the list.

Madam Chairman:—following the procedure here. So let me just clear it now. So you have not started on what you have circulated as yet?

Sen. Ramdeen: Well I can deal that—

Madam Chairman: Please.

Sen. Ramdeen:—it is just as a matter of chronology. I think you would not have any objection to the "fourteen" to "twenty-eight"?

Mr. Al-Rawi: No, Sir.

Sen. Ramdeen: And I am abandoning—

Mr. Al-Rawi: Agreed.

Sen. Ramdeen:—30 subsection (2) with respect to the criminal sanction.

Madam Chairman: You are withdrawing that?

Sen. Ramdeen: Yeah.

Madam Chairman: Okay.

Mr. Al-Rawi: And then there is a further submission on 30(1).

Madam Chairman: And in the last proposed—

Sen. Ramdeen: What I am proposing, AG, is that I do not see—

Mr. Al-Rawi: I got you. The question as to whether we should include a wider net for any other ground than that expressed in (a), (b), and (c).

Sen. Ramdeen: Yeah.

Sen. Chote SC: Madam Chair—

Mr. Al-Rawi: Sorry, please. Madam Chair.

Sen. Chote SC: Sorry to interrupt, AG, I was just going to say that if you circumscribed the—

Mr. Al-Rawi: Grounds.

Sen. Chote SC:—opportunities that someone who has pleaded guilty and wants to appeal against conviction or a sentence, essentially what you are doing is you are saying to the person that you have a lesser right of appeal than somebody who is convicted and sentenced, and this may deter persons from entering into plea bargaining arrangements, I am just suggesting. So I am wondering why not leave it simply to "appeal against conviction or sentence, full stop". The law already says that when you have entered a guilty plea, to win an appeal is a difficult thing because you will have to show, for example, you may have to deal with a situation of incompetence of counsel, person was not examined that kind of thing or the examination was not done by a properly qualified person and so on and so forth. So if you just leave it open and remove the subsections, then it means that the person can appeal just like any other.

Mr. Al-Rawi: Thank you. Through you, Madam Chair. So the mischief that we were trying to deal with in prescribing (a), (b), (c) and as we did was to get to the common root causes of what vitiates an agreement per se. So we are looking at it from a contractual basis, "improper inducement" which we have defined; misrepresentation; prosecutor's breach; standard provisions. Both submissions, Senators Ramdeen and Chote, go to the same cause. There may be other circumstances which were ought to vitiate an agreement of this kind, and therefore

the question is whether we open it with a further element which is some other circumstance which we cannot now contemplate, but which would be, in the interest of justice, to be considered or to simply just allow for an appeal.

It was in reflecting upon the policy positions coming from other jurisdictions as well that we looked at that we really centred upon the contractual approach, the things which ought to vitiate an agreement. I am open to the suggestion, I will just like to reflect back onto our policy from our team.

Sen. Ramdeen: Can I just say AG, that one of the advantages that you might have of actually keeping the subclauses that you have as (a), (b), and (c) and adding on, instead of cutting it out, is that for the person who is not accustomed to drafting grounds of appeal like a normal prisoner, it might be easier for them to take from the legislation if it is available to them, the grounds of appeal there. But that is just a thought that it might be more useful than to have to craft—someone who does not see this and have to craft why they should appeal, it may just assist that person.

Mr. Al-Rawi: Well there was that in my mind and also the fact that I wanted from a legislative perspective to say what we were focused upon, that we were focused upon this agreement.

I am comforted by the fact that improper inducement is so widely crafted as we have put, because essentially that is anything involving all of the grounds that we have set out which is now quite wide as we have broadened the definition of improper inducement in clause 2 of the Bill. So I wondered whether we caught that there. So if you will permit me, Madam Chair, just to double-check the policy prescription that we had.

Sen. Chote SC: Madam Chairman, before, AG—

Mr. Al-Rawi: Sure.

Sen. Chote SC:—I think before we go there, it just struck me, when you are convicted in the criminal courts you have a right of appeal right up to the Privy Council. So what we are doing here talking may allow the person to withdraw or to appeal and that kind of thing, we are affecting a right. So this needs to reworded.

Mr. Al-Rawi: I just took a little look at section 13 of the existing law which is the same formulation of words that we have here which was an appeal on the grounds as stated here. I do note the submission that Sen. Chote has just put on which is your general right of appeal which ought to be an unfettered right in the context just delivered as I have taken it.

I need to just have a little at look this, Madam Chair. Madam Chair, what crosses my mind here is that in 30(1)(a), (b), (c) are proper reasons to withdraw if you really look at it. I am now cleaving in my mind a withdrawal versus an appeal. So if I were to look at this 30(1):

> "The Court may, upon application by an accused person, allow the accused person to withdraw from the plea agreement if"—skip the rest of the language—if improper inducement, misrep, breach terms.

The question now is whether appeal can be cleaved to allow for a general appeal. But I think that the balancing act that was intended in 1999 law, which this one repeats, was really the fact that you have taken the administration of justice through a whole process based upon an agreement; base upon participation; based upon circumstances; you have had due process, you have had your rights being explained to you; you have had cautionary aspects; you have had the court vet your

discussion entry; vet the agreement itself. So we have occupied judicial time inside of here and therefore, it may be appropriate to deal with the agreements in this fashion. That is one of the arguments that can be offered, the balancing act. The question is this unfettered, it is the point of the unfettered right of appeal and that is where I am now back to whether the two ought to cleaved.

Sen. Chote SC: Sure. Madam, sorry.

Sen. Ramdeen: Sorry. AG, sorry. I had just mentioned to Sen. Chote why do you not just entirely—the right of appeal as drafted here after the "," after "sentence" is "or appeal against conviction or sentence based on the plea agreement", in any event if you have a conviction and sentence you will have the right of appeal in any event. So whether is comes as a result of the plea agreement or for any other reason, you are not taking away the general right of appeal, to borrow the words of Sen. Chote. So this section only needs to deal with, because by virtue of the Supreme Court of Judicature Act he will have a right of appeal there on conviction. So this is just, you just need, all that we will have to treat with is whether the fact that you have (a), (b) and (c) to deal with withdrawal from a plea agreement because that is what we are dealing with here whether you want to treat with having any other basis upon which you vitiate the plea agreement or allow for a withdrawal on any other ground.

Mr. Al-Rawi: "Gotch yuh".

Sen. Ramdeen: And you just take out the part of the appeal.

Mr. Al-Rawi: Do you think, through the Chair, that it would be prudent to expressly provide for that right which was a right of appeal in any event in bald statement? Because we are moving from the 1999 law which expressly provided

for withdrawal and appeal on the agreements, now just to the, you may withdraw.

Sen. Chote SC: Madam Chairman, if I may just add my two cents. The fact of the matter is, if you restrict the right of appeal why would anyone want to engage in the process under this piece of legislation, because you can still plea bargain according to the common law, you can still ask for maximum sentence indications under the rules. So it would make it unworkable, apart from that it would make it challengeable in the courts, because you would be affecting a due process right, I think?

So, I agree with Sen. Ramdeen that perhaps what we ought to say is simply remove the reference to the right of appeal because it already exists and then perhaps put in a subsection (d) to deal with other fact situations which may arise.

Mr. Al-Rawi: I think that is very persuasive. I think that the elimination of the right of appeal can work. I am just going to look now for the language that we should associate with a catch-all in the new subclause (d).

Sen. Dr. Mahabir: Hon. AG, may I recommend in subclause (d), there exists other reasonable grounds for vitiating the agreement?

Mr. Al-Rawi: Madam Chairman, I think that Sen. Mahabir's recommendation may fit within the traditional language of grounds which we would put in any notice of appeal or otherwise which is that there are any other grounds for vitiating the plea agreement.

So, Madam Chair, what we would propose to do in 30(1) in the chapeau is to delete the words appearing after "sentence," in the fourth line, or delete these words "or to appeal against a conviction or sentence based on the plea agreement" and the "," as well. So you are deleting from the word "," as they say. And we—

in paragraph (b) we delete the "or" appearing after the ";". In paragraph (c) we would remove the "." and put a semi-colon then insert the word "or" and then we would insert a new paragraph (d) which could read as this "there are any other grounds for vitiating the plea agreement.".

And then, in subclause (2), delete the word "fourteen" and insert "twenty-eight". [*Crosstalk*] No? "If an accused person appeals against a conviction…". So, "the accused person shall give notice of appeal in the form set out". Yes. I understand.

Sen. Ramdeen: It is one word, application to the court.

Mr. Al-Rawi: Yeah. Yeah.

Sen. Ramdeen: It would be out of two and take out the form.

Mr. Al-Rawi: Yep.

Sen. Ramdeen: Take out "Form 9".

Mr. Al-Rawi: So, we would have to delete subclause (2). We would be removing "Form 9" and we be would, of course, deleting the subclause (1) reference in 30, so 30 would read as 30 with no subclause.

Sen. Ramdeen: Correct.

Sen. Ramkissoon: Madam Chair, I do have a question, so before you put it before the House.

Madam Chairman: Just a second.

Sen. Ramkissoon: Yeah.

Madam Chairman: So, you have it as:

> The Court may, upon application by an accused person, allow the accused person to withdraw from the plea agreement at any time before sentence, (a)

if it was entered, (b) if it was so, take off the "or" (c), put in an "or".

Clerk: "; or"—

Madam Chairman: Right. Right. Okay.

Clerk: There will be consequential in 2—

Madam Chairman: Yeah. Yes.

Clerk:—nine in the schedule.

Mr. Al-Rawi: Madam Chair, the drafters have suggested a slight modification to—

Madam Chairman: To the new (d)?

Mr. Al-Rawi:—to the new (d), and that it could instead, "there are any other grounds upon which the plea agreement should be vitiated."

Madam Chairman: [*Crosstalk*] Just a sec. Upon which—

Mr. Al-Rawi: The plea agreement should be vitiated.

Madam Chairman: Okay.

Mr. Al-Rawi: So "there are any other grounds upon which the plea agreement should be vitiated."

Madam Chairman: Attorney General.

Mr. Al-Rawi: We could use "set aside" as well. Sen. Ramdeen, through you, Madam Chair, would you prefer the word "set aside" as opposed to "vitiated". So it would be—

Sen. Ramdeen: "Set aside" would be more appropriate.

Mr. Al-Rawi:—set aside? So, Madam Chair, instead of "vitiated" we use "set aside".

Madam Chairman: Attorney General, Sen. Ramkissoon has a question.

Mr. Al-Rawi: Oh, I am sorry. Yes, Ma'am.

Sen. Ramkissoon: Thank you, Madam Chair. My question is in relation to clause 30 which deals with accused persons, is there a provision for a suspect to withdraw from a plea agreement?

Mr. Al-Rawi: "Suspects" are converted to "accused" because they have to actually get charged. So through the plea negotiation process to get to plea agreement you have to admit, you have to be charged, but you would have agreed upon the things that you should be charged. I think there is a consequential amendment to clause 28 where we make a reference to a form.

Madam Chairman: All right. We will deal with that. Let us just deal with clause 30 and then if anything we will deal with the consequential amendment after. Attorney General, are you ready?

Mr. Al-Rawi: One moment, please. Yes. So that is fine. Okay. That can stay. Yeah. Yeah. Yes. Ma'am, please.

Madam Chairman: All right. Sen. Ramdeen, you are withdrawing all your proposed amendments to clause 30. Right? [*Crosstalk*] Yeah.

Hon. Senators, the question is that clause 30 be amended as follows and I am going to read it out. Clause 30 there will be no subclause (1) anymore, and it will read:

> The Court may upon an application by an accused person allow the accused person to withdraw from the plea agreement at any time before sentence.

So we are deleting words "or to appeal against a conviction or sentence based on the plea agreement if".

Mr. Al-Rawi: No. We are keeping "if".

Madam Chairman: Oh. We are keeping "if". Sorry. Yes.

Mr. Al-Rawi: We are just deleting from "," to "agreement".

Madam Chairman: Yeah. Okay? And then we are adding, we are taking off after, at (b) we are taking off the "or" that comes at the end we are deleting that. At (c) we are including a ";" after the word "agreement", inserting the word "or" and then there is a new sub (d) which reads:

> there are any other grounds upon which the plea agreement should be set aside.

Mr. Al-Rawi: Yes.

Madam Chairman: And subsection (2) is deleted.

Mr. Al-Rawi: Yes.

Question put and agreed to.

Clause 30, as amended, ordered to stand part of the Bill.

Mr. Al-Rawi: Madam Chair, we are just be, of course, amending the marginal reference—

Madam Chairman: Yes.

Mr. Al-Rawi:—by deleting "an appeal by accused person". So it would just read "Grounds for withdrawal from plea agreement".

Madam Chairman: Yes.

Clause 31.

Question proposed: That clause 31 stand part of the Bill.

Madam Chairman: Sen. Ramdeen, you have proposed an amendment?

Sen. Ramdeen: I do not know if you have any—

Mr. Al-Rawi: 14 to 28.

Sen. Ramdeen: Yeah. Through you, Madam Chair, sorry. Apart from the amendment to the time period, when you look at the substance of 31 it is an act deemed— the marginal note says:

> "Application of prosecutor to set aside the plea agreement, conviction or sentence"

Madam Chairman: Sen. Ramdeen, could you talk up a little better.

Sen. Ramdeen: Sorry, sorry, sorry.

Madam Chairman: It is very difficult to hear you.

Sen. Ramdeen: I am sorry. AG, with respect to clause 31(1), the clause reads:

> "Notwithstanding an accused person's conviction and sentence pursuant to plea agreement, the Director of Public Prosecutions may seek the leave of the Court of Appeal to have the agreement, conviction or sentence set aside if the prosecutor was—"

If it is that the object of the exercise is to—well on the clause previously we have dealt with setting aside by the accused—

Mr. Al-Rawi: Yes.

Sen. Ramdeen:—and that application would be made to the court. If we are separating appeals and applications to set aside with respect to the accused, should we not follow the same procedure with respect to the Director of Public Prosecutions, one, as a matter of drafting, but two, as a matter of correctness having regard to the way we have treated the right of the accused to set aside. Unless there is some procedural requirement, I do not see why the Director of Public Prosecutions will the need the leave of Court of Appeal. The director if he comes into knowledge of (a) or (b), the circumstances that are prescribed by (a) or

(b) will go back to the court to set aside which is what we did in relation to clause 30.

Mr. Al-Rawi: I am just wondering whether we should have used the word "set aside" in 30 as you mentioned it, because really it should be withdrawn.

Sen. Ramdeen: What did we use?

Mr. Al-Rawi: We used "set aside", but if I looked at the chapeau of clause 30, now that you have raised in the context of clause 31, so the court may allow and application, and I am going to address why we went to the Court of Appeal as opposed to the judge. So in 30 the court may on the application of the accused person, this is at the High Court, allow the accused person to withdraw from plea agreement. We have kept the appeal going to the Court of Appeal in the normal context by the deletion of the words there.

So when we did the catch-all in (d) and we put "there are any other grounds upon which the plea agreement should be set aside", perhaps it should be "any other grounds upon which the plea agreement should be withdrawn". And then that would make sense of clause 31 where the DPP is now asking for conviction and sentence of the plea agreement to be set aside because now both of them are in an appellate place. My question is whether we should broaden clause 31 now insofar as we have deleted the right of appeal or rather the course of appeal in clause 30? So, Madam Chair, I am wondering if I could invite you to reopen clause 30.

Madam Chairman: Well let us deal with 31 first and settle what we are doing with 31. Well I am sure—

Mr. Al-Rawi: I am sure that I would like you after that to open 30 to change the

words "set aside" to "withdrawn".

Sen. Ramdeen: But, AG, before you actually go there, is it not that if we set aside the appeal there would be any requirement to withdraw, because there would be nothing to withdraw from if you set aside—sorry, not appeal—

Mr. Al-Rawi: The agreement.

Sen. Ramdeen:—if you set aside the agreement and the purpose for which you are making the application is to get rid of the agreement, there would not be need to withdraw.

Mr. Al-Rawi: Well the reason why I am suggesting it is that, we have put the concept of setting aside something in clause 31 in the appellate context. So for the DPP we are saying:

> "Notwithstanding an accused person's conviction and sentence pursuant to a plea agreement…"

The DPP may seek the leave of the court notwithstanding an accused person's conviction and sentence pursuant to a plea agreement.

Sen. Ramdeen: AG, I think the drafting is what is causing the confusion. You have to "set aside" that is being made in reference to an agreement, conviction and sentence.

Sen. Chote SC: Madam Chairman—

Madam Chairman: Just one sec. Just one sec, I think Sen. Ramdeen, I do not know if he is finished.

Sen. Ramdeen: No. No. If Sen. Chote has a suggestion.

Madam Chairman: Sen. Chote.

Sen. Chote SC: Madam Chairman, I know it is a case of diminishing returns here,

but if we look at clause 31, first of all, if you are convicted having pleaded not guilty, the DPP does not have a right of appeal. The DPP, I believe, has a right of appeal in circumstances where a judge upholds a no-case submission. It is only in that kind of situation, the DPP has a right of appeal.

So if we give the DPP a right of appeal where essentially what you want to do with this piece of legislation is encourage people to engage the plea bargaining system. I think that you might actually be doing the opposite. That is just a comment. [*Crosstalk*] Sorry. Yes. [*Crosstalk*] Yes. And the reason I raise this issue, as Sen. Ramdeen is reminding me, is because Sen. Heath had made that point in the judge-alone legislation, but it was not taken on board, it was made late in the day, but it was a very valuable point with respect to that piece of legislation. I do not want us to lose the opportunity or fall into the same error here.

Mr. Al-Rawi: By the way, I did not get to address it on the floor, but I did address it with Sen. Health. We did not affect, there is no right of appeal in the judge-alone, we left it as it was. So the law was fine and he was okay with that point. I went back and I double-checked it, it was a good point raised. It does not dilute the point that you are making now.

So, is it your view that we should not permit the DPP the opportunity to disturb this conviction and sentence in circumstances where it may have been brought to his attention that there was turpitude in the course of the plea discussion and in particular threats, force, bribery, et cetera? Because I would think that those being very limited circumstances, that we should, at least, make sure that we balance the State's position in relation to this matter where something has come into the zone, and we may want to bring it to the court's attention so that we keep

"keep people honest" in their approach towards plea bargaining and plea agreements.

Sen. Chote SC: Well that really is a policy decision for you, but in any event if we are talking about an appeal, we are not talking about an accused person, we are talking about a convict.

Mr. Al-Rawi: Yes.

10.45 p.m.

Sen. Chote SC: If we are talking about an appeal, we should not be talking about having any agreements set aside, it goes without saying that if there is a conviction recorded on a false premise, then the conviction is set aside if the appeal is allowed. So, we need to remove the word "agreement". While I appreciate that the agreement is sort of like the philosophical core for the legislation, I do not think it needs expression in this clause. And, in addition to that, I was thinking that perhaps, just to be safe, that a subclause (c) may be added to deal with any other relevant fact, or any other relevant ground, something along the lines of 30(d).

Mr. Al-Rawi: Yes. Could I just ask, through the Chair, why we would need to delete the agreement? So, you are proposing that in the chapeau, beginning with "notwithstanding", that we should remove reference to the plea agreement?

Sen. Chote SC: Well, inferentially, that is what you are doing. You are saying that by setting aside the conviction and sentence, as you do, in any criminal appeal which is allowed, what you are saying is that the basis on which that conviction and sentence was obtained, no longer stands. So, this is why I am thinking it would be cleaner if you removed the word "agreement". There is no need for the Court of Appeal to make a specific order to say this agreement is no longer valid.

Mr. Al-Rawi: I follow. I follow, and thank you. If I work my way backwards, perhaps a new (c) could read "any other ground upon which the plea agreement conviction or sentence should be set aside." And maybe that may make sense of how we should treat with the chapeau in 31(1)—we are just wrestling with how to express it now. "Notwithstanding an accused person's conviction or sentence"—

Sen. Ramdeen: AG?

Mr. Al-Rawi: Yes.

Sen. Ramdeen: The problem that we have with this section is going back to the fundamental principle that the DPP does not have a right of appeal. So that you have to have a mechanism if you are going to the Court of Appeal, you have to have a mechanism which triggers jurisdiction.

Mr. Al-Rawi: Which is this.

Sen. Ramdeen: Yeah, but this, no, but—

Mr. Al-Rawi: This was intended to give the springboard into the appeal which does not exist, and it was intended to be specifically down to the fact of the agreement which we are doing now which should be set aside for whatever reasons exist: intimidation, wilfully misled, et cetera. So, it was intended to be a very narrow appeal for something which was un-appealable before, generally in terms of the DPP's approach towards convictions. So, it is necessary to put in the right, if we want to have it in 31, that the DPP shall have this right to appeal to set aside. So, I cannot see that we cannot not have it.

Sen. Chote SC: Madam Chairman, I see what you are trying to do, but I think we are not following it through logically. It is either we are talking about the Director of Public Prosecutions now being given in this section the right to appeal against

the person's conviction and sentence, the imposition of the conviction and sentence. If that is so, what you have here does not reflect that. What you have here is an application to have the agreement conviction or sentence set aside. Now, I do not know that we could have the leave of the court to have a conviction or sentence set aside without an appeal. I do not follow it logically.

Mr. Al-Rawi: Right. So, the things which flow from the agreement being set aside I accept, are sentence, et cetera. We, in the 1999 Act in section 15, there was the express right for the DPP to seek the leave of the Court of Appeal to have the agreement, et cetera, set aside. So we had lifted from section 15 of the old Act and repeated it here, pretty much in the same terms and conditions, giving notice, et cetera, and that the Court of Appeal will do whatever it does. The point is that the language as put really was intended to be quite expressive that we were treating with all things which flowed from the agreement. I do accept the fact that obviously if you set aside the very thing from which you have started, everything else that flows after that does not exist because it is void ab initio. But, I am having a difficulty in how I should re-express it, if I am trying to catch the mischief that you are trying to solve.

Sen. Chote SC: Madam Chairman, if I may? If it is that you want to give a right of appeal to the director you must say so in the language that he has the right to appeal against the conviction or sentence.

Mr. Al-Rawi: But we have qualified it. He is seeking leave of the Court of Appeal. They may say no.

Sen. Ramdeen: No, but why would he need leave? Why are you allowing him?

Mr. Al-Rawi: Because of the fact that he did not generally have the appellate

right.

Sen. Ramdeen: No, but leave will not—if the statute is going to give him the right of appeal, and he can only have that right of appeal by virtue of the statute, he would not need the leave of the court.

Mr. Al-Rawi: It is meant to be a two-step process. Go to the court, seek the leave of the court as to whether you can set it aside; if they give you the leave, then you can proceed to apply to set it aside.

Sen. Ramdeen: No, but he cannot get to the court unless he has the right of appeal. There has to be something to trigger the jurisdiction of the Court of Appeal to give him leave. So, what is going to trigger the Court of Appeal to give him leave? You cannot get leave without having an appeal to trigger the jurisdiction of the Court of Appeal.

Sen. Chote SC: Madam Chairman, that is absolutely right.

Mr. Al-Rawi: Got it; I got you now. So, the 1919 law itself had problems. If I draw the analogy to the Privy Council, even seeking leave to go to the Privy Council in conditional leave applications, you still have a right to go to the Privy Council nonetheless, you are just going through the phased approach of seeking the leave to get there apart from then approaching it directly as you can. I see.

Sen. Chote SC: Another option, Madam Chairman, if I may suggest? This is really—I hate to say it—unfair to us, hon. AG, but another option is for us to—[*Interruption*]

Mr. Al-Rawi: Madam Chair, could I just interrupt for one moment. I too am watching the hour, and hon. Senators here, and I am also very mindful that Sen. Mahabir in our side discussions has warned me that he will be going on vacation at

the recess, full stop, and do not call him till it is over. I mean that in the best way possible. I am actually wondering if we could have—and I have not spoken to the Acting Leader or to the Chair—just continued with a few of the other observations, not much staying longer. But I would have proposed that we actual on the next day come back to complete this work. It will allow us to have some reflection on the clauses that we have stood down as well. So, I was minded that we would not necessarily want to go too far into the night. I am hoping that—I have not had a chance, Madam Chair, to discuss what date we would next come.

Sen. Baptiste-Primus: Tuesday, 10 o'clock.

Mr. Al-Rawi: Tuesday, at perhaps 10 o'clock, and then we can seek to tackle the work in the committee stage, and also start and complete the Bail Bill. So, Madam Chair—

Sen. Ramdeen: You could come 10 o'clock, Tuesday? "I doh know how allyuh come to this 10.00 o'clock ting", we have court. I mean, we have court. How we going to court? [*Opposition Senators confer with each other*]

Mr. Ai-Rawi: Madam Chair, I am wondering, and I look a lot of latitude in saying what I just did. Thank you for that. I am just wondering perhaps if we could just flag the issues in relation to the other matters to the end of the Bill, as opposed to if there are areas where we cannot form an immediate agreement, at least if I understand it, it would make the trip on Tuesday all the much faster, subject to your guidance, Madam Chair.

Madam Chairman: So, as I understand it, hon. Attorney General, Members, you want to stand down clause 31?

Mr. Al-Rawi: Yes, please.

Madam Chairman: Yes? So, clause 31 is stood down.

Sen. Ramdeen: And what will follow, AG, is 32 as well. You will have to stand down 32 as well, because it depends on 31.

Mr. Al-Rawi: Yes.

Madam Chairman: May I put the question?

Mr. Al-Rawi: We keep usurping your function. Sorry, Madam Chairman, please.

Clause 31 deferred.

Clause 32.

Question proposed: That clause 32 stand part of the Bill.

Madam Chairman: Attorney General, from what I am hearing clause 32 would be stood down as well. Correct?

Mr. Al-Rawi: Yes, please, because it is squarely related to 31.

Clause 32 deferred.

Clause 33.

Question proposed: That clause stand part of the Bill.

Sen. Chote SC: Madam Chairman, this connects back with a policy position which the Senate took earlier with respect to the evidence of plea agreements being used in the courtroom and whether they are allowed under the bad character laws. So, I think, hon. Attorney General, and I think very tiredly, that perhaps this needs to be looked at as well.

Mr. Al-Rawi: Yes, I think it was in relation to clause 12—it is either 8, 11, or 12 that we stood down.

Madam Chairman: Okay, so, hon. Senators, we will stand down clause 33.

Sen. Mark: Madam Chair, may I with your leave, and with the leave of the hon.

Attorney General, propose that we stand down the remaining clauses for today and we resume at 1.30—

Mr. Al-Rawi: At 10.00, 10.30, 10.00.

Sen. Baptiste-Primus: 10 o'clock.

Sen. Mark: Well, my colleagues are—I have a lot of colleagues who work part-time in this Chamber, and we do not have the luxury of the full-time, and all the money that you all get. [*Crosstalk*] So, we have lawyers who have to be in the court, so, Madam—

Madam Chairman: Sen. Mark, yes, I hear you. I just think that there are some discussions—if it is that the issue of what time we are going to start, if that will necessitate extensive discussion then I am going to suspend and allow the discussions to take place and come back. Because at this stage I do not think it is necessary to have the toing and froing with the time.

Mr. Al-Rawi: Madam Chair, I do not think we have any difficulties with 10.30. My friend is a little tired, I appreciate. [*Crosstalk*] Having sat on that side of the House for five years and done my full share in the same capacity as others, the one thing that I recognize is that there is by far less pay in this position right now. [*Laughter*] I understand, it is true.

Sen. Dr. Mahabir: Hon. AG, we do need to consider the court obligations of the lawyers here, because we do need to get the lawyers' input in this here.

Mr. Al-Rawi: I promise you I have a lot of work on my plate too, you know.

Sen. Ramdeen: AG, what we can do, if we have the time for reflection, we obviously are not going to come here and start all over again in terms of looking at the clauses. Whatever assistance we can give you between now and then, we can

share our views with you, and you can have a look at it, and then we can come back here and whatever needs to be thrashed out between now and then, I think we can get it done in a shorter period of time, having regard to the adjournment.

Mr. Al-Rawi: That is a reasonable position, Madam Chair, if you would permit this discussion, and thank you. My fear is—and again I am laying my cards on the table—that when we start at 1.30, by the time we get through question time, et cetera, and several hours, then we are now running at risk in terms of bail. And, I am very mindful that next week is the last week of the sitting of the Parliament, full stop. There is no other time before the recess hits us. So, I am most respectfully craving the indulgence of hon. Senators to try and come in a little bit earlier. I know it is a hard push.

Sen. Solomon: "Wha yuh want to do? Wha yuh want to do, 12 o'clock?"

Sen. Mark: We can see.

Sen. Ramdeen: Eleven, you want to do 11? [*Opposition Senators confer with each other*]

Sen. Mark: We say about 11.30, yes, because a lot of our colleagues have court.

Mr. Al-Rawi: The last submission I would make on this is just that it is really the earlier start time is really an attempt to try and avoid us staying as late as we do, and that is really a serious indulgence, not only on hon. Senators, who I thank, but also the Parliament staff. I mean, I myself I have been sitting every single day in both Houses, so I appreciate what is happening. So, it is in the overall consideration—and tonight for very good reason we took two hours to do two clauses. I mean, I do not make a complaint about that, because we came out with a better product. So, respectfully I am asking hon. Members to take a little extra

stretch so that we can try and finish at a more reasonable hour for the entire Senate.

Sen. Mark: Madam Chair, I am suggesting, in the spirit of a compromise, that we assemble here at 11.30 on Tuesday of next week, and probably we could cut off at 10.00, and then come back on Thursday, and we start at 10.00 in the morning or 10.30, but you have Cabinet, so you would not be able to make it. [*Laughter*] So, like about 2.30, so you understand the challenge that we have. So, Madam Chair, I would like to suggest to the Hon. Attorney General and the acting Leader of Government Business that we compromise and we come at 11.30.

Mr. Al-Rawi: Sure. Madam Chair, I would be pleased to agree to 11.30. I have not heard the Hon. Independent Senators, but 11.30 and that we go until we finish.

Sen. Dr. Mahabir: You know I do not have a whip hon. Attorney General, but I think that 11.30 seems to be a good compromise, unless my colleagues object strenuously, I think 11.30 is something that we can start with, and hopefully finish at an appropriate time.

Mr. Al-Rawi: Thank you, hon. Senators. Madam Chair, thank you for facilitating the discussion. [*Crosstalk*]

Madam Chairman: Members, we are still in session, Sen. Sturge. So, Attorney General.

Mr. Al-Rawi: Madam Chair, in accordance with Standing Order 68(14), I beg to move that progress on the Bill be reported to the Senate.

Question put and agreed to.

Senate resumed.

Hon. Al-Rawi: Madam President, I wish to report that a Bill entitled an Act to establish a system of plea discussions and plea agreements and for matters

incidental thereto, was considered in committee, however the deliberations of the Bill were not concluded and I therefore seek the leave of the Senate to resume committee stage on Tuesday the 4th of July, 2017, when the time will be announced at the Motion to adjourn the House. Thank you, Madam President.

Question put and agreed to.

ADJOURNMENT

The Minister of Labour and Small Enterprise Development (Sen. The Hon. Jennifer Baptiste-Primus): Madam President, I beg to move that this Senate do now adjourn to Tuesday, 4th of July at 11.30 a.m., to go back into committee stage, and to focus on the Bail (Amdt.) Bill, and if time permits we will also deal with the preliminary enquiry Bill.

Hon. Senator: Ha! [*Crosstalk*]

Madam Chairman: Hon. Senators, before I put the question on the adjournment, leave has been granted for a matter to be raised on the Motion for the Adjournment of the Senate. Sen. Mark.

Sugar Industry Labour Welfare Committee

(Appointment of Board)

Sen. Wade Mark: Madam President, thank you very much. This is a matter this deals with the Sugar Industry Labour Welfare Committee. Madam President, this committee demitted office on September 12, 2015. And this is almost two years after, and the Cabinet who finds time to reshuffle its Members, they are yet to appoint a new board to this particular body.

Madam President, I do not want to attribute reasons at this time, but I would like the Government to indicate to this country, why has it taken two years to

appoint the Sugar Industry Labour Welfare Committee board? In the absence of this board a number of operations of this body have come to a halt, several projects have been halted. Madam President, there are some 24 housing development projects, for which only the board can take action on. Whether it deals with the infrastructural works, the fixing of roads, legal matters relating to these particular housing development projects, the board has to take responsibility. Madam President, whether it is the question of mortgage payments, the board has a role when people need to get conveyances so they can get releases on their properties.

We understand that there are some 764 mortgages that are outstanding. The backlog on deeds that are to be provided to these owners of property, because of the lack of conveyances that only the board can deal with is a real problem as we speak at this time. And in absence of the board, what is happening is that empty lots cannot be handed out to these workers. And we are talking about cane farmers and sugar workers. I do not know what the Government has against cane farmers and sugar workers? [*Desk thumping*] They have closed down Caroni Green, they have closed down Caroni (1975) Limited, and now they are denying the rights—Madam President, let me just cool myself. [*Interruption*]

Madam President, I do not know what is the reason, but there is no plausible reason for this Government not to have taken action to deal with this matter. Madam President, whether this body is responsible for the sewer systems involving housing at Brother/Garth's area, that is in Princes Town; the Tarouba area where there is squatter regularization, that has come to a halt; there is the Orange Field development area where workers were given VSEP, and they need to get their land regularized; and these projects cannot be opened because of the absence of this board. WASA, T&TEC and other utility bodies cannot function because of the absence of this board.

Madam President, what is even more alarming is that this PNM Government allocated some $8 million 2016/2017 for the PSIP, for this body, and that money is going to be returned to the Consolidated Fund because of the absence of a board. Now, Madam President, as I said, whether it is the home—there is something called the Home Improvement Grant, the Home Improvement Subsidy—all of these things can offered to these workers, but because the board is not functioning you have a challenge. What is the problem? Is it political discrimination? [*Desk thumping*] What is the reason? Why is the Government of the PNM that says let us do it together, and they stand for national unity, why, Madam President, after two years the Government has failed to appoint that board?

Madam President, I am a member of a committee of this Parliament and we had the Ministry of Housing and Urban Development before us, because they are responsible for this body, and we asked the question, and the lady who came before us could not give us answers. So I told her the next time I am going to make an appeal to our committee so we can bring to that committee kicking and scream, either the Prime Minister or Randall Mitchell, the Minister of Housing and Urban Development, so they can tell us—[*Desk thumping*]

Sen. Cummings: Hon. Member. Hon. Member. Hon. Member.

Sen. W. Mark: Well, yes, the Honourable. But I want him to honour his commitment to the people who are members of the sugar area. [*Desk thumping*] [*Crosstalk*]

Madam Chairman: Have a seat, Sen. Mark. Members, please, it is too late now for this kind of behaviour. Sen. Mark, continue.

Sen. W. Mark: So, Madam President, all I am asking is for justice to be shown towards these workers, and cane farmers, and sugar workers. All they are begging for, and appealing for is the appointment of a board, and the Government of

Trinidad and Tobago, under the hon. Keith Rowley, is responsible for doing so.

There is a Cabinet board committee, or a committee that deals with the appointment of boards, please do what you have to do and appoint the members of this Sugar Industry Welfare Committee. That is all the people are asking, and they are appealing to the Government. I thank you very much, Madam President. [*Desk thumping*]

The Minister of Agriculture, Land and Fisheries (Sen. The Hon. Clarence Rambharat): Madam President, as we came into the year 2000/2001, Australia and Brazil and other low-cost sugar-producing countries brought a case to the WTO, which eventually led to the dismantling of the long-standing preferential treatment that Trinidad and Tobago sugar enjoyed.

In advance of the dismantling of that preferential treatment, and in answer to my colleague, Sen. Mark, it was a PNM Government that took the decision to offer to Caroni (1975) sugar workers an unprecedented VSEP package, which has resulted in each worker who has applied, receiving a two-acre parcel of lot. [*Desk thumping*] And each worker qualified, receiving a residential parcel of land. [*Desk thumping*] More than 8,000 sugar workers are entitled to these agriculture plots, and more than 7,800 are entitled to a residential plot. This VSEP programme has so far cost taxpayers more than $10 billion.

11.15 p.m.

Madam President, at the end of the VSEP and the distribution of these lots, a Caroni worker who received a residential lot—and these lots are free—currently holds an asset that is valued at least $450,000 and in some cases, like those who have gotten lots in Caroni Savannah Road, the asset is worth $750,000. [*Desk thumping*]

The case of the agricultural plots, those workers who have benefited from a

two-acre agriculture plot hold an asset that is valued at a minimum of $140,000 and in some cases $450,000. So those sugar workers, Madam President, under the hands of the People's National Movement Government currently hold on average land asset worth at least $1million. [*Desk thumping*]

Madam President, the Sugar Industry Labour Welfare Committee has a long history dating back to 1948. The Sugar Industry Labour Welfare Committee is one of three funds which were funded out of the proceeds of the export of sugar. And a long time ago Trinidad and Tobago stopped exporting sugar. In fact, in 2003 and thereafter, under SMCL in 2005/2006, somewhere around there, Trinidad stopped exporting sugar. And once we stopped exporting sugar the rationale and the funding for the three funds including the Sugar Industry Labour Welfare Committee simply disappeared. And since then, Madam President, up until September2015 nothing had been done to address the issues of the funding and the future of the Sugar Industry Labour Welfare Committee.

Since then, Madam President, the Minister of Housing and Urban Development has been engaged in a review of the Sugar Industry Labour Welfare Committee in order to put the funding on a firm footing and in order to deal with those issues which Sen. Mark pointed out—issues of mortgage, leases, loans which are in transition and other matters relating to this long-standing organization.

Madam President, the Minister of Housing and Urban Development has completed his work and has placed before the Cabinet of the country a recommendation for the appointment of a new board charged with new responsibilities to take care of the future and what remains of this long-standing part of our sugar history, the Sugar Industry Labour Welfare Committee. I am confident that the board would be in place and the board will charge of what remains of the affairs of the SILWC and those sugar workers who benefit from that

entity. Thank you very much. [*Desk thumping*]

Question put and agreed to.

Senate adjourned accordingly.

Adjourned at 11.18 p.m.