

2020-02-27

OBJECTS AND REASONS

This Bill would provide for a prosecutor, in relation to certain offences, to enter into an agreement to defer prosecution of an alleged offender and impose certain obligations on the offender, where such an agreement would be in the interest of justice.

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SCHEDULE

OFFENCES IN RESPECT OF WHICH REMEDIATION AGREEMENTS
MAY BE MADE

BARBADOS

A Bill entitled

An Act to provide for a prosecutor to enter into an agreement to defer prosecution of an alleged offender and impose certain obligations on the offender, where such an agreement would be in the interest of justice.

ENACTED by the Parliament of Barbados in accordance with section 49 of the *Constitution* as follows:

Short title

1. This Act may be cited as the *Remediation Agreements (Deferred Prosecutions) Act, 2020*.

Interpretation

2. In this Act

“alleged offence” means an offence specified in paragraph 1 of the *Schedule*;

“alleged offender” means a person whom a prosecutor is considering prosecuting for an alleged offence;

“expiry date”, in relation to a remediation agreement, means the date on which the agreement ceases to have effect where it has not already been terminated under section 12;

“prosecutor” means the Director of Public Prosecutions or the Director General of the Major Organised Crime, Anti-Corruption and Anti-Terrorism Agency established by section 4 of the *Major Organised Crime, Anti-Corruption and Anti-Terrorism Act, 2020* (Act 2020-), as the case may be;

“publish” means to publish in the *Official Gazette*;

“remediation agreement” has the meaning assigned to it by section 4.

Objectives of Act

3. The objectives of this Act are

- (a) to encourage the voluntary disclosure of wrongdoing;
- (b) to hold persons accountable for wrongdoing through effective, proportionate and dissuasive penalties;
- (c) to impose an obligation on persons who engage in wrongdoing to implement corrective measures and promote a culture of compliance;

- (d) to reduce the negative consequences of wrongdoing for persons such as employees and customers who did not engage in the wrongdoing; and
- (e) to provide reparation for harm done as a result of wrongdoing.

Making of remediation agreement

4.(1) For the purposes of this Act, a remediation agreement means an agreement between a prosecutor and an alleged offender in which

- (a) the alleged offender agrees to comply with the requirements imposed by the agreement; and
 - (b) the prosecutor agrees that, upon approval of the agreement by the High Court pursuant to section 11, section 5 shall apply in relation to the prosecution of the alleged offender for the alleged offence.
- (2) In determining whether to enter into a remediation agreement, a prosecutor shall have regard to the objectives of this Act.
- (3) A prosecutor shall not enter into a remediation agreement with an alleged offender unless the prosecutor is of the opinion that
- (a) there is a reasonable prospect of conviction with respect to the alleged offence;
 - (b) the act that forms the basis of the alleged offence
 - (i) did not cause, and was not likely to have caused, serious bodily harm or death;
 - (ii) did not prejudice national defence or national security;
 - (iii) was not committed for the benefit of, at the direction of, or in association with, a terrorist or terrorist organisation; and
 - (c) entering into the agreement with the alleged offender is likely to be in the interest of justice.

- (4) In determining whether a remediation agreement is likely to be in the interest of justice, the following factors shall be taken into account:
- (a) the circumstances in which the act that forms the basis of the alleged offence was brought to the attention of the investigative authorities;
 - (b) the nature and gravity of the act and its impact on any victim;
 - (c) the degree of involvement of senior officers of the alleged offender in the act;
 - (d) whether the alleged offender has
 - (i) taken disciplinary action, including termination of employment, against any person who was involved in the act;
 - (ii) made reparation or taken other measures to remedy the harm caused by the act and to prevent the commission of similar acts;
 - (iii) identified, or expressed a willingness to identify, any person involved in wrongdoing related to the act; or
 - (iv) entered into a previous remediation agreement or other settlement, in Barbados or elsewhere, for similar acts;
 - (e) whether the alleged offender, or any of its representatives
 - (i) was convicted of an offence or sanctioned by a regulatory authority; or
 - (ii) is alleged to have committed any other offences, including offences not listed in the *Schedule*; and
 - (f) any other relevant factor.
- (5) A prosecutor may enter into a remediation agreement with an alleged offender at any time before the institution of criminal proceedings for an alleged offence.
- (6) For the purpose of subsection (5), proceedings shall be taken to have been instituted for an alleged offence when a person is charged with the offence.

Effect of remediation agreement on court proceedings

5. Where a prosecutor and an alleged offender enter into a remediation agreement, no person shall prosecute the alleged offender for the alleged offence at any time when the agreement is in force.

Eligibility to enter into remediation agreement

6.(1) An alleged offender that is a body corporate, a partnership or an unincorporated association may enter into a remediation agreement but an alleged offender who is an individual is not eligible to enter into such an agreement.

(2) Where a remediation agreement is to be entered into by

(a) a partnership

(i) the agreement must be entered into in the name of the partnership, and not in that of any of the partners; and

(ii) any money payable under the agreement must be paid out of the funds of the partnership;

(b) an unincorporated association

(i) the agreement must be entered into in the name of the association, and not in that of any of the members; and

(ii) any money payable under the agreement must be paid out of the funds of the association.

Notice regarding negotiation of remediation agreement

7.(1) Where a prosecutor wishes to negotiate a remediation agreement, the prosecutor shall give the alleged offender written notice of the offer to enter into negotiations.

- (2) A notice referred to in subsection (1) shall include
- (a) a brief description of the alleged offence to which the agreement would apply;
 - (b) an indication of the voluntary nature of the negotiation process;
 - (c) a statement on the legal effect of the agreement;
 - (d) an indication that, by agreeing to the terms of the notice, the alleged offender explicitly waives the inclusion of the negotiation period and the period during which the agreement is in force in any assessment of the reasonableness of the delay in instituting proceedings for the alleged offence;
 - (e) an indication that negotiations must be carried out in good faith and that the alleged offender must provide all information requested by the prosecutor that the alleged offender is aware of or can obtain through reasonable efforts, including information enabling the identification of any person involved in the act that forms the basis of the alleged offence or any wrongdoing related to that act;
 - (f) an indication of how the information disclosed by the alleged offender during the negotiations may be used in accordance with section 16;
 - (g) a warning that knowingly providing inaccurate, misleading or incomplete information during the negotiations may lead to the institution of proceedings for the alleged offence or prosecution for obstruction of justice;
 - (h) an indication that either party may withdraw from the negotiations by providing written notice to the other party;
 - (i) an indication that reasonable efforts must be made by both parties to identify any victim of the alleged offence as soon as practicable; and
 - (j) a deadline to accept the offer to negotiate in accordance with the terms of the notice.

Content of remediation agreement

- 8.(1)** A remediation agreement shall include
- (a) a statement of facts relating to the alleged offence, which may include admissions made by the alleged offender, and an undertaking by the alleged offender not to make or condone any public statement that contradicts those facts;
 - (b) an indication of the use that can be made of information obtained as a result of the agreement in accordance with section 16;
 - (c) a statement on the legal effect of the agreement;
 - (d) an indication of the obligation of the alleged offender to report on the implementation of the agreement to the prosecutor, or such independent monitor as the prosecutor may appoint for the purpose, and an indication of the manner in which the report is to be made, and any other terms with respect to reporting;
 - (e) a statement that the agreement may be varied in accordance with section 13;
 - (f) a warning that the breach of any term of the agreement may lead to an application by the prosecutor for termination of the agreement and the institution of proceedings against the alleged offender for the alleged offence; and
 - (g) an expiry date.
- (2)** A remediation agreement may include a requirement for an alleged offender to
- (a) pay a financial penalty to the Court;
 - (b) compensate victims of the alleged offence;
 - (c) donate money to a charity or other third party;

- (d) disgorge any profits made by the alleged offender from the alleged offence;
 - (e) implement a compliance programme or make changes to an existing compliance programme relating to the policies of the alleged offender or to the training of the employees of the alleged offender or both;
 - (f) co-operate in any investigation related to the alleged offence;
 - (g) pay any reasonable costs associated with the alleged offence or the agreement; or
 - (h) comply with any other appropriate obligation.
- (3) A remediation agreement may provide time limits within which the alleged offender must comply with the requirements imposed.

Code on remediation agreements

- 9.(1) The Minister may by Order issue a code giving guidance on
- (a) the general principles to be applied in determining whether a remediation agreement is likely to be appropriate in a given case; and
 - (b) the disclosure of information by a prosecutor to an alleged offender in the course of negotiations for a remediation agreement and after such an agreement has been made.
- (2) The code may, in addition to the matters set out in subsection (1), provide guidance on any other relevant matter including
- (a) the use of information obtained by a prosecutor in the course of negotiations for a remediation agreement;
 - (b) variation of the agreement;
 - (c) termination of the agreement and the steps that may be taken by a prosecutor following such termination; and
 - (d) the steps that may be taken by a prosecutor where the prosecutor suspects that the agreement has been breached.

(3) A prosecutor shall take account of the code in exercising his functions under this Act.

Preliminary hearing for court approval of remediation agreement

10.(1) After the commencement of negotiations between a prosecutor and an alleged offender in respect of a remediation agreement but before the terms of the agreement are agreed, the prosecutor shall apply to the High Court for a declaration that

- (a) entering into a remediation agreement with the alleged offender is likely to be in the interest of justice; and
- (b) the proposed terms of the agreement are fair, reasonable and proportionate to the gravity of the alleged offence.

(2) The court shall give reasons for its decision to make, or not to make, a declaration under subsection (1).

(3) The prosecutor may make a further application to the court for a declaration under subsection (1) where, following the previous application, the court declined to make a declaration.

(4) A hearing at which an application under this section is determined shall be held, any declaration under subsection (1) shall be made, and the reasons referred to in subsection (2) shall be given, in camera.

Final hearing for court approval of remediation agreement

11.(1) Where a prosecutor and an alleged offender have agreed the terms of a remediation agreement, the prosecutor shall apply to the High Court for a declaration that

- (a) the remediation agreement is in the interest of justice; and
- (b) the terms of the agreement are fair, reasonable and proportionate to the gravity of the alleged offence.

(2) Notwithstanding subsection (1), the prosecutor shall not make an application under subsection (1) unless the court has made a declaration under section 10(1).

(3) A remediation agreement comes into force only when it is approved by the court making a declaration under subsection (1).

(4) The court shall give reasons for its decision to make, or not to make, a declaration under subsection (1).

(5) A hearing at which an application under this section is determined may be held in camera.

(6) Notwithstanding subsection (5), where the court decides to approve a remediation agreement and make a declaration under subsection (1) the court shall do so, and give its reasons, in open court.

(7) Where the court approves a remediation agreement, the prosecutor shall publish

- (a) the fact that the agreement has been made;
- (b) the declaration of the court under section 10 and the reasons for its decision to make the declaration;
- (c) where the court initially declined to make a declaration under section 10, the reasons for that decision; and
- (d) the declaration of the court under this section and the reasons for its decision to make the declaration,

unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

Breach of remediation agreement

12.(1) Where a remediation agreement is in force and the prosecutor believes that the alleged offender has failed to comply with the terms of the agreement,

the prosecutor may make an application to the High Court for it to determine the matter.

(2) The court shall, on an application referred to in subsection (1), decide whether, on the balance of probabilities, the alleged offender has failed to comply with the terms of the agreement.

(3) Where the court finds that the alleged offender has failed to comply with the terms of the remediation agreement, the court may

(a) invite the prosecutor and the alleged offender to agree proposals to remedy the failure of the alleged offender to comply; or

(b) terminate the agreement.

(4) The court shall give reasons for its decisions under subsections (2) and (3).

(5) Where the court decides that the alleged offender has not failed to comply with the terms of the remediation agreement, the prosecutor shall publish the decision of the court and its reasons for that decision, unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

(6) Where the court invites the prosecutor and the alleged offender to agree proposals to remedy the failure of the alleged offender to comply with the terms of the remediation agreement, the prosecutor shall publish the decisions of the court under subsections (2) and (3) and the reasons for those decisions, unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

(7) Where the court terminates a remediation agreement under subsection (3) (b), the prosecutor shall publish

(a) the fact that the remediation agreement has been terminated by the court following a failure by the alleged offender to comply with the terms of the agreement; and

(b) the reasons of the court for its decisions under subsections (2) and (3),

unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

(8) Where the prosecutor believes that an alleged offender has failed to comply with the terms of a remediation agreement but decides not to make an application to the court under this section, the prosecutor shall publish details relating to that decision, including the reasons for

- (a) the belief of the prosecutor that the alleged offender has failed to comply; and
- (b) the decision of the prosecutor not to make an application to the court,

unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

Variation of remediation agreement

13.(1) A prosecutor and an alleged offender may agree to vary the terms of a remediation agreement where

- (a) the High Court has invited the parties to vary the agreement under section 12(3)(a); or
- (b) variation of the agreement is necessary to avoid a failure by the alleged offender to comply with its terms in circumstances that were not, and could not have been, foreseen by the prosecutor or the alleged offender at the time that the agreement was made.

(2) Where a prosecutor and an alleged offender have agreed to vary the terms of a remediation agreement, the prosecutor shall apply to the High Court for a declaration that

- (a) the variation is in the interest of justice; and
- (b) the terms of the agreement as varied are fair, reasonable and proportionate to the gravity of the alleged offence.

- (3) A variation of a remediation agreement only takes effect when it is approved by the court making a declaration under subsection (2).
- (4) The court shall give reasons for its decision on whether or not to make a declaration under subsection (2).
- (5) A hearing at which an application under this section is determined may be held in camera.
- (6) Notwithstanding subsection (5), where the court decides to approve the variation of a remediation agreement and make a declaration under subsection (2) it shall do so, and give its reasons, in open court.
- (7) Where the court decides not to approve the variation, the prosecutor shall publish the decision of the court and the reasons for it, unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.
- (8) Where the court decides to approve the variation of a remediation agreement, the prosecutor shall publish the declaration of the court under this section and the reasons for its decision to make the declaration, unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

Proceedings not to be instituted on expiry of remediation agreement

- 14.(1)** Where a remediation agreement remains in force until its expiry date, after the expiry of the agreement, subject to subsection (2), no proceedings shall be instituted against the alleged offender for the alleged offence.
- (2) Subsection (1) does not prevent proceedings from being instituted against an alleged offender where, after a remediation agreement has expired, the prosecutor finds that, during the course of the negotiations for the agreement
- (a) the alleged offender provided inaccurate, misleading or incomplete information to the prosecutor; and

- (b) the alleged offender knew or ought to have known that the information was inaccurate, misleading or incomplete.
- (3) A remediation agreement shall not be treated as having expired for the purposes of subsection (1) where, on the expiry date specified in the agreement
 - (a) an application made by the prosecutor under section 12 has not yet been decided by the court;
 - (b) following an application under section 12 the court has invited the parties to agree proposals to remedy the failure of the alleged offender to comply with the remediation agreement, but the parties have not yet reached an agreement; or
 - (c) the parties have agreed proposals to remedy the failure of the alleged offender to comply with the agreement following an invitation of the court under section 12(3)(a) but the alleged offender has not yet complied.
- (4) In the case referred to in
 - (a) subsection (3)(a), where the court
 - (i) decides that the alleged offender has not failed to comply with the terms of the remediation agreement or that the alleged offender has failed to comply, but does not take action under section 12(3), the agreement shall be treated as expiring when the application is decided;
 - (ii) terminates the remediation agreement, the agreement shall be treated as not having remained in force until its expiry date, and subsection (1) therefore does not apply;
 - (iii) invites the parties to agree proposals to remedy the failure of the alleged offender to comply the remediation agreement, the remediation agreement shall be treated as expiring when the parties have reached such an agreement and the alleged offender has complied with it;

- (b) subsection (3)(b), the remediation agreement shall be treated as expiring when the parties have reached an agreement and the alleged offender has complied with it; and
 - (c) subsection (3)(c), the remediation agreement shall be treated as expiring when the alleged offender complies with the agreement.
- (5) Where, by virtue of subsection (1), no proceedings can be instituted against the alleged offender for the alleged offence, the prosecutor shall publish
- (a) the fact that the remediation agreement has expired; and
 - (b) details of the compliance of the alleged offender with the agreement,
- unless the prosecutor is prevented from doing so by any other enactment or by an order of the court under section 15.

Postponement of publication of information by prosecutor

15. The High Court may order that the publication of information by the prosecutor under section 11(7),12(5), (6), (7) or (8), 13(7) or (8) or 14(5) be postponed for such period as the court considers necessary if it appears to the court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings.

Use of material in criminal proceedings

16.(1) Where a remediation agreement between a prosecutor and an alleged offender has been approved by the High Court under section 11, the statement of facts contained in the agreement shall, in any criminal proceedings brought against the alleged offender for the alleged offence, be treated as an admission by the alleged offender.

(2) Where the prosecutor and an alleged offender have entered into negotiations for a remediation agreement but the agreement has not been

approved by the court under section 11, material described in subsection (4) shall only be used in evidence against the alleged offender on a prosecution for

- (a) an offence consisting of the provision of inaccurate, misleading or incomplete information; or
 - (b) some other offence where in giving evidence the alleged offender makes a statement inconsistent with the material.
- (3) Notwithstanding subsection (2)(b), material shall not be used against an alleged offender by virtue of subsection (2)(b) unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of the alleged offender in the proceedings arising out of the prosecution.
- (4) The material referred to in subsection (2) is
- (a) material that shows that the alleged offender entered into negotiations for a remediation agreement, including in particular
 - (i) any draft of the agreement;
 - (ii) any draft of a statement of facts intended to be included in the agreement; and
 - (iii) any statement indicating that the alleged offender entered into such negotiations; and
 - (b) material that was created solely for the purpose of preparing the agreement or statement of facts.

Limitation periods

17. The running of a limitation period in respect of any offence to which a remediation agreement applies is suspended while the agreement is in force.

Money received by prosecutor under remediation agreement

18. Any money received by a prosecutor under a term of a remediation agreement that provides for an alleged offender to pay a financial penalty to the

Court or to disgorge profits made from an alleged offence shall be paid into the Consolidated Fund.

Reports to Parliament

19. The Minister shall, within 3 months of the end of each year, cause to be laid in Parliament a report of the remediation agreements made, varied, breached and terminated during the year.

Application of Act

20. This Act applies in relation to conduct occurring before the commencement of this Act as if an alleged offence included any corresponding offence under the law in force at the time of the conduct.

Alteration of *Constitution*

21. Section 79 of the *Constitution* is altered to the extent necessary to give effect to this Act.

Amendment of Schedule

22. The Minister may by Order subject to negative Resolution amend the *Schedule* by

- (a) adding an offence; or
- (b) removing an offence.

Regulations

23. The Minister may make Regulations for giving effect to this Act.

Transitional provision

24.(1) Conduct constituting an alleged offence that occurred before the relevant commencement day may be taken into account for the purposes of this Act.

- (2) In this section, “relevant commencement day” means
- (a) where the alleged offence is an offence that is specified in the *Schedule* when this Act comes into effect, the day on which this Act comes into effect;
 - (b) where the alleged offence is an offence that is subsequently added to the *Schedule*, the day on which the enactment adding the offence to the *Schedule* comes into effect.

Commencement

- 25.** This Act comes into effect on a day to be fixed by Proclamation.

SCHEDULE

(Sections 2, 22 and 24)

**OFFENCES IN RESPECT OF WHICH REMEDIATION AGREEMENTS
MAY BE MADE**

- 1.** A remediation agreement may be entered into in respect of the following:
 - (a)* an offence under Part II of the *Prevention of Corruption Act, 2020* (Act 2020-);
 - (b)* an offence under section 3, 15 or 18 of the *Theft Act, Cap. 155*;
 - (c)* any ancillary offence relating to an offence specified in this paragraph.

- 2.** For the purpose of paragraph 1(*c*), “ancillary offence” in relation to an offence specified in paragraph 1 means
 - (a)* aiding, abetting, counselling or procuring the commission of the offence; or
 - (b)* attempting or conspiring to commit the offence.

Read three times and passed the House of Assembly this
day of _____, 2020.

Speaker

Read three times and passed the Senate this _____ day of
_____, 2020.

President

REMEDATION AGREEMENTS (DEFERRED PROSECUTIONS) BILL, 2020

EXPLANATORY MEMORANDUM

The Bill would provide for a prosecutor to enter into an agreement to defer prosecution of an alleged offender and impose certain obligations on the offender, where such an agreement would be in the interest of justice.

- Clause 1:** provides the short title.
- Clause 2:** provides definitions for certain terms used in the Bill.
- Clause 3:** states the objectives of the Bill.
- Clause 4:** explains what a remediation agreement is and provides guidance to a prosecutor as to when it would be appropriate to enter into such an agreement.
- Clause 5:** precludes prosecution of an alleged offender for an alleged offence where it has entered into a remediation agreement.
- Clause 6:** specifies that individuals are not eligible to enter into remediation agreements.
- Clause 7:** outlines the contents of the notice that a prosecutor must give an alleged offender where he wishes to enter into a remediation agreement.
- Clause 8:** outlines the contents of the remediation agreement itself.
- Clause 9:** provides that a code may be issued to give guidance, among other things, on general principles to be applied in determining whether a remediation agreement would be appropriate.
- Clause 10:** requires that a preliminary court hearing be held to determine whether entering into a remediation agreement is likely to be

in the interest of justice and whether the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

- Clause 11:** provides for a final hearing for the court to approve the remediation agreement.
- Clause 12:** speaks to breach of a remediation agreement and the procedure to be followed in such a case.
- Clause 13:** provides for variation of a remediation agreement.
- Clause 14:** prohibits the institution of criminal proceedings against an alleged offender upon expiry of the remediation agreement, provided there was no breach resulting in premature termination.
- Clause 15:** provides that the court may order the prosecutor to postpone publication of any information that he is required to publish in relation to the agreement.
- Clause 16:** speaks to the use that may be made of any statements of facts made by an alleged offender in relation to an alleged offence during negotiations for the remediation agreement or in the agreement itself.
- Clause 17:** provides for the suspension of limitation periods where a remediation agreement is in effect.
- Clause 18:** requires money received by a prosecutor pursuant to a remediation agreement to be paid into the Consolidated Fund.
- Clause 19:** provides for the responsible Minister to report to Parliament annually on the remediation agreements made during the year.

- Clause 20:*** states that the legislation applies to certain conduct occurring before its commencement.
- Clause 21:*** provides for the Minister to amend the Schedule of alleged offences to which the legislation applies.
- Clause 22:*** empowers the Minister to make regulations.
- Clause 23:*** makes transitional provision.
- Clause 24:*** provides for the commencement of the legislation.