SUBMISSIONS ON BEHALF OF THE BAR ASSOCIATION IN RESPECT OF THE CRIMINAL JUSTICE (PLEA NEGOTIATIONS AND AGREEMENTS) BILL 2004

INTRODUCTION

1. What follows is an amended version of the submissions made by the writer on behalf of the Bar Association to the Joint Select committee of Parliament established to consider the original Criminal Justice (Plea Negotiations And Agreements) Bill. After the submissions were made to the committees there were amendments. In this revised paper the writer has sought to take into account and address these amendments. The submissions to the Joint select committee of parliament were prepared after discussion at committee level and in consultation with committee members.

2. From the outset we should acknowledge that some of the concerns expressed on behalf of the Bar were addressed in some of the amendments made however we also regretfully note that other matters of grave concern have not been addressed in the draft recently approved by the Senate and the Lower House but not yet signed into Law by the Governor General.

3. This proposed Bill comes in the context of concerns surrounding the efficiency of the administration of justice in Jamaica and The Jamaican Bar Association shares these concerns with the wider society. Unfortunately so far as the Bar is aware no coherent or scientific study has been done to establish the reasons for many of the problems impairing the functioning of the courts. For example, what are the main causes of the backlog that now exists in the court system?

4. There can indeed be no doubt that there is a back log and undoubtedly if there were no trials and cases were simply "pleaded out", "bargained out" or otherwise compromised then any back log would be significantly reduced. However this is neither likely nor perhaps desirable and, it is our view that a piecemeal approach will never solve the problem.

5. We recall that when the Gun court was first introduced one of its touted benefits was speedy trials. It was said that trial by a single judge instead of with a jury would ensure this, yet where are we today? There is certainly a backlog in the Gun court. This we submit illustrates the need for an ongoing rational and comprehensive examination of the data. The approach has been largely anecdotal and intuitive. For example, what is the number of or percentage of cases to which pleas are entered, the number and types of cases that are otherwise withdrawn, the sentences imposed for similar offences where conviction results from a plea, as opposed to a trial.

6. There must be an analysis of the data and this body of knowledge ought to be made available to all stakeholders in the justice system, including the representative organizations of the private bar. We do not believe this is as onerous as it may first seem as we know that the data is already readily available and all that is required is to take it to the next stage of collation and analysis. For example the writer after some

resistance from administrators was able to gain access to records of the gun court to gather data and prepare a comparative chart on the sentences imposed for gun offences on guilty pleas and after trials for a particular period. Perhaps it would be a good thing for the Bar to take the initiative to seek funding for a comprehensive study of the operation and efficiency of the courts

7. We believe that it is only on such a rational and informed basis that decisions which are bound to have a far-reaching impact on the judicial system and which touch on fundamental constitutional principles should be made. We emphasize that the material should be made available to the bar and that the view of defence counsel ought to be canvassed and taken into account at the earliest stage We suggest that this is the factual basis on which the discussion as to plea bargaining should have proceeded.

SIMPLE GUILTY PLEAS

8. The Memorandum of Objects and Reasons accompanying the Bill states that the proposed law is designed to address two problems. The difficulty of prosecuting perpetrators of some crimes who the police have difficulty in identifying; and also the vast number of criminal prosecutions and the length of time it takes to bring the criminal trials to completion. It is submitted that the bill as drafted seeks to address the first stated problem and not the second. **Clause 4** allows the Director of Public Prosecutions or his nominee to enter into plea agreements with accused persons. The agreement must have two dimensions: (i).A guilty plea; and (ii) an agreement by the accused to fulfill some other obligation(s); obviously constituting prosecutorial assistance.

9. It is noteworthy that this prosecutorial assistance is not limited to the particular offence which the plea bargaining accused pleads guilty to, but may relate to other police matters including other offences involving other accused persons (not his co-accused on the charge he pleads guilty to). This clearly has implications for disclosure as will be demonstrated later. On the other hand the plea bargaining accused cannot on a plea bargaining agreement go 'scot free'. In the deal with the Director of Public Prosecutions he must plead to the offence charged or to some other related offence disclosed on the facts.

10. This means therefore that the bill does not address the situation of the accused who wishes to plead guilty and for whom prosecutorial assistance does not and would not arise. Assuming that such cases constitute the great majority of cases in which pleas are to be considered then clearly by excluding them, the proposed Bill is failing to address the issue of the backlog in any significant way.

11. Those concerned with the criminal justice system would be aware that already, accused persons may plead guilty and that in a significant number of cases they actually do. In the Half Way Tree criminal court, for example, on any given day one will find a number of persons pleading guilty to drug and other charges. Again, in the Gun Court, young men plead guilty to possession of firearms and related offences on a regular basis; and so it goes for the courts throughout the island.

12. In relation to such guilty pleas, the plea is, as a matter of practice and indeed principle, to be considered as a mitigating factor which operates to reduce the sentence. According to Archbold the leading practitioner's text this as a general rule warrants a one third reduction. However, there has been some concern that this is not applied consistently.

13. Again when an accused decides to plead guilty there may be informal discussions with the prosecutor. Sometimes the court may give an indication of how it might approach sentencing; however as a matter of law, the judge cannot promise or commit himself to a sentence before he actually adjudicates and in the past some authorities have stated that it is bad practice to even give such an indication. Perhaps if the law had codified these practices more defendants would avail themselves of this option. It had been proposed that:
i. They may so indicate to the prosecution
ii. They may have discussions with the prosecutor as to the charge or charges which they will plead to.
iii. On a guilty plea the judge must reduce the sentence by one third unless there is specific reason or other aggravating factors which justify a higher sentence.
Iv. The common law as to the factual basis on which a court should proceed on such guilty pleas should also be preserved allowing the judge to take sworn evidence of the facts and where this is not done requiring him to proceed on the accused's account

14. Simple guilty pleas being specifically excluded from the bill, the question must be asked: What impact if any does or will the proposed law have on the current practice. Further there is a concern that with the mandatory requirement of a minimum one third reduction in sentences in case of a plea bargain agreement, the current practice of one third reductions for simple pleas may become more the exception than the rule. It had been proposed that if the law were to have any significant impact on the "backlog" provisions should also have been included relative to simple pleas.

15. One also wonders what is the net effect of this proposed law as in any event the Director of Public Prosecutions reserves his all encompassing power under the Constitution to intervene in any criminal case at any stage before its completion and has exercised this power in the past, from time to time. (see example **R v Lloydell Richards [1987] 24 J.L.R 142).** Can the proposed law then create any brake or power on the Director's Constitutional powers?

PLEA BARGAINING

16. Fundamental to our criminal justice system is the adversarial process in which the rights of the accused are protected. Prior to trial and in the court setting, this protection is entrusted to his attorney and ultimately controlled by an impartial referee in the person of the presiding judge as well as a rational system of sentencing where but for mitigating factors; similar penalties are awarded for the same or similar offences.

17. The impact on these principles of plea bargaining as contemplated by the bill requires careful consideration. Under the proposed law the accused 'purchases' a reduction in sentence in exchange for providing substantial assistance to the prosecutorial arm. We ask that the following be noted:

i. It is against the spirit and letter of our Constitution for anyone to give evidence based on force or inducement.
ii. In all criminal trials the accused is entitled to disclosure of all relevant material in the possession of the prosecution or any arm of the prosecution.
iii. The Director of Public Prosecutions' history of disclosure in this jurisdiction has come under criticism from our superior courts on a number of occasions with the courts having had to intervene to correct injustice occasioned by failure to disclose material to the defence.
iv. From the time an accused person is arrested to the time he/she is taken before the court he/she is subjected to the elaborate and powerful machinery of the state funded police and other prosecutorial arms of the state. This by itself places great pressure on the accused and it is our experience that from the very earliest stages the police begin to put pressure on the accused to "confess", to "plead", to "assist". Viewed objectively the imbalance and the potential for perjured evidence against others and false confessions cannot be ignored.

It is in this context that we have sought to examine the proposed legislation by which, in exchange for assisting the prosecutorial arm an accused's sentence is reduced.

18. We have noted that the Bill seeks to include certain safeguards: the right of representation, **Clause 6**; the requirement that the accused's attorney signs off on any plea agreement, **Clause 7**; the stipulations as to what must be included in an agreement and the final power that remains in the presiding judge to reject any such plea agreement, **Clause12**; the right of the accused to withdraw from the plea agreement at any time before sentencing, **Clause 16**; and his right to appeal after conviction **Clause 16**.

However, there remain concerns as to the fair operation of the system proposed and its potential to undermine integral bases of our criminal justice system and ultimately its integrity and public confidence in our judicial system.

19. Firstly and fundamentally the principle that a witness must not give evidence based on some expectation of gain or coercion is per se compromised by the fact of the plea bargain agreements contemplated by the Bill. We must face squarely the fact that a principle designed to ensure that evidence is true may be sacrificed on the altar of expediency.

20. To minimize the risks attendant on the legitimization of plea bargaining, we recommended that where persons give evidence as a consequence of a plea bargain agreement, the law must stipulate for corroboration of that witness's evidence whether he is a co-accused in relation to the particular offence of which he has pleaded guilty or

he has pleaded guilty to a separate offence. This was opposed by the Director of Public Prosecutions. However the bar's recommendation was partially taken on board by the inclusion of **Clause 11(2)** which provides that where a judge determines that a person has an interest in the outcome of a case he shall warn himself and the jury that it is dangerous to convict on the uncorroborated evidence of that person and the judge must point to any independent corroborative evidence.

21. Secondly if there is to be balance and adequate protection for the accused the right to representation must be secured. There also needs to be strict provisions that the police must not interview an accused person taken into custody without the accused's lawyer being present and corresponding provisions that where this is breached disciplinary consequences flow for the offending officers. Regrettably, although the law requires that the Director of Public Prosecutions carries out no plea bargaining agreement in the absence of the accused's attorney; the law still does not address contact by representations by discussions with other representatives of the prosecutorial arm (the police for example) which could impact on such negotiations.

22. Connected to this we recommend that there must be some improvement in the legal aid system, particularly as it affects persons who are yet to face the court. Unless we can assure quality legal assistance to accused persons when they are most vulnerable then the right to a lawyer which is recognized in the draft Bill becomes a mere parody.

23. At present duty counsel who visits the police station after the normal working day and in one session may (1) interview several detainees, (2) sit in on 2 – 3 hours of interviews and (3) represent an accused at an Identification parade, and then later attends court for the accused's first appearance is paid the grand total of $5,000.00.

24. There has been some acknowledgement of the validity of the Bar's concerns on this aspect. The houses of Parliament have approved an amendment to the Legal Aid Act that provides that Legal Aid may be granted to a person in custody. The concern continues to be that the proposed change in the law arguably does not *guarantee* legal aid at this stage. It does not require representation or secure legal aid at the pre-negotiation stage. It does not extend legal aid to the previously excepted offences, for example, drug offences. This in a context where it is openly admitted that one of the main thrusts of this legislation is the 'war on drugs'. The rate of payment to counsel for legal aid and the delays in actual payment impact adversely on the availability of counsel for legal aid and the efficient and professional operation of the system

25. It has been our view where an accused person is before the court based on material supplied by a person who has bargained with the Director of Public Prosecutions there must be full disclosure to the accused of:
i. The negotiations leading up to the agreement or any reduced terms asked for or admissions made in the negotiations leading up to the agreement;
ii. The terms of the agreement;
iii. The terms of any agreement;

iv. Details of any material supplied by the plea-bargaining accused which were found to be false or unreliable;
v. Any other information or material which reflects on the dishonesty or unreliability of the plea-bargaining accused;
vi. Any convictions or pending charges against the plea bargaining accused;
vii. The details of the matter in **Clause 10** of the current charge;
viii. Any other matter revealed in any plea bargaining negotiations which is of prima facie relevance to the accused's case.
ix. Notes of all interviews with the plea bargaining accused relative to the terms of the plea and the substance of this evidence.

26. This we submit is the common law. We were of the view that to put its applicability to all aspects of plea bargaining agreements beyond doubt it should be specifically provided for in the law. However the Director of Public Prosecutions' opposing position prevailed. As he urged, disclosure is to be excluded in cases where on the Director of Public Prosecutions' application, the record of the plea bargain agreement is ordered sealed by a court.

27. The implications of this provision are far reaching. It means that the decision to seal the record is likely to be taken at a stage when an affected accused person is not yet before the court and its impact on him cannot then be fully assessed. In any event such a person has no right to participation in the hearing conducted whether to seal or not; by virtue of which his right to disclosure would have been seriously affected.

28. Again the criteria laid down by the bill for deciding to grant a sealing order is the court being 'satisfied that the sealing ...is in the interests of the effective administration of justice'. This is a wide concept. Does it extend beyond the established and restricted 'public interest' guidelines which operate at common law for the exclusion of disclosure? And may there be judicial review of a decision to seal?

29. The stage at which sentencing ought to take place should also be addressed. The rule has been that a person ought to be sentenced and his/her case finally disposed of before he/she became a prosecution witness against his partner in crime. This was to prevent the reality or the perception of the witness testifying under inducement or coercion while he/she gives his evidence. On the other hand since there should be consistency/relativity in sentencing of co-accused in the simple guilty pleas the modern trend has been to postpone sentencing of the persons pleading guilty until the sentencing of the co accused is to take place. The law as presently framed seems to allow for the sentencing of the plea bargainer either before or after the case of the affected accused is prosecuted or disposed of.

SPECIFIC CLAUSES OF THE BILL

30. **Clause 6 (1)** provides for the accused to be informed of his right to have an attorney and to access legal aid. From this **Clause 6 (2)** leaps forward to make it a requirement

that negotiations proceed through the accused's attorney. The implications and inadequacies of this provision have already been considered.

31. The draft of the Bill that went to the Joint Select Committee provided for the victim of the crime or a relative (in cases of victim incapacity or death) to be informed of any plea bargaining agreement. It failed to nominate any criteria for the selection of the particular relative and made no provision for so called 'victimless crimes'. It was proposed that the law address these omissions. In particular; as to "victimless" crimes it was further proposed that the Office of the Public Defender and/or the Attorney General be informed.

32. It was proposed that in the law, provision be made for, in the case of child victims under 10 years, the legal guardian(s) of the child being informed and in case of child victims between 10 and 18 years, the legal guardian(s) as well as the complainant him/herself being informed. The response to the proposal is perhaps reflected in **Clause 8 (3)** of the amended bill which provides that for child victims under the age of 14 years a parent or the legal guardian must be informed and if over 14 the child must also be informed . In the absence of parent or guardian the Child Advocate substitutes. The law is silent as to which of two parents should be informed.

33. It is to be noted that there is a complete and inexplicable absence of any provision for negotiations with accused who are minors. It was proposed that before embarking upon any such negotiations the parents or legal guardians of the accused – minor be informed and their approval secured and that in the written agreement, in addition to the certificate of the attorney, there be a certification of the legal guardian as to their consultation, understanding and their agreement. Where the accused is the legal guardian of the child the Child Advocate or other appropriate officer may stand in the guardian's shoes for the purpose of the negotiations. These proposals did not find favour with the legislators hence **Clause 8** of the bill remains as in its original form.

34. **Clause 9** provides for the court to be informed of the existence of a plea agreement. It further provides that this should be in open court or in chambers on the showing by the D.P.P. of "good cause". It was submitted that this is too vague. The law should specify and limit the reasons that would justify the matter being dealt with in closed chambers. This proposal was not taken on board.

35. It was also submitted that in any case where the matter is being dealt with in chambers the following persons should have the right to be present:
i. The accused plea bargainer
ii. The legal guardian of the accused plea bargainer if he is a minor;
iii. The attorney of the accused plea bargainer
iv. Any co-accused and/or his/her attorney.

The proposals at i. and ii. were included in the amended draft.

36. It is submitted that a delineation of the circumstances in which the matter may be dealt with behind closed doors and the requirement of presence as itemized above are essential to the proper and fair administration of justice. Justice should not only be done but be seen to be done and public scrutiny and judgment is the best guarantee of evenhandedness and fair play.

37. **All attorneys must take careful note of the provisions of Clause 19** by virtue of which they could be the subject of criminal sanction including a substantial fine if they disclose the terms of unconcluded plea bargain agreements or concluded agreements that have been ordered sealed.

38. **Clause 16 (1)** of the Bill provides for the right to appeal conviction based on the plea agreement if it was entered into as a result of improper indictment; the Director of Public Prosecutions breaches the terms of the agreement; or it was entered into as a result of misrepresentation or misapprehension. However, the Clause does not recognize that these reasons may not be made manifest in the time stipulated in the existing time limits for the filing of criminal appeals. **Clause 15 (2)** of the Trinidad and Tobago Act prescribes that the notice of appeal shall be given "in such manner prescribed by the Rules of Court within twelve months of the sentence passed". **Clause 15(3)** states "The Court of appeal may extend the time within which notice of appeal may be given". Our act should make similar provisions in order to give effect to the intent prescribed in **Clause 16 (1)**

CONCLUSION

39. In concluding we note that this is an area in which we ought to proceed with great caution. We are not unaware of the existence of similar legislation in many countries of the world but we are also aware that in some places reliance on plea bargaining has been effectively abandoned and in studies carried out on the efficacy of plea bargaining it has been discovered that it was not the panacea it was anecdotally touted to be. (See **Is Plea Bargaining Inevitable?** by Stephen J. Schulhofer Harvard Law Review). At the heart of our legal system is the adversarial process and while that remains, changes in the law however well intentioned but which chip away at its structure may well in the long run have results the very opposite of that which was intended. Finally we urge that there be continuous rationalization of the available data and transparency in its use to better inform our efforts to improve our justice and law enforcement system.

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