



## THE CAYMAN ISLANDS LAW REFORM COMMISSION



### REGULATION OF QUEEN'S EVIDENCE – IMMUNITY FROM PROSECUTION, RESTRICTED USE UNDERTAKINGS AND REDUCED SENTENCES

FINAL REPORT  
30<sup>TH</sup> NOVEMBER, 2021

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# FINAL REPORT

## REGULATION OF QUEEN'S EVIDENCE - IMMUNITY FROM PROSECUTION, RESTRICTED USE UNDERTAKINGS AND REDUCED SENTENCES

### INTRODUCTION

1. The Honourable Attorney General in 2014 noted in the Parliament that the Cayman Islands are undergoing a changing crime dynamic and cultural shift where violence and the use of firearms have radically impacted the willingness of persons to provide information to the police. On far too many occasions investigations and prosecutions have stalled because witnesses fear reprisals and thus refuse to assist in bringing criminals to justice. In one of the recent tragic cases after a witness refused to testify in a murder trial, a local man accused of the murder was released from jail. The former accused met his death on the streets some time later, gunned down near a popular nightclub.<sup>1</sup>

2. In response to the issues regarding the failure to engage witnesses, the Criminal Evidence (Witness Anonymity) Act was passed in 2014. That Act provides for the protection of witnesses by the making of an investigation anonymity order by a magistrate in relation to a person who is willing and able to assist the police with criminal investigations into certain types of crimes, where that person would not otherwise do so for fear of harm. The Act also provides for the making of a witness anonymity order in relation to a person who is able to give evidence in actual criminal proceedings where that person would not otherwise do so for fear of harm. The investigation anonymity order relates to investigations into the following offences -

- (a) murder;
- (b) attempted murder;
- (c) manslaughter;
- (d) robbery;
- (e) attempted robbery; and
- (f) rape.

3. This Act has successfully been used in two instances involving offences of Murder/Possession of an Unlicensed Firearm and Robbery/Possession of an Imitation Firearm with Intent. Convictions were upheld in the Court of Appeal in *Anglin v. R.* and *Ebanks v. R.* In a third instance, the Cayman Islands Court of Appeal ruled that in the circumstances of that case, where the witness was said to have been on the fringes of gang association, a witness anonymity order was not appropriate.

4. It has been posited that another means of obtaining evidence would be to follow the lead of the UK and provide for the statutory codification of Queen's Evidence or the use of plea deals like the USA. Queen's evidence is defined as evidence from someone who has been accused of committing a crime, given against the people who were accused with them, in order to have their own punishment reduced. It is argued that this would allow prosecutors to be more effective, not only in obtaining accomplice evidence but in securing quicker convictions.

5. In most Commonwealth countries, as in the Cayman Islands, a prosecutor has the power to secure the co-operation of potential co-defendants in an informal manner, as well as the power to

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<sup>1</sup> *Cayman Compass*, 2<sup>nd</sup> October, 2016

determine whether or not to bring criminal charges and what charges to bring. The exercise of the discretion includes the following -

- (a) deciding to prosecute only the main offenders and to call peripheral offenders as witnesses;
- (b) informing the court, when an accomplice or other witness gives evidence, that the witness will not be prosecuted on the basis of anything he may say in the course of truthful evidence on that occasion. This situation may arise at short notice when the court of its own motion warns the witness against self-incrimination during the course of their testimony; and
- (c) where a prosecutor also has regulatory powers, dealing with some of the offenders by way of a civil administrative sanction before calling them as witnesses.<sup>2</sup>

6. Such prosecutorial discretion has been long acknowledged in the UK. According to the former Attorney-General of the UK as far back as 1951, Sir Shawcross KC -

*“It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration.”*

7. The discretion of the Director of Public Prosecutions (DPP) is enshrined in the Cayman Islands Constitution Order 2009 which provides in section 57(2) and (6) as follows -

*“(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so -*

- (a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in the Cayman Islands;*
- (b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and*
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority....*

*(6) In the exercise of the powers conferred on him or her by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.”*

8. The DPP engages in a series of tasks in dealing with any possible prosecution. The DPP has to first decide whether the act or omission is a criminal offence, thereafter he or she has to assess the reliability of the evidence on the file, the credibility of the witnesses and the persuasiveness of any potential defence. Charges are recommended where the evidence satisfies the evidential test and the public interest test is met irrespective of whether there is an indication from the accomplice of a desire to provide assistance.

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<sup>2</sup> The Prosecution Service; Legal Guidance, Queen’s Evidence

9. The existing practice is that, should an accomplice inquire of the police as to any benefit if assistance is provided, the police will advise that no agreements or promises can be made and that it is a matter for the Courts on the sentencing of an accomplice whether or not to take into account any assistance provided to the Crown. The police undertake to bring to the attention of the Court any such assistance by way of a sealed envelope containing a memorandum from a senior officer of police. The sealed envelope procedure endeavours to protect the witness in instances where there may be gang affiliations and the extent of the assistance provided cannot be stated in open Court as it may have implications for the safety of the witness. The Office of the DPP has no contact with accomplices. This in effect was the pre-statutory position in the UK. “Where the evidence of an accomplice is to be used, there is no longer a statutory requirement for corroboration of that evidence” (Evidence Act, section 41). However, at common law, the judge is required to consider the circumstances of the case and to give an appropriate warning. (See *R v Makanjola*<sup>3</sup>)

10. In response to a request by the DPP (who is a member of the Law Reform Commission), as well as to public comments on the need to find varied ways of stemming the growth of crime in the Islands, the Commission undertook a review of the statutory regulation of accomplice evidence. Such review comprised a scoping paper and a Bill sent to the Chief Justice, the Criminal Defence Bar Association as well as to the Attorney General in March 2017. There was no response to this paper. Thereafter a Discussion Paper<sup>4</sup> and a Bill entitled the “Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2017” were submitted for public comment in August 2017. The Discussion Paper gave a summary of this area of the law in the Cayman Islands, the UK, the USA and Jamaica. It also summarised the main points of the Bill. The Commission received responses from the Criminal Defence Bar Association and the final Bill reflects those comments with which there was agreement. These related to immunity from prosecutions, undertakings as to the use of evidence, reduction in sentence, legal representations and informing the victim.

11. The main precedent used in the drafting of the Bill was the UK Serious Organised Crime and Police Act, 2005<sup>5</sup>. Also considered were the Criminal Justice (Plea Negotiations and Agreements) Act of 2005 of Jamaica before its recent repeal in 2017 by the Plea Negotiations and Agreements Act, 2017 and the Trinidadian Criminal Procedure (Plea Discussion and Plea Agreement) Act, 2017.

### **THE CRIMINAL JUSTICE (OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS) BILL, 2021**

12. The Bill has been carefully considered by the Commission. It is now attached as a 2021 Bill in the Appendix to this paper.

13. There were several amendments to the 2017 Bill as a result of the responses from the attorneys but the changes were not significant. The main provisions of the Bill remain as follows-

- (a) The duty of the DPP to prosecute under section 57 of the Constitution remains intact notwithstanding the legislation. In other words, the DPP is not compelled to enter into a plea agreement. **See clause 3.**

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<sup>3</sup>1 KB 223

<sup>4</sup> [www.lrc.gov.ky](http://www.lrc.gov.ky)

<sup>5</sup> There were some amendments of this Act by the Sentencing Act 2020

- (b) Use of immunity from prosecution - if the DPP, in a case which the DPP is of the view is an exceptional case, is of the opinion that, for the purposes of an investigation or prosecution of any offence, it is appropriate to offer a person immunity from prosecution, the DPP, may give the person an immunity notice. If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person except in circumstances specified in the notice. An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice. **See clause 4.**
- (c) Use of restricted use undertakings- if the DPP thinks that, for the purposes of the investigation or prosecution of an offence, it is appropriate to offer a person an undertaking that information of any description will not be used against the person in any proceedings to which this section applies, the DPP may give the person a written restricted use undertaking. Restricted use undertakings apply not only to criminal proceedings but also to civil proceedings related to the recovery of proceeds of crime. **See clause 5.**
- (d) Reduction in sentence by the court because the defendant has assisted in or offered to assist the investigator or prosecutor in relation to that or any other offence. **See clause 6.**
- (e) A review of a sentence where a person has obtained a discounted sentence because he or she agreed to assist and-
- (i) received a discounted sentence in consequence of that person having offered, in pursuance of a written agreement, to give assistance to the prosecutor or investigator of an offence but he or she knowingly fails to any extent to give assistance in accordance with the agreement;
  - (ii) received a discounted sentence in consequence of that person having offered, in pursuance of a written agreement, to give assistance to the prosecutor or investigator of an offence and, having given the assistance in accordance with the agreement, in pursuance of another written agreement, gives, or offers to give, further assistance; or
  - (iii) received a sentence which is not discounted but in pursuance of a written agreement the person subsequently gives, or offers to give, assistance to the prosecutor or investigator of an offence. **See clause 7.**
- (f) Exclusion of the public from proceedings in relation to the review of a sentence- **See clause 8.**
- (g) The right to legal representation of the accused when negotiating a deal. **See clause 9.**
- (h) An obligation of certain persons to keep information secret and confidential under the legislation. **See clause 11.**
- (i) The rights of victims to have a say before plea negotiations. **See clause 12.**
- (j) A court is not bound to accept a restricted use undertaking or an agreement for a reduced sentence. **See clause 13.**

14. Clause 14 of the Bill provides that the DPP may make guidelines to give effect to the legislation. The UK Serious Organised Crime and Police Act, 2005 provides in section 75B that the Attorney General may issue guidance to specified prosecutors about the exercise by them of any of their powers under sections 71 to 74 of that Act.

15. There are several UK Guidelines which may be used as precedents. These include the Guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise (Revised 2009); the Assisting Offenders (Immunity, Undertakings and Agreements) Guidelines and the Queen's Evidence - Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005.

16. The Assisting Offenders (Immunity, Undertakings and Agreements) Guidelines provide essential detail on the matters covered by the legislation. Such details include how victims are incorporated in the process; legal representation; exclusion of the public; legal professional privilege; asset recovery and assessing reliability and credibility of defendants and witnesses.

17. In the forward to the Guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise (Revised 2009) on the UK government website it is noted that-

*“The basis of a plea, particularly in a case that is not contested, is the vehicle through which the victim’s voice is heard. Factual inaccuracies in pleas in mitigation cause distress and offence to victims, the families of victims and witnesses. This can take many forms but may be most acutely felt when the victim is dead and the family hears inaccurate assertions about the victim’s character or lifestyle. Prosecution advocates are reminded that they are required to adhere to the standards set out in the Victim’s Charter, which places the needs of the victim at the heart of the criminal justice process, and that they are subject to a similar obligation in respect of the Code of Practice for Victims of Crime.”.*

18. The above foreword sums up the importance of the legislation in the distribution of justice in the Society. The Victim’s Charter which is referred to is another useful precedent which can be used to enhance the effectiveness of the legislation.

19. The Commission submits for Cabinet’s consideration this Final Report and the Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2021. It is hoped that the government accepts our recommendations on this Bill as another valuable tool in the fight against crime in the Cayman Islands.

November 30, 2021  
Law Reform Commission

**APPENDIX**

**THE CRIMINAL JUSTICE (OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS) BILL,  
2021**