



PARLIAMENT
REPUBLIC OF TRINIDAD AND TOBAGO



The Report

of the Special Select Committee (Senate)
on the **Evidence (Amendment) Bill, 2019**

Fifth Session (2019/2020), Eleventh Parliament



FIFTH SESSION OF THE 11TH PARLIAMENT (2019/2020)

REPORT
OF
THE SPECIAL SELECT COMMITTEE OF THE SENATE
APPOINTED TO CONSIDER AND REPORT ON
A BILL ENTITLED, “AN ACT TO AMEND THE EVIDENCE ACT, CHAP. 7:02”

MP PARL: No. 14/2/31

Senate Paper No. of 2020

[Ordered to be printed by the Senate]

Date Laid in the Senate: 02/02/2020

Committee Mandate

Pursuant to a resolution of the Senate on Wednesday October 02, 2019, a Special Select Committee (Senate) was established to consider and report by November 29, 2019 on the Evidence (Amendment) Bill, 2019. Additionally, the Committee was also mandated to adopt the work of the Special Select Committee appointed in the Fourth Session (2018/2019).

Committee Membership

Mr. Clarence Rambharat - Chairman
Mr. Nigel De Freitas
Ms. Donna Cox
Mr. Saddam Hosein
Mr. Anthony Vieira

Secretariat Support

Mr. Johnson Greenidge, Procedural Clerk Assistant	Secretary
Mr. Brian Lucio, Procedural Clerk Assistant	Assistant Secretary
Ms. Ambika Sewdath, Business Operations Assistant II	Administrative Assistant

Contact

The Secretary
Special Select Committee (Senate) on the Evidence (Amendment) Bill, 2019
The Parliamentary Complex
Cabildo Building
St. Vincent Street, Port of Spain Republic of Trinidad and Tobago
Tel: (868) 624-7275 Ext 2232; 2284 Fax: (868) 625-4672
Email: ssceabill2019@ttparliament.org

Date Laid in Senate:

Senate Paper No.:

PARL No.:

CHAIRMANSHIP

1. Pursuant to a resolution of the Senate on Wednesday October 02, 2019, Mr. Clarence Rambharat was appointed to be Chairman of the Committee, in accordance with **Standing Order 85(2)** of the Senate.

MEETINGS

2. Since its appointment, your Committee held twelve (12) meetings on the following dates:
 - 4th Session, 11th Parliament:
 - Tuesday September 17, 2019;
 - Wednesday September 25, 2019;
 - 5th Session, 11th Parliament:
 - Tuesday November 05, 2019;
 - Thursday November 14, 2019;
 - Tuesday November 26, 2019; and
 - Friday May 29, 2020.
3. The Members' attendance is attached at **Appendix I**. The Minutes of the Meetings are attached at **Appendix II** and the Verbatim Notes of public meetings with stakeholders at **Appendix III**.

REPORTS PRESENTED

4. The report of the Committee established to consider and report on the Evidence (Amendment) Bill, 2019, at the end of the 4th Session, was presented in the Senate on September 25, 2020. This report recommended that:
 - i. the Senate take note of the progress made by the Committee thus far;
 - ii. the proceedings of the Committee established to consider and report on the Evidence (Amendment) Bill, 2019 be saved and resumed in the next session;
 - iii. in the Fifth Session (2019/2020) of the Eleventh Parliament, a similar Committee be appointed to complete the work of that Committee; and
 - iv. the new Committee be empowered to adopt as part of its records the work done to date.
5. The Committee's First Interim Report, Fifth Session was presented in the Senate on Wednesday December 04, 2019. Your Committee requested and was granted an extension to Tuesday December 31, 2019 in order to complete its work.
6. The Committee's Second Interim Report, Fifth Session was presented in the Senate on Wednesday December 18, 2019. Your Committee requested and was granted an extension to February 29, 2020 in order to complete its work.

7. The Committee's Third Interim Report, Fifth Session was presented in the Senate on Tuesday March 03, 2020. Your Committee requested and was granted an extension to April 30, 2020 in order to complete its work.
8. The Committee's Fourth Interim Report, Fifth Session was presented in the Senate on Friday May 01, 2020. Your Committee requested and was granted an extension to June 30, 2020 in order to complete its work.
9. The following outlines the work of your Committee in the Fourth and Fifth Sessions of Parliament.

WORK TO DATE

4th Session, 11th Parliament

10. At its **First Meeting, Fourth Session** held on Tuesday September 17, 2019, your Committee agreed to issue invitations to the following stakeholders for comment on the Bill:

Government

- (i) The Judiciary
- (ii) The Director of Public Prosecutions
- (iii) The Legal Aid and Advisory Authority
- (iv) The Trinidad and Tobago Police Service
- (v) The Trinidad and Tobago Prison Service
- (vi) The Ministry of National Security
 - a. Forensic Science Centre
 - b. DNA Databank
- (vii) The Children's Authority

Non-Governmental

- (viii) The Law Association of Trinidad and Tobago
- (ix) The Justice of the Peace Association
- (x) The Assembly of Southern Lawyers
- (xi) University of the West Indies, St. Augustine, Faculty of Law

11. In addition, your Committee agreed to invite the **Director of Public Prosecutions** and the **Trinidad and Tobago Police Service** to participate in a stakeholder engagement session on Wednesday September 25, 2019.
12. Further to these requests for comments on the Bill, your Committee received written submissions from the Director of Public Prosecutions and the Trinidad and Tobago Police Service. The written submissions received from stakeholders are at **Appendix VI**.

13. By letter dated September 19, 2019, the Director of Public Prosecutions notified the Committee that owing to other pressing official commitments, he was unable to participate in the stakeholder engagement session scheduled for Wednesday September 25, 2019.
14. At its **Second Meeting, Fourth Session** held on Wednesday September 25, 2019, your Committee received oral submissions (in public) from the Trinidad and Tobago Police Service. In addition, your Committee agreed to lay a Report with a view to saving its work and to resuming its deliberations on the Bill in the next session of Parliament.

5th Session, 11th Parliament

15. Your Committee reconvened its work at its **First Meeting, Fifth Session** held on Tuesday November 05, 2019, your Committee received oral submissions (in public) from the following stakeholders:
 - (i) The Office of the Director of Public Prosecutions;
 - (ii) Forensic Science Centre; and
 - (iii) National Forensic DNA Databank.
16. Pursuant to its call for submissions, your Committee received written submissions from the following stakeholders:
 - (i) Office of the Director of Public Prosecutions (DPP);
 - (ii) National Forensic DNA Databank;
 - (iii) Trinidad and Tobago Forensic Science Centre;
 - (iv) Trinidad and Tobago Police Service;
 - (v) Trinidad and Tobago Prisons Service;
 - (vi) Children's Authority of Trinidad and Tobago;
 - (vii) Legal Aid and Advisory Authority; and
 - (viii) Judiciary of Trinidad and Tobago.
17. The deadline established for written submission was October 04, 2019. As at November 28, 2019 written comments remained outstanding from the:
 - (i) Justices of the Peace Association;
 - (ii) Law Association of Trinidad and Tobago;
 - (iii) Assembly of Southern Lawyers; and
 - (iv) Faculty of Law - UWI, St. Augustine
18. Your Committee also noted that the Justices of the Peace Association indicated that it was unable to make a written submission. Your Committee agreed that notwithstanding the Association's inability to submit written comments, the Association would be invited to provide oral comments on the Bill at the earliest occasion.

19. In addition, the Law Association of Trinidad and Tobago indicated that it “will provide its comments in due course”, by letter dated October 03, 2019.
20. At its **Second Meeting, Fifth Session** held on Thursday November 14, 2019, your Committee received oral submissions (in public) from the following stakeholders:
 - (i) Trinidad and Tobago Prison Service;
 - (ii) Children’s Authority of Trinidad and Tobago;
 - (iii) Legal Aid and Advisory Authority of Trinidad and Tobago; and
 - (iv) Justices of the Peace Association.
21. At its **Third Meeting, Fifth Session** held on Tuesday November 26, 2019, your Committee commenced its clause-by-clause examination of the Bill and agreed to lay an Interim Report.
22. Your Committee agreed that the following stakeholders be granted an extension until Friday November 29, 2019 to submit written comments on the Bill:
 - (i) Law Association of Trinidad and Tobago;
 - (ii) Assembly of Southern Lawyers; and
 - (iii) Faculty of Law - UWI, St. Augustine.
23. By email dated Thursday November 28, 2019, the Faculty of Law - UWI, St. Augustine, expressed its decision to not provide comments, as the Bill focuses on criminal procedure and practice (instead of the principles of criminal law) which is not taught at the academic level. The Faculty added that it was strained administratively and could not afford expert staff to comment, if such comments were forthcoming.
24. At its **Fourth Meeting, Fifth Session** held on Tuesday November 26, 2019, your Committee commenced and completed its clause-by-clause examination of the Bill and agreed to the proposed list of amendments (**Appendix IV**) submitted by the Legislative Drafting Department (Office of the Chief Parliamentary Counsel) and the Attorney General. Your Committee took note of Mr. Hosein’s reservations concerning Division 4, Clauses 12AA to 12AH, which can be found on pages 31 to 39 of the **Consolidated Version of the Bill (Appendix V)** (at pages 206 to 213 of this Report).
25. Your Committee also noted the written comments of Mr. Vieira with regard to the definition of “eye witness” as defined in the proposed amendments.
26. In accordance with Senate Standing Order 104 (6), Mr. Hosein submitted a Minority Report (**Appendix VII**).

REPORT

27. Your Committee wishes to report that, in accordance with its mandate, scrutiny of the Bill referred has been completed. The **List of Recommended Amendments** to the Bill are at **Appendix IV** and these are incorporated in the **Consolidated Version of the Bill** attached at **Appendix V**, for ease of reference.
28. The Committee is grateful to all who have assisted it in its work.

RECOMMENDATION

29. The Committee hereby submits its report for the approval and adoption of the Senate at the earliest opportunity, subject to the recommended amendments listed in **Appendix IV**.
30. The Committee further recommends that the Bill be recommitted to a Committee of the whole Senate to allow for further scrutiny by Senators, in particular Division 4, Clauses 12AA to 12AH.

Respectfully Submitted,

Sgd.
Mr. Clarence Rambharat
Chairman

02 June, 2020

Sgd.
Mr. Nigel De Freitas
Member

Sgd.
Ms. Donna Cox
Member

Mr. Saddam Hosein
Member

Sgd.
Mr. Anthony Vieira
Member

LIST OF APPENDICES

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Appendix II.....	Minutes of Proceedings
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APPENDIX I

MEMBERS ATTENDANCE

ATTENDANCE RECORD

SPECIAL SELECT COMMITTEE ON THE EVIDENCE (AMENDMENT) BILL, 2019

Fourth Session			Fifth Session			
Members	1st Meeting 17.09.19	2nd Meeting 25.09.19	1st Meeting 05.11.19	2nd Meeting 14.11.19	3rd Meeting 26.11.19	4th Meeting 29.05.20
Mr. Clarence Rambharat (Chairman)	√	√	√	√	√	√
Ms. Donna Cox	exc	√	√	√	√	√
Mr. Nigel De Freitas	√	√	√	√	exc	√
Mr. Saddam Hosein	exc	√	√	√	√	√
Mr. Anthony Vieira	√	√	√	√	√	exc

*exc- excused

APPENDIX II

MINUTES OF PROCEEDINGS

**MINUTES OF THE 1ST MEETING,
4TH SESSION (2018/2019), 11TH PARLIAMENT,
OF THE SPECIAL SELECT COMMITTEE (SENATE)
APPOINTED TO CONSIDER AND REPORT ON THE
EVIDENCE (AMENDMENT) BILL, 2019
HELD IN THE ARNOLD THOMASOS MEETING ROOM (EAST), LEVEL 6, OFFICE
OF THE PARLIAMENT, TOWER D, 1A WRIGHTSON ROAD, PORT OF SPAIN
ON TUESDAY SEPTEMBER 17, 2019**

PRESENT

Committee Members

Mr. Clarence Rambharat	Chairman
Mr. Nigel De Freitas	Member
Mr. Anthony Vieira	Member

Secretariat

Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Assistant Secretary
Ms. Janelle Mills	Research Assistant

ABSENT / EXCUSED

Ms. Donna Cox	Member
Mr. Saddam Hosein	Member

CALL TO ORDER

- 1.1 The Chairman called the meeting to order at 9:24 a.m. and welcomed Members present.

ANNOUNCEMENTS BY THE CHAIRMAN

- 2.1 The Chairman informed Members that the following Members asked to be excused from the day's meeting:
- i. Ms. Donna Cox; and
 - ii. Mr. Saddam Hosein.

DETERMINATION OF A QUORUM

- 3.1 The Chairman referenced letter dated September 16, 2019 from the President of the Senate, in which, the President, in concurrence with Standing Order 85 (3) of the Senate, directed that the quorum of the Committee shall be three (3) Members inclusive of the Chair.

TERMS OF REFERENCE

- 4.1 The Chairman reminded Members of the Committee's terms of reference, viz.:
- i. "to consider and report on a Bill entitled "The Evidence (Amendment) Bill, 2019"; and
 - ii. to report by September 27, 2019.
- 4.2 The Chairman also reminded Members that:
- i. In accordance with **Standing Order 67(1)** of the Senate, "*any Committee to which a Bill is committed after second reading shall not discuss the general merits and principles of the Bill, but only its details*";
 - ii. In keeping with **Appendix III, Number 9** of the Senate Standing Orders on the General Rules for the conduct of proceedings of Committees, Members should inform the Secretariat of any Senator who wishes to attend Committee meetings to ensure that the leave of the Committee can be granted;
 - iii. In concurrence with **Appendix III, Number 10** of the Senate Standing Orders on the General Rules for conduct of proceedings of Committees, "*the Minister or Member in charge of a Bill may take part in the proceedings of the Committee even though not a Member of the Committee but may not vote on any question put to the Committee.*"

Members took note of the relevant Standing Orders.

DISCUSSIONS ON THE WAY FORWARD

- 5.1 The Chairman informed Members that in keeping with Appendix III, Number 9 of the Senate Standing Orders, **Sen. Hazel Thompson-Ahye** requested leave to participate in the Committee's public proceedings and clause-by-clause consideration of the Bill. Leave was granted.
- 5.2 The Chairman invited Members to consider the *List of Possible Stakeholders* prepared by the Secretariat. After some discussion, the Committee agreed to meet with and request written submissions from the following stakeholders:

Government

- i. The Judiciary;
- ii. The Director of Public Prosecutions;

- iii. The Legal Aid and Advisory Authority;
- iv. The Trinidad and Tobago Police Service;
- v. The Trinidad and Tobago Prison Service;
- vi. The Ministry of National Security:
 - a. Forensic Science Centre;
 - b. DNA Databank; and
- vii. The Children's Authority

Non-Governmental

- i. The Law Association of Trinidad and Tobago;
- ii. The Justice of the Peace Association;
- iii. The Assembly of Southern Lawyers; and
- iv. University of the West Indies, St. Augustine, Faculty of Law.

5.3 The Chairman proposed that the Committee meet next on Wednesday September 25, 2019.

5.4 After some discussion, Members agreed to the Chairman's proposal and further agreed to meet with the following stakeholders on **Wednesday September 25, 2019 at 9:00 a.m.:**

- i. The Director of Public Prosecutions; and
- ii. The Trinidad and Tobago Police Service:

5.5 The Committee agreed to:

- i. request the assignment of a Senior Parliamentary Counsel from the Office of the Chief Parliamentary Counsel, to assist with the clause by clause deliberations on the Bill; and
- ii. request for assistance from the Line Ministry (*i.e. Ministry of the Attorney General and Legal Affairs*).

REPORT OF THE COMMITTEE

6.1 The Chairman reminded Members that in accordance with **Standing Order 104(1)**, the Committee was required to report that due to the imminent prorogation of the Fourth Session (2018/2019), Eleventh Parliament on September 27, 2019, it will be unable to complete its work.

6.2 The Chairman proposed that the Committee's Report be laid at the next sitting of the Senate on Wednesday September 25, 2019 and should therefore recommend that:

- i. the Senate take note of the progress made by the Committee thus far;
- ii. the proceedings of the Committee established to consider and report on the Evidence (Amendment) Bill, 2019 be saved and resumed in the next

session;

- iii. in the Fifth Session (2019/2020) of the Eleventh Parliament a similar Committee be appointed to complete the work begun by this Committee; and
- iv. this new Committee be empowered to adopt as part of its records the work done to date.

6.3 Members agreed to the Chairman's proposal. The Secretariat was instructed to circulate a draft Report for the consideration of Members prior to the next meeting.

ADJOURNMENT

7.1 The meeting was adjourned to Wednesday September 25, 2019 at 9:00 a.m.

7.2 The adjournment was taken at 9:34 a.m.

I certify that the Minutes are true and correct.

Chairman

Secretary

September 20, 2019

**UNCONFIRMED MINUTES OF THE 2nd MEETING,
4TH SESSION (2018/2019), 11TH PARLIAMENT,
OF THE SPECIAL SELECT COMMITTEE (SENATE)
APPOINTED TO CONSIDER AND REPORT ON THE
EVIDENCE (AMENDMENT) BILL, 2019
HELD IN THE A.N.R. ROBINSON MEETING ROOMS , LEVEL 9, OFFICE
OF THE PARLIAMENT, TOWER D, 1A WRIGHTSON ROAD, PORT OF SPAIN
ON WEDNESDAY SEPTEMBER 25, 2019**

PRESENT

Committee Members

Mr. Clarence Rambharat	Chairman
Mr. Nigel De Freitas	Member
Ms. Donna Cox	Member
Mr. Saddam Hosein	Member
Mr. Anthony Vieira	Member

Ministers

Hon. Faris Al-Rawi, MP	Attorney General
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Secretariat

Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Assistant Secretary
Ms. Janelle Mills	Research Assistant

CALL TO ORDER

- 1.2 The Chairman called the meeting to order at 9:24 a.m. and welcomed Members present.

ANNOUNCEMENTS BY THE CHAIRMAN

- 2.1 The Chairman informed Members that Sen. Hazel Thompson-Ahye indicated that she was unable to attend the day's meeting due to prior arrangements.

**CONFIRMATION OF MINUTES OF THE 1ST MEETING HELD ON TUESDAY
SEPTEMBER 17, 2019**

- 3.1 The Chairman invited Members to consider the Minutes page-by-page and inquired whether there were any amendments.
- 3.2 There being no amendments, a motion for the confirmation of the Minutes was moved by Mr. Vieira and seconded by Mr. De Freitas.

MATTERS ARISING FROM THE MINUTES

3.1 **Per Items 5.2 and 5.4.** The Chairman informed Members that:

- By letters dated September 17, 2019, the Secretariat wrote to the Trinidad and Tobago Police Service and the Office of the Director of Public Prosecutions requesting written submissions and inviting them to a public hearing scheduled for Wednesday September 25, 2019.
- By letter dated September 19, 2019, the Director of Public Prosecutions notified the Committee that owing to other pressing official commitments, he was unable to participate in the stakeholder engagement session scheduled for Wednesday September 25, 2019. The DPP also advised he would not be available to meet before October 22, 2019.
- The Secretariat sent requests for written submissions to the other stakeholders listed via letters dated September 18 and September 19, 2019. **(See List of Stakeholders at Appendix I)**

3.2 **Per Item 5.5.** The Chairman informed Members that:

- The Secretariat wrote to the Chief Parliamentary Counsel via letter dated September 17, 2019. In response, the CPC has designated the following officers to assist the Committee:
 - Mrs. Lorraine John – Assistant Chief Parliamentary Counsel;
 - Mrs. Veronica Sahadeo - Senior Parliamentary Counsel; and
 - Mr. Parvin Sookhai - Parliamentary Counsel II (Ag.).
- The Secretariat notified the Attorney General of the date and agenda of today's meeting via email dated September 18, 2019.

3.3 **Per Item 6.2:** The Chairman advised Members that by email dated September 20, 2019, the Secretariat circulated the Committee's draft Report. Copies were included in Member's packages.

FINALISATION OF THE DRAFT REPORT

- 6.1 The Chairman sought Member's concurrence with the Report. After brief discussion, Member's agreed to the Committee's Report.
- 6.2 The Chairman indicated that the Report would be laid at the day's sitting of the Senate as previously agreed by the Committee.

PRE-HEARING DISCUSSIONS

Consideration of Stakeholder Submissions

- 6.1 The Chairman advised Members that the TTPS confirmed attendance at the day's public hearing but were not able to forward their written submission. However, the TTPS had committed to submit copies of its submission at the hearing.
- 6.2 Members agreed on the approach to be taken during the public hearing.

SUSPENSION

- 6.1. The meeting was suspended at 9:29 a.m.

PUBLIC HEARING WITH STAKEHOLDERS

- 7.1 The meeting resumed (in public) at 9:48 a.m.
- 7.2 The following officials joined the meeting:

Trinidad and Tobago Police Service

Mr. Harold Phillip	Deputy Commissioner of Police (Ag.), Crime and Support
Mr. Nazarudeen Pragg	Senior Superintendent (Ag.), Court and Process
Mr. Kerwin Francis	Assistant Superintendent, SIU

- 7.3 For the comments made by the abovementioned stakeholders during this hearing, please see the Verbatim Notes.

ADJOURNMENT

- 7.3 The Chairman thanked officials from the Trinidad and Tobago Police Service, as well as, the Legislative Drafting Team from the Ministry of the Attorney General and Legal Affairs for their attendance.
- 7.4 The adjournment was taken at 11:38 a.m.

I certify that the Minutes are true and correct.

Chairman

Secretary

September 25, 2019

2nd Meeting of SSC (Senate) on
THE EVIDENCE OFFENCES (AMENDMENT) BILL, 2019

Wednesday September 25, 2019

A.N.R. Robinson Meeting Room (East), Level 9

STAKEHOLDERS' ATTENDANCE

Trinidad and Tobago Police Service

NO.	OFFICIAL NAME	PORTFOLIO
1.	Mr. Harold Phillip	DCP (Ag.), Crime and Support
2.	Mr. Nazarudeen Pragg	Senior Supt. (Ag.), Court and Process
3.	Mr. Kerwin Francis	Asst. Supt., SIU

Legislative Drafting Department

NO.	OFFICIAL NAME	PORTFOLIO
1.	Mrs. Lorraine John	Asst. Chief Parliamentary Counsel
2.	Mrs. Veronica Sahadeo	Senior Parliamentary Counsel
3.	Mr. Parvin Sookhai	Parliamentary Counsel II (Ag.)

**MINUTES OF THE 3RD MEETING,
5TH SESSION (2019/2020), 11TH PARLIAMENT,
OF THE SPECIAL SELECT COMMITTEE (SENATE)
APPOINTED TO CONSIDER AND REPORT ON THE
EVIDENCE (AMENDMENT) BILL, 2019
HELD IN THE A.N.R. ROBINSON MEETING ROOM (WEST), LEVEL 9,
OFFICE OF THE PARLIAMENT, TOWER D, 1A WRIGHTSON ROAD,
PORT OF SPAIN ON TUESDAY NOVEMBER 26, 2019**

PRESENT

Committee Members

Mr. Clarence Rambharat	Chairman
Ms. Donna Cox	Member
Mr. Saddam Hosein	Member
Mr. Anthony Vieira	Member

Secretariat

Mr. Julien Ogilvie	Procedural Clerk
Mr. Brian Lucio	Assistant Secretary
Ms. Janelle Mills	Research Assistant

ALSO PRESENT

Mr. Faris Al-Rawi, MP	Attorney General
Mrs. Hazel Thompson-Ahye	Senator

ABSENT/EXCUSED

Mr. Nigel De Freitas	Member
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CALL TO ORDER

- 1.3 The Chairman called the meeting to order at 10:04 a.m. and welcomed Members present.

**CONFIRMATION OF MINUTES OF THE 2ND MEETING HELD ON THURSDAY
NOVEMBER 14, 2019**

- 2.1 The Chairman invited Members to consider the Minutes page-by-page and inquired whether there were any amendments.
- 2.2 There being no amendments, a motion for the confirmation of the Minutes was moved by Mr. Vieira and seconded by Ms. Cox.

MATTERS ARISING FROM THE MINUTES

- 3.4 **Per Item 3.1, sub-item i.** The Chairman informed Members that the Judiciary's submission was circulated to Members by email dated November 15, 2019.
- 3.5 **Per Item 3.1, sub-items ii – iv.** The Committee agreed that the following stakeholders be granted an extension until Friday November 29, 2019 to submit written comments on the Bill:
 - i. Assembly of Southern Lawyers;
 - ii. Faculty of Law - UWI, St. Augustine; and
 - iii. Law Association of Trinidad and Tobago.
- 3.6 **Per Item 5.1.** The Chairman confirmed that the meeting previously scheduled for **Tuesday November 19, 2019** did not occur.

COMMENCEMENT OF THE CLAUSE-BY-CLAUSE EXAMINATION OF THE BILL

- 4.1 Members were advised of the following:
 - i. The clause-by-clause consideration of the Bill will be done in accordance with Standing Orders 67(3) and 68;
 - ii. The Marked-up version of the Bill and a List of proposed Amendments prepared by the Office of the Attorney General were circulated to Members; and
 - iii. The Matrix of Stakeholder Comments prepared by the Secretariat was updated to include comments from the Judiciary.
- 4.2 The Chairman reminded Members that the following persons from the Office of the Chief Parliamentary Counsel (CPC) were invited to render assistance to the Committee in its deliberations on the Bill:
Legislative Drafting Department
 - Mrs. Lorraine John, Assistant Chief Parliamentary Counsel; and
 - Mrs. Veronica Sahadeo, Senior Parliamentary Counsel.
- 4.3 The Chairman invited the representatives of the Legislative Drafting Team from the Ministry of the Attorney General and Legal Affairs to join the proceedings.

- 4.4 Members considered and agreed to the proposed amendments submitted by the Attorney General subject to further changes to be made by the Legislative Drafting Department. The clauses identified for further amendment/examination were: Clause 4, subclauses 12G (1)(a); 12S(4); 12Q(3); 12Z(b); 12AG(7)
- 4.5 The consideration of the Matrix of Stakeholder Comments proceeded as outlined in **Appendix I** to these Minutes.

OTHER BUSINESS

Interim Report

- 5.1 The Chairman reminded Members that the Committee was required to report by November 29, 2019.
- 5.2 The Chairman proposed that the:
- Committee lay its Interim Report at the first Sitting subsequent to the reporting deadline;
 - Committee report by December 31, 2019; and
 - Interim Report be considered and approved via round-robin.

Members agreed to the Chairman's proposal.

ADJOURNMENT

- 6.1 The meeting was adjourned to a date to be determined
- 6.2 The adjournment was taken at 12:00 noon.

I certify that the Minutes are true and correct.

Chairman

Secretary

November 29, 2019

Consideration of the Matrix of Stakeholder Comments

Third Meeting held on Tuesday November 26th 2019

Clause	Issue Raised	Decision Taken	Action to be taken
3 (1A)	i. The term “document” ought to include information, which is retrieved from the device, as well as information retrieved by a device in which information is recorded or stored.	Agreed	CPC Team to draft amendment
	ii. The definition of “statement” should reflect whether the facts are sworn or unsworn.	Agreed	CPC Team to draft amendment
4 (12)	i. The definition of “Court” should encompass the offices of District Court Judge, Registrar and Marshal, Senior Magistracy Registrar and Clerk of the Court and Coroner.	Agreed	CPC Team to draft amendment
	ii. The definition of “representative” should include “adopted parent”, “fit person as appointed by the Court” and “foster parent” as synonymous with the definition of appropriate adult stated earlier.	Agreed	CPC Team to draft amendment
	iii. The current definition of “video recording” simply states any video recording with sound, however it is suggested that the definition in the Interpretation Section 3 (1) of the Children’s Act be utilized instead. This definition states a "video recording means any recording on any medium from which a moving image may by any means be produced or transmitted whether or not accompanied by a sound track"	Agreed	CPC Team to draft amendment

**(UNCONFIRMED) MINUTES OF THE 4th MEETING,
5TH SESSION (2019/2020), 11TH PARLIAMENT,
OF THE SPECIAL SELECT COMMITTEE (SENATE)
APPOINTED TO CONSIDER AND REPORT ON THE
EVIDENCE (AMENDMENT) BILL, 2019
VIRTUAL MEETING (VIA ZOOM CONFERENCING APPLICATION)
ON FRIDAY MAY 29, 2020**

PRESENT

Committee Members

Mr. Clarence Rambharat	Chairman
Ms. Donna Cox	Member
Mr. Nigel De Freitas	Member
Mr. Saddam Hosein	Member

Secretariat

Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Assistant Secretary

ALSO PRESENT

Mr. Faris Al-Rawi, MP	Attorney General
Mrs. Hazel Thompson-Ahye	Senator

ABSENT/EXCUSED

Mr. Anthony Vieira	Member
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CALL TO ORDER

- 1.4 The Chairman called the meeting to order at 10:31 a.m. and welcomed Members present.
- 1.5 The Chairman advised that Mr. Vieira would be excused from the virtual meeting owing to technical difficulties.

**CONFIRMATION OF MINUTES OF THE 3RD MEETING HELD ON TUESDAY
NOVEMBER 26, 2019**

- 2.3 The Chairman invited Members to consider the Minutes page-by-page and inquired

whether there were any amendments.

- 2.4 There being no amendments, a motion for the confirmation of the Minutes was moved by Mr. Hosein and seconded by Mr. De Freitas.

MATTERS ARISING FROM THE MINUTES

- 3.7 **Per Item 3.2.** The Chairman advised Members of the following:

- iv. The Assembly of Southern Lawyers did not forward a submission despite several reminders via email and telephone conversations;
- v. UWI St. Augustine, Faculty of Law opted not to comment on the Bill as it focuses on criminal procedure and practice (not the principles of criminal law) which is not taught at the academic level. The Dean added that the Faculty was strained administratively and could not afford expert staff to comment; and
- vi. The Law Association of Trinidad and Tobago did not forward a submission despite several reminders via email and telephone conversations.

SUSPENSION/RESUMPTION

- 4.1 The meeting suspended at 10:34 a.m. to allow the Attorney General to join the proceedings for the commencement of the clause-by-clause consideration of the Bill.
- 4.2 The meeting resumed at 11:06 a.m.
- 4.3 The Attorney General joined the proceedings.

COMMENCEMENT OF THE CLAUSE-BY-CLAUSE EXAMINATION OF THE BILL

- 4.2 Members were advised of the following:
- i. The clause-by-clause consideration of the Bill would be conducted in accordance with Standing Orders 67(3) and 68; and
 - ii. The Consolidated Marked-up version of the Bill, a List of proposed Amendments as well as an updated Stakeholder Matrix were prepared by the Office of the Attorney General and the Legislative Drafting Department (Office of the CPC) and were circulated to Members.
- 4.3 The Chairman reminded Members that the following persons from the Legislative Drafting Department [Office of the Chief Parliamentary Counsel (CPC)] and the Office of the Attorney General were invited to render assistance to the Committee in its deliberations on the Bill:

Legislative Drafting Department (Office of the CPC)

- Mrs. Lorraine John, Assistant Chief Parliamentary Counsel

Office of the Attorney General

- Ms. Nirana Parsan – Legal Counsel
- 4.4 The Chairman invited the representatives of the Legislative Drafting Team (Office of the CPC) and the Office of the Attorney General to join the virtual meeting.
- 4.5 The Committee considered and agreed to the proposed amendments submitted by the Legislative Drafting Team (Office of the CPC) and the Attorney General. The proposed list of amendments to the Bill is outlined at **Appendix I** to these Minutes.
- 4.6 The Committee also took note of Mr. Hosein’s reservations concerning Division 4, Clauses 12AA to 12AH, which can be found on pages 31 to 39 of the Consolidated Marked-up version of the Bill. Mr. Hosein agreed to a deadline of Monday June 01, 2020 at 4:00 p.m. to submit a Minority Report if one is forthcoming.
- 4.7 In light of the reservations noted, Members agreed that the Committee’s Report should recommend that the Bill be recommitted to the Committee of the Whole to allow for further scrutiny by Senators, in particular Division 4, Clauses 12AA to 12AH.

OTHER BUSINESS

Final Report

- 6.1 The Chairman advised that the final report of the Committee will be drafted by the Secretariat and forwarded via email for Members’ consideration and approval.
- 6.2 The Chairman enquired whether there any business to which there was none.

ADJOURNMENT

- 7.1 The Chairman thanked officials from the Legislative Drafting Team (Office of the CPC) and the Office of the Attorney General for their attendance.
- 7.2 The adjournment was taken at 11:18 a.m.

I certify that the Minutes are true and correct.

Chairman

Secretary

May 29, 2020

THE EVIDENCE (AMENDMENT) BILL, 2019

List of Amendments to be moved in the Senate by the Honourable Attorney General at the Committee Stage of the Evidence (Amendment) Bill, 2019

NOTICE is hereby given that the Honourable Attorney General will move in the Senate, the following amendments at the Committee Stage of the Evidence (Amendment) Bill, 2019:

First Column Clause	Second Column Extent of Amendments
3	A. In the proposed section 1A in the definition of “document” insert before the word “recorded” the words “retrieved,”; B. In the definition of “statement” insert after the word “fact” the words “sworn or unsworn”.
4	A. In the proposed section 12- (a) delete the definition of “Court” and substitute the following definition: ““Court” means a Judge, Master, District Court Judge, Magistrate, Registrar, Senior Magistracy Registrar and Clerk of the Court, Magistracy Registrar and Clerk of the Court, Clerk of the Court or Coroner as applicable;”; (b) in the definition of “Court Interpreter” insert after the word “Act” the words “or who is appointed under section 8 of the Interpreters Act”; (c) insert after the definition of “Court Interpreter” the following definition: “ “eye-witness” in relation to the commission of an offence means a person who claims to have seen another person in circumstances which tend to prove or disprove the involvement of that other person the commission of an offence;”; (d) delete the definition of “video recording” and substitute the following definition:

	““video recording” means any recording on any medium from which a moving image may by any means be produced or transmitted, whether or not accompanied by a sound track;”. B. In the proposed section 12A – (a) in subclause (2)(c)(iv)- (i) insert the words “length of” before the word “time”; (ii) delete the word “and” at the end of the subclause; (b) delete subclause (2)(c)(v) and substitute the following: “(v) whether the eye-witness has seen the suspect before, and if so, on how many prior occasions; (vi) whether there was anything impeding the view of the eye-witness; and (vii) such other particulars that may be relevant.”; (c) delete subclause (3) and substitute the following: “(3) The investigating officer shall ensure that the first description of the suspect given by the eye-witness has been recorded in the approved form before the eye-witness is shown any photographs, a computerised or artist’s composite or similar likeness, for the purpose of identification.”; (d) insert after subclause (3), the following new subclauses : “(4) The investigating officer shall ensure that a record of the first description of the suspect given by the eye-witness is also recorded in the Station Diary. (5) The investigating officer under subsection (3), shall provide the eye-witness with the record of the first description and shall - (a) ask the eye-witness to confirm and sign the record of the first description given; and (b) where the eye-witness refuses to confirm and sign the first description as recorded, he shall record the refusal in the approved form.
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(6) The investigating officer under subsection (3), shall provide the suspect or his representative with the record of the first description and shall –

(a) ask the suspect or his representative to confirm receipt and sign the record of the first description provided; and

(b) where the suspect or his representative refuses to confirm receipt and sign the first description as recorded, record the refusal in the approved form.”.

C. In the proposed section 12B-

(e) in subclause (5) delete the word “Police”;

(f) delete subclause (7) and substitute the following subclause:

“(7) Where a person, has not been positively identified by an eye-witness as a suspect, the Commissioner of Police shall ensure that any photograph used under this section is preserved for the purpose of evidence in all criminal proceedings to which the photographs relate.”.

D. In the proposed section 12C –

(a) in subclause (2), delete the words “necessary to do so” and substitute the word “useful”; and

(b) delete subclause (5) and substitute the following:

“(5) An investigating officer may also conduct an identification procedure where-

(a) a suspect is known and available and the suspect admits to being the person the eye-witness claims to have seen or is able to identify;

(b) a suspect is in police custody and an eye-witness, with no previous knowledge of the suspect, saw the suspect commit the crime or saw him in circumstances relevant to the

	likelihood of his having done so); (c) the suspect and the witness are not well known to each other and neither party disputes this; or (d) the witness claims to know the suspect but the suspect denies this.”. E. In the proposed section 12D in paragraph (a) (ii) insert after the word “any” the word “other”; F. In the proposed section 12E- (a) in subclause (1) delete paragraphs (a) and (b) and substitute the following: “(a) an identification parade in accordance with section 12K; (b) identification using video medium in accordance with section 12J;”; (b) in subclause (3) (b) delete the word “Police”. G. In the proposed section 12F(1)- (a) delete paragraph (a) and substitute the following: “(a) inform the suspect of his right to have a representative present before he decides to give consent to the identification procedure;”; (b) in paragraph (b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms:“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence””. H. In the proposed section 12G. – (a) in subclause (1), delete all the words occurring after the words “shall be” and substituting the following: “_ (a) allowed a telephone call to contact his representative to attend the identification procedure which shall be recorded in the Station Diary; and (b) given a reasonable opportunity to have his representative present during the identification procedure.”; (b) insert after subclause (3) the following subclause:
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	“(3A) Where the representative of the suspect is unable to attend the identification parade within the period referred to in subsection (3), the identification officer- (a) shall record the reason for the delay and the efforts made to secure the attendance of the representative; and (b) may appoint a Justice of the Peace to protect the interest of the suspect.”; (c) in subclause (12)(b), by delete the word “may” and substitute the word “shall”. I. In the proposed section 12H (3) (b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms: “You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”. J. In the proposed section 12J.- (a) in subclause (1) – (i) delete the word “by” occurring after the word “conducted”; (ii) in paragraph (a), insert the word “by” before the word showing”; (iii) in paragraph (b), insert the word “by” before the word “ensuring”; (iv) in paragraph (c) – (A) insert the words “in circumstances” before the word “where”; (B) insert the word “by” after the word “appearance”; and (C) in subparagraph (i), delete the word “show” and substitute the word “showing”; and (b) in subclause (3) delete the word “(a)”. K. In the proposed section 12K – (a) in subclause (1), delete the words “either in a normal room or one” and substitute the words “in a room”; (b) in subclause (2), delete the words “which includes” and substitute the words “as follows”;
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	(c) in subclause (2)(a), delete the word “the” where it first occurs and substitute the word “one”; (d) in subclause (3), insert the words “colour,” after the words “race,”; (e) insert after subclause (6), the following: “(6A) During the conduct of the identification parade, the identification officer shall at all times be in front of, and facing the parade in such a way so as not to obstruct the view of the identifying witness and shall remain impassive in both demeanour and expression. (6B) Where a one-way mirror is not used and the witness wishes to walk along the back of the identification parade, he may be allowed to do so alone while the identification officer remains in front of the parade.”; L. In the proposed section 12L- (a) in subclause (5) insert after the word “shall” the word “temporarily”; (b) insert after subclause (5) the following subclause: “(5A) After the identification officer has recorded the reason for identification parade being temporarily stopped under subsection (5), he shall remove and replace the member of the identification parade who refused to comply and resume the identification parade.”. M. In the proposed section 12M(1)- (a) delete all the words occurring after the words “impractical to” and substitute the words “conduct an identification procedure using video medium or an identification parade”; (b) insert after subclause (4) the following: “(5) Section 12L(1), (2)(a),(c),(d) and (3)(b) shall apply with the necessary modifications to a public identification procedure under this section.”. N. In the proposed section 12N. (1), insert after the word “suspect” the following words “where it is impossible or impractical to conduct an identification procedure using video medium, an identification parade or an identification in a public place with the consent of the suspect”. O. In the proposed section 12O – (a) in subclause (1)-
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	(i) insert after the word “procedure” the words “or it is impossible or impractical to conduct an identification procedure using video medium, an identification parade, identification in a public place with the consent of the suspect or an identification in a public place without the consent of the suspect,”; and (ii) delete the word “the” occurring before the word “refusal” and substitute the word “any”; and (b) in subclause 3(b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms: “You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”; (c) insert after subclause (5), the following: “ (6) An identification officer conducting an identification by confrontation shall ensure that the procedure is recorded by video recording.”. P. In the proposed section 12Q – (a) insert after subclause (2), the following: “ (3) Where an interview is to be conducted under this section, a person suspected of, or charged with, committing an offence shall be given every reasonable opportunity to have his representative present before the interview is conducted.”; (b) renumber subclauses (3), (4), (5), (6) (7), (8), and (9) as subclauses (4), (5), (6), (7), (8), (9) and (10) respectively; (c) in renumbered subclause (8), insert after the word “memory” the word “card”; (d) in renumbered subclause (9)- (i) insert after the words “any interview under this section” the words “was conducted subject to section 12R”; (ii) delete the word “Police”. Q. In the proposed section 12R- (a) in subclause (1) -
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	(i) delete the word “and” at the end of paragraph (f); (ii) delete paragraph (g) and substitute the following paragraphs: “ (g) the names and calling of all other persons present during the interview; (h) whether any request was made by the interviewee; (i) what, if anything was done to facilitate such request under paragraph (h); and” and (j) such other information as may be prescribed by Regulations”; (b) insert after subclause 2, the following subclauses: “(3) Where the interviewee made a telephone call to his representative, a note of that telephone call shall be recorded in the Station Diary; (4) Where a request is made and a copy of an entry is provided pursuant to subsection (2) – (a) a note of this request shall be made in the Register of Interviews; (b) the interviewee or his representative shall be asked to sign and confirm receipt of the copy: and (c) where the interviewee or his representative refuses to sign and confirm receipt of the copy, a note of this refusal shall also be made on the Register of Interviews. (5) Where any request for a copy of an entry is granted under this section – (a) the extract of the request by the interviewee or his representative; (b) the signature of the interviewee or his representative for receipt of the copy of the entry; or (c) the refusal of the interviewee or his representative to sign and confirm receipt of the copy of the entry, is admissible as evidence.”.
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	R. In the proposed section 12S- (a) in subclause 2 (c) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words ““You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence””; (b) insert after subclause (2) the following subclauses: “(2A) The interviewee may be allowed to communicate with his Attorney-at-law, relative or other person if no hindrance is reasonably likely to be caused to the process of investigation, or to the administration of justice by his doing so. (2B) The interviewee shall not only be informed orally of the rights and facilities available to him, but in addition notices describing him shall be displayed at convenient and conspicuous places at police stations and the attention of the interviewee shall be drawn to these notices. (2C) Reasonable arrangements shall be made for the comfort and refreshment of the persons in attendance for the interview. (2D) Wherever practicable, the interviewing officer and interviewee shall be seated.”; (c) in subclause (4) insert after the word “interview” the following words “ and ensure that the entire video or audio recorded interview is re-played to the interviewee or where applicable, re-read to the interviewee in accordance with section 12Q.(4).”. S. In the proposed section 12U(1)(a)- (a) insert after the words “pocket diary” the words “,or by any other available means of note taking,”; (b) delete the word “Police”. T. In the proposed section 12W, insert after subclause (7), the following: “(8) The police officer referred to in subsection (2), shall ensure that the procedure followed, including the date, time and place and all persons present when the seal of the master copy was broken and when the master copy was resealed, is recorded in the Station Diary, and where practicable, by video recording.”. U. In the proposed section 12X-
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	(a) in subclause (1) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence”- and substitute the words ““You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence””; (b) delete the word “Police” wherever it occurs. V. In the proposed section 12Y- (a) delete subclause (2) and renumber subsections (3), (4), (5) and (6) as subsections (2), (3), (4) and (5) accordingly; (b) in renumbered subclause (2), delete the words “subsections (1) and (2)” and substitute the words “subsection (1)”; (c) in renumbered subclause (4)- (i) delete the word “(4)” and substitute the word “(3)”; (ii) delete all the words occurring after the words “adequately addressed in” and substitute the words “a recording under subsection (1)”. W. In the proposed section 12Z- (a) renumber section 12Z as section 12Z (1); (b) in renumbered subclause (1), delete the words “fifty thousand dollars and to imprisonment for one year” and substitute the words “two hundred thousand dollars and to imprisonment for twenty years”; (c) insert after subclause (1) the following: “(2) For the purposes of this section, “lawful authority” means- (d) the Commissioner of Police or any person authorised by him; or (e) the Director of Public Prosecutions or any person authorised or any person authorised by him.”. X. In the proposed section 12AA (1) insert after the words “motion” the words “in the interests of justice”. Y. In the proposed section 12AG-
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	(a) in subclause (3)(d), insert after the words “real harm to” the words “the witness, his family members or to”; (b) in subclause (4)- (i) insert after paragraph (c), the following paragraph: “(ca) the nature and extent of the corroborating evidence, where the evidence of the proposed anonymous witness is not the sole or exclusive evidence.”; (ii) delete the word “and” at the end of paragraph (h); (iii) delete paragraph (i) and substitute the following: “(i) where there is any evidence of an attempt at witness tampering; (j) such other matters as the Court considers relevant.”; (c) insert after subclause (4) the following subclause: “(4A) Before granting a Witness Anonymity Order, the Court may request a risk assessment report from the police which shall include the following: (f) an assessment of the reasonableness of the fear of the witness; (g) an explanation of the inadequacy of other special measures.”; (d) insert after subclause (5) new subclause (6) as follows: “(6) Each party to the proceedings shall have an opportunity to make oral representation to the Court on an application for a Witness Anonymity Order.”; (e) renumber subclauses (6), (7) and (8) as subclauses (7), (8) and (9) respectively; (f) insert after renumbered subclause (10), the following subclauses: “(10) The Court may seal the documents regarding a Witness Anonymity Order. (11) The Court may order the continuation of the anonymity of a witness after the conclusion of a trial, in the interests of justice.”. Z. In the proposed section 12 AJ, insert after the words “in consultation with ” the words “ the Director of Public Prosecutions and”; AA. In the proposed section 12 AL- (a) insert after the words “12AL” the word “(1)”;
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	(b) in the renumbered subclause (1), insert after the words “effect on” the words “ the fairness of”; (c) insert after the renumbered subclause (1), the following subclause: “(2) Nothing in this section shall prejudice any rule of law requiring a Court to exclude evidence.”. AB.Insert after the proposed section 12AL the following section: <table border="1"> <tr> <td>“Approved form admissible as evidence</td><td>12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.</td></tr> </table>	“Approved form admissible as evidence	12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.
“Approved form admissible as evidence	12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.		
6	In the proposed First Schedule, in the third paragraph- (a) delete the full stop after paragraph (b) and substitute a semi-colon; (b) insert after paragraph (b) the following: “(c)the identification officer discharged his functions under section 12F; Yes ☐ No ☐ (d) where the identification officer failed to discharge his functions under section 12F, I notified the suspect of this failure. ☐”.		
New clause 5A	Insert after clause 5 the following new clause: <table border="1"> <tr> <td>“Section 15 amended</td><td>5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.</td></tr> </table>	“Section 15 amended	5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.
“Section 15 amended	5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.		
New clause 7	Insert after clause 6 the following new clause: <table border="1"> <tr> <td>“Second Schedule amended</td><td> 7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland </td></tr> </table>	“Second Schedule amended	7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland
“Second Schedule amended	7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland		

			Revenue” the word “Director”.
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APPENDIX III

VERBATIM NOTES OF
PUBLIC PROCEEDINGS

VERBATIM NOTES OF THE SECOND MEETING OF THE SPECIAL SELECT COMMITTEE (SENATE) ON THE EVIDENCE (AMDT.) BILL, 2019 HELD (IN CAMERA) IN THE A.N.R. ROBINSON MEETING ROOM (WEST), LEVEL 9, AND (IN PUBLIC) A.N.R. ROBINSON MEETING ROOM (EAST), LEVEL 9 OFFICE OF THE PARLIAMENT, TOWER D, PORT OF SPAIN INTERNATIONAL WATERFRONT CENTRE, #1A WRIGHTSON ROAD, PORT OF SPAIN, ON WEDNESDAY, SEPTEMBER 25, 2019 AT 9.48 A.M.

PRESENT

Mr. Clarence Rambharat	Chairman
Mr. Nigel De Freitas	Member
Ms. Donna Cox	Member
Mr. Saddam Hosein	Member
Mr. Anthony Vieira	Member
Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Assistant Secretary

TRINIDAD AND TOBAGO POLICE SERVICE

Mr. Harold Phillip	DCP (Ag.) Crime and Support
Mr. Nazarudeen Pragg	Senior Supt. (Ag.) Court and Process
Mr. Kerwin Francis	Assistant Supt. SIU.

LEGISLATIVE DRAFTING DEPARTMENT

Mrs. Lorraine John	Asst. Chief Parliamentary Counsel
Mrs. Veronica Sahadeo	Senior Parliamentary Counsel
Mr. Parvin Sookhai	Parliamentary Counsel II (Ag.)

Mr. Chairman: Good morning and welcome. This is the second meeting and the first public hearing of the Special Select Committee of the Senate on the Evidence (Amdt.) Bill, 2019. This meeting will be broadcast on Parliament Channel 11, Parliament Radio 105.5 and the Parliament's YouTube Channel, *ParlView*. My name is Clarence Rambharat. I am the Chairman of this Special Select Committee. I will now invite my other colleagues on the Committee to introduce themselves, starting on my right.

[Introductions made]

Mr. Chairman: Thank you very much. We are also supported by the Secretariat provided by the Parliament, Mr. Greenidge and Mr. Lucio and by the team from the CPC's office who would be here with us and throughout to assist us in some of the details of the Bill. We have before us today representatives from the Trinidad and Tobago Police Service led by DPC Crime and Support, Mr. Harold Phillip. Mr. Phillip, welcome to you and your team, and I would now ask your team to introduce themselves.

[Introductions made]

Mr. Chairman: Thank you very much. This Bill was laid in the Senate and after several members made their contributions, the Senate took a decision to submit it to this Special Select Committee for further considerations, not on the policy or the merits of the Bill but the actual contents of the Bill. The Bill seeks to introduce some measures which are new to our jurisdiction and, no doubt, brings a lot of debate in the Senate and out in the public, and maybe amongst those persons who have to enforce the provisions, and those persons who have to prosecute and certainly among those persons who have to defend clients in the future. So it is new in some areas and in some areas we recognize the Attorney General is seeking to make improvements to existing procedures. The Committee has itself already had some discussions on the Bill in terms of the approach, and one of the areas, not only for the Committee, but I am sure for the public, one issue that has been generating a lot of interest in the public is this issue of CCTV and video recordings, and how they are currently used and what is proposed in the Bill in relation to video recordings on the whole. And we recognize that different sections of the Bill, the issue of video recordings arise. So I want to invite member Vieira, the Independent Senator represented on this Committee, to open the discussions on behalf of the Committee, specifically on the broad issue of video recordings and CCTV in the current context of criminal law enforcement in the country. Member Vieira.

Mr. Vieira: Thank you, Chair. Well, clause 12AI of the Bill provides that:

“A video recording recorded by means of a closed circuit television camera shall be admissible as evidence.”

Now, we have some questions about what does that actually contemplate. Is it all CCTV cameras? Is it CCTV cameras that are used by the police and approved by the police? How will that impact the things like mobile phone devices? If you could elaborate on that for us, we would be glad.

DCP Phillip: Well, our understanding with respect to 12AI, it speaks to closed-circuit TV camera—video recording for closed-circuit TV camera. Our understanding is that whether it be the public CCTV cameras or private CCTV television cameras, this is what it speaks to. You did make mention with respect to video recording on phones. I gather that that, too, may also be captured under the Evidence Act with respect to a video recording generally.

Mr. Vieira: So your understanding is that—so, for example, when you look at Ian Alleyne’s show and he is showing you CCTV from a restaurant or a bar, that that would be admissible under this clause?

Mr. Phillip: Yes, because at present we do use video recording either from the public or what we obtain from private residences.

Mr. Chairman: Member Hosein?

Mr. Hosein: Thank you. So is it—the current state of the law is that video footage can be admitted and is admissible in a court of law?

Mr. Phillip: Yes.

Mr. Hosein: All right. And what is the policy of the TTPS when it comes to gathering video footage? And this has been a concern from members of the public, that I have a camera system at my home and a crime takes place and the cameras were able to capture the footage. The person refuses to give over the footage to the TTPS. What are the avenues available to the police service with respect to gathering the relevant footage from these private residences? And I say this because we have to operationalize the legislation, and from your answer before you indicated that CCTV footage may contemplate footage in a private residence also. So what is the policy as it regards to the police service in gathering that relevant footage?

Mr. Phillip: Well, the normal practice is that when we go to obtain video footage or

assistance from private residences, we make a request, voluntarily, and if we get it voluntarily, under normal circumstances that is okay. But if we do not get it voluntarily we are also—because we are investigating a matter and we need to get evidence, we also contemplate using a search warrant.

Ms. Cox: I want to ask a question there. If that problem exists, is there a time frame? Like, for example, if I say no, and by the time you go to get a search warrant, and so on, I could delete it or make some change to it. Do you have a time frame involved in that?

Mr. Phillip: Well, we are required when investigating matters and looking for evidence, or gathering evidence, to move with all urgency, so that there is a possibility that a person could, in fact, delete it, but at the end of the day we could only do our best in terms of entering the premises legally and lawfully by the means of a search warrant.

Mr. Hosein: What are some of these circumstances or instances or probably some of the obstacles that the police service or—and you could probably share your experience with the DPP's office also, in terms of—because you gather the evidence at the end of the day. What are some of those obstacles that may, in fact, prohibit or hinder evidence by video means from being admissible in court?

Mr. Phillip: There is always the issue as to who made the video. So we need to ensure that the video is an original; it was not interfered with; it was not photo-shopped and it was not tampered with. So the person who is actually going to give that evidence and produce the video—who we are going to use to produce the video—we must have evidence that that person actually made the video and evidence that it was not tampered with.

Mr. Hosein: And is there any way that the TTPS has, in order to certify that a video that was captured was not interfered or tampered with?

Mr. Phillip: Well, when we are conducting our investigations we have officers who have been certified to retrieve video footage and those are the officers who we usually send to retrieve our video footage. Where the video footage has been supplied by a private person, certainly we would interview that person, generally to ensure that the person is credible and is speaking the truth. So at the end of the day, based on other corroborating

evidence—sometimes they “doh” have time because it was taped; there are other sources that it may be backed up somewhere, and so on—we look at all of that to ensure that it is an original copy.

Mr. Chairman: DCP Phillip, as you raise the issue of recordings and video recordings, I just want to ask a question based on discussions that have emerged in the public domain. What is the TTPS doing to address this issue of footage from crime scenes, which, in looking at the footage, it has to be recorded by somebody who has authority to be on the crime, maybe some law enforcement person, and this footage finds its way on social media? Is that an issue in the police service? And if it is, how is the police service addressing the issue of the security of footage obtained by law enforcement officers and cases in which that footage is put into the public domain without authority?

Mr. Phillip: The TTPS is—we are developing a social media policy to deal with aspects of officers who put unauthorized footage on social media, as well as, the TTPS—we have been using some moral suasion in the main to let officers understand the serious responsibility and how that, in fact, could interfere with the investigations. But, by and large, we are developing a social media policy for officers so that we would have consequences if officers, in fact, breach that policy.

Mr. Chairman: I have also seen live broadcast on both television and social media from crime scenes where police officers are entering a dwelling, for example, to search for narcotics and it is broadcast live by external parties on Facebook and the footage is also available on programmes on television. Has the police identified this as an issue and is it being dealt with?

Mr. Phillip: That issue has been discussed but at present it is still ongoing discussions, because, in fact, the footage sometimes comes from various sources, including the occupiers, the residents and persons in the vicinity. So the whole issue as to where the footage originates from, investigations will have to be conducted to ensure that it has not been—well, at least, they come from the police. But footage or video recordings, they emanate from various sources and in so doing sometimes it is a bit difficult and it warrants extensive investigations.

Mr. Chairman: I am referring specifically to these I have seen live broadcasted on Facebook, for example, Facebook online. I have seen live broadcasts from crime scenes where the police are about to enter a dwelling and that is being broadcast, not by the police, but external parties with links to television broadcasts, and so the public—so you are able to see police entering a dwelling; occupants of the dwelling coming out, being placed under arrest; being searched. Is that something that is consistent with the law, consistent with the operations of the TTPS? And is it something that the TTPS is looking at?

Mr. Phillip: We have taken note of that but sometimes information or intelligence, or evidence emanate from different sources, including TV hosts and a number of persons, and sometimes when they contact us they are already in place and they take their own video recordings and footage as far as practicable. But in some instances that occurs. But we also believe that there may be some issues with respect to occasionally notifying persons. We believe that that exists too, but it is something that we continue to speak about, but certainly it is a policy that we ought not to contact or do anything that would interfere with the police investigations, and to ensure that the police investigation is done in a professional manner.

Mr. Chairman: Member Vieira?

Mr. Vieira: Thank you. I just want to clarify in my own mind, you talked about closed-circuit television. What, in the police mind, does that mean? And again, I am very concerned about the integrity of the footage that is used. So is it that the CCTV cameras used by the police, say, for example, at traffic lights and in other places, there is something embedded in the system that would show that it is a continuous loop; that it has not been tampered with, photo-shopped; there are no gaps in the time frame? And how does that differentiate to, say, private citizens' closed-circuit TV?

Mr. Phillip: Let me tell you, I am not a technology expert, and certainly it would need some more information for me to speak to that, but what I would tell you is that with respect to the national CCTV system, these recordings are done automatically and it is staffed by persons who are vetted and certainly those records are put on file and they are

backed up. So whatever records we get from the system are actually records that they would have retrieved and that would have been stored there.

Mr. Chairman: Member Hosein?

Mr. Hosein: I just want to go into some of the clauses of the Bill, Chair, if you may permit me. We spent some time on the video recordings. Now, you all would have submitted comments with respect to the identification procedure. Now, the Bill contemplates several methods of identification. At section 12E, page 14 of the Bill: identification by video medium, by identification parade, public place with consent, public place without consent and by confrontation. Now, one of the new additions is the identification using video medium, and the recording of the entire identification parade. And I can see the merit in this, so that you would reduce the amount of challenges in court with respect to the entire procedure. My question is that, you all, as the police service, will have to operationalize this particular piece of legislation, how many police stations or how many facilities does the police service have at its disposal with respect to videotaping of identification parades and also confessions and admissions?

Mr. Phillip: With respect to videotaping of identification parades, we do not have any such facility but we do have facilities with the one-way mirror and we have audio recording, but not video recordings. So that is some logistics and some equipment that we would have to install. We do have audio recording but we do not have video recording.

Mr. Hosein: And how many of these police stations have the one-way mirror?

Mr. Phillip: We have within each police division—and we have nine divisions—at least, to the best of my knowledge, one station within each police division. There may be—in one or two divisions there may be at least two, but at least in the nine divisions there are at least one.

Mr. Hosein: Now, under the original Evidence Act it is contemplated that statements given by witnesses can, in fact, be recorded through audio-visual means. Has that been a practice of the TTPS when investigating crimes?

Mr. Phillip: Well, yes, we have in fact commenced that practice, especially in the serious matters, homicides, and also all other—some very serious crimes, be it kidnapping and a

number of these types of matters, even narcotic matters, and so on, and anti-corruption-type matters. But we still have to do quite a considerable amount of training. So we have started training our specialized staff with respect to the serious investigations, so we have a plan in mind to continue rolling it out because we need to ensure that every police officer is trained to use the equipment and that the equipment, he would be very familiar with. However, even like under the Children Act, we need to have with respect to video-recording interviews with respect to children, there is some need for certification there, too. And even officers within the Child Protection Unit we are also currently engaging that they are re-certificated to ensure that those interviews are conducted through the video recording means.

Mr. Hosein: Are there any issues from your practice of video recording that you think us, as a committee, could amend or include in this particular piece of legislation to assist the TTPS?

Mr. Phillip: Certainly one of the main issues that we suffer with respect to video recording of suspect interviews is with respect to—it conflicts with the Judges' Rules, whereby the Judges' Rules say that when we are interviewing a person, under caution we should take it down in writing, and when we video record the interviews, we have to ask the questions as well as write them down, and write down the answers, because the law did not provide for just the video recording of the interview of the suspect. They say that it must be taken down in writing. So that is a little concern. Although we saw here that they did speak about—or being recorded in the law now—interviews with respect to suspects could be recorded. So that would certainly assist us in some way. But we still, according to the Judges' Rules. We need to have the Judges' Rules amended to ensure that it also includes that the interviews could be recorded. Because one of the concerns we have too, is even the—because a number of the suspects that we interview, you would well understand that they speak broken language and we need to have that dictionary. So we are working closely with the Judiciary, as well as some providers, to ensure that we develop and that we acquire the appropriate system to help us with respect to the video recording and at the same point in time, according to the Evidence Act, we also have to

produce transcripts or give a written record of the interview. So we need to see how that would—we need to ensure that we have the equipment that would provide that written record too.

Mr. Chairman: DCP Phillip, you have brought us straight to your written submission, and we have received it and I believe we have all read it, or at least perused it. I believe you have identified about 10 areas there in your submission, including the one you have already raised, which is the potential conflict between the Bill and the Judges' Rules. I see you have devoted a significant part of your submission on this issue of drawing adverse inferences from silence and you have also identified some practical aspects of the Bill that you would like to see changes be made to. So I now want to invite your team to take us through your written submission and on the basis of what you say we would ask some further questions. But I do not know if member Vieira wants to ask something before we move on to the written submission. Thank you.

10.15 a.m.

Mr. Vieira: Well, the Judges' Rules are really rules of practice. This Evidence Bill when it becomes law, will be rules of law. And so, my understanding is that you can still always have written transcripts as an aid but once this law becomes law, your audio visual and your audio recordings are documents that are admissible. So that should be a big help to the police service.

My question really is: How many stations are equipped with this audio recording technology? Where you talked about training, if you could tell me a little bit about the training, and I would also like to know about the chain of custody from the recordings, where they are stored and until they find their way to the court.

[Mr. Al-Rawi enters meeting room]

Mr. Chairman: Before you answer, DCP Phillip, I Just want to welcome the hon. Attorney General who has joined us from another meeting. Attorney General, welcome, and you can proceed DCP Phillip.

Mr. Phillip: Yes. Well, let me just apologize for the late submission of the submissions in the first instance. With respect to the question raised by the hon. Sen. Vieira, we have

audio visual recording in at least about 17 locations—in about 17 locations in the police service.

Mr. Al-Rawi: I believe it is 21. I have a list of all of them.

Mr. Phillip: Well, I stand corrected but I—

Mr. Al-Rawi: We can provide that listing to the Committee. We have the locations and addresses of all of the suits. I know—sorry, forgive me for interrupting DCP, I know it is unfair because I know you juggle so much, that you may not have had the precise listing. I requested that listing from the TTPS and received it in writing. So, what I will do is I will undertake to provide that in cross reference to your team as well.

Mr. Phillip: And I actually made a request, you know, this morning just to get it finalized. So, it is probably on my phone there, but I did not have the time to look for it. But I know that we do have some so, I stand corrected with 21. So, we do have video recording equipment at locations.

With respect to the training, well, what we had is that the company that would have provided the equipment would have also been responsible for doing the training. They would have done some train the trainers, and we would have in fact as I mentioned earlier, several members from across the TTPS, in particular those from the specialist units were in fact trained to do the interviews, to video record interviews. But we do have—there is an issue that we are dealing with. I do not want to elaborate on that here, but that issue is an issue that has not allowed us to fully, you know, utilize the equipment but it is something that our information technology manager is assisting us with. We do you have in particular, need to ensure that we have large quantities of disks to ensure—to record these, to keep records, and to ensure that we make working copies.

So, what we do is when we record the interviews, we have a master copy and we have working copy, and the master copy is kept at present by the investigator and certainly, the working copy is what they would use under normal circumstances. So, that is in terms of the chain of custody, it is usually kept by the investigator—the person who in fact did the interview and under most circumstances, it is the investigator.

Mr. Al-Rawi: Could I just join the honourable DCP. I can tell you Sen. Vieira, that

when we came into office we discovered that the vast majority of suites were not accounted for. We then went on an exercise of identifying every single suite in every single location. Because we confirmed that the Judiciary had also been trained in detail in relation to the recordings and the management. Because obviously there is a migration of evidence from the TTPS, through the prosecutorial arms TTPS and DPP, and then into the Judiciary.

It turns out that there had been years of training in relation to the systems but there was not one repository management system. The exercise that is afoot right now between the Judiciary, the office of the DPP, and the TTPS is a harmonization exercise. We are in the middle of, and very close to the end of harmonizing the FTR, that is the entire recording systems and structures at the Judiciary, at the TTPS and at the DPP's office, because the system that is being used which was the backbone of which came from the Chief Justice and the Government of Nigeria, as then modified by the Government of Spain, and then the local IT aspects of the Judiciary. That platform which is built upon something called TT.jim. That TT.jim platform has a desktop dial that tells you what is required, who is responsible for dealing with it, what are steps outstanding, where it migrates to. And then the harmonization of the system right now is the effort that is going on. Fortunately, IT, Attorney General, is the mind and spoke around all of these divisions because the AG's office is responsible for 19 respective individuals, meaning Judiciary—other aspects of it, DPP et cetera.

You would remember that we did the Criminal Division Bill and in that we introduced the prospect for the first time in law of the TTPS actually prosecuting in law. Before that we had police prosecutors who were not lawyers, and who were prosecuting. So, we have dealt with a lot of the anomalies. What this is intended to do is to harmonize one consistent practice, and then it has to be applied upon a structure. What I am basically saying in short is that the structure is being built while we are discussing this. The intention is to have operationalization in full form this year, particularly because we intend to abolish preliminary inquiries this year, which is why this Parliament has been identified as the place for civil courts, giving us 65 criminal courts at the Hall of Justice.

But while that system is being built, just as we have in the Privy Council where transcript evidence is in fact audio and visual because they are now documents as you have carefully described, you will notice in the Privy Council you no longer get written transcripts, you get the video and you look for the time marker, one hour and three minutes and forty two seconds.

So that kind of migration away from a paper-based bottleneck is what this Bill is intended to achieve whilst we are building the system at the same time. So there is a lot of operational work that is very far ahead at the same time.

Mr. Vieira: I am heartened to hear that. I am still thinking about the chain of custody, and I was wondering if you are going to have a central repository.

Mr. Al-Rawi: Yes, there will be.

Mr. Vieira: Maybe that would be the place for the master and everybody else would have the working until—

Mr. Al-Rawi: So, without letting the cat out of the bag, there is a national prosecution Bill that will be brought to Parliament. In that national prosecution Bill the TTPS and the DPP's office centralize their management position. The TTPS has been operating to its most incredible credit without adequate resources in structuring. There is no one building for the mind and management of the TTPS prosecutorial team. They are spread across the country. The computerization effort in the TTPS whilst they have resources, it has not been harmonized. So the Commissioner of Police has taken lead on these resources with the urgings of the AG's office obviously because we have done the DPP and the Judiciary at the same time. So we do not want to use one system in one place, and then have an incongruity of systems, so what we are doing right now, is we are marrying the systems on a very accelerated time frame basis. And I would like to compliment the TTPS IT Division and the Judiciary, because a lot of this is just home-grown IT that is being applied.

Mr. Chairman: Thank you very much, hon. AG. DCP Phillip, you are now invited to take us through your submissions.

Mr. Al-Rawi: Mr. Chair, if I could indicate, and to honourable members, we at the AG's

office received commentary coming from the TTPS in several iterations in the many years of consultation on the evidence law. Secondly, when we sat and we drafted the legislation. Thirdly, after we first piloted the Bill in the Senate and went through the two days, we received further submissions. A lot of the observations made in this legislation we have already accepted or have responses to.

And Mr. Chairman, I am going to indicate to your Committee after, mind you, I am not a member of the Committee. I am a Minister attending by virtue of portfolio. There is a matrix of suggestions that we have already accepted. Some of which are addressed in these submission here. Had we gone to the Committee stage all of this would have been dealt with there, but we thought it appropriate to refer it to a Joint Select Committee. So just to indicate that we have at the AG's office looked at a number of these submissions already, and have positions for the Committee's consideration in short course.

Mr. Chairman: Thank you. DCP Phillip.

Mr. Phillip: Having heard the hon. Attorney General, I should probably go directly to the last submission under Division 3 that—I do not know, it may be new, it may not be so new, but it speaks to the whole aspect of adverse inferences. I think this is 2019 and the Evidence Act is being amended. And we need to, as we continue to level the playing field in particular for the accused and the defendants, we need to level the playing field for the victims also.

So, with that in mind, it is timely that the hon. Attorney General should give serious consideration to the whole aspect of adverse inferences because while we recognize the whole aspect of the right to silence, and the presumption of innocence, as well as that privilege against self-incrimination, historically what we have observed is that when we interview suspects they have nothing to say, and they wait until the trial continues and at the end of the trial they come up with this glorified defence after having heard all the evidence.

So, in fairness to the honest accused persons and defendants, it would be grateful if at the first instance, the first interaction with the police, they make a clear indication as to what

in fact, you know, they would want to say in their defence so that credibility and all the good things would happen early. It has been so, this is the law in England. And I know that we in particular look—we use it as good precedent and they have had this more than 20-something years ago. So we are almost 30 years behind. So it would be good if serious consideration is put in law with respect to adverse inferences by suspects and in particular defendants and accused.

Mr. Chairman: Hon. AG.

Mr. Al-Rawi: Mr. Chair, I could not help but smile for the entire submission of DCP Phillips because he has hit the nail on the head. I would like to just say to the Committee for the benefit of the Committee, under the anti-terrorism laws of the United Kingdom, the adverse inference on silence is a very powerful tool that they use in respect to their convictions. Also post PACE reform, the UK introduced the adverse inference silence aspects. This has actually come across the office of the AG most recently in the fulminations around the Sedition Act. We have heard in the public domain the allegation that sedition legislation can be replaced because there are laws which are adequately in place to adequately address the situation, when the truth is that the comparator jurisdictions that are being used, all have the adverse inference on silence rule.

So the United Kingdom for instance where we heard recent submissions saying, “Let us abolish T&T’s sedition law, there are adequate laws”, that was the debate that came up in the United Kingdom, and Australia, and Canada, and the United States, all of whom, every single one of whom have the adverse influence rule. I would welcome this suggestion. The reason that we at the AG’s office did not volunteer it, is that we felt that we would have a “ring-down” fight over it, that may have delayed the passage of the Bill. However, the real voice inside of this is the Opposition’s, because they are the ones that make the submission that our laws are in *pari materia* when in fact this is the crux of the law that exists in the other jurisdictions, and does not find itself in Trinidad and Tobago. So I would welcome the Committee’s fulmination and support for this.

Mr. Vieira: Well, AG, I would be one of those that might have a little concern about the adverse inference on silence. I think that is certainly something that one would want to

give very careful consideration of, because there all kinds of reasons why an accused person might be silent at that time. I would point out however, with your very pertinent concern about an accused listening to hear the prosecution unveil their case and then coming up with defences. That has been pretty much addressed now with the new Criminal Procedure Rules and the recent practice direction that was issued by the Judiciary, on the need for filing a defence statement. My suspicion is that that has not been applied as it should be in practice sufficiently, but it would address the concern you have raised.

Mr. Hosein: With respect to the adverse inferences, in order for this to properly work, the police service and the DPP's office must be equipped in order to give early and full disclosure—full and frank disclosure. You cannot ask an accused person to state what your case is if he does not know what the case against him is. That is a concern that we have to take into consideration. I also want to agree with Sen. Vieira with respect to the defence stating their case at an early stage in the proceedings at the stage of case management.

Further, this was tested in the Privy Council and it was found that it is to be constitutional, and we have it in our law but again, it all goes back to the applicability of this and how it is going to work. So while adverse inference is going to be a wide debate, AG made reference to the Sedition Act, it must be used in such a responsible manner in which you also have to protect the right of the accused. The three rights, the right to silence, the right against self-incrimination, and also the right to be presumed innocent. Because we cannot force the hand of a defendant, especially in the case of a capital charge to state what their case is at a very early stage until they have full and frank disclosure. So, I do not think at this time we have enough before us in order to make a solid decision with respect to whether or not this Committee can go forward with this suggestion made by the TTPS.

Mr. Al-Rawi: Mr. Chair, could I say that I think Sen. Hosein has summarized this in the most precise form possible, I compliment him. It is the exact point of view. It is why the AG's office did not introduce it. We believe in the AG's philosophy of "just start" that

we have to work our way into success, which is why we just started the Civil Proceedings Rules. We just started the amendment of the Civil Proceedings Rules. We have just started the application of the rules.

The TTPS can testify that they have received from the Chief Magistrate very strict directions on the operability of the Criminal Procedure Rules to the point where cases will be thrown out if they are not ready on time. So, the rules are now beginning to grind into the system. I really drew the point to say—and forgive me, I was being a little naughty in provoking my colleague—my dear colleague Sen. Hosein, into saying that one cannot simply roll up and say repeal X and when truthfully the system is not ready for repeal X in its form. But you know, lay that aside, I think it is a large issue that we ought to track. It came up, Sen. Hosein was a member of the Joint Select Committee on the anti-terrorism laws where we raised the same issue of that coming ahead, and I think that the time for this is a little bit later down the line as we begin to grind disclosure into mandatory aspects, and as we define what sanctions for non-compliance with the rules are, because it is a very grey area right now.

Obviously, the concept of sanctions cannot work if the system was not working which is why we focused on systemic reform first, plant and machinery, people and processes.

10.35 a.m.

Once we got that into place you plug in the laws and then we work our way forward, but I want to compliment the TTPS on having the foresight onto this particular point. I am very anxious about it, but I share Sen. Hosein's concerns too as well, and Sen. Vieira. But just to mark the spot that we at the AG's Office did think about this in deep form, but we did not bring it forward for the very eloquent reasons put forward by Sen. Vieira and Sen. Hosein.

Mr. Chairman: Thank you, hon. AG. Now I see the Assistant Superintendent Kerwin Francis is at the ready to go. Now, much of your written submission outside of the issue of adverse influences covers the ID parade aspects and the changes that you have proposed, and at the opening I made the comment that this issue of witness anonymity is

new and as expected there are different views in the Parliament and outside the Parliament. In fact, my colleague, member Hosein, in his contribution on the Bill raised about 15 issues including this issue of witness anonymity. Now, if there was ever—I am just following submissions and conversations from the Trinidad and Tobago Police Service—an advocate for stronger protection for witnesses in our current and operating environment it was the police service. What are your views on that aspect of the Bill which seeks to introduce in certain circumstances sanctioned by the court, witness anonymity?

Mr. Francis: Thank you, Chair. With respect to witness anonymity, this is a provision that the TTPS fully endorses on two fronts: one, on the side of civilian witnesses who may come forward to give evidence that the State is seeking to rely on in a criminal trial or criminal proceedings, and on the other front, where you have police officers involved in criminal investigations whose identity we may seek or want to protect given the nature of the investigation they have been involved in.

We understand and appreciate that any accused has a right to a fair trial and that has to be balanced against the provisions which we are seeking to have put into law, and we acknowledge as well the high threshold set by the Bill which requires three conditionalities which must be met by the State, more so the police through the DPP's Office, in having the court consider any application for witness anonymity. From a practical standpoint, with respect to, for example, drug trafficking investigations, many times we have drug seizures and because of the way drug trafficking occurs you may have drugs being sent through a courier service, through cargo, where civilians are employed, and the experience has been that persons generally are fearful to even go on record to say what occurred even in the performance of their functions when they were dealing with the individual.

Further to that, with respect to even attending an identification parade, because of the fear that is attached to drug trafficking these individuals themselves on many occasions have declined to even attend an identification parade. So with that in mind, such a provision would aid the police service greatly in getting cooperating witnesses to come forward.

Further to that, it would not be the first port of call for the police service, because in looking at the provisions of the Bill, it contemplates as well, having exhausted all other means that are available to the police, to bring this witness safely to the court to give their evidence. So those particular areas that are available must have been explored, there must be evidence in support of those areas, and then now the police service can seek to satisfy all three requirements under the Bill coming forward with its application through the DPP's Office for such an order.

Mr. Chairman: Assistant Superintendent Francis, for members and members of the public following, because it is an issue that the public would have a very keen interest in, from a practical point of view is it contemplated, or how practical is it— What are we seeking to do to protect the identity of the witness at the trial, or from the first interaction? Because, of course, from a practical sense a potential witness is identified, if the witness gives a statement it would have to be disclosed in advance to the defence. So the identity of the person is known, what the person looks like. So how does it work from a practical point of view; where does the protection or where does the anonymity begin in the implementation of this provision?

Mr. Francis: From a practical standpoint, we would want anonymity to begin from the onset of the investigation. In that way, the witness himself or herself is afforded that safeguard knowing look, there is this order in place that prevents disclosure of your identity to any individual who may be seeking information surrounding the investigation and, by extension, any witnesses who may be involved in the investigation. So that is the first level of protection we would like to see. I have seen that reflected in the UK. Further to that, the second tier now would be when criminal proceedings are instituted, where the witness now is afforded that protection by way of their identity being withheld at trial in the courts. So two tiers of protection: during the course of the investigation, and then at trial to its completion.

Mr. Hosein: Thank you very much. Chair, through you, to the members present, under the Evidence Act at section 15C, and in particular (1)(e) and (f), it states that statements can be admissible where a person:

- “(e) is kept away from proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person; or
- (f) is fearful and no reasonable steps can be taken to protect the person or others or to protect him or others from financial loss.”

So you would agree with me that already in the existing law there are provisions to deal with witnesses who may be vulnerable to threats from the elements. This provision that the Bill seeks to include is an order where the witness himself attends the court and gives the evidence under circumstances of screening or through video link in an unknown location. Would you not agree that the clause or the provision that already exists in law protects the witness even more because in this instance the witness does not even need to come to court? The statement of the witness can in fact be tendered as a hearsay statement and it would be read to the jury. However, the only difference is that the defence will not have an opportunity to cross-examine the record maker of the statement. However, in this instance, the defence now has the opportunity to cross that person. So that is one issue I am raising.

The second is that if this provision already exists in law, then how do you treat with those witnesses who are fearful already? Because one of the submissions you made is that you want protection from beginning to end, but it already exists that persons may have been fearful at the time of giving a statement at the beginning and then to the end of the trial. So how do you deal with those circumstances of witnesses who are in need of protection?

Mr. Francis: With respect to the provisions under the Evidence Act, yes, it allows for the statement of the witness to go in. However, as you rightly indicated, Senator, the defence does not have an opportunity to cross-examine the maker of the statement. With this provision he is afforded that opportunity. So from the TTPS perspective, it gives the defence a greater opportunity to cross-examine a witness, albeit that the identity of the witness is not disclosed, and in our view, assist that accused or defendant in the court, as opposed to the provisions that exist right now where you just have the statement being tendered and there is no opportunity to cross-examine. So it adds a level of fairness or a greater level of fairness to the defendant or accused.

Mr. Hosein: We could moot on that point because at the end of the day when the statement is disclosed you will know who the witness is, you will know who—

Mr. Al-Rawi: Mr. Chair, just to jump in. Forgive me, Senator, with your permission. I think Sen. Hosein's question is, or rather, line of enquiry is spot on to a point. Senator, forgive me. ACP Francis has raised a question of when the order applies, and I just want to refer to what the law proposes in the Bill. So at 12AG:

“(1) Where there are reasonable grounds to believe that the identity of a witness should be concealed from an accused person and the public so as to protect the witness, any of his relatives or any other person, the Court may grant a Witness Anonymity Order.

(2) A party to criminal proceedings may, in relation to a witness, make an application...”

So I want to ground the suggestion here now as to whether this ought to be moved beyond the ambit of that pot. That pot right now is criminal proceedings. Where one defines a criminal proceeding to begin is the key point inside of here. Are we to disaggregate the events prior from the events post? I would think that arguably, insofar as disclosure only comes about when proceedings begin, I think we are safe because insofar as that is the case, 12AG contemplates that anybody at that point, for instance, under the Criminal Procedure Rules, where you are giving disclosure for the first time as you must, you can make the application for a Witness Anonymity Order. But there is nothing in this law that prevents conditionalities from the order such that the court can revisit the failure to disclose the position. So it is contemplated that rules and regulations will be made under these positions, because as drafted, certainly as I intended in scrubbing this draft, it was intended to come from when proceedings begin because that is the point where disclosure must happen.

So anywhere along the point of proceedings beginning, the intention of the drafter of the law was that you could knock on the door of the courts, say to the court, “I would like you to consider the grant of a Witness Anonymity Order”, it was in my mind that the court would in its full discretion—because this is entirely up to the court—that the court

would say, “Order granted or refused, right of appeal may exist or not”, and then conditionalities can apply for the revisiting of the order. And that is where you then get into the position of whether one attends personally or is deemed to attend, and you are not dealing with a hearsay admission of a statement which is put that way.

So I think that we are actually on the same page, but I am speaking now as the drafter of the law what we intended. We intended, proceedings begin disclosure arises, obligation with disclosure is currently managed, (a), as a matter of common law statute and criminal proceedings rules. At that point and any point there, the party to the proceedings who wishes to use the Witness Anonymity Order can apply to the court for consideration, the court then may or may not grant the order subject to conditions as it may see fit, and what we can do is that we can scrub that down into any regulations or rules that may be required to make that operate just for the record.

Mr. Hosein: What the solution of the AG is, now it settled law that what forms part of the disclosure to the defence would be the credibility of the prosecution’s witness in terms of disclosing their criminal record because that forms part of the cross-examination of the defence when testing the evidence or the veracity of the statements given by the witness. Now if an order is made in the circumstance of anonymity, is it that now the criminal record of that witness forms part of disclosure? Is it going to be a redacted version? Because at the end of the day the jury must know whether or not this is a witness of truth.

Mr. Al-Rawi: So it is settled law that you must disclose the case that is least favourable to the prosecution to the defendant. In other words then, you must disclose the worst version of your case to the defendant. That may and does include some of the aspects of the character of the person. There are rules of bad character, there are other positions that no doubt come about. But when we look to the Star Chamber and the European decisions that come out of that, and as they have tiered the analysis of this thing, the weight of the evidence of witness anonymity orders have been in sharp focus and, more particularly, the conviction on the basis of a sole witness in particular, a witness who is anonymous, those have been frowned upon in very serious points to the point where the courts, Star

Chamber in particular, has said, unanimously, that if you are going to convict on the basis of a witness who is anonymous do not do it for the very reasons of the fairness of trial and other aspects. So the case law is very persuasive in strength, pushing at the point that the caution is to be given to the—rather the balance is to be shifted to the accused if you are going to rely upon the strength of an anonymous witness position. But this has been well articulated in the jurisprudence, both in the United Kingdom and in the European Star Chamber as well.

Mr. Vieira: Thank you, Chair. As a matter of practicality, I would expect that in the course of an investigation you would keep the witness' identity anonymous. It only really begins to become relevant when you need to seek an order, when proceedings have actually begun, and then the disclosure requirements kick in. But I was heartened by you indicating that the police are aware of the seriousness of Witness Anonymity Orders, that you would exhaust all measures first before seeking to go down that route, because I take the view that those orders should be used with extreme caution and in the few situations where they are absolutely imperative.

Having said that, I would like to get from your own experience, based on what you have encountered—there is a difference between being fearful because I am afraid to talk in public and go to court, or I am afraid to take time off from my boss's work and being in real apprehension of loss of limb or life. So the grounds to believe is what I am coming about, and in your experience can you tell me about witnesses who have been threatened, about witnesses who may have been harmed, about witnesses who may have been assassinated so as to justify the bringing into law these provisions?

Mr. Francis: I just want to go back to one point the AG made and then I will come to you, member. Hon. AG, with respect to the current position in the Bill, with respect to the order where it is applied for only at the institution of the criminal proceedings, in our submission it was intended that leave would have been asked for, through the Chairman, to make further submissions to include that provision of getting that order from the beginning of an investigation for the consideration of the Committee and your good office, Sir.

Mr. Al-Rawi: Mr. Chair, I do not think that there is anything that could stop that submission coming, and then the Committee could consider if you got precedent positions, et cetera, that whole consideration I think it is something that the Committee could look at. But as drafted from the policy position from the Government, we erred at the beginning of proceedings because we were fearful of the Gestapo approach of sequestered information and how that can go. Again, not that it is not a very worthy submission, this is a very far-reaching and progressive view that the TTPS has recommended. The question is if we are societally ready for that just yet in terms of our progression through birthing of criminal practice which is now much quicker than before.

Mr. Chairman: Now, DCP Phillip, so—

Mr. Al-Rawi: Sorry. Mr. Chair, it might be—Sen. Vieira just said something which was so powerful—that we want to convert some of the tipping off provisions to other aspects, because tipping off is a massively important venture and the tipping off really gets to two sources of difficulty, a person and a law enforcement officer. So section 51 of POCA is a powerful piece of law when considered in the money laundering context. The question is whether we consider money laundering to be more serious than rape, or murder, or grievous assault. So is it time now to put in this Evidence Act a tipping off provision particularly as the TTPS is reforming itself right now and you are going into more and more stringent analysis of what the Americans call “Who’s in the room, who is approved to be in the room and who can be certified to continuously be representing the truth in the room”. So maybe it is that we could look at it in that context there.

Mr. Chairman: Thank you. DCP Phillip, I want you to take us through and help us get a practical understanding, and the public in particular of—I know you support these changes subject to some of the suggestions you have made, but you do in fact support changes to the way ID parades are conducted and statements are taken, and so on. So from a practical point of view based on your written submissions can you take us through what you are recommending, and also share with us your views on how this may assist in criminal prosecution?

Mr. Phillip: With respect to clause 12 and that has the definitions included, when one

looks at the definition of “identification procedure”, we did say means:

“...a method or system of ascertaining or determining the identity of a suspect for the purposes of an investigation”—and they have—“as specified in section 12E (1)(a) to (e);”

However, there was a concern under 12B which is the use of photographs to assist in identifying suspects. While this speaks about this is a process prior to the commencement of an identification procedure, there was the belief that even the showing of photographs to a witness is actually part of an identification procedure. So there was a recommendation. Instead of “prior to”, we had “as part of the conduct of an identification procedure”. We wanted to include that, that the whole aspect—although that was not mentioned with respect to 12E in terms of both 12E(1) both subsection (a) to (e), the whole use of photograph. But we were of the view in the practical sense of the way we conduct our business is that when you have a report and you have witnesses present, sometimes the whole use of photographs is in fact triggering some form of identification if somebody—you know.

So we were concerned that it may form part of the identification procedure. But just to progress that we also saw that under 12B(4) it says that—we had basically hear that:

“Where a suspect has been positively identified by an eye-witness, the investigating officer shall, in respect of the matter under investigation, take all necessary steps...”

And we were of the view that even under 12B(3)(ii) where they have the word “investigating officer”—because that is one of the processes that we should have there “identification officer” instead, and in order to ensure that we have some integrity in the system there is provision in the Act for the identification officer to in fact delegate or he could authorize other persons to participate.

So we were saying there that the photograph should be shown by, well somebody at the rank of corporal or sergeant just out of integrity to keep as a suggestion to ensure that the process—

Mr. Al-Rawi: What is the current practice just for the record?

Mr. Phillip: The current practice is actually we would have a—the investigating officer.

Mr. Al-Rawi: Right. So you want to move away from the current practice which our Standing Orders provide, which is the investigating officer shows you the photograph, and now take the caution and say let an identification officer do that instead?

Mr. Phillip: An identification officer and who is authorized that he could delegate it to either a sergeant or a corporal. Because we wanted to—we were of the view that is it being considered part of the identification procedure, or it is outside of the—we were viewing at it as it may form part of the identification procedures.

Mr. Al-Rawi: So we identified—we defined “identification officer” as a police officer of the rank of inspector or above, who is not involved in the investigation and who shall be responsible for identification procedure. Then we have the “investigating officer” means a police officer involved in a criminal investigation. In Division 2 when we deal with identification procedures, before identification procedure takes place, et cetera, record, (b) use of photographs. So we have pinpointed here:

“12B. (1) Prior to the conduct of an identification procedure, an investigating officer may use photographs to assist in establishing the identity of a suspect.”

But that is prior to the conduct of an identification procedure.

“(2) Where photographs are used...a minimum of twelve...shall be shown to an eye-witness at a time.”

Then you ensure these things.

Detailed record.

“12C. (1) Subject to...(3)...identification procedure shall not be conducted unless a suspect is known and available...”

So I did not see this—in borrowing this from Pace and from the UK perspective, we took it with reasonable certainty having someone who knew what they were dealing with, preparing—this was travaux préparatoires —preliminary work to get you to the point of then putting it to somebody. So you had to have some reasonable certainty as to who a suspect was, otherwise it could be too diffused. That is the way I understood the English

practice and why we thought of it that way.

Mr. Vieira: AG, what I am seeing is the way the law is being slanted is that you want to preserve the integrity of the identification procedure so that there is nothing to corrupt it or to undermine it. You are free before the identification procedure to show, as it says to 12B:

“(1) Prior to the conduct of an identification procedure, an investigating officer may use photographs to assist in establishing the identity of a suspect.”

Up until that time you can show the photographs, but from the time the identification procedure kicks in then it is off limit.

Mr. Al-Rawi: Say 12D kicks in. So 12D says after you do all the preliminary fair certainty aspects so that there is integrity in ensuring that the right person is potentially in the zone. It is at 12D that we then kick in to say the:

“...identification officer—

(a) shall—

- (i) be responsible for making arrangements...
- (ii) conduct an identification...”—et cetera.

So we borrowed from the English that line of logic which I thought was there to preserve the integrity and certainty of you have not been on a fishing expedition, or just rounds up a set of people unfairly and brought them forward and pinpoint some degree of liability to the investigating officer to make sure that he was not outwitting the law particularly as it relates to malicious prosecution as it tends to come up from time to time from the State’s perspective.

Mr. Chairman: Okay.

Mr. Francis: One comment please, Chair. With respect to 12B, practical application, a robbery takes place, victim goes to the police station, makes a report, gives a first description. What TTPS is contemplating is that instead of having the investigating officer present the photographs as pre-work to maintain the integrity of that whole identification process from the beginning to the end, have it done by some other officer, not necessarily the identification officer who would be conducting any one of the

identification procedures. That is one option.

So that is the practical application of what Mr. Phillip is indicating, to add a level of integrity.

11.05 a.m.

Mr. Al-Rawi: But what do you currently do? Is it not currently your practice that the investigating officer would do this right now?

Mr. Francis: Correct. Right.

Mr. Al-Rawi: So what experience have you had from a prosecutorial failure point of view, a mal-pros point of view? What mischief are you addressing by recommending a shift from what you do right now, and which other laws suggest? In other words then, why change it?

Mr. Phillip: Well, it was basically ensuring that outside of the investigating officer, we have some other ranked person, where in terms of dealing with the whole aspect of photograph identification, handle that matter.

Mr. Al-Rawi: But what I am asking is, has it come in for condemnation in court? Has the practice at the TTPS said “Well, look, this is a problem we have to fix”? I am sort of cautious about changing things too quickly and building on systems that may cause complexity in your investigations. Because, would we not, by deviating from the established age-old successful route, now be introducing a line that the defence now says well, you know, “let us attack the event prior”. You see, there is some degree of certainty in saying well, look, the investigating officer prepared the material for the identification officer to go and do certain things. So I thought that that was a safe practice.

Mr. Phillip: Well, again, it was a suggestion just to ensure the integrity of the system. That was basically that.

Mr. Al-Rawi: But now I have you on record—forgive me for rejoining—as saying that there may be suspicion as to the integrity. And if there is, I want to know, well, what is it? What has come about? Has the court condemned it? In your practice, do you think it is unsafe? Why should we change it now as a matter of policy?

Mr. Phillip: One of the issues that we were also viewing it is, we were concerned that

may have been considered to be part of the identification procedure. And since identification procedure spoke about an inspector and above, and we do not have, well, enough such inspectors, we were just saying that, if it is considered part of that, could we now delegate that, to the rank of corporal or sergeant? Basically within that.

Mr. Al-Rawi: I understand that now. Thank you so much.

Mr. Chairman: Thank you very much. The next area in your submission deals with the destruction of photographs?

Mr. Phillip: Yes. We were—under 12B(7), the consideration was given—we were looking just as—in light of the same policy with respect to fingerprints. We were saying that, even if someone has not been positively identified, you know, by the eyewitness, as the suspect, they said that the photograph should be destroyed. And we are saying given that the collection of photographs would come from persons who have either been convicted, persons who have been detained by the police, arrested by the police and so on, we were saying that the photograph should not be destroyed and should be kept for a period of five years. You know, because we would have to be using—true, it is mandatory to use photographs, so we would need to have photographs.

Mr. Al-Rawi: So, Mr. Chair, here is what happened. We recognized in the debate that we were in conflict with the destruction of photographs elsewhere. So we had actually drafted an amendment to cause the destruction of photographs. So we understand, and when I asked my team, I said, “Where did this come from”? They said the TTPS made the recommendation. But then I had to wrestle with the fact that we do destroy photographs of suspects. And when you think about it, when we looked at the DNA Bill in particular, and we ran into the Kennedy and Marpa decisions, the destruction of information in that case, DNA profiles and fingerprints, and obviously photographs run alongside those aspects, you would think that there is a balancing right to be had. So we had recommended for the Committee's benefit, that we actually go back to the consistency of destruction. I do not know what the Committee's view will be on that, when it considers it in the round.

Mr. Chairman: Thank you. Your next submission relates to 12E(1).

Mr. Phillip: 12E(1). One of the concerns—well, having read obviously, the PACE and the English law, we did see under 12E(1), this priority ranking. Now, one would well imagine that one would have to be able to determine why we did not follow the priority ranking. And since we are of the view too, that there may be some need for some training in particular, starting at video identification using video medium in accordance with 12J. At present, we normally start with (b), so one of the concerns was that we need to build some capacity to deal with (a), and whether that in our context could have probably come just—we start with (b), (b) becomes 1, (c) becomes 2, (d) becomes 3, and then the video becomes 4. Because we would have to—we certainly, that has not been our history and we would have to—unless we get some, you know, some date in the future to at least be able to deal with this. Because we would always be—I am saying that, we certainly would not be able to comply with this immediately, if it becomes law because it has not been the practice. We normally deal with the identification parade and so on.

Mr. Al-Rawi: So, Mr. Chair, as the drafter, for the benefit of the Committee, the reason why we had put (a) first, which is subject to two conditionalities:

- (a) practicability; and
- (b) the availability or cooperation of the suspect.

So, we wanted to push the video aspect first because it would encourage a safer form of participation. The psyche that we saw in the policy behind this legislation, was that most people were reluctant to participate in the identification parade because there are perhaps untruthful stories outside there, about standing up in the room, and the light turns on, and the one-way mirror, and you see the guy, and family outside are waiting for you and see you coming inside. And with all of those things inside, we had urged the video medium in accordance with 12J first. But we recognized that until that becomes a system that is in full operation, that the practicability argument will excuse (a) being number one and then take it to (b). So if you had not the equipment or you had not the opportunity to operationalize it, that would be your excuse. Practically speaking, you could not go for (a) first, but we wanted to urge the practice this way, particularly because the medium is relatively cheap to be put into effect, it just requires training and consistency. So that was

just the rationale behind the Government's approach in the ranking of priorities for these positions.

Mr. Chairman: Member Vieira, followed by member Hosein.

Mr. Vieira: As the implementer of the procedure, I would be guided by the police. Because if they say this is how they feel most comfortable in doing the priority steps, I would take very much on board, you know, their practice. But trying to accommodate your suggestion about raising the bar, my question is, is it in the foreseeable future that you could see that this be a ranking that you could live with? Or you would still prefer for the time being to follow as you have suggested in your recommendations.

Mr. Al-Rawi: It is up to the Government to underwrite the facility. We will have to pay for the facilities and cause its implementation. And just to give you the example. Nobody wanted the Criminal Procedure Rules, and a lot of noise about it. We had 26 years of Opposition to the abolition of preliminary inquiries, led by the Criminal Bar. We then had the Criminal Division, the Law Association adopted a most inconsistent and egregious inconsistency in saying yes to the FCD, Family and Children Division, where we implemented the exact model for criminal divisions for children. And then they rolled up and said nah, nah, we have concerns constitutionally about Criminal Division and I had to ask them, Well, which is it? You are okay with it under 18, it is in operation in the two courts and now you are coming to say you have concerns about it for over 18? How do you explain that? They then went silent. So we are conscious that when we built out the Criminal Division, we had to go and underwrite the hiring of 531 people. We had to expand the courts, expand the Judiciary, expand the complements and we did it. Because otherwise the law could not be operationalized.

So in this scenario here, we have taken a policy decision that we will have to underwrite and foot the bill, for training, for plant, for machinery, for equipment, for the TTPS. Because what we saw coming forward as a traditional complaint from the DPP's Office, is that people did not want to participate in the witness identification parade.

Mr. Vieira: And to add to what the AG is saying, there may be some consolation because it says "subject to practicability". So—

Mr. Chairman: You were saying?

Mr. Hosein: Chair, what I want to find out is the practical aspects of the police conducting its work. On average, how long will it take for a suspect to undergo an identification parade from date of being detained? What are some of the obstacles that you all encounter? Because there are complaints that it takes some time. Some may take faster than the others. What are some of the issues you all have with respect to these identification parades?

Mr. Phillip: Certainly for an identification parade, and you are talking about the line-up identification parade that we are speaking about. We need to get persons who closely resemble, same age, sex, and you know, whatever, as the suspect—that sometimes causes us some concern. The availability of the witnesses causes us some concern. And then sometimes the availability of the attorneys, you know, some of them, they want to witness the parade, or a relative as the case is. And the odd time too, we do have a number of investigative-type issues that come up, you know. So there is a particular tactical decision as to when to put the person on a parade because you cannot really move around a person. So we have to locate—generally, we have to ensure that a person is located close to a facility. But sometimes we do not have the accommodation in terms of the cell space in the court. So there are a few of those things that do sometimes cause us some delay.

Mr. Hosein: And having regard to those issues that you identified, do you think the introduction of identification by video medium will address these issues?

Mr. Phillip: Well, it would, but I am just saying too, that it would take some time for us to build the capacity because it is new and we want to ensure—they talk about in some instances when you read it, about nine such, 12 such, you know. Where do we get these video footages? This is a small place. I do not know if you have to get some—you know. We have to work out the logistics and then what is of concern here, when they put this in the following order of priority, you have to go first and say why, what and then, you know, you have to give reasons why you did not use this and then the person—so if you put it in a particular location where we are, given that we are Third World and developing, put it in a realistic position, it helps us. We want to be realistic. Yes we do things, there

are a number of things that are going on that we want to be first still. Like the abuse inferences. We want to be first for that, you know. And in this particular case, we want to be realistic here. We want to be realistic, so we are saying put it where we would not always have to be excused. We did not use this because and—because from the time you start to give excuses in the court, you start to see incompetence, you know, “Well, look at them again”. So we are saying we need to build the capacity. And I am just saying that we would do our best, but the reality is that we should put it in a realistic position where we can in fact get it right.

Mr. Al-Rawi: So, Mr. Chair, if I could just join in. I understand the position. Having had a small bit of experience, certainly not as long as many people in the room, in getting executives to support the institutional reform of entities, one thing that I have realized is unless I create a rationale in law to compel change, which compels the expenditure, which compels the institutionalizing of change, it does not happen.

So when I put it in law and the fact that we constantly have to complain, it is not anything other than the Judiciary reminding and then that forms the basis for the TTPS saying, “Aye, we have to do this, the courts are criticizing us”. You note today in the *Newsday*, quite an incredible publication about the state of our prisons. Nobody who turned up at that event—for first of all we do not even—we denounced that convention when the hanging for Dole Chadee happened. So we are not members of that conventional body. But none of the persons that attended there, bothered to say well, whilst these are the problems, Trinidad and Tobago reestablished a whole new matrix which is in effect. New court structures, criminal proceedings, data analysis. All the work that has happened in the last couple of years has really been the equivalent of about 26 years work crunched into one. So that only happened because we set the bar differently and caused the expenditure to happen. So we feel confident that we need to constantly urge any government. Because governments come and go. We wanted to establish a bar that the court would constantly say you have to achieve and cause the reform of the systems that way. Because what we found out is that the availability of witnesses is what cripples hard police work. We just cannot convert intelligence, good information, potential evidence,

to conviction, because it collapses at the point of witnesses. And this Bill, the guts of this Bill, is defined to try and capture the witness integrity. And one of the prevailing fears in this country is with the security and ease of management. So that is why we have from a policy point of view, ranked the priority “(a)” over “(b)”. Because if we put (b), then we would have no compelling reason to change the situation. We would not be constantly explaining, because we just go with what we know. And what we know right now, is not working.

Mr. Chairman: Member Vieira.

Mr. Vieira: And just again, if it will give you comfort. Because I mean, you have expressed quite strongly, you know, your position and your concerns. But, 12E(2), makes clear:

“Notwithstanding the order of priority established under subsection (1), where it is impractical or circumstances are unsuitable to conduct an identification procedure in the order of priority, the identification officer shall offer the next identification procedure in the order of priority which is reasonably practicable in the circumstances...”

So there is some give, I very much take on board what you have said, but that should give you some comfort.

Mr. Chairman: Thank you very much. In your next two submissions, DCP Phillip, 12F1(b), you have raised the issue of inconsistency between what is proposed, and that deals with the protection against self-incrimination. The inconsistency with what is proposed and the Judges’ Rules.

Mr. Phillip: Yes.

Mr. Chairman: I think Sen. Vieira has responded and is there anything more you want to add?

Mr. Phillip: Well, Sen. Vieira’s response seems to be saying that what we put into the law would alter the Judges’ Rules. But I was looking at consistency. Because in terms of how the Judges’ Rules—the wording of the Judges’ Rules and in the same breath, since he did speak about rules and law, and I just want to go back to that in a little bit.

11.25 a.m.

We spoke about the Criminal Procedure Rules and the whole aspect of the defence, you know, to give us the defence statement and that is rules and if we put the adverse inferences in the law, that, as it is in the English legislation, it would be even though more powerful than the rules. So what I am saying here too is, this change here in the law, is it to say that inherently the Judges' Rules, the caution has now changed?

Mr. Vieira: What I am saying is that this is the law and this will trump practice. Now, the other thing I want to say is when you read this section that you have identified, I think it is even more elegant than what is customarily said in the rules because the caution under the rules is you are not obliged to say anything unless you wish to but what you say may be put into writing and given in evidence. Now, compare that to this.

Mr. Phillip: And maybe given on evidence.

Mr. Vieira: No, I am giving in evidence. What this says now is you are not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence. It is not far apart but I think it actually improves what you have been accustomed to.

Mr. Phillip: Well, subject to disagreement, you know, but we take it, yes.

Mr. Chairman: We take note of the submission. The next submission relates to section 12L. I myself have read the clause and have read your submission and I think we will all benefit from an explanation from you from a practical point of view of what you want to achieve by the change you have recommended.

Mr. Phillip: Yes, the change that we are recommending is that you may have an identification parade and the witness may have identified the suspect physically and then there is a request by the witness to speak or turn or whatever and then one person on the parade—and I am specifically referring to the suspect because they are well briefed by their attorney and so on—they do not comply with the instructions of the identification parade officer and then we have to abort that. Now, that is a lot of time and effort in that situation because, you know, they are very, for want of a better word, tricky. So at the end of the day, it would just help to frustrate the parade. So we believe that the parade

should not be aborted in light of persons either did not speak or—and especially if you have already been physically identified, because the reality of identification parade is to identify you in the physical sense. Yes, if somebody is asked to say something or to turn or to walk, that is some additional, but we do not want to ensure after we would have gone through that process and one person, mainly the suspect, failed to comply, that the parade is aborted, because he is the person, more than likely, stands to be—you know, a decision has to be made on him. So if he realizes that he is already identified and then there is the possibility now of further request and he does not comply and the parade is aborted, we may not be able to use the result of identification parade.

Mr. Chairman: Thank you very much. Any member has any response on that particular submission? No. The last area, DCP Phillip, relates to the approved forms and it is a submission made by my colleague, member Hosein, during the debate. So we have taken note of that submission which is essentially to have the approved forms included and it is a matter that the AG would look at.

As we close, I want to ask you first if there is any other submission or anything that you would like to say to the Committee and to the members of the public in relation to this Bill.

Mr. Phillip: Officer Pragg would want to say something.

Mr. Pragg: Good morning, each and every one. Division 3, Interviews and Oral Submissions, 12R:

“The Commissioner of Police shall cause to be established and maintained at each police station, a register to be known as ‘the Register of Interviews’...”

And there are four points that you have, (a) to (d). We would like to see (e) where it shall be included in the register:

Any other person present during the interview.

Because most times, there is a senior officer also present while the interview is going on. So in addition to your four points, we just want that additional point to be included.

I just wanted to address Sen. Hosein on one of the challenges that we face with respect

to the identification parade is the issue of remuneration and incentives for participants. Yes, we have a small fund, a police fund where we give participants for attending the identification parade but we want something in the law saying that the incentive will come from a special fund. Because when you go to get participants to come forward, they refuse saying “Wah is there fuh me, why do I have to come in ah line up?” So instead of the fund coming from the police fund, let us have something given in law under the Government.

Mr. Chairman: Well I remember when we were “lil boys” growing up, people looked forward to getting some rum and cigarettes. Was that rumour or was that true?

Mr. Phillip: That is real.

Mr. Chairman: Real? [*Laughter*]

Mr. Phillip: Yeah, at that time. It is no longer that.

Mr. Al-Rawi: Question though, when you say not coming from the police fund, you mean not coming from the appropriations given to the police?

Mr. Pragg: Yes, yes. To that extent, yes.

Mr. Al-Rawi: Right. Just as I understand appropriations, so the TTPS is one of the largest receivers of appropriations across all entities in Trinidad and Tobago. If we were to put it from a fund that comes outside of the Government, out of the TTPS, they all come from the same pot, is the Minister of Finance to give. So as I understand it, all that is required is a line item in the TTPS budget where you know that that is the pot of money. I would be loath to recommend going outside the TTPS because of section 123A of the Constitution. I would not want any entity to frustrate police business when the law, as it currently is, is that the TTPS has its own authority to manage itself anyway it wants to. So once that line Item was in the budget, they could vire money, they could request supplementation. But I think from a policy point of view, the TTPS should always have its Commissioner in charge of its business and no politician or Minister of Finance or anybody else should ever be an encumbrance to that operation.

Mr. Phillip: Yes, Sir. I think while he understands that, probably the whole aspect of the slowness in which funds become available. But that is another issue.

Mr. Al-Rawi: Well boy, if you see the slowness in requesting it from a Ministry.
[Laughter]

Mr. Chairman: Let us not get into that.

Mr. Al-Rawi: I get the point. What we may need to do—and I take the point well, Mr. Pragg—is to perhaps work on a better operationalization of that, how it can be done in real time because that seems to be the problem. Right? What it is, standardizing it and then the real time approach and making sure it is not abused. Correct?

Mr. Pragg: Certainly, Sir.

Mr. Al-Rawi: Got you, Sir. Thanks.

Mr. Hosein: I am just curious, what is the remuneration that you give to these persons who participate on these parades?

Mr. Chairman: I thought that that question might be asked.

Mr. Phillip: My understanding is \$60 a person.

Mr. Hosein: Sixty dollars?

Mr. Phillip: Yes.

Mr. Chairman: Well, you could get some rum and cigarettes with that. Member Vieira had asked earlier about witness interference or witness tampering.

Mr. Vieira: I wanted to get a sense of how real, how serious the threat was to justify that provision.

Mr. Francis: So, member, I do not have any statistics here with me to give you on a case-by-case basis. However, what I can say from investigations that my unit has conducted, the general fear expressed by individuals is fear of harm to themselves, to their families or damage to property, but more so, fear of harm to themselves and their relatives. The fear expressed is not one that deals with time off from work or the concern about being fired by their employer. So that concern is one that is ceded in fear of harm to themselves and their relatives.

Mr. Vieira: Would it be possible to get statistics that you may have showing where witnesses have been assassinated, have actually been harmed, trials have been derailed because of intimidation?

Mr. Francis: Attempts will be made to get those stats and forward them to the honourable Committee.

Mr. Al-Rawi: But I would like to just point out something. So it does exist. Right? In this year's newspapers alone, I could think of five off the bat. That five is enough. The mother killed with her son outside of the graduation; the doubles vendor, you name it. That is enough in the echo of the fourth estate to make sure that nobody turns up. It is the same reason why we see those very large numbers in the jury exemptions, hundreds of people in the court saying "I doh wanna be ah juror". But I do appreciate the evidence nonetheless.

Mr. Chairman: Gentlemen, I want to thank you for at short notice responding to our invitation and also providing your written submission. I look around, for most of us in the Select Committee, we need assistance because from a practical point of view—we understand language and law and legislation, we understand policy but from a practical point of view, members of the public having to interface with the police during an investigation and the police having to conduct its investigation, we appreciate the opportunity to understand the difficulties you face and how these things could improve. We welcome your further submission on any matter, including the data that has been asked for. That is important information and we know from reading the newspapers and we know from living in Trinidad and Tobago, the issue of witness interference, tampering, threats to witnesses, witnesses being killed, investigations being derailed, we know that and we would appreciate the data and any other submission you want to make on this Bill that you believe will assist us in our deliberations before we report back to the Senate.

So I want to thank you, DCP Phillip, Mr. Pragg, Mr. Francis. Thank you for your work as officers of the Trinidad and Tobago Police Service and your work in support of us as legislators and to help the public understand. I want to thank the members of the Committee, the hon. Attorney General who has been juggling, is always juggling, but has been here with us and has indicated to me that he would try to be as part of many of the meetings as he could. I want to thank the CPC and the Parliament Secretariat. Most

importantly, I want to thank the viewers and listeners who will follow the broadcast later and would also make submissions or make comments that will assist us. Thank you very much. This meeting is adjourned.

11.38 a.m.: *Meeting adjourned.*

VERBATIM NOTES OF THE FIRST MEETING OF THE SPECIAL SELECT COMMITTEE (SENATE) ON THE EVIDENCE (AMDT.) BILL, 2019, HELD IN THE ARNOLD THOMASOS MEETING ROOM (EAST), LEVEL 6, (IN CAMERA), AND IN THE J. HAMILTON MAURICE MEETING ROOM, MEZZANINE FLOOR, (IN PUBLIC), OFFICE OF THE PARLIAMENT, TOWER D, PORT OF SPAIN INTERNATIONAL WATERFRONT CENTRE, #1A WRIGHTSON ROAD, PORT OF SPAIN, ON TUESDAY, NOVEMBER 05, 2019, AT 9.44 A.M.

PRESENT

Mr. Clarence Rambharat	Chairman
Mr. Nigel De Freitas	Member
Ms. Donna Cox	Member
Mr. Saddam Hosein	Member
Mr. Anthony Vieira	Member
Mrs. Hazel Thompson-Ahye	
Mr. Faris Al-Rawi	
Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Assistant Secretary

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Roger Gaspard SC	Director of Public Prosecutions
Mr. Nigel Pilgrim	State Counsel III
Ms. Anju Bhola	State Counsel III

TRINIDAD AND TOBAGO FORENSIC SCIENCE CENTRE

Mr. Derrick Sankar	Director (Ag.)
Mr. Kirt De Coteau	Scientific Officer III (Ag.)

Ms. Earlene Bahadoorsingh Scientific Officer II

Ms. Amanda Moses Ferreira Scientific Officer I

NATIONAL FORENSIC DNA DATABANK

Mr. Justin Lewis Custodian

Ms. Tonia-Marie James Databank Analyst

LEGISLATIVE DRAFTING DEPARTMENT

Mrs. Veronica Sahadeo Senior Parliamentary Counsel

Mr. Parvin Sookhai Parliamentary Counsel II (Ag.)

Mr. Chairman: Good morning, and welcome to the first meeting and first public hearing of the Special Select Committee of the Senate on the Evidence (Amdt.) Bill, 2019. This hearing is broadcast live on Parliament Channel 11, Parliament Radio 105.5 FM and the Parliament's YouTube Channel, *ParlView*. I am Clarence Rambharat, I am Chairman of this Select Committee. I now invite my colleagues on the Committee to introduce themselves, starting on my right.

[Introductions made]

Mr. Chairman: Thank you very much. I should point out that Sen. Thompson-Ahye is an Independent Senator who has been given leave by the Committee to participate in the deliberations and discussions of the Committee as is provided in the Standing Order of the Senate. The Committee is supported by the Secretariat provided by the Parliament, Mr. Lucio, Mr. Greenidge, and we are also supported by the staff from the Attorney General's office and the Chief Parliamentary Counsel's office, and they are here to support the Committee.

The hon. Attorney General is expected to participate also. He has indicated that he may be running late at this time. So we have before us today—and I thank you for accepting our invitation and also making your written submissions—the representatives from the Director of Public Prosecutions Office, the Trinidad and Tobago Forensic Science Centre and the National Forensic DNA Databank. And when the Committee met

in camera before coming here, we identified the stakeholders before us as very critical to the success of the work of this Select Committee which has been appointed by the Senate to review the Bill, to conduct the appropriate discussions with stakeholders and to report back to the Senate by the end of November 2019, and we intend to do so.

So I now want to invite the three stakeholders before us to make your opening submissions based on your written submissions, and whatever else you wish to share with us. So we would start with the Director of Public Prosecutions, then follow with the Forensic Science Centre and then the DNA Databank. So thank you very much. DPP.

Mr. Gaspard SC: Good morning. I would like to thank the Committee for extending its kind invitation to my office. It is a signal honour to be here. These issues as they pertain to the Evidence (Amdt.) Bill are very, very important issues, especially when viewed against the backdrop of our criminal justice system that has appeared and has in fact been moving rather sluggishly over the last few years. The Evidence (Amdt.) Act, and in particular those sections of the Act which pertain to special measures, I welcome them. And I am on public record for at least 10 years now as an advocate for special measures, especially in the unwholesome climate of fear which tends to pervade if not cloud the ambience that sometimes exists in the courtroom.

The Evidence (Amdt.) Bill, as I see it, can go a long way towards obviating certain problems associated with identification procedures and this can in turn result in the amelioration of the criminal justice system. It is not a magic bullet or a panacea that would automatically and ineluctably result in the system being improved, but I see it as presenting an opportunity for other ingredients in the cocktail of measures which the country has a duty to the citizens to create so as to deal with the problems or some of the problems which are currently besetting the criminal justice system.

It is in this context and against that backdrop I look forward to making a contribution before this Committee, and I trust that we would engage in rather wholesome discussions. Thank you.

Mr. Chairman: Thank you very much. Forensic Science Centre.

Mr. Sankar: Derrick Sankar, the Acting Director of the Trinidad and Tobago Forensic

Science Centre. Trinidad and Tobago Forensic Science Centre's core function is to process evidence gathered by the police officers of the Trinidad and Tobago Police Service and to report on these items of evidence. We prepare certificates of analysis that are used as part of the judicial system in assisting the DPP and the police officers in prosecuting these cases before the court. The officers who prepare these reports are also summoned to court on many occasions to testify as witnesses, as expert witnesses. As a result, the Evidence Bill dealing with witnesses, ID parades and video conferencing is very relevant to us in how we present our case before the court and it is very relevant to the climate in which witnesses are asked to present evidence. And it is a great honour for us to be invited and to be here to contribute to this Bill.

Mr. Chairman: Thank you. DNA Databank.

Mr. Lewis: Hi, good morning. I am Justin Lewis, DNA Custodian Manager. I have, alongside with me, my Databank Analyst, Tonia-Marie James. We both compiled the comments that we are going to detail today. The Databank basically is a repository of DNA profiles from crime scenes, and persons mentioned in the DNA Act, we compare profiles to find matches, contaminations for medical associations. We provide reports to the police on matches, of course, and to the Forensic Science Centre.

I am going to say that we are not experts in the ID parade policies and regulations; however, as scientists we do see value in providing comments and we would get through them today. Thank you very much.

Mr. Chairman: Thank you. I would now invite member Vieira to lead the opening questions on behalf of the Committee.

Mr. Vieira: Thank you, Chair. Good morning everyone, again. Director, first of all congratulations for presenting us with a very helpful brief. Clearly you went through the legislation with a fine-tooth comb and your package is well received. Now, one critic has described the provisions on the Anonymity Orders as a perjurer's charter. What is your take on that?

Mr. Gaspard SC: I think, at first blush, such a contention might appear to be somewhat seductive, but bearing in mind how the law of perjury works, I do not see this particular

provision as precluding the law enforcement authorities from acting against a perjurer. So I do not think such a contention can easily bear any real critical scrutiny.

Mr. Vieira: Thank you. Now, I noticed you also made comment about the photographs, a couple of other commentators have made reference to that bit. I am wondering, there is something called “choice overload” where psychologists talk about the dangers of having too many options to choose from, do you think that the number of photographs being shown to a witness runs the risk of choice overload?

Mr. Gaspard SC: That might be so in a particular case, but I do not agree with that in this case since the touchstone of any identifying procedure must necessarily turn and hinge on fairness, and it is only fair for the identifying witness to be asked to make an identification from a number of photographs as opposed to one photograph, two photographs or three photographs. Having said that, on the other hand, it might be inefficient being hypothetical and reasoning and extremist for the identifying witness to have to choose from 500 photographs. The way how it is laid out in the Bill, it is my office’s view that this is perfectly permissible and fair.

Mr. Vieira: Thank you. I just have one other question and I am sure other members would have. Are there any aspects to the legislation that you would have a concern about or that you find troubling?

Mr. Gaspard SC: Apart from what I would have reduced into writing in our submissions, I do not have any particular concerns outside of those.

Mr. Chairman: Member Hosein.

Mr. Hosein: Thank you very much, Chair. Good morning, Director. Director, I was reading your submissions that were submitted to the Secretariat of the Committee, I noticed that there was a heading, “Order of Priority of Identification Procedures, Rights and Representatives.” Now, members of the public would not be aware or have an opportunity to have read these submissions. Can you just take us through with respect to, in particular, the order of priority as listed in the Bill currently before us, whether or not that is adequate or should there be any changes in terms of amendments? It is at page 2 of the submissions.

Mr. Gaspard SC: The apposite section of the Bill is clause 12E(1), and it reads, if I may be permitted:

“Where an identification procedure is to be conducted, it shall, subject to practicability or the availability or cooperation of the suspect, be conducted in the following order of priority:

- (a) identification using video medium in accordance with section 12J;
- (b) an identification parade in accordance with section 12K;
- (c) identification in a public place with the consent of the suspect in accordance with section 12M;
- (d) identification in a public place without the consent of the suspect in accordance with section 12N; or
- (e) identification by confrontation in accordance with section 12O.”

When the Bill speaks about priority it simply means that the procedure, identified at (a) in the adumbrated list of five options, would first be adopted, and if it is not practicable to adopt that first procedure which is “identification using video medium...”, then you go to the second one, which is “an identification parade in accordance with section 12K”.

If neither of those are practicable then you go to the third one, as opposed to giving the police and law enforcement the opportunity to just choose any of the five. They have to start with (a), and if (a) is not suitable then go to (b), then go to (c), then go to (d), then go to (e). That is what is meant and that is how I interpret the types of identification procedures in the context of an order of priority.

Mr. Hosein: Director, particularly with respect to the order of the priority, are you satisfied that the first method of identification during the course of the investigation should be by video or should it be by identification parade as opposed to video, because at that stage, let us just assume, that the suspect is in the custody in the police?

Mr. Gaspard SC: Well, as we had outlined in our submissions, we were of the view that the first item in the order of priority should be the identification parade since—if the first item in the order of priority is identification using the video medium there are certain things that might be lost which may otherwise aid an identifying witness to make a

positive identification. For instance, depending on how the video medium is used it will wholly exclude the prospect of the witness asking the officer conducting the procedure to have the suspect or the persons in the video medium to walk, to talk, to bend, to stretch, to do other things which may lend itself by way of confirmation of a positive identification. Whereas at the ID parade, it is well settled that a witness might properly ask the identification parade officer to have the suspect, and by extension all the persons on the parade, say a particular word, make a particular motion, walk, raise their hands, et cetera, et cetera; with the video medium you would lose all of that.

So it is my respectful view, and it is the position of this office that the first in the order of priority should be the identification parade. Now I know that, increasingly, the police are having problems in this climate finding and getting persons to agree to go on an identification parade. Well, in those circumstances if the identification parade were to be the first in the order of priority then it may no longer be practicable in that case for the police to go with the identification parade, so then they go to option number two in the order of priority which would be the video medium, so you lose nothing.

Mr. Hosein: Director, if we are to move identification parade up to the first option for identification, are you satisfied with how the order of priority with respect to the other options as listed currently in the Bill?

Mr. Gaspard SC: Well, your question does not quite contemplate what would be the second item in the order of priority.

Mr. Hosein: If we are to switch (b) and (a).

Mr. Gaspard SC: Right. Yes, I do.

Mr. Chairman: I welcome the hon. Attorney General and invite him to raise a few questions with the three stakeholders who are here before us today.

Mr. Al-Rawi: Good morning to everyone, apologies, just juggling a few meetings, and good morning to the viewing public. I welcome the very distinguished representatives of the stakeholders who are here before us as key stakeholders in this exercise. DPP, you quite correctly put the reason for the—as the drafter of the Bill and in electing the PACE methodology and in going for the priorities that we had seen in other parts of the

Commonwealth, starting in England, we had selected the video as the first port of call. I certainly take on board the recommendation because it is without prejudice to the fact that it may no longer be practicable and therefore one can step to another step. I was just wondering your view in particular if we are looking at 12E, whether—in my mind as the drafter of the law I had contemplated that video medium, even though 12J says moving images I had not discounted the use of actually live video medium in which case the advantages of directing the witness to stretch or to move—forgive me, the person in the parade to conduct certain things which could assist the identifying person in that point. I really had in my mind the concept of live imagery also falling into that. Do you have any views in respect of that?

Mr. Gaspard SC: That might go some way in addressing the concern that I would have raised earlier, but I still see it as having the possibility of falling short of the benefits to be derived from an identification parade in practical terms.

Mr. Al-Rawi: Thank you, Sir. May I, having been the last person to enter the room, be so bold as to ask for some of your views and thoughts on this very strong concept of witness anonymity? As you know, this Bill contemplates using witness anonymity and orders in very strict and certain circumstances. It is a rather unique feature for us, something which I think has been thought about for quite some time. As the person with responsibility for a large part of the operation of this arena, would you mind giving us a little bit of expansion of your views on the proposed Witness Anonymity Orders that this law contemplates?

Mr. Gaspard SC: There was a time when a section or a clause or clauses like these as they pertain to witness anonymity would have attracted much concern on my part, but given the present climate and the prevailing winds those concerns have, to a large extent, been defanged by the practical realities extant in Trinidad and Tobago today. So, in those circumstances and against that backdrop I find that the clauses as they pertain to witness anonymity in this Bill, I find them to be unexceptionable.

Mr. Al-Rawi: Thank you, Sir.

Mr. Vieira: Coming back to the order of priority, at the last hearing the police had

indicated, like you, they wanted a change in the order. So I am just going to run the order that they had proposed and ask how that squares with you. They had suggested first, (b), “an identification parade in accordance with section 12K”; secondly, “identification in a public place with the consent of the suspect...”, which is (c); then (d) as three, “identification in a public place without the consent of the suspect...”, and then four would be “identification using video medium...”, and then five, which is (e), “identification by confrontation...”. Would that be an acceptable list in terms of priority for you?

Mr. Gaspard SC: I have no problem in principle with that suggestion.

Mr. Al-Rawi: Could I just have a rejoinder here? In my mind again as the drafter of the law I am tempted to include the fact that the video medium may be live and I think that it is reasonable that many of the stakeholders have viewed this to be something which is filmed and then played to the witness. The mischief that we are trying to treat on the drafting side, I accept the (b) moving to (a) route, but just to put in mind that the mischief that we were trying to achieve was the reluctance of people to participate, because there was a chorus of concern that the bottle of rum or the scotch, or whatever it is that people use, the \$200, it is quite hackneyed in terms of the incentives that people use and the limitations, and also to the fact that people do not want to find themselves in these circumstances of participation.

I do propose, subject to the Committee’s view of course, to perhaps look at the modification of the video to make it clear that it does not include filmed historical records but that it can also include live video medium, because in that circumstance we thought that we would have a greater participation of people because they would be in a remote event where a conductor could ask somebody remotely to do something or to do not. I do remind hon. members that when we are looking at 12E, it is subject specifically to practicability and availability or cooperation, and therefore that is a huge consequence. I was trying to find a mechanism of flexibility in the circumstances. If I could say it this way, again in a hackneyed way, to think outside the box. So I hope that that helps from a drafting perspective.

Mr. Vieira: My concern is that we have a particular culture in Trinidad and Tobago. We have a particular way our courts interpret legislation and do things, so there is always a difficulty and sometimes even a disconnect between what the law says on paper and what obtains in practice, and I think what we are trying to achieve is to get that right balance that would work in practice. So, for example, one of the concerns that has been expressed is about, for example, not being able to get hold of station diaries when you are at trial and you are calling for things like that. Are there any areas in this legislation that you can see gaps arising where we need to shore up, not just what is on paper but in terms of, say, infrastructure support systems, and so on?

10.10 a.m.

Mr. Gaspard SC: Well, there were several areas of the legislation which I believe can be shored up so as to meet with the concerns that the hon. member has expressed. I would have reduced most of those concerns into writing in my submissions.

If I might get into one particular, as it pertains to this issue of identification procedure, and something which I would have alluded to in my submissions, the whole area of identification procedure. When you look at the Act it strangely leaves out the issue of verification. Now, if we are looking at an order of priority it might be that verification should find itself at A. So if a criminal offence is perpetrated by someone well known by the victim—like if my brother, God forbid, were to wound me with a cutlass, the police as a matter of duty would still want to carry out an identification procedure, using me as a witness, to identify my brother. That is called verification, and it does not find itself in the Act, notwithstanding the fact that the Act speaks to identification procedure. And more particularly, when you look at the definition section of the Act it speaks to identification procedure and it defines it thus:

“‘identification procedure’ means a method or system of ascertaining or determining the identity of a suspect for the purposes of an investigation as specified in section 12E(1)(a) to (e);”

In my respectful view, section 12E must necessarily include verification. This is a major omission in the Act.

Mr. Al-Rawi: DPP, I can say immediately off the bat as the drafter that I sincerely thank you for that observation at 12E for the inclusion of verification. I also note with great appreciation the recommendation for incorporating certain aspects of the Judges' Rules into the text of the position, and I also welcome the observation that some of the penalties are far too low and that we should adjust them. They are very powerful recommendations.

DPP, may I ask you, this is something that I have been knocking on the door of, and in the course of the debate I raised it. In the Anti-Terrorism Act I raised it, in a number of pieces of law I raised it, and I wish to thank you profusely for your recommendations or observations at J of your submission, which is to be found at page 5. This touches and concerns the adverse inference from silence.

Forgive me for being a little bit long in the run-up to the wicket. I am conscious that people are observing the proceedings and may not be on the point of law as quickly as we would be, and therefore I could be a little bit briefer if I was speaking only to lawyers.

Our jurisdiction is often compared to other Commonwealth jurisdictions, in particular the United Kingdom and the United States, where convictions come with rapidity and trials are much briefer, and where defences are viewed to be less complicated in terms of allegations of fabrications. Those are all driven from the application of the adverse inference to silence rule.

I note that in paragraph J of your submission, that you have a suggestion for reform and the use of adverse inferences from silence, and you have very usefully quoted from *Murphy on Evidence* and disclosure of defence. You have also noted that the limited form of practice direction by the Chief Justice in our jurisdiction is already in place.

Could I ask you please, for the benefit of the public on such a nuclear submission—a powerful submission—to truly take the reform of our law forward, to give us a little amplification on paragraph J of your submission?

Mr. Gaspard SC: Certainly. A useful starting point might be the Criminal Procedure Rules. The Criminal Procedure Rules are designed to make trials more efficient, put

simply, and there is this issue of the right to silence which is a very, very touchy issue, especially if you were to hold discussions with those persons who are numbered among the criminal defence Bar.

Having opened in that way, adverse inferences from a person's silence I should say, may go some way in making trials speedier, in expediting the criminal justice process, because what you find happening—and it also may go some way in ensuring that a verdict rendered by a jury of the accused peers is a true verdict. One has to look at adverse inferences from silence in at least two ways. One, you look at adverse inferences from silence in the context of pre-charged operations by law enforcement, and you may also look at it in the context of directions a trial judge is required to give to a jury in the context of adverse inferences from silence.

What you find happening from time to time in criminal trials, notwithstanding the stellar efforts of the Chief Justice by dint of his practice direction, is that persons are still proceeding to trial hoping in some instances to patch, construct and reconstruct their defences, depending on how the prosecution's case evolves. In other words, they may remain silent at the investigative stage. They may remain silent at the stage where the person is charged and, depending on how the prosecution's case goes, notwithstanding disclosure being made by the prosecution, then you find that some persons construct a defence.

I am not laying this at the feet of the attorneys, but then you find—let me put it another way, there is the prospect that a defence might be advanced which is not a true defence. Now, if a particular act, reasoning hypothetically, would have occurred on X date, and the accused is alleged to have been the perpetrator of the crime, if his defence is an alibi, he does not have to wait until 2012 to indicate that his defence is alibi, because he already knows that; and the law has already gone some way in treating with that defence alibi. So, to some extent, the law has already made an incursion into the classic right of silence.

I am saying that the time may have come, subject to the issue being treated with by way of further discussions with other august bodies, for us to consider—this is not a

plea for us to implement or to do away with the right to silence—this is merely an invitation for this Committee to consider, in all the circumstances, whether or not the time has come for us to go further in terms of the right of silence, and whether or not in going further, or some persons might very well contend, whether in making a further incursion or sortie into the right of silence, whether we are doing an injustice to accused persons. Or whether on the other hand, by making that type of incursion, we are ensuring that the product delivered by the criminal justice system is a fairer product.

Mr. Viera: Director, I thank you for that because you have given a nuanced position. You have indicated that you are not at all looking to interfere with the right to silence, but that in certain circumstances adverse inferences may be drawn.

You made an interesting observation, and it is something that my own view is, what we are really talking about is not only about changes in legislation, but behavioural change in the way trials are conducted. When I look at the new Criminal Procedure Rules and the case management procedures, and the overriding objective, and I look at the Chief Justice's practice direction on defence statements, I think we have already gone a long way. It is not so much a matter about bringing in new laws as it is about implementing what we have effectively in the courtroom. Would you agree?

Mr. Gaspard SC: I do, that the Criminal Procedure Rules would have gone some way, and to a large extent the implementation of those rules and the enforcement of those rules, while it is a work in progress there are certain lags that are occasioning some concern. Initially when the criminal rules were first brought into effect, for some strange reason this whole issue of the defence's case would have been left out. That is why the Chief Justice had to come back by way of the repechage with the practice direction.

And when you look at other jurisdictions, if you are talking about efficiency in the trial process, how do you say well the prosecution should disclose, the prosecution should let the other side know what the case is, but the other side, the defence Bar, they are allowed to proceed in the process almost by way of ambush. Hence the reason why the legislation would have gone the way that it did in relation to alibi. Because what used to happen in bygone days was that at the trial itself during the pendency of the trial, accused

persons would just before they went into the box, if at all, indicate that their defence is an alibi, or the prosecutor might hear it for the first time when the accused person testified in the box.

Now, in those circumstances, how could that process have been fair? Because when would the prosecuting authorities have been able to find the time to check out the alibi—when? Even if the judge was to adjourn to give the prosecuting authorities time to investigate the alibi, how could that make for an efficient trial?

Mr. Al-Rawi: Director, could I please invite, and again thank you for being here. This is an issue which, albeit I have raised on umpteen occasions on the floor of the Parliament, it does not necessarily resonate unless it comes from the practitioner and the person with constitutional authority to speak to these matters, which obviously under section 19 is you. Could I ask you to connect now to another very material and important submission in your written submissions, which is the substantive closing statement argument? This is at paragraph N of your statement. There is a recommendation and an observation which warms me that we look at section 15(2) of the principal law, the Evidence Act. And there is a recommendation that the prosecution be given an independent right to give a closing address, which is not necessarily tied to the defence. Could you for the benefit of the listening public indicate the rationale for that submission, which I would confess, not even as a member of this Committee, but as the drafter of this law, I warmly accept?

Mr. Gaspard SC: From time immemorial the prosecutor was tasked with the onus of proof. Onus simply means the obligation or the responsibility of proving. The prosecutor also has to meet a particular standard of proof. The standard in criminal matters classically is proof beyond reasonable doubt. There are some criminal matters where a different standard of proof becomes applicable. It usually finds itself embracing legislation which gives or which creates a reverse burden of proof on the accused.

Now, the prosecution has the obligation of proving, so the prosecution bears that mantle. Classically it was seen and it is seen in this way: the prosecutor's right to address the jury is like a right of reply. So if the defence does not address the jury, what is the prosecutor replying to? The right of reply was seen in the context of a reply to the

defence's closing arguments. So if there were no closing arguments by the defence, then the prosecutor did not have a right to reply to anything. So the trial would then proceed without any address to the jury by the prosecutor or the defence, and the judge would then go on with his summation and so on.

This submission is made in the context of the prosecutor having this obligation to prove, and even though the defence makes the tactical choice of not closing, because the prosecutor carries the burden of proof and the standard must be proof beyond reasonable doubt or proof to the extent that you feel sure, you being the jurors, it my respectful submission that notwithstanding the fact that the defence chooses not to close, the prosecutor should be still allowed to make closing submissions to the jury, consonant to and complementary with the prosecutor's obligation to prove.

Mr. Al-Rawi: This will of course be an amplification of the manner in which we adjust the behaviour in trials as opposed to fairness and procedure, because obviously one has the right to speak. So if there is a clear intention that the prosecution intends to address, then of course the opportunity for the defence would always be there, and therefore the balance would be struck. Yes?

Mr. Gaspard SC: Yes, but I would like to add a caveat with that. In this jurisdiction, unlike in some other Anglophone jurisdictions, the prosecution has the last word to the jury ordinarily, where there are addresses being made to the jury. I do not want this submission to be construed in such a way that it is interpreted as though I am saying that the prosecutor should no longer have the last word.

Mr. Al-Rawi: I understand it in the other way.

Mr. Gaspard SC: Because the way how it reads that is an interpretation open to you when you read it, but I am saying that is not what I am contending. I am saying that bearing in mind that the defence would know, if the law is adjusted or changed, amended that, listen, that tactical choice that we would ordinarily have made, it might not make sense to make that choice now, and it is open to them in those circumstances to address, and in certain circumstances, they may very well do that. So I am not for a moment suggesting that the defence be allowed the last say since they have no burden to discharge.

Mr. Al-Rawi: Thank you DPP. Sorry, Mr. Chairman, one last very important point that I would like the DPP's assistance on. This is again in respect of another one of the anchors of this legislation. Again, as a drafter I considered the need for Trinidad to have special procedures and CCTV evidence in use for vulnerable witnesses to be a core treatment for something that ails our society, that is, there is a lack of witness evidence because of fear, intimidation and other beliefs which cause witnesses to simply be put out of the system because they believe that they cannot be protected.

Section 12AA of the legislation, which is at pages 41 and 42 of the legislation, treats with the concept of special measures, evidence by video link and Witness Anonymity Orders. Specifically at 12AA we treat with vulnerable witnesses and special measures. The definition of "vulnerable witness" at subsection (3) is put into persons who are likely to be affected by reason of age, immaturity, physical disability, mental disorder, trauma suffered by a witness, fear of intimidation of the witness and the witness being virtual complainant in proceedings for sexual offenses. We have the concept of vulnerable witnesses under the suite of legislation that treats with children on a stand-alone position and also in the Family and Children Division law which we created.

You have made, again, a very important observation at paragraph K of your submission, on the last page of your submission, where you make a submission that subsection (3) of 12AA should contain a specific provision for witnesses in gang and terrorism prosecutions to be deemed vulnerable witnesses. I welcome the suggestion. As the drafter I had really sought in a framework kind of perspective to include that under paragraph D, which is "fear of intimidation of the witness or", but I do generally believe that in treating with Trinidad and Tobago's current situation that there would be an expressed benefit to singling out the concept of witnesses in gang matters and terrorism matters, because we have had matters of this type and have matters of this type in our jurisdiction come to the fore.

Could you lend us a little assistance in disaggregating the special mention of vulnerable witnesses in gang and terrorism matters, from the framework of fear of intimidation of the witness in subparagraph D? I will also ask you to consider whether

we ought to now be having a discussion about special procedures and special advocates in a voir dire kind of context, where an application is made and we have to now manage the access to the vulnerable witness. So let me put that one, if you would permit me to flesh it out.

Right now, in wrestling with another piece of law which I am in conjunction with many stakeholders on, including the Office of the DPP, the fairness of excluding witnesses from being met by the accuser is the subject. So there is an accuser who is a defendant in proceedings. There is a witness who is giving evidence. The witness is a vulnerable witness let us say. The witness is somebody who statute says ought not to be identified in certain circumstances. Other jurisdictions have a process referred to as a “special procedure” where a special advocate represents—it is done in the UK for terrorism matters, et cetera—they represent the interest of the accused, but that attorney is a vetted attorney from a panel of vetted attorneys who will approach the case on behalf of the defendant to now test in a special forum, akin to a voir dire, meaning a side discussion, as to whether the judge ought to allow the evidence or not.

In looking at this general issue of vulnerable witnesses, applications which may be made and then in this special cohort of terrorism and gang matters, do you think the time has come for us to adopt that special procedure? Panel of vetted attorneys who will interview carefully the accused, and the accused attorney approach a judge, have the judge consider the propriety of granting the order, and then allow the process to continue. Could you assist me?

Mr. Gaspard SC: Hon. AG, when you look at section 12AA subsection (3)(d), there is a very little word that attracts huge concerns. It is the definite article, and the word “the.” Persons who are up to no good in the criminal world may intimidate or do acts pertaining to persons other than the witness. So the fear of intimidation of “the” witness would not catch that at all. It is not the fear of intimidation of “a” witness. You are using the definite article T-H-E. So the intimidation of relatives, friends, et cetera, persons within the inner circle of the witness, this would not catch that.

Mr. Al-Rawi: Good point.

Mr. Gaspard SC: Terrorism and offences under the Anti-Gang Act, they are offences which, in my respectful view, should attract a very high degree of moral blameworthiness. And consonantly, prosecutions under the Anti-Terrorism Act and the Anti-Gang Act, to my mind, make for particularly dangerous situations for witnesses, not just civilian witnesses, but witnesses.

Mr. Al-Rawi: And functionaries.

Mr. Gaspard SC: All of us are aware as to the threats to law enforcement and to other persons in the society which ordinary prosecutions present. Bearing that in mind, it is easy to understand the multiplier effect on one's fear in circumstances where you are dealing with matters under the Anti-Gang Act and the Anti-Terrorism Act.

With respect to the second issue raised by your good self, the idea of vetted attorneys dealing with these supposedly vulnerable witnesses, as you know is a novel one in this jurisdiction, but it is something which operates in other jurisdictions. But I will respectfully crave your indulgence and perhaps try to focus your mind on the resource problem that is faced by Trinidad and Tobago. At this current time there are several matters awaiting trials in the courts of Trinidad and Tobago, especially in the case of murder, where one of the big bugbears is unavailability of counsel, especially by way of the Legal Aid clinic. And as you know, this has given rise to discussions pertaining to a different system, whereby you create an equivalent to the DPP's Office on the defence's side.

Mr. Al-Rawi: The office is rented, the staff is advertised and hopefully during the course of November and December the public defenders division will be birthed.

Mr. Gaspard SC: Public defenders indeed. Now, the question that, just like if you are starting a family, at the present time you have no children, you might very well wish to construct a home in contemplation of the arrival of children sometime in the future, and as a good lawmaker one would expect that you would have the vision in terms of the development of the society, in terms of the maturing of the society, you do not want to have to make amendments every year. But having said that, the question also arises as to whether or not that voir dire exercise, given our resources at this time, whether or not

that voir dire exercise cannot be properly conducted by trial judges.

10.40 a.m.

I think at the moment our trial judges are fully empowered, capable, and highly competent to deal with the voir dire situation involving, supposedly, vulnerable witnesses.

Mr. Al-Rawi: Important clarification. Wow! Let me put that simple word on the record. So the mischief in my mind was protecting the accused who is facing a Witness Anonymity Order or a special procedure, CCTV utilization, et cetera, and how I would allow the accused the right to interrogate the process of the grant of that order in the pseudo voir dire setting or voir dire setting. Is it that you are suggesting that a judge who is not involved in the matter can supervise the interest of the accused before the judge who is hearing the voir dire?

Mr. Gaspard SC: I do not see why that is necessary, with respect, because as trials go now—

Mr. Al-Rawi: The same trial judge.

Mr. Gaspard SC:—the same trial judge. We have to trust our judges.

Mr. Al-Rawi: Question: So would you be comfortable—so the risk in other jurisdictions as painted is, that if we allow the accused via his attorney alone to know the identity of the witness in full circumstances and interact in that voir dire setting where the application is made, that that could be a risk that goes back to prejudice the very vulnerable witness that we are looking at.

So the other jurisdictions had grown up with this practice of using another “defence counsel”, a counsel to represent the rights of the defence in that setting. How would you suggest that we manage that process of who the correct person to represent the accused will be where there are allegations that the representative of the accused, to borrow Commissioner Griffith’s expression, criminal lawyers as opposed to attorneys-at-law who practise in criminal law may be involved in the situation?

Mr. Gaspard SC: First of all, I am loath to borrow Commissioner Griffith’s expression. Having said that, there is legislation in this jurisdiction as we speak, and the common law

allows certain applications to be made without the accused being present, his attorney being present, and the applications are made, and the process has never attracted the allegation of unfairness. One of the issues that readily comes to mind is the whole issue of public interest immunity. For those matters, we do not get a separate attorney, and in some instances, the attorney is excluded—not the attorney, the accused is excluded from the process, “excluded”. Even if you look at the Bill before us in relation to screens and so on, the accused may not be allowed to see the witness testifying, but the screens must not prevent the accused’s attorney from seeing the witness. So by way of symmetry, what is the difference?

Mr. Al-Rawi: Thank you so much, DPP. And I guess I could amplify that by saying that the practice that is engaged in children matters where these are now run of the mill par for the course sort of thing are also symmetrical.

Mr. Gaspard SC: Yeah.

Mr. Al-Rawi: Thank you so much, DPP. Appreciated.

Mr. Vieira: Director, I just have one more question because you touched about the resource problem and I am sure that we are going to have questions of the other panellists on that point. But I am asking this question for the record and for the viewing public because we know the answer.

We live in a time when there is a lot of cynicism, if not a jaundiced view about prosecutors and the police, and so, unlike some jurisdictions where district attorneys and prosecutors could actually be political and they can use it as a stepping-stone to political careers, in our jurisdiction the office is seen as a minister of justice who is constitutionally protected, and you actually have a code for prosecutors which makes it quite clear you are not a rubber stamp for anyone, police, politician or otherwise. Could you speak to us a little bit in terms of giving assurances of impartiality, fairness and so on as prosecutor?

Mr. Gaspard SC: I suspect that it is not the intension of the hon. member, but to my mind identifying a need to give reassurances obliquely suggests that there is some strong contention that the prosecutors are not ministers of justice or they do not act as such.

Mr. Vieira: No. Let me hasten to assure you not at all. It is just in the context of this

legislation which people may be looking at it and saying, well, you know, this is charter for the heavy hand of the law to come down and be oppressive, I want to say that in the office it is actually going to be doing the administration of the prosecutions; there is a check and balance there as well.

Mr. Gaspard SC: The Office of the Director of Public Prosecutions I can assure you is an impartial office. I am also of the view that the empirical evidence would show that, if at all that office wields a sword, the sword is sharpened on both sides. As for guidelines and further assurances, the *raison d'être* for the promulgation of the code for prosecutors was so as to provide the public with the opportunity of demystifying prosecutorial decisions and the operations of the Office of the Director of Public Prosecutions, hence the reason why I spared no effort in being at the forefront thanks to the assistance of the British Government and the Canadian authorities of publishing the code for prosecutors and I will tell you that we are guided by that code. Prosecution in Trinidad and Tobago, the litmus test is the full code test, and the full code test is test that has been warmly and trenchantly embraced throughout the Commonwealth.

Mr. Al-Rawi: Mr. Chair, I can ask as we are on the topic of the forensics division, Mr. Sankar, may I ask you, Sir, to lend, as we are on the concept of vulnerable witnesses, part of your submission involves applying the definition of “vulnerable witnesses” to forensic experts.

I can also say that there is a live discussion for persons involved in the interception of communication which we are treating with in a different piece of law at this moment right now as we are very far advanced in a proposed amendment to that law, and we are looking at the concept of vulnerability.

So at page 4 of your submission you addressed the category of persons who ought to be included in the broad definition of “vulnerability”. And you also very usefully proceed with your support for the CCTV and video linking evidence. In fact, we have had cases as recently as last Friday where the complication of getting evidence from foreign jurisdictions comes about, and persons who retire and migrate elsewhere fall into this mix.

Would you mind, for the benefit of the public, and for the benefit of the Committee, assisting us with your views as to vulnerable witnesses and video testimony and anonymity orders as put out in your submission?

Mr. Sankar: The Forensic Science Centre generates various types of certificates of analysis based on the evidence that we process. Some may be pathologists report, there are ballistic reports which are involved in analysis of exhibits for murder cases, homicides. There are offences under the Dangerous Drugs Act with large quantities of drugs, and as a result of that we are witnesses—like any other witness, we provide expert opinions, we present a report before the court.

Depending on the type of offence under the anti-gang legislation, we are sometimes witnesses in those matters as well, because many of the members of the gangs are perpetrators of homicides, they are involved in firearm-related offences, they are related in serious drug cases, and as a result of that, we are seeing that we are linked, you know, intricately to those types of offences and presentation of evidence in court. As a result of that, we may be in a position, as the climate is now that, you know, we are vulnerable to certain types of, you know, implications in those matters, and as a result from my own experience, we would appreciate that the vulnerable witness, you know, be extended to us.

We appreciate also the fact that the video link will help us testify in matters of a very serious nature. We have pathologists who have retired and have migrated for various reasons. We have scientific officers where there are still cases outstanding that may be required to attend court. We had at one time American firearm and ballistic experts who worked over a period of three years with exhibits from the Forensic Science Centre and are now called upon to testify in court.

We have experts from England as well who examined and tested our exhibits, prepared certificates of analysis, and may be required to attend. For the sake of cost, for the sake of convenience, we are asking that the video link procedure be, you know, available to them to give that type of evidence, so that the smooth flowing of the court will take place. We are also very, you know, very grateful if the vulnerable witness at

every stage, we are allowed to participate in contributing to the applications made to the court if we fall within that purview.

Mr. Chairman: Thank you very much, Mr. Sankar, and before you, the DPP. We deliberately allowed an extended time for the Director of Public Prosecutions because a lot of what was submitted by the DPP is also addressed in your submissions from the Forensic Science Centre and the Databank.

And I want now, Mr. Sankar, to give you an opportunity, followed by Mr. Lewis to take us through your submissions. Now, we have the written submissions and we have read it, and I want you to just take us through and highlight, particularly for the benefit of the viewing and listening public, you highlight the key areas of your submission. And thereafter Mr. Lewis, I will come to you and ask you to do the same thing, and then I will come back to the Director of Public Prosecutions to ask you to address those aspects of your written submission. I have counted at least 10 recommendations you have made. I will ask you to address those which you have not already addressed and before I ask you do that, I will ask you something in relation to witness anonymity. So before I invite you, Mr. Sankar, to continue, I want to invite member Hosein to make a submission.

Mr. Hosein: Thank you very much, Chair. Chair, it is a question to Mr. Sankar. Mr. Sankar, the aim of this particular piece of legislation is to really get faster trials and get the system working in a much more efficient manner. One of the complaints that we hear very often is a resource issue at your establishment. Can you give the Committee an idea of the average time it will take for the production of a ballistic report from the date of submission of the item or even certificates of analysis?

Mr. Sankar: Let me say at the outset, there are a number of stakeholders that make representations to the Forensic Science Centre for ballistic reports: the Police Complaints Authority; summons from police officers through the Magistrates' Court, the High Court are sent to us; police officers who require management of their cases in an expedient manner will make written requests.

The Forensic Science Centre manages these requests and place in priority those requests. We have a backlog of ballistic cases, but we prioritize according to the needs

from the police officers, from the Commissioner of Police, from the various stakeholders, and we recognize that some cases will require fast-tracking, as they say, and we fast track those cases because probably they are before the court, probably you have two witnesses in custody and you would like a ballistic report to negative or positive, you know, the case moving forward. We look at police shootings as well where it involves a number of firearms that will be taken out the service if the police officers' firearms are seized and kept at the Forensic Science Centre over a long period of time.

So there are a number of factors that we gave way to in order to expedite those priority cases. On a daily basis requests are made, on a daily basis decisions are made, and we try to assist all stakeholders, especially the police officers and the court, in moving forward with those cases.

The ballistic, having prioritized the case that comes before the scientific officer who specializes in ballistics, the officer now has before him an exhibit that has to be opened. There may be a number of cartridge cases, bullets; there may be two firearms, 10 firearms. So the time for processing a case from the point of opening the exhibit to closing and reporting will vary according to the amount of exhibits, and the number of microscopy items required analysis. Microscopy, by that I mean, matching a bullet from a crime scene or from a body to a test fire in a particular firearm. So it may take four hours, it may take days. Sometimes the bullet is not as detailed as other bullets, and the scientific officer will be required to spend more time on the case, so it may take hours as well as days.

Mr. Chairman: Thank you. Member Vieira.

Mr. Vieira: Director Sankar, obviously the Forensic Science Centre is a critical institution to this undertaking of dealing with crime and enforcement, but we have been hearing of late that there is going to be an increase in judges, there is going to be an increase in courts, we are streamlining procedures, so one can anticipate increased demands on the centre. You already have said that there is a backlog and you having to prioritize according to need. My question is: Can you cope with the anticipated demands? And also, what measures are in place to keep pace with those increased demands on the

centre?

Mr. Al-Rawi: Could I just interrupt? Because it is more so a resource constraint that is provided to the hon. director of forensics. What I can say just to prove the MOU between India and Trinidad for the increase in forensics, similar one with China, and the location of the forensics division at the Mount Hope location is, in fact, set to go save for clearing the land which is currently under litigation. I have personally also attended to Jamaica where we have dealt with some of the expansion of forensic facilities. So from a governmental perspective there is an aggressive simultaneous expansion like we are trying in every other area to make sure that we operationalize the system.

So I can say, at least, and this is always so odd when we have committees where primary government members sit on the committee with first-hand knowledge, but being one of the persons involved in this equation I can say, there are at least three MOUs, land already identified, structure ready to go. As soon as we clear the injunction at the Mount Hope site which the Minister, then chairman has done, we expect to have to a rapidity of expansion going on right now; so there is good news ahead. Is that enough to manage the pace at present? No, obviously, but having recognized what is required, there is an aggressive anxiety to get it done.

Mr. Vieira: Well, I think that helps answer your question, but I am still interested in knowing, in light of what the AG has said, what would you identify as your priority list of needs?

Mr. Sankar: Well, in further support of what the hon. AG has said, is that the new Forensic Science Centre is projected to be six times the size of the original Forensic Science Centre, at least, six times, approximately 60 to 6,000 square feet of land—square feet of floor space.

In addition to that, the ballistic section, we have had discussions, and I personally have undertaken a project where I will train, together with the firearm unit, at least 12 police officers or other suggested persons with bachelor of science degrees or bachelor's degrees and master's degree to train in the specific area of forensic ballistic. This is a highly specialized areas. Having knowledge of firearms is not enough, you need to

actually be specialized in the area of microscopy, matching strains in the bullets to the particular firearm, test bullets. And we intend to train those ballistic officers, be it police officers or members of the army or other persons in those areas to help us reduce the backlog.

So with the priority of cases that we have already in train, we will get those persons trained to, you know, assist with the backlog on a short-term basis, and in the long term, because the police officers, as we envisage, they are salaried, they are paid, so that will assist us in cost, and we will do the training free of charge together and in harmony with the police service and with use of their facilities.

The biology section which also has a backlog, the public service has supplied our cadre of officers, so there are no vacant positions at the Forensic Science Centre. We have had recently four forensic biologists who are now Scientific Officers Is trained awaiting to start case work in that area as well. So with a strategic move, we are hoping that we will point our guns, so to speak, at the target areas of ballistics and biology.

We are grateful that the hon. AG to inform us of the new Forensic Science Centre, but we are not waiting for that, we are taking immediate action in those two keys areas where there is a backlog of cases. And with the scientists at the Forensic Science Centre and strategic moves and approval by the Permanent Secretary, Ministry of National Security, we are looking to attack that backlog head on and be very proactive and useful to the courts in providing these cases in an expeditious manner.

Mr. Al-Rawi: Just to give one position, again, to both members who have asked these questions. We have approached the issue of law, every single law that we have brought with the following formula in mind, plant and machinery, people, processes and law. That is the only way we have been able to open courts, increase facilities and increase rapidity. It is the first time that that four-pronged approach has been applied with a consistent measure. So I am very grateful that the members have asked the question and can hear it live from the proverbial horse's mouth.

Mr. Chairman: Thank you very much. Mr. Sankar, could you proceed with your—as I asked, that you identify the key aspects of your written submissions, the members have

had it, we have read it, and particularly in the interest of the public that you go through the submission for us.

Mr. Sankar: A number of the submissions that the hon. DPP has indeed addressed some of those issues in the questions addressed to him specifically in the first 40 pages, but I will comply.

Clause 12A at page 8 of the Evidence (Amdt.) Bill. That deals with “Identification Procedures”. It is suggested that the first description be taken from the words of the station diary. This record in the station diary must be made by a police officer who is in part of the investigation team as soon as practicable after interviewing the witness for the first time.

And this is important because if that is not done due to a failure to do so, it leaves room for allegations of prompting witnesses by police officers. And we are saying that that note in the station diary should be done as promptly as possible.

With respect the clause 12D, page 13, we are saying that the identification officer should not be a police officer or an inspector from the same station. We are saying that the inspector may come from another station. We are also concerned that whether the inspector is from the same batch of police investigators, they may have a personal link, and we are concerned about but, at least, the inspector should be from another police station, not from where the investigating officer works, because this will leave room for bias against the accused.

Under clause 12E, page 14, identification by confrontation, as the hon. DPP has alluded to, that is the last resort, identification by confrontation, and we in full agreement with that.

With respect to clause 12F, page 15, a note should be made of what measures were put in place to have the suspect be provided with legal representation. It is suggested that a legal aid officer be contacted, and the accused be allowed to communicate with that person in person or by phone to get advice on the identification process, and a note of this made in the station diary.

We are also saying, in most cases before the court, an accused person will deny he

was given the opportunity to contact a friend or family or a legal representative. It is important that provision be made to enforce the right of the accused.

Going to page 33 of the Evidence (Amdt.) Bill, clause 12R(2). This clause suggests that the interview or his representative can request a copy of the entry in the register of interviews in relation to his interview. The question is, would the police officer inform that person of that entry? And we are saying that the police officer shall inform the interviewee that he is entitled to this entry. It exists, and should be pointed to it in the actual station diary. Right?

There must be provisions for the interviewing officers to inform him of his right to have copy, and to put a note to this effect in the station diary. And if he has requested the same, a note will be made of this in the station diary, and the person receiving, signs the station diary on receiving same so that he cannot come and deny that he was not informed of it.

The section mentions a representative or his representative. The Constitution of Trinidad and Tobago states that a person arrested is entitled to have an attorney-at-law, friend, or relative, present. As such, any of these could be present. There have always been allegations by the accused that he has never informed of his rights when he is brought before a court charged with an offence. Provision should be made to have this accused contact a legal adviser by phone such as a legal aid lawyer or a duty counsel, or be given names of attorneys-at-law to contact in order to receive advice of his rights. We are also saying that the suspect interviewed should also request that legal officers or the attorney-at-law contact a friend or relative to visit him.

Under clause 12R(2) page 33, we are saying, this section suggest that the interviewer's representative can request a copy of the entry. We already alluded to that before.

And if you look at page 34, clause 12S(2)(c), this caution should, after being given to the interviewee, be explained to him in simple language. Where the accused has a legal adviser, he would be advised what this means, that he has a right silence, and he need not give an interview, and it is voluntary to do so. The hon. DPP has gone into that,

and we will not say anything further on that.

Clause 12X(1), page 38. Where a suspect or person charged makes an oral admission and a note of this is made in the station diary, if the admission is made before he is legally advised by a legal representative or in the absence of a legal representative, the interviewing officer or the officer in charge of the investigation should as soon as possible thereafter make all efforts as mentioned above to communicate with a legal representative and have him present at the station, and there and then in the presence of the legal representative, the note should be read to the suspect of his oral admission, and at the end of the reading, he should be given the opportunity to state whether the note is true and if he made it of his own free will, and if he signed to same. A note of what transpired should be then made in the station diary and the accused and his legal adviser be asked to sign. Should they refuse to sign, then another note should be made to this effect.

At page 41, clause 12AA. As I had indicated, we, the forensic experts at the Trinidad and Tobago Forensic Science Centre, we view ourselves, as depending on the circumstances of the case and the matter before the court, we view ourselves to be considered as vulnerable experts, and in those circumstances, we should be able to make that application or make that communication to the respective court through the different media, and for the court to consider whether that is indeed so by all the factors the court has alluded to in the Evidence Act.

11.10 a.m.

We also would like to be considered to present evidence in video link, using the video link in special circumstances, because of the nature of the crime and the case, and the persons involved, we would like to be encapsulated within that and have that opportunity to do so.

Mr. Chairman: Mr. Sankar, could you provide a little more detail on that, in the context of the circumstances in which you wish to be involved that you are not already involved? And you had raised before some of the practical issues with people not being present in the jurisdiction, but beyond that, in what circumstances do you see yourself being

involved?

Mr. Sankar: Well, in terms of the actual presentation of—the nature of the case, the witness may be very crucial in the determination of the case, if it is a homicide, if it is involving some heavy firearms related matters, dangerous drugs, and if it is that we were previously threatened, for example by a phone call—which has happened before— by phone call, or if—

Mr. Chairman: Just clarifying, the witnesses from the Forensic Science Centre in certain circumstances should be considered for witness anonymity protection?

Mr. Sankar: I feel so. Yes, that is my strong belief.

Mr. Chairman: Right. Okay, thank you.

Mr. Sankar: And I say so, not as Director, but previously I operated as a Scientific Officer. I function as a Scientific Officer. My speciality is forensic ballistics, and I have testified in a number of matters before the court in homicide cases, firearm related matters, so I am speaking from first-hand experience.

Mr. Chairman: Which gives me an opportunity to you and to the DPP, because I had planned to ask the DPP this question: When the Committee met with the representatives from the Trinidad and Tobago Police Service, I just want to draw your attention to, in the Bill 12AG(2), and the issue raised, 12AG(2) reads:

“A party to criminal proceedings may, in relation to a witness, make an application to the Court, for a Witness Anonymity Order.”

And in those discussions with the TTPS, the question was asked, where does the criminal proceedings start? And from a practical point of view I myself, and I know others have tried to determine, particularly in the context of the amount of disclosure that is required in criminal proceedings and the timing of the disclosure, the disclosure having to be made as early as possible so that the accused party may meet their defence. So, I want to ask you, in reference to 12AG(2), where does the criminal proceedings begin? At what point? And at what point is this witness anonymity order sought, and how does that work in relation to previous disclosures that have been made in preparation for the trial?

Mr. Sankar: Forensic Science Centre looks at the matter of the initiation of proceedings. We receive exhibits from police officers. The police officers give instructions to process the exhibits, and these instructions are complied with at the Forensic Science Centre. At this stage we do not know if there will be impending proceedings or not. We do what—our core competence, we process the exhibits, we prepare a report and we send it out. At a later stage we may be communicated with, and we are told that we have to appear in court, which is the normal course of events for some cases. Not all the cases we process will be in the court's jurisdiction. As a result, after preparation of the cases if we are summoned to court, we go to court. So, from the forensic point of view our matter starts with the receipt of the exhibits.

Mr. Chairman: DPP, do you have a view?

Mr. Gaspard SC: A criminal trial usually begins upon the accused being arraigned. In the Magistrates' Court one might say upon the defendant being—the charge being read and he is called upon to plead, but that is a criminal trial. Criminal proceedings would begin, in my respectful view, from the time that the accused is charged and brought before the court and the proceedings commenced with the reading of the charge. I think that is when criminal proceedings begin.

Mr. Chairman: So, how do you see that working in relation to the Witness Anonymity Order?

Mr. Gaspard SC: In relation to Witness Anonymity Orders, it is my respectful submission that the Witness Anonymity Order would properly be made at any time after criminal proceedings would have commenced, but before the witness is due to give evidence.

Mr. Chairman: Okay, thank you. Mr. Sankar, you can continue.

Mr. Sankar: We are asking in support of the video link where we can give evidence over a video, via conference, video conference, and this is now very applicable to us for one, our safety; two, the availability of some of the experts who have retired and have migrated, for former experts who came from other jurisdictions to work at the Forensic Science Centre, from England and America. This is a perfect medium for which to bring

the trial to them rather than they have to come to Trinidad to testify in our courts. It reduces cost and time and allows for speedy preparation, and we would like to be included as part of this Act for video link preference and privilege.

In terms of a support person we are also asking that in certain circumstances, and it depends on the offence, that a support person be provided for us as expert witnesses, because if we are deemed vulnerable then the support person will be one of those tools or persons to assist us to provide security and make us comfortable in the circumstances. So, we are in support of clause 12A, page 44, the provision of support persons to the Forensic Scientist or the expert in the relevant matter. We are also in full support of a risk assessment of the endangerment being conducted because it will all be part of the same procedure to be deemed as vulnerable or not, whether we are deemed a vulnerable witness or not. So that risk assessment, we are in full support of that as well. And, of course, it is all linked to closed-circuit television to present expert evidence as part of the tool used to present evidence before the court. We would like to be represented in that. We have that privilege to access that opportunity. As it exists now, we are summoned to court and we give testimony before the court and in the presence of the accused. In the future—we are looking at the future where things may be a little different.

Mr. Chairman: Thank you very much. Mr. Lewis.

Mr. Lewis: Okay, morning again. So, we reviewed the amendment Bill and provided the following comments: Under Division two, Identification Procedures, 12B(1):

“Prior to the conduct of an” —ID — “procedure...”

This may imply that a suspect is known and available to participate in the procedure. Fine. And they say that may want to use photographs, so we are suggesting that these photographs, some regulations should be applied because the contents of the photographs may lend prejudice to the witness, and may form some bias against the suspect. That is one. Under 12F, we are suggesting a clause should be added to basically let the suspect know the reason why he is being identified in this procedure. I think it is his right to know why he is being in an ID procedure.

Under Division 3, which is under Interviews and Oral Admissions, we looked at 12Q,

and we are suggesting that a clause again should be added, saying:

“Before the commencement of an interview proceeding a suspect and/or his representative shall be given sufficient information about the nature of the offence and why they are suspected of committing it in order to allow for the effective exercise of the rights of the defence.”

Under 12S, we are suggesting to add another clause that says:

“Whereby the interviewing officer under this section shall also, in the event that a removable recording medium is used in the recording of the interview, ensure that the new and previously unused recording medium is unwrapped or opened, loaded in the recording device and set to record in the view and presence of the suspect and/or his representative.”

Under 12S, we want to add another clause basically speaking about, where there is a change in the recording medium, or a break in the recording process, or even the failure of the recording equipment, there should be some discussions regarding that. And finally, under 12Q, 12S or 12X, we are suggesting to add a clause to provide for the interviewing and the recording of interviews of juveniles, incapable persons and vulnerable persons, and even non-English speaking interviewees or suspects. And those are our brief recommendations to the Evidence (Amdt.) Bill.

Mr. Chairman: Thank you very much. DPP, I want to come back to you as I indicated and ask you to take us through your recommendations, except for those you have already given us some detail on. I recognize you have at least 10 recommendations, and I would ask that you just take us through those recommendations, and that would give the opportunity to the members of the Committee who may have questions on those recommendations to raise those with you.

Mr. Gaspard SC: Thank you very much. The first recommendation pertains to the issue of first description under the Bill, and in particular clause 12A(2)(c), and we would have recommended that the proposed clause 12A(2)(c) be widened so as to include how many times the identifying witness would have seen the person who committed the offence before, and whether there was anything impeding the view of the witness as is required

by the case of *Laverne and Queen v The State*.

In relation to the use of photographs, and this respectfully is a particularly poignant matter. It is my respectful recommendation that photographs ought not to be used by the law enforcing authorities while a suspect is in custody. I should put that more properly. Photographs of the suspect and indeed photographs should not be used while a suspect is in custody. The photograph may be used so as to assist the police to arrest a suspect. But if the police would already have arrested a suspect, the use of photographs before an identification parade can and will make for some contamination of the integrity of the identification proceeding.

Recommendation number three: We are of the view that an identification parade should be held when it would serve a useful purpose, and accordingly. Clause 12C(2) should be amended or reworded so that the word “necessary to do so” is replaced with the word “useful”. In addition to which, when you look at clause 12C(2), you would realize that the words “necessary to do so” appear, and yet still in the very Bill if you look at clause 12C(iv), the Bill itself uses the word “useful”. So, for consistency, internal consistency, I respectfully recommend that the word “useful” should be used in both places.

It is also recommended that the identification procedure—well let me put it another way, it is also recommended that the abrogation of the need for an identification procedure if the suspect admits presence and gives a similar account, it is respectfully submitted that that flies in the face of the law and common sense, and I will tell you why: an accused person or a suspect may in certain circumstances admit presence and give a similar account as the witness does, but the court later on may find that that admission is inadmissible for different reasons. If the court makes that type of ruling that would infect the case to the extent that there would have been no identifying procedure in the case. So what you would have is, the court making that ruling and then if that is the only evidence in the case, or that is the main evidence in the case, the prosecution is fatally compromised.

I also recommend that the Committee look closely at section 12, sorry, clause 12E(1), which, again, speaks to the identification procedures and the order of priority, but in this

instance I would take you further into clause 12F, where the legislation purports to give rights to the accused persons that they ought not properly to have, or that they do not have. For instance, in relation to the rights which the suspect should be advised of in the proposed section 12 or clause 12F, namely the right of being advised the legal aid. This presumably refers to the statutory right to duty counsel under the Legal Aid Act at section 4(1). But that is restricted to certain offenders and certain offences. It is not a blanket approach. It is also unclear as to why the suspect needs to be advised at that stage of his right to be presumed innocent, or that he be advised of his right against self-incrimination when we already have the Judges' Rules and the police are already mandated to caution suspects according to the Judges' Rules. So, one would not wish to create a situation where the courts have to settle any conflicts, overlaps or interceptions between the Judges' Rules and the proposed legislation.

Further, the recommendation in the Bill, that the suspect be given nine hours notice for his representative to attend an identification procedure, it is a bit opaque to me as to how the drafters would have arrived at nine hours. Why not six? Why not 12? Why not three? Why nine? But more particularly, one must bear in mind that from the time someone is arrested, time begins to run, and I am putting this liberally, against the police. So, by giving the suspect this nine-hour period, that might be too long. And in our recommendations we are submitting that the suspect be given a reasonable opportunity in the discretion of the identification officer, and this would be tested by the court and in court so as to have the suspect's representative attend. And failing that, once the identification officer is of the view that a reasonable opportunity would have been given and spurned, a Justice of the Peace, an impartial person may then be appointed to protect the accused or the suspect's interest.

It is to be noted also that this Bill places considerable reliance on Justices of the Peace, and they are in short supply. This reliance can be lessened by the adoption of the formula in rule 6 of Appendix B of the Judges' Rules, on the taking of statements, which permits a responsible member of the community to safeguard the investigative procedure. We have reached a stage where inexorably, the only body of persons we are minded to task

with this particular responsibility are Justices of the Peace. But there are other persons and categories of persons in the society, in my respectful view, who can discharge this obligation outside of that category of Justices of the Peace. In other jurisdictions, for instance, in the jurisdiction of St. Vincent and the Grenadines, a lot of the times the authentication and the witnessing of statement is done by responsible members of the community. I was Director of Public Prosecutions in St. Vincent for a couple of years, and it was the norm for school teachers, principals, head teachers, bank managers, et cetera, to play the role of the authenticating or witnessing independent person.

With respect to the recommendation as it pertains to the video medium, which looks at clause 12J of the Bill, it is noteworthy that there is no independent representative or representative of the suspect in attendance at the video medium identification, and that can be perceived and characterized as unfair to the accused or suspect. In relation to clause 12K, clause 12K(5), it reads in the Bill:

“Where the suspect, his representative or a Justice of the Peace objects under subsection (4), the identification officer shall—

- (a) where practicable, take steps to remove the grounds for the objection;
or
- (b) where it is not practicable to take steps to remove the grounds for the objection, the suspect, his representative or the Justice of the Peace shall be told why his objection cannot met and this shall be recorded in the approved form.”

The legislation perhaps unwittingly seems to contemplate the ineluctable compliance of the police officer conducting the identification procedure to meet and remedy the objection made by the suspect’s representative. Put another way, it is my respectful submission that the identification officer shall, where practicable, and if he agrees with the objection, takes steps to remove the grounds for the objection. As it reads, once there is an objection it appears as though he must take steps. That is unfair to the identification officer, and it is unfair to the prosecution, and again it might result in common sense being our blind spot.

In relation to interviews and oral admissions, if we look at clause 12Q, I am sorry, clause 12W. Clause 12W(4), which reads:

“Where an interviewee or his representative is present at the breaking of a seal under subsection (2), either of them shall be invited to reseal the master copy and sign the seal.”

I am respectfully submitting that the law enforcement authorities would have to be particularly careful with this. If this piece of evidence is incriminating evidence or contains incriminating evidence against the suspect, it is difficult to contemplate a good reason for putting the piece of evidence into the hands of the suspect.

I have already touched on the matter of adverse inferences from silence, and also special measures, and CCTV footage, but there is a point in relation to the special measures that I would also like to raise. It is my respectful submission—and special measures appear at clause 12AG of the Bill. That would be page 48, and in particular the Witness Anonymity Orders. When you read this legislation, a huge concern attending upon that reading of the legislation is the fact that the legislation does not appear to contemplate that an accused person may wish to make an application for a Witness Anonymity Order for his witness.

In matters involving gangs and so on, you would find that an accused person may wish to call a witness on his behalf who himself might be fearful of giving evidence in favour of the accused person, whatever the interest of the State or the prosecution might be.

11.40 a.m.

So it wholly ignores the prospect that the accused might wish to make an application for a Witness Anonymity Order and to that extent the legislation is skewed asymmetrically so as to make unwittingly for an unfair outcome in the context of the rights of accused persons.

In relation to forms and procedure and in particular reference to clause 12AJ, it is my respectful recommendation that having regard to the impact—the material covered by that section could have on the criminal justice system, the Director of Public Prosecutions should also be consulted by the Minister together with the Commissioner of Police.

And in relation to clause 12AL, it is my respectful submission that this clause creates a statutory discretion to exclude prosecution evidence. But it is my respectful recommendation that the common law position be codified to the effect that a trial judge is given the power to exclude evidence that is more prejudicial than probative. What one should try to avoid is any insipient conflicts between the common law and the legislation unless the express intention of the legislation is to depart from the common law. And that completes my task of taking you through my submissions and recommendations.

Mr. Chairman: Thank you very much DPP. I know my colleague Sen. Hosein, member Hosein has a question, and after that I would ask each of you to make your closing submissions if you have any.

Mr. Hosein: Thank you very much, Chair. DPP, thank you very much for your fulsome submissions, both in writing and before the Committee. During the course of the debate on this Bill some points were raised on whether or not we should introduce criminal procedural appeals during the trial. For example, where trial judges make decisions on procedural matters, whether or not we should introduce that in our jurisdiction. Can you give me your views on criminal procedural appeals?

Mr. Gaspard SC: It is my respectful submission that the advent of criminal procedural appeals would be counter-intuitive, counter-productive and would fly in the face of any notion or prospect of the expeditious hearing of matters. What you find happening is, criminal procedure appeals could tend to defeat the purpose of case management; defeat the purpose of the Criminal Procedure Rules; cause unnecessary interruptions in the trial; cause unnecessary interruptions in the case management process.

Procedural issues in my respectful view should be dealt with at the trial or the earliest in some cases at the case management hearings. If those issues go the wrong way or if there is a feeling that they should be appealed or an appeal should be brought in relation to the rulings on those issues that could be taken up after. But it has been my experience. One of the most inglorious instances would have been the situation as it pertains to the Piarco cases. There were several interlocutory, to use the civil term, applications made during the pendency of those proceedings and some of those

applications would have found themselves going right up the chain to the Privy Council. It resulted in almost scandalous delays in the carriage of those matters and those matters would have taken a much longer time than they should have and in other jurisdictions those types of interlocutory applications may not have been allowed, perhaps may not have been allowed in a jurisdiction like the UK, they would have been taken up after. So they allow for constant interruptions of the process and they would be counter-productive given what we appeared to be trying to do.

Mr. Chairman: Thank you. Mr. Sankar. Member Thompson-Ahye.

Mrs. Thompson-Ahye: Mr. Gaspard, DPP, I must tell you thanks very much for the very comprehensive document that you supplied to us. I am sure you see this legislation as a new way of thinking of the Government to have prosecution—people who have committed crimes brought to justice by providing as much assistance as possible and especially to the prosecution who are sometimes very constrained. Would you therefore agree that with this new thinking of the Government should come along not just and look at this legislation but other legislation that may be relevant in terms of how we treat with potential witnesses?

Do you see any need for us to look at legislation such as the Police Complaints Authority Act, where you may have a witness who will come under the description of being vulnerable and yet when you look at how the person may be treated in that the person may be threatened to—that you can have a conviction fine of \$50,000 and claim imprisonment for five years if they not cooperate with the Police Complaints Authority. Can you see a situation where a police officer, because of, perhaps his history or because of the nature of the offence, may in fact provide such fear or give such fear to a witness that the person may not want to come forward. And therefore the legislation could be amended and perhaps include, “without reasonable excuse” or something like that to assist in those circumstances. Because eventually it is going to come to you in your department to deal with.

Another thing, would you agree that perhaps the Justice Protection Act should also be looked at because all of that is involved when you have to provide protection for a

witness. We have so many witnesses who have been killed because they walked out of protective custody and you have some jurisdictions which actually provide that someone who is in protective custody, as happened recently with the lady who went to the birthday party or whatever, that that person should be accompanied by someone. So that provision could in fact be one that could come into our legislation.

When you look on page 50 of the Bill and you see the provision, clause 12AG (4)(e), and it speaks about:

“whether the fear of giving live testimony by an intimidated witness is well-grounded and that the risk of intimidation justifies it;”

Do you think that clause could be improved by instead of using the word “well-grounded” that it is supported by credible evidence as occurs in some jurisdictions.

You would be aware of the controversy between the European Court of Human Rights and the Supreme Court because of the whole question of anonymity of witnesses and the amount of confusion that arose and the head of the Supreme Court had her say and a number of things happened. I think now there is now some kind of truce but it aroused a number of—a bit of ill-feeling between the Supreme Court of England and the European Court of Human Rights.

So perhaps we ought to look to see how at the end of the day we could learn from the experience, because any erosion of common law rights creates a lot of uneasiness. And although this legislation is well founded because of a real problem in society that perhaps we ought to look to see how other jurisdictions, a bit more, have tried to improve on the legislation, on their way of dealing with the—the old situation that we have grown up with and all the common law rights that are being eroded and there are some concern in the community about that. I am saying this particularly because we do not always catch the Attorney General in these fora. So as he is here listening and he spoke about that he is the draftsman so I take this opportunity to speak to him by speaking to you, Sir. Thank you.

Mr. Al-Rawi: I am right here, [*Laughter*] and always available, hon. member, especially to you. But DPP’s is as good a candidate as anyone else.

Mr. Chairman: Thank you, Mr. Sankar, and Mr. Lewis any closing comments?

Mr. Al-Rawi: Last question is for the DPP.

Mr. Chairman: DPP.

Mr. Gaspard SC: Thank you. Hon. member, you would appreciate that you somewhat conflated several questions with some of your observations which made it a bit difficult to identify clearly which questions you wanted me to answer.

Mrs. Thompson-Ahye: All.

Mr. Gaspard SC: What I got clearly is that you were using me as a conduit to make a convenient echo in the ear of the Attorney General and I have no problem with that. But to the extent that I understand and I would have been able to grasp exactly what you wanted me to deal with, in relation to the PCA, it cannot be gainsaid that the legislation creating the PCA and governing the PCA may be in need of amendment.

In relation to the Justice Protection Act, which is the Act creating the Justice Protection Agency, which is the agency which is mandated to carry out tasks pertaining to the protection of state witnesses—if a state witness goes to a party, you do not have to legislate that somebody should go with her. While you cannot prevent somebody from leaving protective custody to go anywhere, because being in protective custody, as a witness, is entirely voluntary. You could advise, but there are other ways, some covert, that can employed to monitor the witness who despite better advice chooses to leave the sanctuary of protective custody. It is not something that—sometimes we try to legislate practices that really should be undergone by way of the initiative being taken by the responsible authority and the responsible authority being charged and tasked with managing their affairs properly. Not everything we might be able to legislate for.

Mrs. Thompson-Ahye: I will provide you with the Caribbean legislation.

Mr. Gaspard SC: Yes. In relation of clause 12AG, you raised the issue of whether the fear—the subclause:

“whether the fear of giving live testimony by an intimidated witness is well-grounded and that the risk of intimidation justifies it;”

Admittedly the term “well-grounded” is not a term that you would usually find in

legislation. It sounds very prosaic and it also sounds somewhat amorphous. But to suggest that it be replaced and I know it was only a suggestion, you were illustrating how it perhaps might be changed by the term “by credible evidence”. Sometimes a reason may be justifiable notwithstanding the fact that there is no credible evidence of it. Sometimes what you have is credible intelligence of it; sometimes what you have is credible information of it, but no credible evidence of it.

So in respect to the concern expressed that this legislation might chip away at certain human rights and so on and so on, we have to be mindful of the society in which we live, our policy and anything that I would said here today should not be construed as though or to the effect that I am saying there should be no further discussion on the matter. And you would also have used a term that “the Government is trying to do X, Y and Z” by dint of this legislation. I prefer to look at it in a context of what the country is trying to do since there is also contributions from Independent persons and Opposition personnel.

Mr. Chairman: Thank you very much DPP. Member Cox.

Ms. Cox: I just wanted to refer to (d), the last paragraph, with regard Rule Six of Appendix B of the Judges Rules, undertaking of statements and you spoke about your experience in St. Vincent and the Grenadines, where it speaks about permitting a responsible member of the community to take statements to safeguard the investigative procedure. I just wanted to find out, should these types of responsible people be itemized?

Mr. Gaspard SC: Yes.

Ms. Cox: Do you think they should be itemized? Because for me who I might think are responsible somebody else may not feel that that person is a responsible enough person. So I was just asking your opinion and if you think that they should be itemized.

Mr. Gaspard SC: Hon. member, the problem with itemizing is that you create an exhaustive category. So anybody falling outside that category even though they may be a very responsible member of the community they will not be able to make a contribution. What you can do is itemize some persons or some categories of person. So you would

use the word “including”. So the category is not closed.

Ms. Cox: Thank you.

Mr. Chairman: Thank you very much. Mr. Sankar, closing submission.

Mr. Sankar: Thank you, Mr. Chairman. The Forensic Science Centre under section 14D of the original Evidence Act states that:

“(1) In any criminal proceeding or inquest, any record kept by a Government expert relating to anything submitted to him for examination, analysis or report shall be *prima facie* evidence...”

And a Government expert at section 19(4) includes the:

- “(a) Senior Pathologist;
- (b) Pathologist;
- (c) Government Chemist;
- (d) Armourer;
- *(e) Forensic Document Examiner;
- (f) Forensic Biologist;
- (g) Scientific Examiner...”

So we are in the original Act and it is very appreciative that in the amendment that we are considered in terms of managing the forensic expert, in terms of the other aspects of the process in court, for example, in video linking, in the anonymity. Because, these are real issues that the experts have concerns with over the years and the nature of the cases that we are involved in before the court. So we are very appreciative of being part of this process where the Bill is being amended—at the Bill stage, the Evidence Act is being amended, and we at the Forensic Science Centre are very, very, grateful to be here.

Mr. Chairman: Thank you. Mr. Lewis.

Mr. Lewis: Yes, I want to piggyback on what Mr. Sankar said. We are grateful as well to be here for our contribution to be heard. I must add that we as custodian scientists are also witnesses in court as well to give evidence, so we should fall under the vulnerable persons if that would be considered in the future. That is all I have to add. Thank you.

Mr. Chairman: Thank you very much. I want to thank the three stakeholders who have

appeared before us and you have spent your time going through your written submissions and taking the questions from the Committee. I am sure as the Committee does its work we may have further questions and if you have any thing that you would like to share with us that you have not shared already you are free to make further written submissions.

I want to thank the Committee members, the representatives from the AG's Office, our Secretariat from the Parliament, and most importantly, viewers and listeners who would see this broadcast, listen to it now and those who would listen to it and watch it later. I know the Parliament Channel has a massive viewership and a lot of members of the public are interested in what you described in your opening, DPP, as the cocktail that is being created to deal with the criminal elements in this country. And I like how you closed, that we have our own issues in this country to deal with, and sometimes it requires unprecedented action in the form of legislation that is properly passed by people like the members of this Committee today. Thank you very much, thank you hon. Attorney General for coming. I know you had scheduling issues this morning but we always appreciate your input and support. Thank you very much. Meeting is adjourned.

12.01 p.m.: *Meeting adjourned.*

VERBATIM NOTES OF THE SECOND MEETING OF THE SPECIAL SELECT COMMITTEE (SENATE) ON THE EVIDENCE (AMDT.) BILL, 2019, HELD IN THE ARNOLD THOMASOS MEETING ROOM (EAST), LEVEL 6, (IN CAMERA), AND IN THE J. HAMILTON MAURICE MEETING ROOM, MEZZANINE FLOOR, (IN PUBLIC), OFFICE OF THE PARLIAMENT, TOWER D, PORT OF SPAIN INTERNATIONAL WATERFRONT CENTRE, #1A WRIGHTSON ROAD, PORT OF SPAIN, ON THURSDAY, NOVEMBER 14, 2019, AT 3.08 P.M.

PRESENT

Mr. Clarence Rambharat	Chairman
Mr. Nigel De Freitas	Member
Ms. Donna Cox	Member
Mr. Saddam Hosein	Member
Mr. Anthony Vieira	Member
Mrs. Hazel Thompson-Ahye	
Mr. Johnson Greenidge	Secretary
Mr. Brian Lucio	Procedural Clerk Assistant

TRINIDAD AND TOBAGO PRISON SERVICE

Mr. Dane Clarke	Deputy Commissioner of Prisons
Mr. Garvin Ferette	Legal Officer

CHILDREN'S AUTHORITY OF TRINIDAD AND TOBAGO

Mr. Hanif E.A. Benjamin	Chairman
Ms. Sharlene Jaggernauth	Legal Services Manager

LEGAL AID AND ADVISORY AUTHORITY OF TRINIDAD AND TOBAGO

Mr. Gilbert Peterson SC	Director/Chairman
Mr. Ravindra Rajah	Legal Officer II
Mr. Martin Joseph	Legal Officer II

JUSTICES OF THE PEACE ASSOCIATION OF TRINIDAD AND TOBAGO

Mr. Don Asgarali	Vice President
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LEGISLATIVE DRAFTING DEPARTMENT

Mrs. Lorraine John

Assistant Chief Parliamentary Counsel

Mrs. Veronica Sahadeo

Senior Parliamentary Counsel

Mr. Chairman: Good afternoon. This is the Second Meeting and second public hearing of the Select Committee of the Senate on the Evidence (Amdt.) Bill, 2019, in this the Fifth Session of the Eleventh Parliament.

This hearing is broadcast on Parliament Channel 11, Parliament Radio 105.5FM and the Parliament's YouTube Channel, *ParlView*. I am Clarence Rambharat, I am the Chairman of this Committee, and I now invite my colleagues from the Senate to introduce themselves starting on my right.

[Introductions made]

Mr. Chairman: Thank you. The Committee is also supported by the Secretariat provided by the Parliament, Mr. Lucio and Mr. Greenidge. We also have representatives from the Office of the Attorney General, the Chief Parliamentary Counsel who support us.

I want to thank the stakeholders who are here and have accepted our invitation to be here. We have today representatives of the Legal Aid and Advisory Authority, the Children's Authority and the Trinidad and Tobago Prisons Service. We also have the representative from the Justices of the Peace Association, and I thank you for the coming.

We have received written submissions from Legal Aid and Advisory Authority, the prisons service, and the Children's Authority.

We have invited the Justices of the Peace Association, not in respect of a written submission that they have given us. We would not ask you to make an opening statement, but we would ask you from time to time during the proceeding on your opinion on matters that would arise, because we know that the Justices of the Peace in this country pay a particular and very important role in criminal procedure. We believe that you would have an opinion, based on your experience, on matters that you may hear while you are part of this session, or matters that members of the Committee may direct to you. I will not ask you Mr. Asgarali to make an opening statement, but from time to time we will indicate

when we would invite your contribution, or you can indicate whether you wish to make a contribution on something that has arisen.

I want to invite the other three stakeholders. We have received your written submissions. I want to invite you to make an opening statement, and as we go along you would have an opportunity to take us through the details of your statement, if there is anything beyond your statement.

So I want to invite the Legal Aid and Advisory Authority. We are very privileged Mr. Peterson to have you. You are not only the Chairman of the Authority, but a senior counsel with a significant number of years in the criminal realm. So that we invite you to make your opening submission on behalf of the Authority.

Mr. Peterson SC: Thank you very much, Mr. Chairman and members of the Committee. I do not propose to be long, Mr. Chairman, but what I wish to say is that I wish to rely on our written submission, and I am certain that we will be grilled on some of the areas that we have purported to address in our written submission.

What I will say about the draft Bill is that I think it is a progressive move. I think it has attempted, to a great extent successfully so, to codify a lot of what has been practised in the courts to some extent, and it has sought to codify and address some of the areas that are usually challenged by attorneys during the course of the trial. So what is refreshing about the draft Bill is that it has assisted in rendering some clarity to the process, some certainty to the process, so that attorneys both for the prosecution and for the defence will be clear as to the areas in which they would be called upon to operate.

In particular it is quite refreshing to see some of the drafting with respect to the identification procedures, and with respect to the anonymity orders with respect to witnesses, which we all recognize over time that the fear that witnesses tend to harbour has been very effective in prejudicing the justice system and undermining the integrity of a lot of trials. So I would say that the Bill is a good start, and I am sure by the time it has gone through this Committee and eventually on the floor of Parliament that the end product would be very welcome at the Criminal Bar in particular with respect to trials and the comfort of witnesses in the course of trials.

Mr. Chairman: Thank you very much, Mr. Peterson. Mr. Dane Clarke who is the Deputy Commissioner of the Trinidad and Tobago Prisons Service. Mr. Clarke.

Mr. Clarke: Thank you, Mr. Chairman and other members of the Committee. First, let me apologize for non-appearance of Mr. Wilson, the Commissioner of Prisons. He is due to proceed on pre-retirement leave on Tuesday, so he is taking care of some other matters as we speak.

From a prison perspective we appreciate what the Bill can do for the Trinidad and Tobago Prison Service. From our perspective today the prison opened with a population of 4,117 inmates, which is actually a 16 per cent increase from January 2017. What we expect to happen with the passage of this Bill is that we could see a further increase in our population due to speedier trials and what have you. However, what will be significant for us is that the remand population, which now stands at approximately 58 per cent of our population, could be reduced due to those speedier trials.

As you may be well aware, the remanded inmates' population is where we face our greatest challenges. Having those speedier trials will reduce the amount of time spent in the Remand Prison, from an average of seven years for the charge of murder to well over 15 years in some cases. So it is expected that with the passage of the Bill and success, the prison service would see some measure of relief as it relates to that, especially as the prison service is better geared towards the treatment of convicted inmates than remanded inmates. So with a higher convicted population we will be in a better place to treat with our rehabilitation and reintegration programmes.

So the Bill actually impacts us in two direct ways. One is with the anonymity of officers giving evidence, again due to the fear factor that we have been challenged with, and as it relates to the Children's Authority. One aspect of it in terms of appropriate adult. At the appropriate time I guess my legal officer would treat with those questions if and when necessary. So thank you for the opportunity, Mr. Chairman.

Mr. Chairman: Thank you very much, Mr. Clarke. Mr. Hanif Benjamin, Chairman of the Children's Authority of Trinidad and Tobago.

Mr. Benjamin: Thank you, Mr. Chairman, for the opportunity yet again for the

Children's Authority to be a part of these deliberations. We see this Bill as quite progressive, and more so for us as we have grappled in the last five years of the Authority's existence, anonymity is a serious and critical area in terms of reporting child sexual abuse and other types of abuses. So this can further extend the protection to people who wish to make reports, not just via the telephone, but even family members who may come forward and give evidence, whether it is to police and/or the Children's Authority, this can help us to get people more out there to come forward. This can help us to get family members, community, as well as the professional services.

We have a challenge right now where people in the professional service, whether it is doctors, lawyers, nurses, social workers, teachers, are afraid to come forward because they do not want to be implicated in their workplaces. And I think this will give us a greater ability to get people to come forward and to share the information. So we look forward to the delineation today and we thank you for the opportunity.

Mr. Chairman: Thank you very much, Mr. Benjamin. Mr. Clarke, I will now return to you. You have made your written submissions in respect of three specific areas of the Bill. Either you or your legal officer we now invite you to make your submissions. We have the written submissions, we have read them. If there is anything now that you want to explain to us or take us through on your written submissions we give you the opportunity to do that now.

Mr. Clarke: Thank you, Mr. Chairman. At this time I will ask Mr. Ferette, the legal officer to take us through.

Mr. Ferette: Through you, Chairman. Firstly, I will go to the issue of the "appropriate adult", which is defined at Part 1A, Police and Criminal Evidence, of the Bill. As the Commissioner of Prisons is the designated authority in charge of rehabilitation centres, he has control of all aspects of the rehabilitation of children at these centres including those convicted and remanded. What we have seen in the past is attorneys, and in one case a police officer would have visited the station to see minors.

Now, the issue that we have is that the attorneys would come on their own volition to see a resident—that would be the appropriate term for them—and we would have had

to turn them back. The reason being is that they would have come without a person who is an appropriate adult, a parent or a guardian. The issue we are having is in our legislation, the Child Rehabilitation Centres Regulations—let me quote for you. At section 44 of those Regulations it reads as follows:

“A resident is entitled to receive visits from his Attorney-at-law in the sight but not the hearing of an officer of the Rehabilitation Centre.”

At part (2), 44(2):

“The Attorney-at-law for a resident shall visit the resident in the company of his parent, guardian or person with responsibility for the resident, an appropriate adult or next friend.”

Right, so as I have mentioned before, the issue we are having is that attorneys show up to the centre to visit persons who are under the age of 18, and as we interpret the regs they must be accompanied by an appropriate adult, a parent or some other person with responsibility for the child. So that is one issue in our Act. So what we need some clarification on from the appropriate body who legislates is whether in fact that that child who is under the age of 18 at our rehab centres is entitled to see an attorney-at-law in his own right or whether this stands. Because as it is at this point in time, this regulation is consistent with the Children Court Rules, the Judges Rules for children, which speaks to the same issue.

Mr. Chairman: Okay. Then you have also made submissions on clause 3 and clause 4. So do you want to take us through those submissions?

Mr. Ferette: In relation to those clauses, our submission is that we were in agreement with those clauses as they support and enhance the Bill at this point. That is basically it.

Mr. Chairman: Okay, thank you very much.

Mr. Ferette: One more thing I want to touch on is the anonymity orders. We are having another issue at the prisons, in civil cases especially where officers are reluctant to go to testify due to situations that arise in the prison service. We see this as a great help if it could be extended to civil matters, because a lot of the times officers appear in the civil courts in relation to incidents that happen in the prison. So we would like to see if this

could be extended to civil cases also in respect of these officers, because it would provide an additional layer of protection for them and it would encourage them to come and give evidence if they have this protection.

Mr. Chairman: Thank you very much. Sen. Hazel Thompson-Ahye has a question for the Trinidad and Tobago Prison Service.

Mrs. Thompson-Ahye: Are you saying that this Bill is in accord with the Judges Rules for children as far as “appropriate adult” is concerned? Is that what you are saying?

Mr. Ferette: Yes.

Mrs. Thompson-Ahye: But when you look at the Judges Rules for children, an appropriate adult does not include the following person, and at (5) it says, “a person employed at a detention centre”. Yes?

Mr. Ferette: Yes, I agree with that.

Mrs. Thompson-Ahye: And when you look at the Bill, it says 12(k), what it does not include:

“a person employed at a Rehabilitation Centre other than...”

Mr. Ferette: Yes.

Mrs. Thompson-Ahye: And one of the exceptions would be a person with whom the child is comfortable. So “a person employed at a rehabilitation centre other than”. So that if you are employed at a rehabilitation centre and you are a family member or person who is well-known to the child, or a person with whom the child is comfortable, would you not agree that this Bill is saying that you can in those circumstances be an appropriate adult?

Mr. Ferette: Yes I agree with that situation, but just from our past experience that was not the case at all, where the child would have been comfortable with anybody at the rehab centre, or it was not a family member to the child. So just in that regard we are speaking of.

Mrs. Thompson-Ahye: So you are talking about the history. You are not talking about what is going to happen if this Bill is passed into law?

Mr. Ferette: Yes, yes.

Mrs. Thompson-Ahye: Because it certainly makes a difference here now.

Mr. Chairman: I would now want to invite Mr. Peterson on behalf of the Legal Aid and Advisory Authority to take us through your written submission. It is very comprehensive. You cover 17 areas, and if there are those aspects of your written submissions that you wish to highlight for us, we now invite you to do so.

Mr. Peterson SC: Thank you very much, Mr. Chairman. I first wish to highlight section 12A(1). With respect to the identification procedure to record the first description of the suspect given by an eyewitness. I just wish to underscore that this is welcomed, but in practice now it is common for the prosecution to disclose the first description of a witness purporting to make an identification. That is standard procedure. But what this amendment would do, or what this codification would do, is to put that first description into a form, and I gather from the working of the Bill that the recording of this first description in a standard form would lead to two things: consistency of the recording of the first description, because there would be a standard established form, and it would be a form that would be disclosed in the normal course of disclosure, as opposed to the present practice where the first description is transposed from the witness's statement into a letter or document and sent to the opposing attorney. There would be a standard form which is welcome, and then that form is signed. What this does is lead to consistency and eliminates possibilities of discrepancies in the description, and also it safeguards the investigating officer against allegations being made that he has tweaked or in any way tampered with the first description given by the witness. So that is a very, very welcomed codification of what presently obtains in practice.

I wish to follow on to section 12B(2) which deals with the identification by photographs. The section speaks about showing a minimum of 12 photographs to the witness to make the identification. One understands the reason for that number, as opposed to where you have what I could call a live ID parade where normally nine persons would be used. The fact that they are using photographs, the number has increased to 12 to give a greater degree of fairness, where a witness is identified by paragraphs. But I think coming out of our work, members of the Legal Aid team that

helped to put the submissions together were of the view that there should be imported there a maximum number of paragraphs within a certain time, because the witness is using photographs and have been shown photographs, the witness could then become overburdened and it could lead to some inaccuracies, or a witness tending to make a positive identification where otherwise he may not have. So there should be a balancing of the amount of photographs when employing the process of identification by photographs.

Section 12B also provides for where a suspect has been positively identified by an eyewitness. We recommend in this provision that there should be a specified procedure for movement of photographs. For example, a separate database or ID logbook. But subsequent to sending this submission in, I had considered that there should be consideration for disclosing copies of the photographs used to the defence. So if a positive identification is being relied upon by using the system or the medium of identification by photographs, in fairness the defence ought to be given copies of what I would call the “dumb photographs”, the photographs that are just put to create the process. That they should be given, if not copies, but access in the form of disclosure to possibly attend and view the photographs.

It may not be advisable to send copies because you do not want copies of the photographs that are being used from other persons who may lend their photographs to the process, to be floating around all over. So what can happen, in order to ensure fairness and balance to the prosecution and the defence, is to have as part of the disclosure regime where there is identification by photographs, that the defence be given an opportunity to attend, whether it be at the police station or the Director of Public Prosecutions office at a fixed time to view the photographs that were used in the photo identification process.

I then to deal with 12D(a)(ii), the conduct of ID parade procedure in respect of investigations are not in any way involved in investigation. This again is a codification of what obtains now in practice, and this is also commendable. Because it is a practice usually that presently where you are using even the one-way mirror and you line up nine men, and they put the suspect among eight persons, totalling nine, to have the

identification, usually it is someone of a rank of Inspector and up and higher, and someone not involved in the investigation. That is to eliminate allegations that the person who has conduct of the identification parade and supervisory conduct, did not alert the witness as to the suspect that is in the line. So this is a codification of what, from my practice and my years of experience, I have always found that this is usually observed rigidly by the police service. But it is just a codification on it, so it is welcome and it is commendable.

I move on. I will not deal with every section. Section 12AG(4)(h), Mr. Chairman, that deals with special measures, evidence by video link and Witness Anonymity Orders. This is not new to some jurisdictions, but it is fairly new to ours. But presently again the practice has developed and the practice has been employed, and up to over the last two months or so I know of two or three cases where this has been employed. Over the last three years I know of about five or six cases where evidence by video link has been employed.

I have been involved in matters where we have taken evidence from witnesses in the United States, where we have taken evidence from witnesses by video link in England. It creates some degree of difficulty sometimes with the logistics, but not insurmountable difficulties. For example, some of the difficulties—and I do not think I have seen it addressed in the Bill, some of the practical difficulties—and I do not immediately have the answers to how some of those difficulties can be overcome, but I am sure members putting their heads together will be able to come up with a drafting formula that could deal with it. But some of the practical difficulties that I have experienced with video link evidence is the simple thing of taking the oath of the witness. The witness is in the United Kingdom or United States taking the oath or the affirmation to give the evidence.

3.35 p.m.

Recently we had that difficulty, no one thought of a simple thing as having a *Bible* on the link where the camera is on the other side. That was easily overcome. But then there was another matter in which we were involved in, apart from just taking the evidence, the accused who was granted bail and was abroad and unable to travel for the trial for the preliminary enquiry in the particular case, was willing to participate in the

preliminary enquiry. He was not absconding. So we decided to do the preliminary enquiry by video link.

The practical difficulty that arose there is that under the Preliminary Enquiry Act in Trinidad when you complete the preliminary enquiry and the person is about to be committed, they then have to sign a recognizance. Now, the problem with that is that the person was abroad, we finished the evidence and the magistrate was about to commit and it requires the person to sign a recognizance to either take bail at that stage upon committal, because if they were previously on bail, it expires on the committal.

So the person was aboard, PI is finished, if the person is committed and the recognizance lapse then there will be no instrument in the system to compel them to appear. How we got over that with some degree of cooperation by the defence is that, we stood the matter down, faxed the recognizance abroad, got the person to sign it, faxed it back and the court treated it and got the person to confirm on the video link. It took some time and then we had different time zones and that kind of thing. There could be rules that could deal with once you go the way of video link, all those procedures are deemed to be taken orally. So that you can say that, do you swear that you hereby accept your recognizance, you could say, yes, and that is recorded, even though not documented, but video link, that could replace the paper recognizance that is usually attendant on a committal. But as far as the video link is concerned it is fine.

The bigger thorny question is the anonymity order. Now, in the United Kingdom I have been to the Old Bailey and witnessed that witnesses are giving evidence from behind a screen. I could see this provision getting some resistance because persons like to subscribe to the old adage that he who accused, I must be able to see my accuser and all of that. I see no magic in the accused person seeing the person who is accusing him, what he is accused on is the evidence. So there is no gain per se by him seeing the person, because we know from history that some witnesses get amnesia when they enter the court and they see the person who has caused them allegedly harm, so they are not willing at that stage to continue giving evidence.

The only difficulty with that anonymity provision is that sometimes an accused

person or a suspect may not be aware of the identity of the person who is making the accusation. So sometimes for them to give instructions, for example, they may want to say that that person has a grudge against me for the longest while. But if they do not know the identity of the person, apart from seeing them, they may not be able to give proper instructions and there will be a case where you will know the person's identity once you get their name, but then there will be some persons you may know by an alias, for example, and you do not know that the person whose name is given in the evidence as the accuser is the person who you know as the alias. So, to that extent, that is the only area where I see there could be some discomfort with respect to the anonymity order, but I think in the climate in which we have now advanced that that is a welcomed provision and it is a necessary one in order to not to defeat the ends of justice.

Now, in our submission, some members of my team had referred to a 1934 case, but I did say to them that we will put it in because I thought the Committee should have the benefit of a wider range of input not only that of the Director/Chairman, but I have said to my team that we have come a long way since 1934 and the climate in which we operate we have to be different, we have to do things differently because we no longer operate in 1934, things have changed.

Without me condescending to further particulars on what I mean, I think we all understand why this incursion into what someone may call an incursion into one's rights by having a Witness Anonymity Order, I think it is necessary in the climate now.

The Bill also deals with identification parades, it also deals with confrontation identification. Confrontation identification is something that is already employed, but in our submission, one member of the team came up with a very helpful proposal which I think would assist. Confrontation identification sometimes takes place where a suspect has declined the avenue to have an identification parade done; in the normal course of things where eight persons are lined up together with him making nine and he is behind a one-way mirror and the suspect is called to identify him with a representative of the accused present or his attorney, and a Justice of the Peace as the case may be.

Where that is declined, the police sometimes could employ a confrontation

identification where the suspect is in a room and the witness is brought and he said, “Yes, that is the person,” because the suspect, at that stage, had declined the fairer process that was given to him. One of the proposals that is being suggested in our submission, where that suspect has declined the established fair identification parade procedure, what can be done in a confrontation is to add other persons into the room that generally looks like him. He does not have to participate, he is there, but he is among other people and the witness coming in could see six or seven persons and pick out that person. It is a move away from the established rigid identification parade procedure, but it is also a fairer process than just a one-on-one confrontation. Because if I could say, Mr. Chairman and members, the identification parade procedures, whichever one is adopted, generally is designed to try to be as fair as possible and have the person identified as objectively as possible. And whatever systems could be employed over and above even what is provided in the statute, if the statute says nine persons and they put the person among 12, I cannot see a person complaining that you had too many persons on the parade for the person to pick me out. I mean, that is as more objective as you can get.

So the parades are designed to or the identification procedures are designed to lead to fairness and the more fairness that can be employed, I think the ends of justice will be preserved. Mr. Chairman, could I just check with my colleagues to see if there is anything they wish I should highlight?

Mr. Chairman: Sure. While the members of the Committee who have been taking a lot of notes get ready to ask you some questions. Proceed—

Mr. Peterson SC: Members of my team said that they do not wish me to highlight anything else on the submissions.

Mr. Chairman: At this time, I would invite the members of the Committee to raise any questions they wish to Mr. Clarke or to Mr. Peterson SC.

Ms. Cox: Good afternoon.

Mr. Peterson SC: Afternoon, Sen. Cox.

Ms. Cox: I will deal with your last point concerning confrontation. But I wonder how fair it is if others are just put into the room with a suspect. By his body language, I think

that person would be easily identified.

Mr. Peterson SC: That is actually correct, Senator. But the difficulty that I could see an investigating officer facing at that stage is that I have offered you, I, the investigating officer, I have offered you this established rigid, tested, objective mode of identification, you have declined it. I could bring in the witness to confront you, probably maybe in a room sitting by yourself, possibly handcuffed to the chair depending on how inclined you are to make free your escape. In that case, that is the least fair way you can have. But one cannot have the suspect to retard the progress of the investigation. So the next best thing would be what would amount to a group identification. In that way, it is true that the other persons in the room may appear to be jovial because they are free, but the suspect is obviously going to be giving off his body language, but that is what he will have to suffer having declined the earlier offer of the most objective mode of identification. It is not perfect but fairness is what they will most likely aim at and hope to achieve.

Mr. Hosein: Thank you very much, Chairman. This one is for Senior Counsel. Senior is our resident in JSC witness having appeared in most of our Joint Select Committees. And I thank you for your submissions that you made this afternoon. So I want to look at the thorny issue that you raised with respect to witness anonymity. Now, it is a very special procedure that we are going to put into the Evidence Act. Our Constitution protects us having a right of fair trial. Now, you would imagine that is an exceptional tool that the prosecution would want to use with respect to prosecutions for various matters.

Now, the question is whether this special measure of Witness Anonymity Orders should be for all offences or should we specify the types of matters in which these orders can be granted? And I say this because in other jurisdictions you have the order being available for matter of terrorism, for gang-related offences and even in some cases of murder. As presently drafted, it seems as though this order we can get it for almost any offence a person is indicted before or charged in the Summary Courts Act. What are your views on that?

Mr. Peterson SC: First, Senator— thank you, Senator for the question. A Witness Anonymity Order is a serious thing. It is a clear incursion into what we have come to understand to be our right, to know who our accuser is. But the difficulty that the prosecution or the prosecuting arm of the State, if I can speak on behalf of them to the extent to which sometimes I do that, they have been experiencing is witnesses tend to have amnesia. And the Evidence Act attempted to deal with that before by a section 15 amendment, I think it is 15C amendment, where the statement that the witness gave stood as the witness's evidence in chief.

So prior to that, it would have been the hostile witness provision where that evidence will come down to almost nil and have very little effect where the witness has departed from the statement. They deemed hostile, but once you deemed hostile then you are cross-examined by the person who called you and the evidence is of very little value. The amendment allowed that statement to now stand as the witness's evidence in chief. The difficulty with that procedure why we would probably have to go the way of anonymity is that sometimes a witness really, really would like to support the statement because when we go this way of section 15 it undermines the integrity of the prosecution's case and I will explain what I mean by that.

If you have a key witness departing and separating himself from a statement that he gave previously, usually the allegation is that the police fabricated that statement, I never gave it so the prosecution now has to make a section 15C application, call the officers who were involved in the taking of the statement and give evidence as to the circumstances under which the statement was taken to try to show the court that the witness is not speaking the truth when he is separating himself from the statement. But, of course, that is a question of fact and that allegation stands in the case and there is always that blot against the integrity of the entire prosecution.

So what you could find in a jury trial is that any doubt with respect to an attack on a particular aspect of the case going along, the jury will always bear in mind, "you remember that key witness, on the first day of the trial, remember he was saying the police, they have been doing this". So that undermines the integrity of the prosecution's

case which is what no prosecutor would like. Apart from just that witness, it permeates the entire case, the integrity of the case. But when you have the Witness Anonymity Order, the witness will have a bit more comfort in—I know I am not answering the part of the number of offence, I am coming to that, the witness will have a bit more comfort in supporting his evidence as previously given because he would have given it voluntarily to the police.

Now, I think we can at least start with serious offences and if you get as more—well, I do not like to say offences are trivial, but when it get less serious offences, you could see witnesses not being inclined to at disavow their statements but with respect to your question, I think at least we should consider gang-related offences, terrorism and murder if we are to proceed to listing witnesses—listing offences.

Mr. Hosein: It is just a follow-up question, Senior. Now, I appreciate the Witness Anonymity Order and we could look at specifying various offences. One issue that still troubles me is that the character of that witness. Because you have witnesses or people saying all sorts of things, making all sort of wild allegations and we have to test that evidence eventually. Now, when you look at this you do not know who the witness is because of whatever grounds on which the prosecution will make the application on. The question I want to as is that we have seen prosecutions failed in the Appeal Court because the prosecutors failed to disclose the character evidence of the witness. How can we deal with situations like that where we do not know the identity of the witness and the defence now being denied the opportunity to cross-examine that witness based on the credibility of their character?

Mr. Peterson SC: Senator, that is a very—if I could say so, and I could say to the greatest of difference, that is a very difficult situation to deal with. It is a very practical one, it is a real one because you need to attack the witnesses, if the witness is a witness of bad character, the witness cannot hide behind an anonymity order to insulate his bad character. But then you have— how do we balance—and that is really a practical problem. It is something that gave me some pause when I was considering that part of the Bill. I really do not have the answer at this point but it is a very, very, very important

point to consider. How do you assess the witness's character as you are entitled to do, to attack the credibility of the witness because of their historical bad character without knowing the identity of the person? And that is the difficulty. I think at the end of the day we all have to come up with some formula that would allow a balance between the right of the accused to attack the bad character and let us know the nature of the person who is making the allegations against him and at the same time protecting his identity. That is the balance that needs to be struck to be achieved.

Mr. Vieira: Thank you, Chair. Director Peterson—

Mr. Peterson SC: Yes, Senator.

Mr. Vieira: Welcome. I recognize you as a leader of the Criminal Bar and your voice is very important at this hearing, because as Chairman of the Legal Aid and Advisory Authority you are representing the public defenders office so you speak really on behalf of defenders. Now, thank you again for your very helpful, specific recommendations. In summary, you found that the Bill brings clarity in the procedures and measures to be adopted in properly taking evidence. Correct?

Mr. Peterson SC: Yes.

Mr. Vieira: You did indicate you had a concern about what happens if these new procedures are not properly observed or implemented. Could you expand on that?

Mr. Peterson SC: What we are really referring to there, some of it has to do with resources because a lot of these, like, the video link for example, some of the matters have been involved in by video link, simple thing as bandwidth for the reception keeps breaking up, you have to keep dropping the calls, sometime we reschedule and you have to reschedule venues abroad and you have to pay for venues twice and that kind of thing. We have been locking some of the matters to use some of the consulate offices that we have abroad but there are some jurisdictions for which we have no presence. So there has to be accommodation for room for witnesses twice and that kind of thing because simple things like the bandwidth and resources and the quality of the digital and all of those kinds of things. So that is what we are referring to with respect to implementation and resources.

Mr. Vieira: And I think you also were talking about sometimes the mismatch between officers, for example, who were supposed to walk with their diaries or the station diaries and are not showing up court. What your recommendation would be to address that deficiency?

Mr. Peterson SC: I have observed, to be fair to the investigators and the police, sometimes the court system—one can anticipate where that case is going and the present Criminal Procedure Rules will help a lot in alleviating some of the historical difficulties. Sometimes you will go to court and you will see 10, 12 police officers stand up along the wall waiting to get to the prosecutor when their case is called. Ten out of those cases obviously cannot go on that day. If they are to send disclosure, if they have sent the status of their witness's statements, the preparations of their statements, the preparation of their file, all of that could be sent in a report by one messenger, if you want to call the person that. Instead of having manpower lined up there all day when they should be out on the streets.

So you find that sometimes, some of the officers are absent, cases are dismissed or cases they are recorded as being absent which that record may appear to be innocuous on the occasion. But two months, three months down the road when the case is called the third time and the record shows he is absent twice, it is because he probably worked all night on some exercise or in the station all night, knocking off duty at 7.00 in the morning or 8.00, trying to get to court for 9.00, or tired, fell asleep, absent, so all of those things are some of the things that we need to address.

So those are practical things that could alleviate some of those difficulties. But with the Criminal Procedure Rules now, with the case management system that is now imported into the criminal procedure, it leads to more certainty so that officers and the prosecutors will know this case is not likely to go on because it has not been trial ready through the process. So that has been less a difficulty lately.

Mr. Vieira: Well, I am glad you said that because that is also my own view that these Criminal Procedure Rules and the recent Practice Direction should assist. But really it is a culture change that we need to see.

Mr. Peterson SC: Yes. And with time it is getting there.

Mr. Vieira: Another point you had raised is that the Legal Aid Act does not give across the board representation for all accused just in respect of a limited category of offences and under certain circumstances. Could you elaborate on that and make a recommendation?

Mr. Peterson SC: A lot of what you are referring to there is the duty counsel system. Presently the duty counsel system applies where there is a counsel on call, we have a 24-hour hotline system, but that applies only to murder and to juveniles. So a lot of children, when children are detained in stations they get a—they make a call, the police officers most of them on duty they have a schedule, they call, a counsel is assigned during the nights and that counsel takes care or over the weekend, takes care of that accused person rights or the child's rights until the first appearance in court on the next occasion, which most times is the Monday morning. But that could be widened, but when we made this recommendation we did not factor in that we have the public defenders system which is moving apace which is—we have started to roll out, I do not know if you have seen in the papers we have RFPs out for the facilities and all of that and we have started interviews for public defenders. So the legal aid system would be virtually divided into the civil and then we have a whole public defender system akin to something like what we see in the United States. So that is going to help with a lot of that.

Mr. Vieira: Good. And so what I am getting to because the Witness Anonymity Orders, for example, have been very controversial and from your experience and perspective as a very Senior Defense Counsel and as Chairman of the Legal Aid Authority you do not see a challenge you are not—you do not see this as a serious abrogation of citizens' rights, you think that this is a necessary step in the legislation, do you?

Mr. Peterson SC: It is an incursion into one's right because one always tends to guard the rights historically as to how they know it to have existed. But society has evolved and we could no longer—for example, one could also put into that the right to silence where historically you remain silent throughout but now that is being eroded or being—it may have been reducing the impact, the sanctity of that in that if you do not, you could

remain silent, but if you do not certain inferences could be drawn and all of that. That is an incursion into that historical right to silence.

The thing about witness anonymity is before we always used to say he who is accused must prove and you must know your accuser. But those days, we do not have the comfort to those days anymore. So even though it is an incursion, there will be some challenges, one we will want to consider whether we go fully there or whether we have some case by case basis and whether we get—we seek an anonymity order and justify it on a particular case by case basis. All those safeguards could be put in place, because there will be the case where it is necessary.

Mr. Vieira: But in terms of getting there, would you say that the Witness Anonymity Order should be a measure of last resort to be used in limited circumstances?

Mr. Peterson SC: At this stage, that may be the appropriate course to achieve some measure of what we need. We need it. I will not say we need it in every case, but I have seen cases where I think if we had it, wear the hat as a prosecutor, I think I have seen cases where if we had it life would have been easier.

Mr. Vieira: So, I just have two more questions. You recognized that it is within Parliament's right to make these changes to the Evidence Act which traditionally have been features of the common law. Do you?

Mr. Peterson SC: Yes.

Mr. Vieira: And on balance, would you say that the legislation achieves a fair balance?

Mr. Peterson SC: I think so. I think it is a good draft. Yes.

Mr. Chairman: Thank you very much member and Senior Counsel. I noticed Mr. Asgarali was paying very careful attention and shaking his head as you got into a discussion on station diaries and before that, witness identification. Mr. Asgarali, some people but not everybody in the country knows what role a Justice of the Peace plays in the criminal trial procedure, particularly that part of it that before the accused is charged. So perhaps you can spend a few minutes just telling us and telling the listening and viewing public the role of a Justice of the Peace, particularly in the criminal law arena and also, anything that you want to contribute in relation to what has been said today,

particularly your interest in station diaries and witness ID and so on.

Mr. Asgarali: Thank you very much, Mr. Chairman. First of all, let me thank the Committee for inviting JOPATT to be part of this. A Justice of the Peace really, he is one who had to—you sign warrants, you sign summonses, you do ID parades, you authenticate statements, mainly it is that that you do. And I was very interested and I wanted to say this, especially where the ID parade is concerned, I listened to Mr. Peterson SC, and he was saying that when you do the ID parade with the one-way mirror and the person is not identified that what could be done—I do not know if this is what—that you could bring them into a room with the witness and maybe have him handcuffed, well that is out of the question. I do not know. I do not think that is right. I do not know if that is what you said.

I was in an ID parade that was really professionally done by an inspector in Four Roads Police Station. Now if the witness is not identified or where the confrontation is concerned, they normally take them into a public place. I did one where the guy was taken, the accused or suspect was taken at KFC and he sat among other customers and then the victim said, “Listen, you can walk around and if you see him then you could point him out.” That is what the confrontation is all about.

4.05 p.m.

So that was done, and I will tell you something, witnesses are very afraid now, they are scared to identify anybody at all. So the police might arrest you or they suspect, they call them. I saw one where they fella just came in and they numbered them during the ID parade, and he just glanced around like that from one to nine, and he said, “No, the man is not there”. I could tell that he was afraid, you understand.

When the ID parade is done with nine persons, I went into the station and I spoke to a suspect and I said, “You are about to be on an ID parade. Did you agree to this ID parade”? And he said, “Yes”. The line up for the ID parade is that all of them must be of similar height, the clothes must be similar, because the one that I went to, the guy was not a stupid boy, when they lined up he had on three-quarter pants and all of them they were in long pants. And before I could tell the inspector, I said “Listen, we have to get

this guy to change his pants”. He indicated well, “Sir, you know I have noticed that they are all wearing long pants and I have on a three-quarter pants”; so he knew what he was doing. He was the only one in slippers, the others had on shoes, and he said, “Sir, you know I am the only one wearing slippers”. And I said to them, he is perfectly correct, all of this has to be done, because he is only in slippers and the others have on shoes, if he was the only one in a three-quarter pants and the others had long pants, he would have been easily identified.

So that is the way it is done. The confrontation, the confrontation, as I said, is one in a public place where they take you into a public place and you sit down with the public, and he walk around, and if you have to point them out, you point them out. So I am interested in those two points that I wanted to talk about.

Mr. Chairman: I believe that you are about to be cross-examined by member Vieira.

Mr. Asgarali: No problem.

Mr. Vieira: Mr. Asgarali, you are a very experienced Justice of the Peace.

Mr. Asgarali: Well, this year will make me my 19th year.

Mr. Vieira: Very good. And so you will agree with me that certainly with the identification parade the Justice of the Peace is like a referee to ensure that it is conducted fairly.

Mr. Asgarali: Yes, Sir.

Mr. Vieira: Now my question is this. All Justices of the Peace have your many years of experience. Do you as a body, as a profession get investigative training?

Mr. Asgarali: We do not get investigative training.

Mr. Vieira: Do you get any training in criminal practice and procedure?

Mr. Asgarali: No, Sir.

Mr. Vieira: So would you say that all Justices of the Peace may be astute as you are in discerning the slippers and the three-quarter pants?

Mr. Asgarali: I would like to think so. *[Laughter]*

Mr. Vieira: In the off chance that we are disappointed, do you have any recommendations in terms of what support we can give to the Justices of the Peace to

ensure that your role, the very important role you play in this legislation, you meet that role?

Mr. Asgarali: Well, we have been asking to meet with members or the Attorney General or whoever it is, it is important that we meet with them, because what happens is that they are appointing Justices of the Peace and we do not know anything about it. At present, there are about 168 Justices of the Peace, and as an organization we have been asking that when you appoint these Justices of the Peace, at least, you should let us know. We do not know anything, we do not know how they go about appointing them now because we have training sessions for Justices of the Peace. At our meetings we have a meeting every second Sunday in every month, and at our meetings whatever training we can do to the limited amount of Justices of the Peace that we have, we try to train them. We know we have some new ones who just came, and we have training sessions.

Mr. Vieira: Who is doing that training? Is it the older Justices of the Peace?

Mr. Asgarali: The older Justices of the Peace, we are doing the training.

Mr. Vieira: But are you getting sort of, for example, seminars or training from experienced attorneys, from maybe the Judiciary, anything like that?

Mr. Asgarali: At some of our meetings we have invited attorneys to be present. And an attorney, I am trying to remember his name, but he came especially, and he explained about the identification parade. As a matter of fact, he wrote a little paper on it for us, and we have that.

Mr. Chairman: Mr. Asgarali, I know you have to leave us shortly, I want to thank you for being here and for making your contribution. I undertake to bring your submissions to the attention of the hon. Attorney General. I am sure he would be happy to meet with the association particularly in the context of this particular Bill, and some of the other issues you have raised before us.

Mr. Asgarali: Thank you, Mr. Chairman, and we have written to not only this Attorney General, the ones before him and the others and we have been asking them for meetings with them, and so far we are not successful in meeting with them. So I am hoping that maybe something might be done or something could be done. Again, thank you very

much, Mr. Chairman.

Mr. Chairman: Before you leave, member Thompson-Ahye has a question she would like to pose to you.

Mrs. Thompson-Ahye: Mr. Asgarali, in respect of the training, following up on what Sen. Vieira asked you, have you as a body or an association had training like, for example, from the Children's Authority in respect to child rights, how you should treat with children?

Mr. Asgarali: No, Ma'am, we have had no training with child rights, but I am very involved with the CPU, the Child Protection Unit. You know, when they have to do statements and they have taken statements that I have to authenticate, I am called upon by the police a lot especially I deal with the CPU, the Child Protection Unit, but we have had no training where that is concerned.

Mrs. Thompson-Ahye: All right. Thank you.

Mr. Chairman: Thank you very much, Mr. Asgarali. You are free to leave.

Mr. Asgarali: Thank you, Sir.

[Mr. Asgarali exits room]

Mr. Chairman: I want to now invite my colleague member Cox who has a question for the prison service, and then my colleague member De Freitas and then member Vieira, and then we would go to the Children's Authority. We have received your submission in the main three areas you have addressed. The theme in your submission is a request for the extension of the provisions in the Bill to offer the Children's Authority and its officers and representatives some of the protection that is being offered in several areas of the Bill, and then you also addressed a specific technical issue relating to—let me just make sure I get it right—under 12X, the issue of psychological assessment of potential child offenders. So I will invite you to just highlight for us the key areas of your written submission after we have had the opportunity to hear from the three members.

Ms. Cox: Hi good afternoon, again, and thank you very much for your submission. One of the major problems that exists in the Trinidad and Tobago Prison Service is the overcrowding at the Remand Yard. Would you agree that the passage of this Bill will

assist in this overcrowding? And if that is the case, then in what way?

Mr. Clarke: Thank you, Madam Senator. We expect once the passage of the Bill and the evidence begins to flow, we expect that the population will go up. However, it may not be the “unconvicted” population, because the matters will be going through the court faster, so you may get more convicted persons coming into the environment which then would reduce the remanded population.

As I said before, the remanded population is the challenging population for us because the fact is that they do not know how many more years they would be in our custody. So while we expect an increase in the population, I am not certain that it will be in the remand population.

Ms. Cox: You are not certain?

Mr. Clarke: Well, as far as the remanded population goes—

Ms. Cox: Yes.

Mr. Clarke:—as I said we are now at 58 per cent.

Ms. Cox: Right.

Mr. Clarke: However, with the passage of the Bill, we expect that we will get more convictions in court—

Ms. Cox: Yes.

Mr. Clarke:—so that the convicted population will go up.

Ms. Cox: The remand population should go down.

Mr. Clarke: Should go down. Yes.

Ms. Cox: Okay. Thanks.

Mr. Chairman: Thank you. Member De Freitas.

Mr. De Freitas: Thank you, Mr. Chair. Good afternoon, again. This may seem like an unorthodox question, but I promise you there is a reason that I am asking it, and this is really to Mr. Peterson, so I am really trying to just get some information to clarify some thoughts in my head from practitioners within this sphere. So I ask the first question: Do you trust the judicial system as it is right now?

Mr. Peterson SC: Senator, you are correct, it is unorthodox. Yes. Well, I trust the

system. Are you referring to efficiency of the system of the system, the integrity of the system?

Mr. De Freitas: The way the system is itself because it is set up in a particular way when you are dealing with an accused or a trial in general, so you have prosecution, defence, judge, jury and so forth, so that model I would say of justice, I am assuming once you are in the legal fraternity, you learn about that system—

Mr. Peterson SC: Yes.

Mr. De Freitas:—and therefore, you trust that system. Right. So the reason that I am asking that is because we are dealing with the Witness Anonymity Order, and in the Bill it speaks to the application being made to the court. So just for my clarification because I have something in my head, when you hear that, who is that application being made to?—let us say by the prosecution. It is to the judge, correct?

Mr. Peterson SC: The judge and magistrate.

Mr. De Freitas: Or the magistrate? Right. So, so far, in speaking about the Witness Anonymity Order, I am realizing that there are certain things coming forward, and this is concerns in relation to something that I assume is an entrenched right when dealing with trials which is the right to face your accuser, and also the possibly of the witness being not credible and making stories up and what not. But to me when I read the Bill and how it treats with that order, it speaks to the decision to grant such an order being done by the magistrate.

Now, if you trust the system, it means that you trust that the magistrate the following the Bill would not just grant that order to use the word “willy-nilly”, you take into account a lot of factors, one of which is the right to face the accuser and, two, the credibility of the witness amongst other things.

Mr. Peterson SC: Yes.

Mr. De Freitas: So it seems to me that the Bill takes care of a lot of those concerns by the mere fact of using the process which is as old as trials themselves, which is the judge’s discretion. And want to assume, and I made this point in the debate itself before it came here, that if you trust that process and you trust that the judge will always do the best that

they can, given the information that they have, but the beautiful thing about the Bill is that it takes into account human error—

Mr. Peterson SC: Yes.

Mr. De Freitas:—so much so that the judge can revoke that order should new information come to them. So given that that is what is happening in the Bill, do you still have those concerns knowing that a judge will take into account all of the entrenched rights that are there before, and everything that you have said before and make a best-scenario decision based on the information that he has. And the way that this is written it is already case by case, so you do not even need limit, it is already case by case, because as you all know, every case that comes before the court is unique—

Mr. Peterson SC: Yes.

Mr. De Freitas:—so it has to be case by case. So do you think—

Mr. Peterson SC: Yes, Senator, I now understand the context of the first question, and that is why I said that that the anonymity order will be the provision that will attract the greatest attention and disquiet among us all, because historically we are accustomed to facing the accuser, but your point is well taken if I could say that, and I say it with the greatest of respect, that the order would—you have to apply for an anonymity order, you have to justify it, you cannot just come and say, I want an anonymity order, you have to demonstrate—there would almost be like what we call a trial within a trial, just like what we do for confessions. When a confession is challenged in a trial, there is a trial within a trial and they hear all the—a trial may have 10 witnesses, one witness speaks to the confession, they will break away into trial within a trial, and it could have 15 witnesses giving evidence on that confession as to whether it is voluntary or not.

Similarly, with an anonymity order, one would apply for it, they will go and demonstrate in a trial of the issue as to whether such an order would be made, and the magistrate would not grant it lightly, the judge would not grant it lightly, they are going to investigate and interrogate the circumstances, and the requirements as to why you need an anonymity order, and it is nothing new. And that is why I said, and I will come to say, where my area of not discomfort but of pause is the question coming from Sen. Saddam

Hosein a while ago.

When you apply for an interception of communication that is usually done ex parte, you go to a judge and you justify the need for it. It is done, you do not even know that you are being intercepted because you cannot be alerted. Under the financial legislation with respect to tipping-off, you are being investigated financially, you are not tipped-off, all those things. You go behind in an ex parte position, get an order from a judge, but you have to justify it. And that safeguard exists in the Interception of Communications Act where an order to intercept is given, if you no longer need it or any new information or all of that, you have to destroy the material or it could be revoked. So that applies in the same section 15 application under the Evidence Act to put in the witness's statement to stand as his evidence, you have to apply and justify why you should be granted a section 15C order. So those safeguards are there, and that same kind of safeguard will be transposed into the anonymity order.

The only area that I have some pause that I have not been able to clearly work out in my mind, is the question coming from Sen. Saddam Hosein with respect to, how do you have the anonymity order, have the bad character avenue where you could attack the witness bad character to show the kind of person who is now making the allegation against this person on trial without—how do you avail yourself of the bad character challenge without disclosing the identity of the witness? That is the only area where, I think, we have to have some tweaking and pause about, but your point is well taken, that it will not be granted willy-nilly, you have to demonstrate to get that, and that already obtains, that regime already obtains in the Interception of Communications and the section 15 provision.

Mr. Chairman: Member Vieira and then member Hosein.

Mr. Vieira: Thank you, Chair. Deputy Commissioner Clarke, I want to thank you for your submissions because even though as you pointed out, the Bill has limited application to the prison service, and that in the main you are supportive of this legislation, you raised two points that intrigued me. The first one was, you said, the new procedures for identification of suspects, the proposed Witness Anonymity Orders which will boost

prison officers who face threats daily in their work environment. So I get from this that you are supportive of the Witness Anonymity Orders for prison officers. Could you expand a little bit about this so we can get some meat to the submission?

Mr. Clarke: Senator, as you know prison officers, many prison officers have been killed in Trinidad and Tobago over the last few years, and some of the challenges we face is the issue of threats against prison officers. Many times in the normal course of their duty, prison officers have to take action in terms of disciplinary matters against some of our charges. In some cases these matters come to court and the officers' lives are threatened.

And in many cases as well, once it gets to court, as you know with the discloser and so on, the name and address of the officer is disclosed to the defence in court, this then brings a lot of fear in the environment to the officers.

So if the officers can give the evidence in court anonymously then, of course, that will allow some of the matters to be better heard to be brought to trial, so that the officers safety and security will be better addressed once they are allowed to testify in that matter.

Mr. Vieira: Right. So this is a very real risk that you live with in your work environment?

Mr. Clarke: Continuously.

Mr. Vieira: My second point, you raised concerns about children committed to rehabilitation centres. Could you expand on that, please?

Mr. Clarke: That was directly as it relates to the appropriate adult persons coming to visit, again, going back to what Mr. Ferette had indicated, attorney or police persons coming to interview children under the age of 18 without having the necessary appropriate adult present, that is, of course, a concern for us.

Mr. Vieira: Thank you.

Mr. Chairman: Member Hosein.

Mr. Hosein: Thank you very much, Chair. Senior, I just have another question for you. When you started off your submission, you spoke about the use of photographs in assisting the witnesses to identify the relevant suspect. Now, Senior, we have heard submissions from the DPP with respect to this matter that photographs should only be

used in certain circumstances, and I want to get your view wearing your defence hat, of course. If the suspect is in custody, do you think that in light of the fairness of the identification procedure that has to take place afterwards whether or not photographs should be shown to the witness prior to the identification procedure if the suspect is in custody?

Mr. Peterson SC: No, I saw them as alternatives. I thought you use the photograph, the mode of photograph as the mode of identification. If you intend on having an ID parade which would be the best process, that is the first best step, the formal, what I could call the traditional ID parade, then that is the first best practice. If you do not, I always saw the photograph identification by the use of photographs to be an alternative mode of identification.

Mr. Hosein: Because my interpretation from reading the Bill is that the photographs are not one of the identification procedures, because if you look 12E of the Bill it sets out five procedures which are video then the “identification parade”, then “public place with consent of the suspect”, then “public place without the consent of the suspect”, and lastly, “confrontation”.

Mr. Peterson SC: Yes, but you see, all of these—that is why I thought it was a mode of identification, it might be a matter of drafting. But if you notice all of these presupposed the custody of the person. So you have an ID parade by video, you have the person done by video, by public you have the person to take into the public with their consent, you have all of these presupposes, the physical custody of the person.

What I understood the photo identification mode to be is, where you are investigating, you do not yet have the person nabbed, but you need to get to the identity of the person that you are pursuing, then you use the photos. Because these modes in 12E presupposes physical custody of the person.

Mr. Hosein: Because I think it will be—a defence will have a field day—

Mr. Peterson SC: Yes.

Mr. Hosein:—if you show the witness photograph—

Mr. Peterson SC: Yes.

Mr. Hosein:—before you conduct—

Mr. Peterson SC: Right. Because once you use the photographs, you will have a difficulty thereafter mounting a parade having shown them the photographs. What I think, you could be employing subsequent to that is a—I am looking for the phrase—verification. Right. A verification process, and the verification could be obtained in two ways. The person may identify the person by photo and say, “that photo”, but they may not know their name, so they could verify that this is the person I have been referring to as “Bubba boy”, for example, to use an alias, or in a recognition situation where I know “Bubba boy” for 20 years, when they hold “Bubba boy” whose name is John James, he will then have to verify that the “Bubba boy” I spoke about is this person who is John James.

Mr. Hosein: Okay. Point taken, Senior. Thank you.

Mr. Chairman: Member Thompson-Ahye.

Mrs. Thompson-Ahye: With regard to vulnerable witnesses who are vulnerable witnesses and their eligibility for special measures. In (a) the first category we looked at the age, the legislation speaks about the “age or immaturity of the witness”, and it goes on, “physical disability”, “trauma”, “fear of intimidation”, “the witness being a virtual complainant”, but the Youth Justice and Criminal Evidence Act 1999 was amended by the coroners and justice Act 2009, I believe it was, that came into force in 2013, and the effect of that is that there is automatic eligibility for a child. So once you are under 18—that is one.

Now also, if it is an offence involving a weapon like knife or gun, you know, that is an important consideration as well that makes it eligible. Do you think that our legislation would be improved by actually specifying that?—instead of having it broad as age or immaturity of the child that, you know, you are automatically eligible and then, you know, you have the enquiry. Mr. Legal Aid, do not look on your right, I want you to answer; Mr. Benjamin, I mean. *[Laughter]* Children Authority. Sorry. No. I saw him looking across.

Mr. Peterson SC: I always thought it was Mr. Benjamin.

Mr. Benjamin: I was waiting on the good Chair, to let me know when to start.

Mr. Chairman: The member did, in fact, start off directing to one person, and we landed by you, which is where we planned to end up anyway.

Mr. Benjamin: And which is where, thank you, Chair, I plan to start, and I know we have an order in the document, but because of this seriousness of the discussion in relation to the anonymity and that area, I want to start there. And I want to preface by saying off the bat that children should fall into a category even without having to make an application to the court. I think that once you are a child and you are in relation to any form of abuse, that you fall under that category without any application to a court. Additionally, we are looking for an extension in relation to persons who may make reports in relation to abuse of children.

Over the last five years of our operation one of the greatest challenges that we have been facing with is reporting of abuse. Not just reporting of abuse, but follow up and follow through to prosecution. And so what we are seeking to do via this important piece of legislation here, is to include persons who may make an application or make a report to the Children's Authority about an abuse, and we are looking at it from two perspectives. We are looking at it from one perspective that person has to cover, and so we made some indication medical profession, educators, the neighbour or the father in a home or the mother, whomever it is.

But the second part of this is that, if this person should be called to testify, that again, should have the cover of this Act, where that if you are to testify about an abusive situation, through our forensic interviewing process, you can have that cover. Yeah?

Mr. Chairman, we have established by the Children Act our Forensic Science Centre where you can have forensic interviews, the two-way mirror, the recording, the video conferencing and stuff like that, but there has been a reluctance to use it thus far, whether or not it is for fear of newness or it is untested so far, but we have within our purview at our assessment centres that ability. And so we want to be able to utilize that facility to record these statements, and to be able to give the persons or the child or children that level of protection by utilizing that.

As it stands, the CPU, the Child Protection Unit of the police service, works hand in hand with us, and they are present to record these statements, yet we are having challenges with it going forward as evidence. Right.

4.35 p.m.

And so with me today is Sharlene Jaggernaut, Legal Services Manager, who has ably pointed out that under the new clause 12Q that is where we are seeking to have an extension, not just investigating officer, but the Children's Authority of Trinidad and Tobago added. Also, under 69—

Mrs. Thompson-Ahye: What page?

Mr. Benjamin: Under Recording of Interviews, the new clause 12Q. And so under this area of special measures we are seriously advocating for that inclusion, for the protection of children. I would now move to the first area on our submission, which is that of provision for recording of interviews.

Mr. Chairman: Okay Chairman and I gather from the written submission that you are seeking to have the Children's Authority included in the specific section of the Bill.

Mr. Benjamin: Correct.

Mr. Chairman: And in the opening I referred to that, because you believe that where the Authority itself takes statements, and you just alluded to it, video recorded statements, it should be covered by this Bill.

Mr. Benjamin: Correct.

Mr. Chairman: I would now ask you to go to your second submission which deals with 12X of the Bill.

Mr. Benjamin: And so for this point I would ask our Legal Services Manager to guide us through, and I will assist as needed.

Mr. Chairman: Ms. Jaggernaut.

Ms. Jaggernaut: I am grateful, Chairman, members of the Committee. The point to be made in relation to the proposed section 12X which speaks to—it prescribes procedures for the taking by the police of oral admissions given by accused persons who are giving statements. What we see here, the wording of this section actually assisted us

in identifying a lacuna in the law that is very applicable to our process insofar as we are straddling both as the agency with responsibility for child protection, there is a straddling of that area between civil arena, the public law element in which we seek care orders, and wardship orders from the Children Court, and then there is the other element that is dealt with by the CPO, which is the criminal prosecutions of those matters. So that this straddling will take place in relation to pretty much, a matter arising out of the same case, the same report being made to different agencies doing separate investigations for that report.

Now, our investigation would include the civil investigation, that would involve both our clinical interviews as well as in depth assessments of both the child victim and the potential perpetrator of the act, and during that process in many occasions we have situations in which oral submissions are made. Lo and behold thus far, have we seen any provisions which treat with the admissibility of that evidence in the taking through the civil investigation process in the criminal proceedings that are related. We understand that it will, of course, be a contentious issue. In other jurisdictions there are difficult approaches that are taken.

In the UK, for instance, there is a provision for joint case management by both courts. So, what we are just asking at this point is that consideration be given, whether it is in this Act or perhaps in other law, but there is need for some regularization of that area. How do we treat with oral admissions made to the Authority, and the admissibility, which is critical to the prosecution of the re-related criminal offence. That is the crux of the submission in that regard.

Mr. Chairman: All right, thank you very much, and I know at least one member has already turned in my direction and said this is going to be very contentious.

Ms. Jaggernaut: It will.

Mr. Chairman: We appreciate the submission. Your third submission as I alluded to earlier deals with similarly the extension of provisions in the Bill, and in particular 12AA and 12AG, to the proceedings of the Children's Authority. Is there anything in that submission you would like to highlight beyond what is in the written submission? We

understand we have also heard from the Trinidad and Tobago Police Service, the need to have those provisions as similar provisions extended to cover some of their officers.

Ms. Jaggernauth: So, with respect to section 12AA, the special measures, now, a lot of this already exists by virtue of the Children Act at Part 13 deals with the application, where again the court has the discretion or the jurisdiction to hear applications which would allow the court to put in place certain—special measures in place to protect the vulnerable witnesses. We are saying that it would be prudent to include a provision that would cover also victims of things like spousal abuse, which we also see coming up in our matters. Yes, that is the crux of our argument.

Mr. Chairman: Okay, I see members nodding in agreement and maybe happiness. I do not see any of my members trying to get my attention, so I want to proceed to thank the three groups which are before us today, Legal Aid and Advisory Authority, Senior Counsel Gilbert Peterson. I was watching the clock. We have cost you maybe an hour and a half. *[Laughter]*

Mr. Peterson SC: I would apply the published rates of the Judiciary. *[Laughter]*

Mr. Chairman: And I was about to say that you having extended to this country a lot of public service, and we appreciate and we appreciate the team you have brought from the Legal Aid today.

Mr. Peterson SC: Thank you, Mr. Chairman.

Mr. Chairman: Mr. Clarke, thank you very much for taking time. We know you have a lot of work to do. We appreciate having your team here with you, your legal officer who has provided support to you. On behalf of the Committee we want you to extend to Mr. Wilson thanks for his service, and we wish him well in his retirement. Mr. Benjamin and Ms. Jaggernauth you have been before various committees of the Parliament, we appreciate your contribution, your written contribution, your submissions before us today, and if there is anything all three stakeholders wish to contribute further, you can do so in writing. And to the members of the public who are listening now and viewing on television and who would listen later on and view the rebroadcast, we thank you very much for your participation. Members of the Committee, representatives from the Office

of the Attorney General, and the Chief Parliamentary Counsel, and of course the Secretariat provided to us by the Parliament, and of course the media. I see Mr. Douglas in the corner there, thank you very much for covering and for reporting fairly and accurately on these proceedings. Thank you very much. This meeting is adjourned.

4.43 p.m.: *Meeting adjourned.*

APPENDIX IV

LIST OF RECOMMENDED AMENDMENTS

THE EVIDENCE (AMENDMENT) BILL, 2019

List of Amendments recommended by the Special Select Committee (Senate) on the Evidence (Amendment) Bill, 2019

First Column Clause	Second Column Extent of Amendments
3	C. In the proposed section 1A in the definition of “document” insert before the word “recorded” the words “retrieved,”; D. In the definition of “statement” insert after the word “fact” the words “sworn or unsworn”.
4	B. In the proposed section 12- (g) delete the definition of “Court” and substitute the following definition: ““Court” means a Judge, Master, District Court Judge, Magistrate, Registrar, Senior Magistracy Registrar and Clerk of the Court, Magistracy Registrar and Clerk of the Court, Clerk of the Court or Coroner as applicable;”; (h) in the definition of “Court Interpreter” insert after the word “Act” the words “or who is appointed under section 8 of the Interpreters Act”; (i) insert after the definition of “Court Interpreter” the following definition: “ “eye-witness” in relation to the commission of an offence means a person who claims to have seen another person in circumstances which tend to prove or disprove the involvement of that other person the commission of an offence;”; (j) delete the definition of “video recording” and substitute the following definition: ““video recording” means any recording on any medium from which a moving image may by any means be produced or transmitted, whether or not accompanied by a sound track;”. B. In the proposed section 12A – (a) in subclause (2)(c)(iv)-

	(i) insert the words “length of” before the word “time”; (ii) delete the word “and” at the end of the subclause; (b) delete subclause (2)(c)(v) and substitute the following: “(v) whether the eye-witness has seen the suspect before, and if so, on how many prior occasions; (vi) whether there was anything impeding the view of the eye-witness; and (vii) such other particulars that may be relevant.”; (c) delete subclause (3) and substitute the following: “(3) The investigating officer shall ensure that the first description of the suspect given by the eye-witness has been recorded in the approved form before the eye-witness is shown any photographs, a computerised or artist’s composite or similar likeness, for the purpose of identification.”; (d) insert after subclause (3), the following new subclauses : “(4) The investigating officer shall ensure that a record of the first description of the suspect given by the eye-witness is also recorded in the Station Diary. (5) The investigating officer under subsection (3), shall provide the eye-witness with the record of the first description and shall - (a) ask the eye-witness to confirm and sign the record of the first description given; and (b) where the eye-witness refuses to confirm and sign the first description as recorded, he shall record the refusal in the approved form. (6) The investigating officer under subsection (3), shall provide the suspect or his representative with the record of the first description and shall – (a) ask the suspect or his representative to confirm receipt
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	and sign the record of the first description provided; and (b) where the suspect or his representative refuses to confirm receipt and sign the first description as recorded, record the refusal in the approved form.”. C. In the proposed section 12B- (k) in subclause (5) delete the word “Police”; (l) delete subclause (7) and substitute the following subclause: “ (7) Where a person, has not been positively identified by an eye-witness as a suspect, the Commissioner of Police shall ensure that any photograph used under this section is preserved for the purpose of evidence in all criminal proceedings to which the photographs relate.”. D. In the proposed section 12C – (a) in subclause (2), delete the words “necessary to do so” and substitute the word “useful”; and (b) delete subclause (5) and substitute the following: “ (5) An investigating officer may also conduct an identification procedure where- (e) a suspect is known and available and the suspect admits to being the person the eye-witness claims to have seen or is able to identify; (f) a suspect is in police custody and an eye-witness, with no previous knowledge of the suspect, saw the suspect commit the crime or saw him in circumstances relevant to the likelihood of his having done so); (g) the suspect and the witness are not well known to each other and neither party disputes this; or (h) the witness claims to know the suspect but the suspect denies this.”.
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	E. In the proposed section 12D in paragraph (a) (ii) insert after the word “any” the word “other”; F. In the proposed section 12E- (a) in subclause (1) delete paragraphs (a) and (b) and substitute the following: “(a) an identification parade in accordance with section 12K; (b) identification using video medium in accordance with section 12J;”; (b) in subclause (3) (b) delete the word “Police”. G. In the proposed section 12F(1)- (a) delete paragraph (a) and substitute the following: “(a) inform the suspect of his right to have a representative present before he decides to give consent to the identification procedure;”; (b) in paragraph (b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms:“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence””. H. In the proposed section 12G. – (a) in subclause (1), delete all the words occurring after the words “shall be” and substituting the following: “- (a) allowed a telephone call to contact his representative to attend the identification procedure which shall be recorded in the Station Diary; and (b) given a reasonable opportunity to have his representative present during the identification procedure.”; (b) insert after subclause (3) the following subclause: “(3A) Where the representative of the suspect is unable to attend the identification parade within the period referred to in subsection (3), the identification officer- (c) shall record the reason for the delay and the efforts made to secure the attendance of the representative; and (d) may appoint a Justice of the Peace to
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	protect the interest of the suspect.”; (c) in subclause (12)(b), by delete the word “may” and substitute the word “shall”. I. In the proposed section 12H (3) (b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms: “You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”. J. In the proposed section 12J.- (a) in subclause (1) – (i) delete the word “by” occurring after the word “conducted”; (ii) in paragraph (a), insert the word “by” before the word showing”; (iii) in paragraph (b), insert the word “by” before the word “ensuring”; (iv) in paragraph (c) – (A) insert the words “in circumstances” before the word “where”; (B) insert the word “by” after the word “appearance”; and (C) in subparagraph (i), delete the word “show” and substitute the word “showing”; and (b) in subclause (3) delete the word “(a)”. K. In the proposed section 12K – (a) in subclause (1), delete the words “either in a normal room or one” and substitute the words “in a room”; (b) in subclause (2), delete the words “which includes” and substitute the words “as follows”; (c) in subclause (2)(a), delete the word “the” where it first occurs and substitute the word “one”; (d) in subclause (3), insert the words “colour,” after the words “race,”; (e) insert after subclause (6), the following: “(6A) During the conduct of the identification parade, the identification officer shall at all times be in
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	front of, and facing the parade in such a way so as not to obstruct the view of the identifying witness and shall remain impassive in both demeanour and expression. (6B) Where a one-way mirror is not used and the witness wishes to walk along the back of the identification parade, he may be allowed to do so alone while the identification officer remains in front of the parade.”; L. In the proposed section 12L- (d) in subclause (5) insert after the word “shall” the word “temporarily”; (e) insert after subclause (5) the following subclause: “(5A) After the identification officer has recorded the reason for identification parade being temporarily stopped under subsection (5), he shall remove and replace the member of the identification parade who refused to comply and resume the identification parade.”. M. In the proposed section 12M(1)- (a) delete all the words occurring after the words “impractical to” and substitute the words “conduct an identification procedure using video medium or an identification parade”; (b) insert after subclause (4) the following: “(5) Section 12L(1), (2)(a),(c),(d) and (3)(b) shall apply with the necessary modifications to a public identification procedure under this section.”. N. In the proposed section 12N. (1), insert after the word “suspect” the following words “where it is impossible or impractical to conduct an identification procedure using video medium, an identification parade or an identification in a public place with the consent of the suspect”. O. In the proposed section 12O – (a) in subclause (1)- (i) insert after the word “procedure” the words “or it is impossible or impractical to conduct an identification procedure using video medium, an identification parade, identification in a public place with the consent of the suspect or an identification in a public place without the consent of the suspect,”; and (ii) delete the word “the” occurring before the word “refusal” and substitute the word “any”; and
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	(b) in subclause 3(b) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence” and substitute the words “in the following terms: “You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”; (f) insert after subclause (5), the following: “ (6) An identification officer conducting an identification by confrontation shall ensure that the procedure is recorded by video recording.”. P. In the proposed section 12Q – (a) insert after subclause (2), the following: “ (3) Where an interview is to be conducted under this section, a person suspected of, or charged with, committing an offence shall be given every reasonable opportunity to have his representative present before the interview is conducted.”; (b) renumber subclauses (3), (4), (5), (6) (7), (8), and (9) as subclauses (4), (5), (6), (7), (8), (9) and (10) respectively; (c) in renumbered subclause (8), insert after the word “memory” the word “card”; (d) in renumbered subclause (9)- (i) insert after the words “any interview under this section” the words “was conducted subject to section 12R”; (ii) delete the word “Police”. Q. In the proposed section 12R- (a) in subclause (1) - (i) delete the word “and” at the end of paragraph (f); (ii) delete paragraph (g) and substitute the following paragraphs: “ (g) the names and calling of all other persons present during the interview; (h) whether any request was made by the interviewee;
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	(i) what, if anything was done to facilitate such request under paragraph (h); and” and (j) such other information as may be prescribed by Regulations”; (b) insert after subclause 2, the following subclauses: “(3) Where the interviewee made a telephone call to his representative, a note of that telephone call shall be recorded in the Station Diary; (4) Where a request is made and a copy of an entry is provided pursuant to subsection (2) – (a) a note of this request shall be made in the Register of Interviews; (b) the interviewee or his representative shall be asked to sign and confirm receipt of the copy: and (c) where the interviewee or his representative refuses to sign and confirm receipt of the copy, a note of this refusal shall also be made on the Register of Interviews. (5) Where any request for a copy of an entry is granted under this section – (a) the extract of the request by the interviewee or his representative; (b) the signature of the interviewee or his representative for receipt of the copy of the entry; or (c) the refusal of the interviewee or his representative to sign and confirm receipt of the copy of the entry, is admissible as evidence.”. R. In the proposed section 12S- (d) in subclause 2 (c) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence”and substitute the words ““You are not obliged to say anything unless you wish to do so but
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	what you say may be put into writing and given in evidence””; (e) insert after subclause (2) the following subclauses: “(2A) The interviewee may be allowed to communicate with his Attorney-at-law, relative or other person if no hindrance is reasonably likely to caused to the process of investigation, or to the administration of justice by his doing so. (2B) The interviewee shall not only be informed orally of the rights and facilities available to him, but in addition notices describing him shall be displayed at convenient and conspicuous places at police stations and the attention of the interviewee shall be drawn to these notices. (2C) Reasonable arrangements shall be made for the comfort and refreshment of the persons in attendance for the interview. (2D) Wherever practicable, the interviewing officer and interviewee shall be seated.”; (f) in subclause (4) insert after the word “interview” the following words “ and ensure that the entire video or audio recorded interview is re-played to the interviewee or where applicable, re-read to the interviewee in accordance with section 12Q.(4).”. S. In the proposed section 12U(1)(a)- (a) insert after the words “pocket diary” the words “,or by any other available means of note taking,”; (b) delete the word “Police”. T. In the proposed section 12W, insert after subclause (7), the following: “(8) The police officer referred to in subsection (2), shall ensure that the procedure followed, including the date, time and place and all persons present when the seal of the master copy was broken and when the master copy was resealed, is recorded in the Station Diary, and where practicable, by video recording.”. U. In the proposed section 12X- (c) in subclause (1) delete the words “to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence”- and substitute the words ““You are not obliged to say anything unless you wish to do so but what you say may be put
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	into writing and given in evidence””; (d) delete the word “Police” wherever it occurs. V. In the proposed section 12Y- (a) delete subclause (2) and renumber subsections (3), (4), (5) and (6) as subsections (2), (3), (4) and (5) accordingly; (b) in renumbered subclause (2), delete the words “subsections (1) and (2)” and substitute the words “subsection (1)”; (c) in renumbered subclause (4)- (i) delete the word “(4)” and substitute the word “(3)”; (ii) delete all the words occurring after the words “adequately addressed in” and substitute the words “ a recording under subsection (1)”. W. In the proposed section 12Z- (h) renumber section 12Z as section 12Z (1); (i) in renumbered subclause (1), delete the words “ fifty thousand dollars and to imprisonment for one year” and substitute the words “two hundred thousand dollars and to imprisonment for twenty years”; (j) insert after subclause (1) the following: “(2) For the purposes of this section, “lawful authority” means- (k) the Commissioner of Police or any person authorised by him; or (l) the Director of Public Prosecutions or any person authorised by him.”. X. In the proposed section 12AA (1) insert after the words “motion” the words “in the interests of justice”. Y. In the proposed section 12AG- (a) in subclause (3)(d), insert after the words “real harm to” the words “the witness, his family members or to”; (b) in subclause (4)- (i) insert after paragraph (c), the following paragraph: “(ca) the nature and extent of the corroborating evidence, where the evidence of the
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	proposed anonymous witness is not the sole or exclusive evidence;”; (ii) delete the word “and” at the end of paragraph (h); (iii) delete paragraph (i) and substitute the following: “ (i) where there is any evidence of an attempt at witness tampering; (j) such other matters as the Court considers relevant.”; (c) insert after subclause (4) the following subclause: “(4A) Before granting a Witness Anonymity Order, the Court may request a risk assessment report from the police which shall include the following: (m)an assessment of the reasonableness of the fear of the witness; (n) an explanation of the inadequacy of other special measures.”; (d) insert after subclause (5) new subclause (6) as follows: “ (6) Each party to the proceedings shall have an opportunity to make oral representation to the Court on an application for a Witness Anonymity Order.”; (e) renumber subclauses (6), (7) and (8) as subclauses (7), (8) and (9) respectively; (f) insert after renumbered subclause (10), the following subclauses: “(10) The Court may seal the documents regarding a Witness Anonymity Order. (11) The Court may order the continuation of the anonymity of a witness after the conclusion of a trial, in the interests of justice.”. Z. In the proposed section 12 AJ, insert after the words “in consultation with ” the words “ the Director of Public Prosecutions and”; AA. In the proposed section 12 AL- (a) insert after the words “12AL” the word “(1)”; (b) in the renumbered subclause (1), insert after the words “effect on” the words “ the fairness of”; (c) insert after the renumbered subclause (1), the following subclause: “(2) Nothing in this section shall prejudice any rule of law requiring a Court to exclude evidence.”.
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	AB.Insert after the proposed section 12AL the following section: <table border="1"> <tr> <td>“Approved form admissible as evidence</td><td>12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.</td></tr> </table>	“Approved form admissible as evidence	12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.
“Approved form admissible as evidence	12AM. A duly completed approved form referred to under this Part shall be admissible as evidence.”.		
6	In the proposed First Schedule, in the third paragraph- (c) delete the full stop after paragraph (b) and substitute a semi-colon; (d) insert after paragraph (b) the following: “(c)the identification officer discharged his functions under section 12F; Yes ☐ No ☐ (d) where the identification officer failed to discharge his functions under section 12F, I notified the suspect of this failure. ☐”.		
New clause 5A	Insert after clause 5 the following new clause: <table border="1"> <tr> <td>“Section 15 amended</td><td>5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.</td></tr> </table>	“Section 15 amended	5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.
“Section 15 amended	5A. The Evidence Act is amended in section 15(2) by deleting the words “confer on” and substituting the words “deny”.		
New clause 7	Insert after clause 6 the following new clause: <table border="1"> <tr> <td>“Second Schedule amended</td><td> 7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland Revenue” the word “Director”. </td></tr> </table>	“Second Schedule amended	7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland Revenue” the word “Director”.
“Second Schedule amended	7. The Evidence Act is amended in the Second Schedule – (a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and (b) by inserting in Column II, above the reference to “Commissioner of Inland Revenue” the word “Director”.		

APPENDIX V

CONSOLIDATED VERSION OF THE BILL

A BILL

An Act to amend the Evidence Act, Chap. 7:02

Preamble WHEREAS it is enacted by section 13(1) of the Constitution that an Act of Parliament to which that section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and, if any Act does so declare, it shall have effect accordingly;

And whereas it is provided in section 13(2) of the Constitution that an Act of Parliament to which that section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House;

And whereas it is necessary and expedient that the provisions of this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution;

Enactment ENACTED by the Parliament of Trinidad and Tobago as follows:

Short title and commencement

1. (1) This Act may be cited as the Evidence (Amendment) Act, 2019.

(2) This Act comes into operation on such date as is fixed by the President by Proclamation.

Act inconsistent with the Constitution

2. This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.

Section 1A inserted

3. The Evidence Act is amended by inserting after section 1, the following section:

“Interpretation 1A. In this Act, unless the context otherwise requires-

“business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

“document” includes any device by means of which information is retrieved, recorded or stored;

“statement” includes any representation of fact sworn or unsworn, whether made in words or otherwise.”.

Part IA inserted

4. The Evidence Act is amended by inserting after section 11 the following Part:

“PART IA
POLICE AND CRIMINAL EVIDENCE

DIVISION 1

GENERAL

Definitions

12. In this Part, unless the context otherwise requires -

“appropriate adult” means a person eighteen years of age and over and who is a –

- (a) social worker;
 - (b) welfare worker;
 - (c) Justice of the Peace;
 - (d) Children’s Attorney as defined under section 88 of the Children Act;
 - (e) any other responsible person with whom the child is comfortable; or
 - (f) in the case of a person with a disability, the appropriate professional,
- but does not include –
- (g) an accomplice;
 - (h) a person, not being a parent, with previous convictions relating to a child or affecting that child within the last ten years;
 - (i) a person, not being a parent who is on probation;
 - (j) a member of the police service or any employee in the police service other than –
 - (i) a family member; or
 - (ii) a person with whom the child is comfortable;
 - (k) a person employed at a Rehabilitation Centre other than –
 - (i) a family member;

Chap. 46:01

- (ii) a person who is well known to the child; or
- (iii) a person with whom the child is comfortable;

“approved form” means a form approved by the Commissioner of Police;

“audio recording” means an audio recording on a non-rewritable recording medium identifying the persons speaking;

“child witness” means a witness under the age of eighteen years;

“confrontation” means an occurrence where the suspect comes directly face to face with an eye-witness, without the consent of the suspect;

~~“Court” means a Judge, Master or Magistrate;~~

Chap. 6:54

“Court” means a Judge, Master, District Court Judge, Magistrate, Registrar, Senior Magistracy Registrar and Clerk of the Court, Magistracy Registrar and Clerk of the Court, Clerk of the Court or Coroner as applicable;”.

“Court Interpreter” means any person who holds a valid licence under the Interpreters Act or who is appointed under section 8 of the Interpreters Act;

“ eye-witness” in relation to the commission of an offence means a person who claims to have seen another person in circumstances which tend to prove or disprove the involvement of that other person the commission of an offence;

“identification officer ” means a police officer of the rank of Inspector or above who is not involved in the investigation and who shall be responsible for an identification procedure;

“identification procedure” means a method or system of ascertaining or determining the identity of a suspect for the purposes of an investigation as specified in section 12E (1)(a) to (e);

	“interview” means the interrogation by a police officer of, or the taking of a statement or confession by a police officer, from a person suspected of, or charged with, committing an offence.
	“interviewee”, in relation to an interview, means a person who is suspected of, or is charged with, committing an offence;
	“interviewing officer” means a police officer who is conducting an interview;
	“investigation” means a criminal investigation;
Chap. 28:02	“investigating officer” means a police officer involved in a criminal investigation;
Chap. 15:01	“master copy” means the video or audio recording of an interview which is labelled as the master copy pursuant to section 12U(1)(b)(i);
Chap. 15:03	
	“Minister” means the Minister to whom responsibility for national security is assigned;
	“mental disorder” has the meaning assigned to it under section 2(1) of the Mental Health Act;
	“police officer” has the meaning assigned to it under section 3 of the Police Service Act and includes a member of the Special Reserve Police established under the Special Reserve Police Act;
	“Police Service” has the meaning assigned to it under section 3 of the Police Service Act;
	“recording medium” includes any removable, physical video recording medium, audio recording medium or any other recording medium such as magnetic tape, optical disk or solid state memory card which can be played, or copied;
	“Register” means the Register of Interviews established under section 12R(1);
	“representative”, in relation to a person, means- (a) his Attorney-at-law;

(b) in the case of a child, his parent or guardian, a person with responsibility for the child or an appropriate adult; or

(c) any other person nominated by the person;

“special measure direction” means a direction issued by the Court under section 12AA.

“suspect” means a person whom a police officer, with reasonable cause, suspects has committed an offence, but who is not yet charged with the offence or offences under investigation;

“video link” means a technological arrangement whereby a witness, without being physically present in the place where the proceedings are conducted, is able to see and hear and be seen and be heard by the following persons:

(a) the Judge, Master or Magistrate;

(b) the parties to the proceedings;

(c) the Attorney-at-law acting in the proceedings;

(d) the jury where there is one;

(e) any Court Interpreter or other person appointed to assist; or

(f) any other person who may be required to assist the Court in the conduct of its proceeding;

~~“video recording” means a video recording with sound;~~

“video recording” means any recording on any medium from which a moving image may by any means be produced or transmitted, whether or not accompanied by a sound track;

“Witness Anonymity Orders” means an order made under section 12AG;

“working copy” means a copy of a video or audio recording of an interview which is labeled as a

working copy, pursuant to section 12U (1)(b)(ii).

DIVISION 2

IDENTIFICATION PROCEDURES

First description

12A. (1) Before any identification procedure takes place, a record shall be taken by the investigating officer of the first description of the suspect given by the eye-witness.

(2) A record under subsection (1) shall-

(a) be made and kept in an approved form which-

(i) enables details of the description to be accurately produced from it, in a visible, audible or legible form; and

(ii) can be given to the suspect or his representative;

(b) unless otherwise specified, be made before the eye-witness participates in any identification procedures; and

(c) include –

(i) the distance the eye-witness was from the suspect;

(ii) the weather conditions at the time;

(iii) the lighting conditions at the time;

(iv) the length of time during which the eye-witness was able to observe the suspect; ~~and~~

(v) ~~such other particulars that the investigating officer thinks fit may be relevant.~~

(v) whether the eye-witness has seen the suspect before, and if so, on how many prior occasions;

(vi) whether there was anything impeding the view of the eye-witness; and

(vii) such other particulars that may be relevant.

~~(3) The investigating officer shall confirm that the first description of the suspect given by the eye-witness has been recorded in the approved form before the eye-witness is shown any photographs for the purpose of identification.~~

(3) The investigating officer shall ensure that the first description of the suspect given by the eye-witness has been recorded in the approved form before the eye-witness is shown any photographs, a computerised or artist's composite or similar likeness, for the purpose of identification.

(4) The investigating officer shall ensure that a record of the first description of the suspect given by the eye-witness is also recorded in the Station Diary.

(5) The investigating officer under subsection (3), shall provide the eye-witness with the record of the first description and shall -

(a) ask the eye-witness to confirm and sign the record of the first description given; and

(b) where the eye-witness refuses to confirm and sign the first description as recorded, he shall record the refusal in the approved form.

(6) The investigating officer under subsection (3), shall provide the suspect or his representative with the record of the first description and shall -

(a) ask the suspect or his representative to confirm receipt and sign the record of the first description provided; and

(b) where the suspect or his representative refuses to confirm receipt and sign the first description as recorded, record the refusal in the approved form.

Use of
photographs to
assist in
identifying
suspects

12B. (1) Prior to the conduct of an identification procedure, an investigating officer may use photographs to assist in establishing the identity of a suspect.

(2) Where photographs are used pursuant to subsection (1), a minimum of twelve photographs shall be shown to an eye-witness at a time.

(3) An investigating officer shall ensure that –

(a) only one eye-witness is shown photographs at any one time;

(b) an eye-witness is not shown photographs in the presence or hearing of another eye-witness; and

(c) all photographs which are shown to an eye-witness are, as far as possible, images of persons with characteristics similar to the first description referred to in section 12 A(1).

(4) Where a suspect has been positively identified by an eye-witness, the investigating officer shall, in respect of the matter under investigation, take all necessary steps to ensure that all photographs used are kept securely and the movement of the photographs is carefully accounted for.

(5) A detailed record of the proceedings under this section shall be made and kept by the investigating officer in the approved form and recorded in the ~~Police~~ Station Diary, whether or not an identification of a suspect is made.

(6) A record under subsection (5) shall include –

(a) anything said by the eye-witness about any identification; and

(b) the names of all persons present while the photographs were being shown to the eye-witness.

~~(7) Where a person has not been positively identified by an eye-witness as a suspect, the Commissioner of Police shall cause all photographs of that person to be destroyed.~~

(7) Where a person has not been positively identified by an eye-witness as a suspect, the Commissioner of Police shall ensure that any photograph used under this section is preserved for the purpose of evidence in all criminal proceedings to which the photographs relate.

12C. (1) Subject to subsection (3), an identification procedure shall not be conducted unless a suspect is known and available and-

(a) an eye-witness claims to have seen the suspect or purports to have done so; or

(b) there is an eye-witness available who expresses an ability to identify the suspect or where there is a reasonable chance of an eye-witness being able to do so,

and the suspect does not admit to being the person the eye-witness claims to have seen or is able to identify.

(2) Subject to subsection (3), an identification procedure may also be conducted where the investigating officer in charge of a criminal investigation considers that it would be ~~necessary to do so~~ useful.

(3) Where an eye-witness and a suspect participate in an identification procedure in relation to the investigation of an offence, a subsequent identification procedure involving –

(a) the same eye-witness and the same suspect shall not be conducted in respect of the same offence;

(b) the same eye-witness and another suspect may be conducted in respect of the same offence; and

(c) the same suspect and another eye-witness may be conducted in respect of the same offence.

(4) An identification procedure need not be conducted –

(a) where it is not practicable to hold one; or

(b) where –

(i) it is not disputed that the suspect is already well-known to the eye-witness;

(ii) the eye-witness merely describes a piece of clothing or provides an insufficient description of the person he claims to have seen;

(iii) the suspect admits to being at the scene of the commission of the offence and gives an account of what took place and the eye-witness does

- not contradict anything in the suspect's account; or
- (iv) the identification procedure would otherwise serve no useful purpose in proving or disproving the suspect was involved in committing the offence.

~~(5) An identification procedure shall not be conducted to test whether an eye-witness can recognise a person as someone he knows.~~

(5) An investigating officer may also conduct an identification procedure where-

- (a) a suspect is known and available and the suspect admits to being the person the eye-witness claims to have seen or is able to identify;
- (b) a suspect is in police custody and an eye-witness, with no previous knowledge of the suspect, saw the suspect commit the crime or saw him in circumstances relevant to the likelihood of his having done so);
- (c) the suspect and the witness are not well known to each other and neither party disputes this; or
- (d) the witness claims to know the suspect but the suspect denies this.

(6) Where an eye-witness had previously made an identification by photographs or a computerised or artist's composite or similar likeness, he shall not be reminded of such photograph or composite likeness or any description of the suspect, once a suspect is available for identification by any other means.

(7) Where an identification procedure is required, in the interest of fairness to a suspect or an eye-witness, it should be conducted as soon as is reasonably practicable.

Identification
officer

12D. An identification officer -
(a) shall-

- (i) be responsible for making arrangements for an identification procedure; and
- (ii) conduct an identification procedure in respect of an investigation and not be in

any other way involved in the investigation; and

- (b) may direct one or more police officers, who are not in any way involved in the investigation, to assist him in the conduct of an identification procedure.

Types of
identification
procedures

12E. (1) Where an identification procedure is to be conducted, it shall, subject to practicability or the availability or cooperation of the suspect, be conducted in the following order of priority:

~~(a) identification using video medium in accordance with section 12J;~~

~~(b) an identification parade in accordance with section 12K;~~

(a) an identification parade in accordance with section 12K;

(b) identification using video medium in accordance with section 12J;

(c) identification in a public place with the consent of the suspect in accordance with section 12M;

(d) identification in a public place without the consent of the suspect in accordance with section 12N; or

(e) identification by confrontation in accordance with section 12O.

(2) Notwithstanding the order of priority established under subsection (1), where it is impractical or circumstances are unsuitable to conduct an identification procedure in the order of priority, the identification officer shall offer the next identification procedure in the order of priority which is reasonably practicable in the circumstances, and shall record in detail, the reasons for so offering.

(3) An identification officer shall be responsible for ensuring that the proceedings of an identification procedure are recorded-

(a) in the approved form; and

(b) in the ~~Police~~ Station Diary.

12F. (1) Where an identification procedure is to be conducted, the identification officer shall –

~~(a) inform the suspect of –~~

~~(i) his right to legal representation including, where applicable, legal representation under the Legal Aid and Advice Act;~~

~~(ii) his right to be presumed innocent;~~

~~(iii) his right to remain silent;~~

~~(iv) his right to protection against self-incrimination; and~~

~~(v) his right to have a representative present before he decides to give consent to the identification procedure;~~

(a) inform the suspect of his right to have a representative present before he decides to give consent to the identification procedure; and

(b) ensure that the suspect is cautioned ~~to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence~~ in the following terms:

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”; and

(c) the identification officer shall record in the approved form his compliance with paragraphs (a) and (b) and –

(i) give a copy of the form to the suspect who shall also be asked to sign and confirm receipt of the form; and

(ii) where the suspect refuses to sign and confirm receipt of the form, he shall record the refusal in the approved form.

(2) Where the consent of the suspect is required to participate in an identification procedure and the suspect has been informed of all his rights under subsection (1), the suspect shall be given the opportunity –

(a) to give consent to –

- (i) participating in an identification procedure; and
- (ii) the type of identification procedure to be used; and

- (b) to obtain advice from his representative, if practicable,

and his consent or refusal shall be recorded in the approved form and a copy of this form shall be given to the suspect or his representative who shall also be asked to sign and confirm receipt of the form.

(3) A refusal by the suspect to give consent shall not be a bar to an identification procedure being conducted under sections 12N or 12O.

(4) Where a suspect refuses to participate in an identification procedure or requests another identification procedure -

- (a) he shall be asked whether he wishes to state his reasons for refusing and his reasons, if any, for requesting another identification procedure; and

- (b) the identification officer shall record in detail, in the approved form, the refusal and the reasons given under paragraph (a).

Suspect may have a representative

12G. (1) Subject to sections 12J (5) and 12N where a suspect is involved in an identification procedure, he shall be ~~given a reasonable opportunity to have his representative present during the identification procedure.~~

(a) allowed a telephone call to contact his representative to attend the identification procedure; and

(b) given a reasonable opportunity to have his representative present during the identification procedure.

(2) The suspect under subsection (1), shall be asked to indicate to the identification officer and sign on the approved form, whether or not he wishes to have his representative present.

(3) For the purposes of subsection (1), a suspect shall be given at least nine hours' notice of the time and place at which the identification procedure is to be conducted.

(3A) Where the representative of the suspect is unable to attend the identification parade within the period referred to in subsection (3), the identification officer-

- (e) shall record the reason for the delay and the efforts made to secure the attendance of the representative; and
- (f) may appoint a Justice of the Peace to protect the interest of the suspect.

(4) Notwithstanding subsection (3), an identification procedure may be conducted before the expiration of the period of notice referred to in that subsection if his representative is present.

(5) Where a representative of the suspect is present at the identification procedure, the identification officer shall, in the presence of the suspect and prior to the conduct of the identification procedure inform the representative of –

- (a) the rights of the suspect and all other matters which the identification officer is required to inform the suspect under section 12F; and
- (b) whether the suspect has consented to the identification procedure.

(6) An identification officer shall, in the approved form record the information given to a representative under subsection (5) and –

- (a) give a copy of the form to the representative who shall also be asked to sign and confirm receipt of the form; and
- (b) where the representative refuses to sign and confirm receipt of the form, he shall record the refusal in the approved form.

(7) An identification officer shall record in the approved form, any objections or statements made by the suspect and any unusual occurrences during the course of the identification procedure and shall provide the suspect or his representative with a copy of the form and the representative shall be asked to sign in the approved form, confirmation of the receipt of the copy of the form.

(8) Where the suspect or representative under subsection (7), refuses to sign in the approved form, the identification officer shall also make a note of the refusal in the approved form.

(9) The suspect or his representative shall be provided with details of the first description of the suspect which was given by each eye-witness who is to participate in an identification procedure, and the suspect or his representative shall be asked to sign in the approved form confirmation of receipt of the details of the first description.

(10) Where the suspect or the representative under subsection (9), refuses to sign in the approved form the identification officer shall also make a note of the refusal in the approved form.

(11) Where any material in the form of an image, composite, sketch or video has been published, broadcast or released to the media by the Police Service for the purpose of recognising or tracing the suspect, the identification officer shall obtain a copy of the material and allow the suspect and his representative to view the material, provided it is practical and would not unreasonably delay the identification procedure.

(12) Where the suspect or his representative refuses to sign in the approved form under this section, the identification officer –

- (a) shall ensure that a Justice of the Peace is present to witness the identification procedure; and
- (b) ~~may~~ shall request that the Justice of the Peace sign in the approved form.

Where suspect
does not have a
representative

12H. (1) Where a suspect involved in an identification procedure is unable to secure a representative for himself pursuant to section 12G (1) to (3), the identification officer shall be responsible for ensuring that a Justice of the Peace is present to witness the procedure.

(2) Where a Justice of the Peace is present at the identification procedure he shall, prior to the conduct of the identification procedure, be satisfied that the suspect was informed of his rights by the identification officer and has consented under section 12F to the conduct of the identification procedure.

(3) A Justice of the Peace under subsection (2) shall ensure that –

- (a) the identification officer informs the suspect of all matters of which the identification officer is required to inform him under section 12 F; and

First Schedule

- (b) immediately before the identification procedure begins, the suspect is cautioned by the identification officer ~~to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence in the following terms:~~

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”,

and shall so certify in the prescribed form.

(4) The Justice of the Peace shall record any objections or statements made by the suspect and any unusual occurrences during the course of the identification procedure in the prescribed form.

(5) The Justice of the Peace shall be provided with details of the first description of the suspect which was given by each eye-witness who is to participate in an identification procedure.

(6) Where any material in the form of an image, composite, sketch or video has been published, broadcast or released to the media by the Police Service for the purpose of recognising or tracing the suspect, the identification officer shall obtain a copy of the material and allow the Justice of the Peace, to view the material, provided it is practical and would not unreasonably delay the identification procedure.

Eye-witness to be informed that person he saw may not be in the identification procedure

12I. Before an identification procedure is conducted, an eye-witness shall be informed by the identification officer that –

- (a) the person he claims to have seen may or may not be in the identification procedure; and
- (b) if the person he claims to have seen is or is not in the identification procedure, he should report this to the identification officer.

Identification using video medium

12J. (1) An identification procedure using video medium shall be conducted ~~by-~~

- (a) by showing an eye-witness moving images of the suspect together with similar

images of at least eight other persons who resemble the suspect;

- (b) by ensuring that the eye-witness is shown at least nine images before an identification is made; or
- (c) in circumstances where there are two suspects of roughly similar appearance by –
 - (i) showing ~~show~~—an eye- witness moving images of the suspects together with similar images of at least twelve other persons who resemble the suspects ; and
 - (ii) ensuring that the eye-witness is shown at least fourteen images before an identification is made.

(2) The identification officer shall ensure that where there is more than one witness, only one eye-witness is shown the video images at a time.

(3) Where a video identification procedure is used, the persons referred to in subsection (1)~~(a)~~ shall, as far as possible, resemble the suspect in terms of race, age and general appearance.

(4) All the images referred to in subsection (3), shall be shown to the witness individually and sequentially.

(5) A suspect shall not be present during an identification using video medium.

Identification
parade

12K. (1) An identification parade shall be conducted in a police station or other building under the control of, or regularly used by the Police Service in the normal conduct of their duties, ~~either in a normal room or one~~ in a room equipped with a screen permitting the witness to view the suspect without himself being seen.

(2) An identification parade shall comprise a lineup of persons ~~which includes~~ as follows –

- (a) ~~the one~~ suspect and at least eight other persons who resemble the suspect; or
- (b) two suspects who resemble each other and at least twelve other persons who resemble the suspects.

(3) Where an identification parade is conducted, members of the parade shall, as far as possible, resemble the suspect in terms of race, colour, age, height and general appearance.

(4) Where an identification parade is conducted under subsection (3), the suspect, his representative or a Justice of the Peace shall be given an opportunity to object to any one or more persons being used in the lineup of persons or to the arrangements for the identification parade and such objections shall be recorded, in accordance with sections 12G (7) and 12 H (4), by the identification officer.

(5) Where the suspect, his representative or a Justice of the Peace objects under subsection (4), the identification officer shall –

- (a) where practicable, take steps to remove the grounds for the objection; or
- (b) where it is not practicable to take steps to remove the grounds for the objection, the suspect, his representative of the Justice of the Peace shall be told why his objection cannot be met and this shall be recorded in the approved form.

(6) Where an identification parade involves the use of a screen, which permits an eye-witness to see the composition of the identification parade without being seen, the identification parade shall be conducted and everything said to, or by, a witness shall be said in the hearing of the suspect, his representative or a Justice of the Peace.

(6A) During the conduct of the identification parade, the identification officer shall at all times be in front of, and facing the parade in such a way so as not to obstruct the view of the identifying witness and shall remain impassive in both demeanour and expression.

(6B) Where a one-way mirror is not used and the witness wishes to walk along the back of the identification parade, he may be allowed to do so alone while the identification officer remains in front of the parade.

(7) The identification officer conducting an identification parade shall ensure that-

- (a) the identification parade is recorded by video recording; and

- (b) the movement of persons when entering or exiting the area in which the identification parade is being conducted is recorded by video recording.

(8) A copy of the original recording taken under subsection (7)(a) and (b) shall be supplied on request, to the suspect or his representative within seven days.

(9) The video recording referred to under subsection (7) shall be admissible in evidence.

Eye-witness in
identification
parade

12L. (1) Each eye-witness to an identification parade shall be brought into the parade room one at a time, and no more than one eye-witness shall be in the parade room at a time while the identification parade is being conducted.

(2) The identification officer conducting an identification parade, shall be responsible for making proper arrangements to ensure that before an eye-witness attends an identification parade, he is not able to –

- (a) communicate with any other eye-witness about the case or overhear another eye-witness who has already seen the identification parade;
- (b) see any member of the identification parade;
- (c) see, or be reminded of, any photograph or description of the suspect or be given any other indication as to the identity of the suspect; or
- (d) see the suspect before or after the identification parade.

(3) The identification officer shall ensure that before an identification parade is conducted, the following are not discussed with an eye-witness –

- (a) the composition of the identification parade; or
- (b) whether a previous eye-witness participating in the identification parade, has made an identification.

(4) Where an eye-witness makes a request to an identification officer that a member of the identification parade speak, move or adopt any specified posture, the

identification officer shall require all members of the parade to comply with the request, whether or not the eye-witness is able to identify the suspect on the basis of appearance only.

(5) Where a member of an identification parade refuses to comply with a request under subsection (4), the identification officer shall temporarily stop the parade and record in detail, in the approved form, the refusal and why the identification parade was stopped.

(5A) After the identification officer has recorded the reason for identification parade being temporarily stopped under subsection (5), he shall remove and replace the member of the identification parade who refused to comply and resume the identification parade.

(6) Where during the course of an identification parade, a suspect indicates to the identification officer that he no longer wishes to participate in the parade, the identification officer shall –

- (a) stop the parade and record in detail in the approved form, the refusal and why the identification parade was stopped;
- (b) provide the suspect with a copy of the approved form and ask the suspect to sign for the receipt of such form; and
- (c) where the suspect refuses to sign and confirm receipt of such form, a record of this refusal shall be made in the approved form.

Identification in public place with consent of suspect

12M. (1) An identification in a public place under this section may be conducted with the consent of the suspect, which shall be recorded in the approved form, where the suspect is not in police custody or it is impossible or impractical to ~~make use of any other identification procedure~~ conduct an identification procedure using video medium or an identification parade.

(2) The suspect under subsection (1), shall be provided with a copy of the approved form by the identification officer and he shall be asked to sign to confirm the receipt of such form.

(3) Where an identification procedure under this section is being conducted, an identification officer may take an eye-witness to a public place in an area where –

- (a) other people are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by an eye-witness at the same time as others in the group; or
- (b) the suspect lives, is employed or frequents or may be seen under normal conditions so that the eye-witness may or may not identify him.

(4) An identification procedure under this section may also be valid where, at the time of being seen by an eye-witness, the suspect was on his own rather than in a group.

(6) Section 12L(1), (2)(a),(c),(d) and (3)(b) shall apply with the necessary modifications to a public identification procedure under this section.”.

Identification in public without consent of suspect

12N. (1) An identification in a public place under this section may be conducted without the consent of the suspect where it is impossible or impractical to conduct an identification procedure using video medium, an identification parade or an identification in a public place with the consent of the suspect.

(2) Where the identification procedure under this section is to be done without the consent or co-operation of the suspect, the identification officer shall ensure that the procedure is carried out in the presence of a Justice of the Peace.

(3) The conduct of an identification procedure under this section without the consent of the suspect, may only be conducted where –

- (a) the suspect is not in custody; or
- (b) the suspect has refused to give his consent to the conduct of a procedure under section 12M or it is impossible or impractical to obtain the consent of the suspect.

(4) An identification in a public place under this section, may be conducted in places such as those referred to in section 12M (3)(b) and (4).

Identification by confrontation

12O. (1) Where a suspect who is in police custody refuses to consent to any other identification procedure or it is impossible or impractical to conduct an identification procedure using video medium, an identification parade,

identification in a public place with the consent of the suspect or an identification in a public place without the consent of the suspect, an identification by confrontation may be used, and a detailed record of ~~the~~ any refusal shall be made by the identification officer in the approved form.

(2) The suspect under subsection (1) shall be provided with a copy of the approved form by the identification officer and he shall be asked to sign for the receipt of the copy of the form.

(3) Where an identification by confrontation is to be conducted, the suspect shall be -

(a) informed by the identification officer, that because of his refusal to consent to any identification procedure, he shall now be confronted by each eye-witness to the matter for which he has been arrested; and

(b) cautioned by the identification officer ~~to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence in the following terms:~~

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”.

(4) An identification by confrontation shall be conducted in a police station or other building under the control of, or regularly used by, the Police Service in the normal conduct of their duties, either in a normal room or one equipped with a screen, permitting the witness to view the suspect without himself being seen.

(5) Where the room is equipped with a screen, the representative of the suspect or a Justice of the Peace shall be present on the side of the screen on which the witness is to make the identification.

(6) An identification officer conducting an identification by confrontation shall ensure that the procedure is recorded by video recording.

Destruction of
forms and
recordings

12P. The Commissioner of Police shall consult with the Director of Public Prosecutions, prior to the destruction of

any approved forms and recordings of identification procedures.

DIVISION 3

INTERVIEWS AND ORAL ADMISSIONS

Recording of
interviews

12Q. (1) Subject to subsections (2) to (4), an investigating officer shall record the interview of any person suspected of, or charged with, committing an offence.

(2) An interview under subsection (1), shall be recorded by video recording unless it is not reasonably practicable to do so.

(3) Where an interview is to be conducted under this section, a person suspected of, or charged with, committing an offence shall be given a reasonable opportunity to have his representative present before the interview is conducted.

~~(3)~~ (4) Where it is not reasonably practicable to record an interview by video recording but it is reasonably practicable to record the interview by audio recording, the interview shall be recorded by audio recording.

~~(4)~~ (5) Where it is not reasonably practicable to record the interview by either video or audio recording, the interview shall be recorded in writing.

~~(5)~~ (6) Where a video recording of an interview is being made under subsection (2), the camera shall be situated so as to ensure coverage of as much of the surroundings as is practicably possible, whilst the interview is taking place.

~~(6)~~ (7) Any removable recording medium used in the recording of an interview shall be new and previously unused.

~~(7)~~ (8) For the purposes of this section, “removable recording medium” includes magnetic tape, optical disc, solid state memory card or any removable physical recording medium which can be played and copied.

~~(8)~~ (9) An interviewing officer shall record in the approved form and in the ~~Police~~ Station Diary, any interview under this section and any reason why it was not reasonably practicable to comply with any of the provisions of this section.

~~(9)~~ (10) The recording of an interview under this section was conducted subject to section 12R shall be admissible as evidence.

Register of
Interviews

12R. (1) The Commissioner of Police shall cause to be established and maintained at each police station, a register to be known as “ the Register of Interviews” in which shall be recorded the following information:

- (a) the reference number of the interview ;
- (b) the name of the interviewee;
- (c) the number, rank and name of the interviewing officer;
- (d) the date, time and place of the interview;
- (e) the time of commencement and completion of the interview;
- (f) the manner in which the interview is recorded; ~~and~~
- ~~(g) such other information as may be prescribed by Regulations.~~
- (g) the names and calling of all other persons present during the interview;
- (h) whether any request was made by the interviewee;
- (i) what, if anything, was done to facilitate such request under paragraph (h); and
- (j) such other information as may be prescribed by Regulations.

(2) An interviewee or his representative shall on request, be provided with a copy of the entry in the Register of Interviews in relation to his interview.

(3) Where the interviewee made a telephone call to his representative, a note of that telephone call shall be recorded in the Station Diary;

(4) Where a request is made and a copy of an entry is provided pursuant to subsection (2) –

- (a) a note of this request shall be made in the Register of Interviews;

(b) the interviewee or his representative shall be asked to sign and confirm receipt of the copy; and

(c) where the interviewee or his representative refuses to sign and confirm receipt of the copy, a note of this refusal shall also be made on the Register of Interviews.

(5) Where any request for a copy of an entry is granted under this section –

(a) the extract of the request by the interviewee or his representative;

(b) the signature of the interviewee or his representative for receipt of the copy of the entry; or

(c) the refusal of the interviewee or his representative to sign and confirm receipt of the copy of the entry.
shall be admissible as evidence.

Recording of
interview

12S. (1) At the commencement of an interview, the interviewing officer shall first state-

- (a) his number, rank and name and that of any other officer present;
- (b) the name of the interviewee;
- (c) the date, time of commencement and place of the interview; and
- (d) the offence for which the interview is being conducted.

(2) The interviewing officer under this section shall also -

- (a) inform the interviewee about the recording and point out the sign or indicator which shows that the recording equipment is activated and recording;
- (b) ask the interviewee and any other person present, including his representative to identify themselves; and
- (c) caution the interviewee ~~to the effect that he is not obliged to say anything unless he~~

~~wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence as follows:~~

~~“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”.~~

~~(2A) The interviewee may be allowed to communicate with his Attorney-at-law, relative or other person if no hindrance is reasonably likely to be caused to the process of investigation, or to the administration of justice by his doing so.~~

~~(2B) The interviewee shall not only be informed orally of the rights and facilities available to him, but in addition notices describing him shall be displayed at convenient and conspicuous places at police stations and the attention of the interviewee shall be drawn to these notices.~~

~~(2C) Reasonable arrangements shall be made for the comfort and refreshment of the persons in attendance for the interview.~~

~~(2D) Wherever practicable, the interviewing officer and interviewee shall be seated.~~

(3) At the conclusion of the interview, the interviewee shall be offered the opportunity to clarify, add to or correct anything that he said during the interview, and any such clarification, addition or correction he makes shall also be recorded.

(4) An interviewing officer shall record the entire interview and ensure that the entire video or audio recorded interview is re-played to the interviewee or where applicable, re-read to the interviewee in accordance with section 12Q (4).

Objection by
interviewee to
video or audio
recording

12T. (1) Where an interviewee objects to a video or audio recording of an interview either at the outset or during the interview or during a break in the interview, the objection of the interviewee shall be recorded on the recording media by the interviewing officer.

(2) When an objection under subsection (1) has been recorded or the interviewee has refused to have his objection recorded, the interviewing officer shall state orally that he is turning off the recording equipment, give his reasons for so doing, turn the equipment off and make a written record of the remainder of the interview.

Requirements of interviewing officer at conclusion of interview

12U. (1) At the conclusion of an interview, the interviewing officer shall-

(a) make a note in his pocket diary, or by any other available means of note-taking, and in the ~~Police~~ Station Diary of –

(i) the fact that the interview has taken place and has been recorded; and

(ii) the time, duration and date of the interview;

(b) in the case of an interview that is recorded by video or audio recording –

(i) place his marking on the recording medium, label it as the master copy and request the interviewee or his representative to sign it;

(ii) make two copies of the master copy in the presence of the interviewee or his representative, label each copy as a working copy, give one copy to the interviewee and give one copy to the investigating officer; and

(iii) seal the master copy in the presence of the interviewee or his representative; and

(c) ensure that the required information is entered into the Register of Interviews.

(2) Where an interviewee or his representative refuses to sign the master copy of a recording medium, as requested under subsection (1)(b)(i), the interviewing officer shall cause the refusal to be noted in the Register of Interviews.

(3) Where a transcript of the recording of an interview is made, the interviewee or his representative shall be given a copy of the transcript within seven days of the making of the transcript.

Master copy

12V. (1) An interviewing officer shall submit the sealed and marked master copy to a police officer of the rank of Assistant Superintendent or above.

(2) The Commissioner of Police shall make arrangements to ensure that all master copies are kept securely and their movements fully accounted for, whether or not any Court proceedings are commenced in respect of the relevant interviewee.

(3) A master copy shall be retained up to and until the final determination of the court matters in which the recordings are to be used.

(4) The Commissioner of Police shall consult with the Director of Public Prosecutions, prior to the destruction of any master copy.

Breaking seal of
a master copy

12W. (1) No person shall break the seal of a master copy unless it is done in accordance with this section.

(2) Where it becomes necessary to break the seal of a master copy in order to make a copy of the master copy, because a working copy –

(a) is destroyed or otherwise unavailable;

(b) can no longer be copied; or

(c) is incapable of being used to review the interview,

the seal shall be broken by a police officer of the rank of Assistant Superintendent or above in the presence of a Justice of the Peace, and where practicable, the interviewee or his representative.

(3) An interviewee or his representative shall be informed of the intention to break the seal of the master copy and shall be given a reasonable opportunity to be present.

(4) Where an interviewee or his representative is present at the breaking of a seal under subsection (2), either of them shall be invited to reseal the master copy and sign the seal.

(5) Where an interviewee or his representative refuses to reseal the master copy and sign the seal, the Justice of the Peace shall reseal the master copy and sign the seal.

(6) Where the seal of a master copy is broken and a copy made of the master copy and the master copy is resealed, the police officer referred to in subsection (2), shall in the approved form record the procedure followed, including the date, time and place and all persons present when the seal of the master copy was broken and when the master copy was resealed.

(7) Where the interviewee or his representative is not present when the seal of a master copy is broken, the seal shall be broken in the presence of a Justice of the Peace who shall also reseal the master copy and sign the seal.

(8) The police officer referred to in subsection (2), shall ensure that the procedure followed, including the date, time and place and all persons present when the seal of the master copy was broken and when the master copy was resealed, is recorded in the Station Diary, and where practicable, by video recording .

Oral admission

12X. (1) Where a person who is suspected of, or charged with, committing an offence makes an oral admission, the investigating officer shall immediately –

- (a) caution the person ~~as follows: to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put into writing or otherwise recorded and may be given in evidence~~

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”; and

- (b) make a note in his pocket diary and the **Police** Station Diary of any oral admission made by the person to him.

(2) A note taken under subsection (1) shall -

- (a) be read to the person who shall also be asked to sign the note; and

- (b) be signed by the police officer taking the note.

(3) Where a person under this section refuses to sign the note, a written record shall be taken of the request being made and the refusal of the person to accede to the request.

(4) Where it is not practical to make an immediate note of the oral admission, the investigating officer shall, as soon as is reasonably practicable, make a note of the oral admission in his pocket diary and in the **Police** Station Diary.

(5) A note made in the **Police** Station Diary under subsection (4), shall -

- (a) be read to the person in the presence of a police officer senior in rank to the investigating officer and the person shall be asked to sign it; and

- (b) be signed by the police officer referred to in paragraph (a).

(6) Where the person refuses to sign the note under subsection (5), a written record shall be taken of the request being made and the refusal of the person.

(7) Where the person is unable to affix his signature, the investigating officer shall read the oral admission to the person and request that he puts his mark or thumbprint on it and the oral admission shall also contain a declaration that it was read to the person and he appeared to understand it and agreed to it.

Video or audio
recorded
evidence of
witness

12Y. (1) A video or audio recording of the whole or part of a witness statement shall be admissible as evidence.

~~(2) A video or audio recording may be made of the examination-in-chief, cross-examination or re-examination of a witness and the whole or part of such recording shall be admissible as the evidence of the testimony of the witness.~~

~~(3)~~ (2) Where a video or audio recording is admitted as evidence pursuant to ~~subsections (1) and (2)~~ subsection (1), all such evidence shall be admissible to the same extent and have the same effect as if it were evidence given in direct oral testimony.

~~(4)~~ (3) The admission of a video or audio recording as evidence shall not be seen as a bar to the same witness, where appropriate, being allowed to give direct oral testimony.

~~(5)~~ (4) Where direct oral testimony referred to under subsection ~~(4)~~ (3) is given, the witness shall not be asked to address any issue in examination-in-chief, cross-examination or re-examination that in the estimation of the Court has already been adequately addressed in ~~the recorded examination-in-chief, cross-examination or re-examination~~ a recording under subsection (1).

Chap. 7:02

~~(6)~~ (5) The Audio Visual Recording Rules shall apply *mutatis mutandis* to a video or audio recording of the whole or part of a witness statement.

Offences

12Z. Any person who without lawful authority –

- (a) possesses, plays or offers to supply a recording of an interview under this Division to any person; or

(b) copies, tampers with, modifies, erases or publishes a recording of an interview under this Division, commits an offence and is liable upon summary conviction to a fine of ~~fifty thousand dollars and to imprisonment for one year~~ two hundred thousand dollars and to imprisonment for twenty years.

(2) For the purposes of this section, “lawful authority” means-

(a) the Commissioner of Police or any person authorised by him; or

(b) the Director of Public Prosecutions or any person authorised by him.”.

DIVISION 4

SPECIAL MEASURES, EVIDENCE BY VIDEO LINK AND WITNESS ANONYMITY ORDERS

Vulnerable witnesses and special measures accorded to them

12AA. (1) Subject to subsection (2), in any criminal proceedings, the Court may, on an application made by a party to the proceedings or on its own motion in the interests of justice, issue a direction that a special measure or a combination of special measures shall be used for the giving of evidence by a witness.

(2) Before issuing a special measure direction, the Court shall be satisfied that-

(a) the witness is a vulnerable witness; and

(b) the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(3) For the purposes of this section, “vulnerable witness” means a witness whose ability to give evidence or the quality of whose evidence is likely to be affected by reason of –

(a) the age or immaturity of the witness;

(b) the physical disability or mental disorder of the witness ;

(c) any trauma suffered by the witness;

(d) the fear of intimidation of the witness; or

(e) the witness being a virtual complainant in proceedings for a sexual offence.

Closed
proceedings

12AB. (1) The Court may, where it considers it appropriate to protect the identity of a witness from the public, or to protect a witness from being intimidated by the presence of other persons in the courtroom, issue a special measure direction that closed proceedings be utilised.

(2) Where closed proceedings are utilised under this section, no person other than the Judge, Master, Magistrate or Attorneys-at-law acting in the proceedings, the jury, Court Interpreter or any other person who may be required to assist the Court in the conduct of its proceedings and the accused person shall be present in the courtroom during the giving of the testimony.

Screening
witness
accused from

12AC. (1) Where the Court considers it appropriate, the Court may issue a special measure direction that a witness, while giving testimony or being sworn in Court, be prevented by means of a screen or other arrangement from seeing or being seen by the accused person.

(2) The screen or other arrangement referred to in subsection (1) shall not prevent the witness from seeing or being seen by –

- (a) the Judge, Master and jury;
- (b) an Attorney-at-law acting in the proceedings; and
- (c) any Court Interpreter or other person appointed to assist the witness.

Evidence of
vulnerable
witness by video
link

12AD. (1) Subject to subsections (2) and (3), where the Court considers it appropriate, the Court may issue a special measure direction that a vulnerable witness give evidence by means of a video link.

(2) The Court may, where it deems it appropriate in the interests of justice, refuse the use of video link as a special measure, where –

- (a) the Court considers that the special measures would not be likely to improve the quality of the evidence; or
- (b) the witness requests that the special measures not be used and the Court is

satisfied that the quality of the evidence would not be diminished as a result.

(3) The Court, in deciding whether to allow evidence of a child witness by video link, shall take into account –

- (a) the age and maturity of the child;
- (b) the ability of the child to understand what is involved in giving evidence; and
- (c) any other matters that the Court considers relevant.

(4) Where the witness appears by video link, he shall be deemed to be present in the courtroom.

Support persons
and devices

12AE. (1) The Court may issue a special measure direction to ensure that a vulnerable witness is provided with such support person as it thinks fit.

(2) A support person under subsection (1) shall, as far as is reasonably practicable, ensure that a vulnerable witness is comfortable and secure while giving evidence.

(3) Where necessary, a vulnerable witness shall be provided with, or allowed to use devices to assist him to overcome any disability, disorder or impairment that may affect the ability of the witness to hear or understand questions and communicate answers.

Appearance or
giving of
evidence by
video link

12AF. (1) Notwithstanding section 12AD a Court may, on application by a party or on its own motion, issue a direction for a person to appear before the Court or give evidence in criminal proceedings by means of a video link.

(2) In deciding whether to issue a direction under subsection (1), the Court shall take into account -

- (a) whether or not it is reasonably practicable to secure the physical attendance of the person at the proceedings, having regard to –
 - (i) the expense that would be incurred in order to bring the person to attend the proceedings;
 - (ii) any logistical difficulties in the person attending the proceedings; or
 - (iii) any other factors which the Court considers relevant;

- (b) whether the use of a video link is reasonably practicable to facilitate administrative procedures where the accused person is held on remand pending his next Court appearance and evidence will not be given at the proceedings; and
- (c) whether the use of a video link is appropriate in the interests of justice.

(3) In determining whether the use of video link is appropriate in the interests of justice under subsection (2), the Court shall consider the following:

- (a) the views expressed by, or submissions made on behalf of the person or a party;
- (b) the nature of the evidence to be given;
- (d) the availability and quality of the technology that is to be used;
- (d) the ability of the party or the person, to participate effectively in the proceedings;
- (e) the ability of the accused person to consult and instruct his Attorney-at-law privately; and
- (f) any other matter the Court considers relevant.

(4) The Court, in determining whether to allow an accused person to give evidence by video link, shall in addition to the matters specified in subsection (2) and (3), take into account the following:

- (a) the risk that the personal security of a particular person including the accused person, may be endangered if the accused person appears in the courtroom or any other place where the Court is sitting;
- (b) the risk of the accused person escaping, or attempting to escape from custody when attending the courtroom or any other place where the Court is sitting;
- (c) the behaviour of the accused person when appearing before a Court in the past;

- (d) the conduct of the accused person while in custody, including the conduct of the accused person during any period in the past where the accused person was being held in custody in a prison;
- (e) safety and welfare considerations in transporting the accused person to the courtroom or any other place where the Court is sitting;
- (f) the efficient use of available judicial and administrative resources; and
- (g) any other relevant matter raised by a party to the proceedings for the making of the direction.

(5) Where evidence is given by a person by means of a video link, the person is deemed to be physically present at the proceedings and the evidence shall be admissible to the same extent and effect as if it were given in direct oral testimony.

Witness
Anonymity
Orders

12AG. (1) Where there are reasonable grounds to believe that the identity of a witness should be concealed from an accused person and the public so as to protect the witness, any of his relatives or any other person, the Court may grant a Witness Anonymity Order.

(2) A party to criminal proceedings may, in relation to a witness, make an application to the Court, for a Witness Anonymity Order.

(3) Before a Court grants a Witness Anonymity Order, the Court shall consider whether –

- (a) the proposed Order is necessary to-
 - (i) protect the safety of the witness or another person;
 - (ii) prevent any serious damage to property; or
 - (iii) prevent real harm to the public interest;
- (b) having regard to all the circumstances, the effect of the proposed Order would be consistent with the accused person receiving a fair trial;

- (c) the importance of the testimony of the witness is such that the witness ought to testify in order to preserve the interests of justice; and
- (d) the witness would not be willing to testify if the proposed Order is not made or whether there would be real harm to the witness, his family members or to the public interest if the witness testifies without the proposed Order being made.

(4) In deciding whether the conditions under subsection (3) are met, the Court shall also take into consideration, the following –

- (a) the general right of an accused person in criminal proceedings to know the identity of a witness in the proceedings;
- (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence is to be assessed;
- (c) whether evidence given by the witness might be the sole or decisive evidence implicating the accused person;
- (ca) the nature and extent of the corroborating evidence, where the evidence of the proposed anonymous witness is not the sole or exclusive evidence;”;
- (d) whether the evidence of the witness could be properly tested without his identity being disclosed;
- (e) whether the fear of giving live testimony by an intimidated witness is well-grounded and that the risk of intimidation justifies it;
- (f) whether there is any reason to believe that the witness –
 - (i) has a tendency to be dishonest;
 - or

(ii) has any motive to be dishonest in the circumstances of the case, having regard, in particular, to any previous convictions of the witness and to any relationship between the witness and an accused person or any associates of an accused person;

(g) whether it would be reasonably practicable to protect the witness by any means other than by making a Witness Anonymity Order specifying the measures that are under consideration by the Court;

(h) whether a Witness Anonymity Order is necessary and in the interest of justice, and whether such an order will impact negatively on an accused person receiving a fair trial; ~~and~~

~~(i) such other matters as the Court considers relevant.~~

(i) where there is any evidence of an attempt at witness tampering;

~~(j) such other matters as the Court considers relevant.~~

(4A) Before granting a Witness Anonymity Order, the Court may request a risk assessment report from the police which shall include the following:

(a) an assessment of the reasonableness of the fear of the witness;

(b) an explanation of the inadequacy of other special measures.

(5) A Witness Anonymity Order shall as far as reasonably practicable, include measures for ensuring -

(a) that the name and other identifying details of the witness are withheld or removed from materials disclosed to any party to the proceedings;

(b) that the witness uses a pseudonym;

(c) that the witness is not asked questions that might lead to the identification of the witness;

(d) that subject to subsection (6), that the witness is prevented by means of a screen or other arrangement from seeing or being seen by the accused person or the public; and

(e) that subject to subsection (7), that the voice of the witness is subjected to modulation to any specified extent.

(6) Each party to the proceedings shall have an opportunity to make oral representation to the Court on an application for a Witness Anonymity Order.

~~(6)~~(7) A witness shall not be screened to such an extent that the witness cannot be seen by –

- (a) the Judge, Master or Magistrate; or
- (b) the jury where applicable, Court interpreter or any other person who may be required to assist the Court in the conduct of its proceedings.

~~(7)~~(8) The voice of a witness shall not be modulated to such an extent that the natural voice of the witness cannot be heard by –

- (a) the Judge, Master or Magistrate; or
- (b) the jury where applicable, Court interpreter or any other person who may be required to assist the Court in the conduct of its proceedings.

~~(8)~~ (9) The Court may discharge or vary a Witness Anonymity Order which it previously made if it appears appropriate for it to do so in light of subsections (3) and (4).

(10) The Court seal the documents regarding a Witness Anonymity Order.

(11) The Court may order the continuation of the anonymity of a witness after the conclusion of a trial, in the interests of justice.

Order not to
prejudice
accused

12AH. Where the Court gives a direction or makes an order under this Division and the particular proceedings require a trial by jury, the Judge shall give the jury such warning as the Judge considers appropriate to ensure that the fact that an order was made does not prejudice the accused person.

DIVISION 5

SUPPLEMENTAL PROVISIONS

Closed circuit
television
(CCTV)

12AI. A video recording recorded by means of a closed circuit television camera shall be admissible as evidence.

Regulations

12AJ. The Minister in consultation with the Director of Public Prosecutions and Commissioner of Police, may make Regulations –

- (a) prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made where a person is to use any audio or video recording medium;
- (b) prescribing the types of photographs, screens and support devices;
- (c) prescribing forms for the purposes of this Part; and
- (d) providing for such other matters as are necessary or expedient for giving effect to this Part.

Provisions of
other Acts and
Rules to apply
Chap. 11:28
Chap. 46:01

12AK. Notwithstanding the provisions of this Part, where a person under this Part is a child, the provisions of the Sexual Offences Act, the Children Act, the Judges Rules for Children 2016 and any other written law relating to a child, shall apply as necessary.

Exclusion of
unfair evidence

12AL. In any criminal proceedings, a Court may refuse to allow evidence of which the prosecution proposes to rely to be given, if it appears to the Court that having regard to all the circumstances, including –

- (a) any breach of this Part or any regulations made under section 12 AJ; and
- (b) the circumstances in which the evidence was obtained,

the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

Approved form
admissible as
evidence

12AM. A duly completed approved form referred to
under this Part, shall be admissible as evidence.

Section 14
amended
Section 15
amended

5. The Evidence Act is amended by repealing section 14(1).

5A. The Evidence Act is amended in section 15(2) by deleting the words
“confer on” and substituting the words “deny”.

First Schedule
inserted

6. The Evidence Act is amended in Part VII, by deleting the words “(Repealed
by Act No. 28 of 1996)”, occurring after the words “FIRST SCHEDULE”
and substituting the following:

“(Section 12H)

(This Form applies where the suspect does not have a representative present)

REPUBLIC OF TRINIDAD AND TOBAGO

CERTIFICATION BY THE JUSTICE OF THE PEACE OF CONDUCT OF IDENTIFICATION
PROCEDURE

WHEREAS the suspect (NAME OF SUSPECT)..... was on the
..... day of, 20 asked to consent to
participate in an identification procedure namely :

- (a) identification using video medium ☐
- (b) identification parade ☐
- (c) identification in a public place with the consent of the suspect ☐
- (d) identification in a public place without the consent of the suspect ☐
- (e) identification by confrontation ☐

And whereas I....., Justice of the Peace for the County of was
present during the conduct of the identification procedure, I hereby certify that:

- (a) the suspect was informed of his rights under section 12F, including the right to have a
representative present during the identification procedure; ☐
- (b) the suspect was cautioned; and ☐
- (c) the suspect gave his consent to participate in the identification procedure; ☐

And whereas the suspect was given at least 9 hours' notice of when the identification procedure
is to be conducted, I also hereby certify that -

- (a) the time period for the representative of the suspect to be present has expired; ☐ and
- (b) the suspect elected not to have a representative present during the identification
procedure. ☐

(c)the identification officer discharged his functions under section 12F; Yes ☐ No ☐

(d) where the identification officer failed to discharge his functions under section 12F, I notified the suspect of this failure. □

And I also hereby certify the following:

- (a) Objections/ Statements, if any, made by the suspect during the Identification Procedure –
- (b) Unusual occurrences, if any, during the identification procedure –

(Signed)

.....
Justice of the Peace”.

Second
Schedule
amended

7. The Evidence Act is amended in the Second Schedule –

(a) by inserting in Column I, above the reference to “(Inland Revenue Department)” the words “Financial Intelligence Unit of Trinidad and Tobago”; and

(b) by inserting in Column II, above the reference to “Commissioner of Inland Revenue” the word “Director”.

Passed in the House of Representatives this day of , 2019.

Clerk of the House

IT IS HEREBY CERTIFIED that this Act is one the Bill for which has been passed by the House of Representatives and at the final vote thereon in the House has been supported by the votes of not less than three-fifths of all members of the House, that is to say, by the votes of members of the House.

Clerk of the House

I confirm the above.

Speaker

Passed in the Senate this day of , 2019.

Clerk of the Senate

IT IS HEREBY CERTIFIED that this Act is one the Bill for which has been passed by the Senate and at the final vote thereon in the Senate has been supported by the votes of not less than three-fifths of all the members of the Senate, that is to say, by the votes of Senators.

Clerk of the Senate

I confirm the above.

President of the Senate

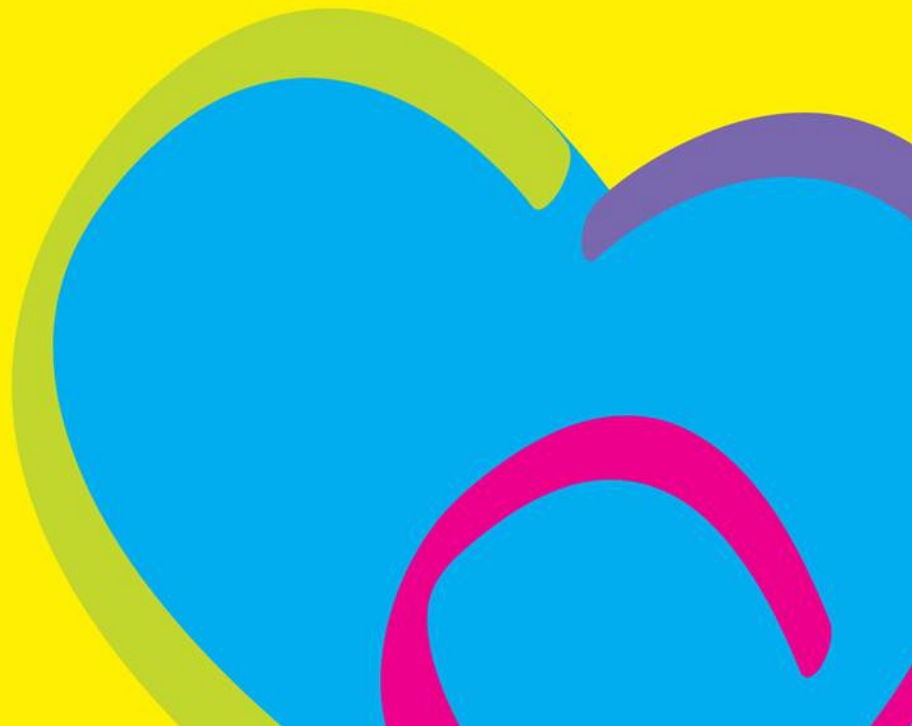
APPENDIX VI

STAKEHOLDER SUBMISSIONS RECEIVED



Special Select Committee (Senate) on the Evidence (Amendment) Bill, 2019

**Written Comments submitted on behalf of the Children's
Authority of Trinidad and Tobago**



By letter dated 18th September 2019, the Children’s Authority of Trinidad and Tobago (“the CATT”) was invited to submit written comments on the Evidence (Amendment) Bill, 2019 which was referred to a Special Select Committee of the Senate for consideration and report.

The CATT extends its gratitude to Senator the Honourable Clarence Rambharat, Chairman of the Special Select Committee for the opportunity to submit its comments on this critical legislative development, which has the potential to revolutionise the laws of evidence which affect the criminal prosecution of offences against children.

In this regard, the preliminary comments of the CATT on the amendments as proposed in the Evidence (Amendment) Bill are set out hereinbelow:

1. Applicability of the proposed Division 3 (provisions for recording of interviews) to Forensic Interviews of children at risk conducted by the Children’s Authority of Trinidad and Tobago

- 1.1 The CATT respectfully submits that consideration be given to the expansion of the application of the laws relating to the video recorded statements to the conduct of Forensic Interviews by the CATT for use in Wardship and Care Proceedings under the Children’s Authority Act Chap. 46:10.

- 1.2 By virtue of the Children’s Authority Act, Chapter 46:10 (hereinafter called “**the Children’s Authority Act**”), the CATT is responsible, *inter alia*, for the provision of care, protection and rehabilitation of children in accordance with Part III of the Children’s Authority Act Chap. 46:10. The legislative powers of the CATT in this regard include the mandate to investigate complaints or reports of mistreatment of children and upon investigation, removing a child from his home where it is shown that the child is in imminent danger.

- 1.3 Imminent danger’ is defined in the Children’s Authority Act Chap. 46:10 as the risk of physical, emotional, mental or psychological harm to the child.

1.4 Where the Authority forms the view that a child which is brought to its attention is a child in need of care and protection within the meaning of section 22(1A) of the Children's Authority Act Chap. 46:10, it may where appropriate, receive the child into its care and immediately apply to the Children's Court for a Wardship and / or Care Order or any other relevant order for the care and protection of the child as may be deemed necessary for the care and protection of the child under sections 23 and 25 of the Children's Authority Act Chap. 46:10.

1.5 The Child Protection Unit of the Trinidad and Tobago Police Service ("the CPU") was established in 2015 as a specialised Unit of the TTPS to mandated to receive, investigate and prosecute certain offences relating to children created under the laws of Trinidad and Tobago and to collaborate and cooperate with and support the Authority in the execution of its functions and duties under the Children's Authority Act and the Children Act, 2012.

1.6 In this regard, the CATT and the CPU have established a partnership and work closely and collaboratively in pursuance of the requisite psychosocial and criminal investigations respectively triggered by the receipt by the Authority of any report of the ill-treatment of a child, which may involve the commission of an offence against the child under the Children Act, 2012 or an offence mentioned in Schedule 1 of the Children Act, 2012 has been or there is reason to believe has been, or is likely to be committed or any child who is at risk of harm as defined in Section 50(14) of the Children Act, 2012.

1.7 The CATT and CPU also partner in relation to the removal from their home of children who are deemed to be in imminent danger as defined in the Children's Authority Act Chap. 46:10.

1.8 As part of its evidence gathering in relation to the civil care proceedings and possible criminal proceedings which may potentially arise in relation to the child who is received

into care by the CATT, the CATT and CPU have developed and agreed to a Forensic Interviewing Protocol for vulnerable children.

1.9 The Child Protection Unit of the Trinidad and Tobago Police Service (“CPU”) is responsible for interviewing children who are victims or witnesses of crimes for the purpose of taking statements for the investigation of any criminal offence committed against the child.

1.10 Where the CPU requests that the Forensic Interview be led by a psychologist or social worker recommended by the Authority and trained in the Forensic Interviewing of children or who possesses such other specialty as may be required, the conduct of the Forensic Interview by the Authority’s designated psychologist or social worker is expressly agreed in writing between the Authority and the CPU.

1.11 A forensic interview entails an audio-video recorded interview with the child conducted in a specially equipped and designated space within the Authority’s Assessment Centre, Mount Hope. During the conduct of the forensic interview, the interviewer shall utilise non-suggestive, legally admissible, developmentally appropriate processes for gathering the child’s account of events.

1.12 The Authority, so far as is practicable, facilitates the conduct of a video-recorded forensic interviews of children brought to its attention at the Authority’s Assessment Centre in any case involving an allegation that an offence under the Children Act, 2012 (the Act) or an offence mentioned in Schedule 1 of the Act, has been committed against a child and in relation to which the Trinidad and Tobago Police Service intends to file an application in accordance with Part XIII of the Children Act, 2012 seeking an order of the Court to:

- (a) take in writing the deposition of the child;
- (b) have recorded by audio digital recording or computer aided transcription, the evidence of the child; or

(c) have the child appear from a remote location by video conferencing in accordance with the rules made by the Rules Committee of the Supreme Court.

1.13 Where a video-recorded forensic interview is to be conducted at the Authority's Assessment Centre, the CPU investigating officer assigned to the case and the Authority's staff attached to the Assessment Centre shall, prior to the conduct of the forensic interview, conduct a pre-interview conference during which the parties shall:

- (i) plan the structure of the interview,
- (ii) determine whether the child is particularly vulnerable or traumatised, and
- (iii) designate a suitably trained CPU officer and/or the Authority's designated psychologist or social worker to conduct the interview.

1.13 All decisions taken in the pre-interview conference are recorded in a Forensic Interview Briefing Agreement Form which shall be signed by the CPU officer, the Authority's authorized representative and all persons involved in the conduct of the Forensic Interview.

1.14 Where a child is determined by the CPU assigned investigating officer and the Authority's designated psychologist or social worker to be particularly vulnerable or traumatised, the CPU shall seek the leave of the Court to permit the Authority's designated psychologist or social worker to lead the forensic interview of such child.

1.15 Where the Authority's designated psychologist or social worker leads a forensic interview pursuant to clause 6 the CPU officer may either:

- (a) remain in the room with the psychologist or social worker and the child for the duration of the interview, or;
- (b) observe the forensic interview behind a one-way mirror and may assist the Authority's psychologist or social worker in the conduct of the interview through the use of an electronic device for this purpose.

- 1.16 The CPU shall be responsible for the production of the transcript of the forensic interview in accordance with the provisions of the Recording of Court Proceedings Act, Chap. 4:31 and by the Rules of the Supreme Court which are referred to therein.
- 1.17 Where the Authority's designated psychologist or social worker leads a forensic interview pursuant to clause 6, the Authority shall verify in writing the accuracy of the transcript of the interview provided by the CPU.
- 1.18 Critically, although the protocol described above was designed to assist the CPU in the gathering of evidence for the prosecution of criminal offences against children, the audio/video recorded evidence obtained in these Forensic Interviews will also be critical evidence in the civil Wardship / care proceedings initiated by the CATT following the receipt of a child into its care.**
- 1.19 Having regard to the above, the CATT requests that consideration be given to extending the ambit of the proposed provisions within Division 3 of the Evidence (Amendment) Bill 2019 dealing with the recording of interviews to Wardship and care proceedings initiated by the CATT under sections 23 and 25 of the Children's Authority Act, Chap 46:10.

2. Applicability of the proposed section 12X (treating with Oral Admissions) to psychological assessments of potential child offenders conducted by the CATT

2.1 As part of its psycho-social investigation into the manner in which a child who was received into the care of the Authority was treated prior to said removal, the CATT in accordance with section 14 of the Children's Authority Act, Chap 46:10, conducts a multi-disciplinary (medical, social and psychological) assessment of the child and his/her parents / guardians. The findings of said multidisciplinary assessment are compiled within a Treatment Plan which sets out the recommended placement options for the child. This Treatment Plan is approved by the CATT Board of Management prior to being filed as evidence in support of the Wardship / Care proceedings initiated by the CATT for all children received into its care.

2.2 Having regard for the potential for admissions being made of offences against a child by parents/ guardians who are assessed by the CATT following the child's receipt into its care, the CATT submits that consideration should be given to in the Evidence (Amendment) Bill to **the admissibility of such admissions which are recorded by the CATT clinicians during the assessment process** in civil Wardship / Care proceedings and / or related criminal proceedings arising out of any offence committed against a child, which was admitted to by the perpetrator during the course of the CATT's assessment process.

2.3 Legal research reflecting the approach adopted by other jurisdictions in relation to admissions given during the assessment of a party by the civil child protection agency can be collated and submitted to the Special Committee upon its request for same.

3. Applicability of the proposed sections within Division 4 of the proposed Bill (treating with Special Measures, Evidence by Video Link and Witness Anonymity Orders) to civil Wardship / Care proceedings initiated by the CATT under the Children's Authority Act, Chap. 46:10
-

Special Measures

- 3.1 The policy underlying the special measures under the proposed section 12AA of the Evidence (Amendment) Bill is of clear relevance and applicability to children and witnesses within Wardship/ Care proceedings initiated by the CATT under the Children's Authority Act, Chap. 46:10. In this regard, the CATT submits that consideration be given to the extension of the provisions under section 12AA to child witnesses and other vulnerable persons (eg victims of spousal abuse) who are subject to said proceedings.

Witness Anonymity Orders (proposed section 12AG)

- 3.2 Like the TTPS, the CATT has since being operationalised, advocated to members of the public that they have the option to report instances of child mistreatment to the CATT anonymously. This strategy seeks to treat with the previously low rates of reporting of child sexual and other abuse due to a fear by persons with information (including medical professionals and educators) of retaliation by the alleged offender if the identity of the reporter is revealed.
- 3.3 Although the CATT may successfully achieve an interim order for its removal of a child into its care based on an anonymous report received, where the care proceedings are contested, the CATT must rely on anonymous reporters to present their evidence to the Court as witnesses.
- 3.4 To this extent, the CATT submits that the provision for the grant of a Witness Anonymity Order as set out under the proposed section 12AG of the Evidence (Amendment) Bill 2019

should be extended to a Court with conduct of Wardship/ Care proceedings initiated by the CATT under the Children's Authority Act, Chap. 46:10.

The CATT extends its gratitude to the Special Committee for its consideration of the proposals submitted herein and remains committed to making all further contributions necessary for the successful finalisation of the Evidence (Amendment) Bill 2019.

DNA Custodian Unit Review of Evidence (Amendment) Bill, 2019

This document presents a review of the *Evidence (Amendment) Bill, 2019*. This review is submitted in response to the **Request for Written Comments on the Evidence (Amendment) Bill, 2019** dated 18th September, 2019. The DNA Custodian Manager wishes to advise that, while it is a great honour to be consulted, the contents of the ***Evidence (Amendment) Bill, 2019*** (and the ***Evidence Act, Chap. 7:02***² it purports to amend), falls outside the purview of the DNA Custodian Unit. As such, comments outlined in this review are not based on professional experience in the field of “identification procedures, interviews and oral admissions, special measures, the taking of evidence by video link and witness anonymity orders” as cited in the *Evidence (Amendment) Bill, 2019*.

GENERAL COMMENTS

The *Evidence (Amendment) Bill, 2019* seeks to amend the ***Evidence Act, Chap. 7:02***² and provide for the use of different identification procedures, interviews and oral admissions, special measures, the taking of evidence by video link and witness anonymity orders. In providing comments on the contents of the *Evidence (Amendment) Bill, 2019*, a comparison was made to the United Kingdom’s Police and Criminal Evidence Act 1984 codes of practice and the Criminal Evidence (Witness Anonymity) Act 2008.

The DNA Custodian Unit suggests the following additions for improvement of the *Evidence (Amendment) Bill, 2019*:

I. Division 2 - Identification Procedures

- Under **12B (1)** i.e. “Prior to the conduct of an identification procedure.....” may imply that a suspect is known and available to participate in an identification procedure. Further guidelines should be provided for the use of and selection of photographs when the suspect is known as the contents of the photograph may lend prejudice to the subsequent identification procedure, in particular, when the known suspect’s photograph is used.
- Under **12F (1)**, a clause(s) whereby the suspect shall be “informed of the reason for the identification procedure” should be added.

II. Division 3 - Interviews and Oral Admissions

- Under **12Q**, the addition of a clause(s) whereby “before the commencement of an interview proceeding, a suspect and or his representative shall be given sufficient information about the nature of the offence and why they are suspected of committing it in order to allow for the effective exercise of the rights of the defence”.
- Under **12S**, the addition of a clause(s) whereby “the interviewing officer under this section shall also, in the event that a removable recording medium is used in the recording of an interview, ensure that the new and previously unused recording medium is unwrapped or opened, loaded in the recording device and set to record in the view and presence of the suspect and or his representative”.
- Under **12S**, the addition of a clause(s) to provide for the event whereby a change in recording media or a break is necessary and also failure of the recording equipment after the commencement of an interview.
- Under **12Q, 12S** or **12X**, the addition of a clause(s) to provide for the interviewing (and recording of interviews) of suspected juveniles, incapable and or vulnerable persons (disabled due inebriation, narcotics, illnesses, ailments, conditions) and non-English speaking interviewee/suspects.

III. Division 4 - Special measures, evidence by video link and Witness anonymity orders

- The clauses within Division 4 were consistent with the United Kingdom’s Police and Criminal Evidence Act 1984 codes of practice and the Criminal Evidence (Witness Anonymity) Act 2008 therefore the Custodian Unit has no further recommendations to this section.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Winsure Building, No. 24-28 Richmond Street
Port of Spain, Republic of Trinidad & Tobago, West Indies

Phone: (868) 225-4DPP; 623-7532/625-8737 (South Office) 652-2225 Fax: (868) 225-1164 Email: dpp@dpp.gov.tt

1st November, 2019

The Secretary,
SSC Evidence (Amendment) Bill 2019,
Office of the Parliament,
Level 3, Tower D,
The Port-of-Spain International Waterfront Centre,
1A Wrightson Road,
PORT-OF-SPAIN.

Re: Request for Written Comment and Invitation to Attend Stakeholder Engagement Session with the Special Select Committee (Senate) appointed to consider and report on the Evidence (Amendment) Bill 2019

Reference is made to yours of 17th September 2019 and your request for written comments on the **Evidence (Amendment) Bill 2019** (hereinafter 'the Bill'). I wish to, firstly, thank the Committee for the opportunity extended to comment on this very important Bill which laudably attempts to legislate on some fundamental matters of criminal justice. I have carefully perused the Bill and make the general and specific comments below.

A. FIRST DESCRIPTION

On the issue of information contained in the record of the first description at the proposed section 12A(2)(c) it is recommended that other specifically required areas to probe the eye-witness are (i) whether, and if they have, how many times they had seen the person who committed the offence before; and (ii) whether there was anything impeding the view of the witness as is required by the case of **La Vende v The State (1979) 30 WIR 460**, ('Tab A') at pages 467 to 469, a decision of our Court of Appeal which adopted the English decision of *Turnbull*.

B. USE OF PHOTOGRAPHS

It is submitted that it is quite appropriate to use photographs in establishing the identity of an offender under the existing common law, as is the intention of the proposed section 12B. It is however important to note that the common law, based on its sense of fairness, as outlined by the Privy Council in **Charles v R (2007) 70 WIR 158** ('Tab B') at paragraph 12 and the Australian High Court in **Alexander v R (1981) 34 ALR 289** at pages 292 to 293 ('Tab C'), opined that photographs ought not to be used while a suspect is in custody in deference to what they had thought to be preferable, an identification parade. This issue is connected with what, in my respectful view, should be the first preference in terms of mode of identification procedure dealt with at proposed section 12E, namely an identification parade. It should be clearly stated, in my

respectful view, that photographs should not be used to establish identity if a suspect is in custody, and that if there is a suspect in custody the police should then move to one of the proposed identification procedures outlined in proposed section 12E. It is submitted that otherwise it would be easily argued that the memory of the photograph in the mind of the eye-witness may taint any further identification procedure employed.

On a similar issue, it is submitted, that some clarity should be provided for the definition and distinction between what is a “sketch” and a “composite” in the proposed sections 12G(11) and 12H(6).

C. WHEN AN IDENTIFICATION PROCEDURE IS REQUIRED

This matter is treated with by the proposed section 12C of the Bill. There are several common law Privy Council authorities which indicate that an identification parade should be held when it would serve a “useful purpose”, for instance, *France v R (2012) 82 WIR 382* (‘Tab D’) at paragraph 28, and the principles are well defined judicially. It is submitted that for a harmonious match to the common law that the proposed section 12 C(2) should be re-worded to replace the word “necessary to do so” with “useful”.

It is submitted that there is a difficulty with the proposed section 12C(4)(b)(iii) in the abrogation of the need for an identification procedure if the suspect admits presence and gives a similar account. It is submitted that those admissions are admitted as a matter of the court’s discretion and it may in circumstances be excluded if the court believes it unfair to allow it. The prosecution may then have to fall back to the evidence of the eye-witness whose identification has not been properly tested in an identification procedure, if that proposed section were to be followed. It is suggested that that proposed section be removed.

D. ORDER OF PRIORITY OF IDENTIFICATION PROCEDURES, RIGHTS AND REPRESENTATIVES

It is submitted, in the context of proposed section 12 E (1), that the first in the order of priority of the identification procedures should be identification parades. It is a familiar practice of antiquity; it is one where there is the most control by the identification officer of (i) the persons comprising the parade, e.g. their movement and speech; and (ii) the involvement of the suspect’s representative.

In relation to the rights which the suspect should be advised of in the proposed section 12F there are a few queries in that area, namely (i) the right of being advised of legal aid, is presumably referable to the statutory right to duty counsel under the *Legal Aid and Advice Act, Chap. 7:07* (‘Tab E’) at section 4A(1) which is restricted to certain offenders and certain offences, so there is no general right to legal aid at the stage of the investigative process, so as worded the provision may require the police to advise a suspect of a right he does not have; (ii) it is unclear why the suspect needs to be advised of his right to be presumed innocent as is done by the proposed section 12F(a)(ii) and that is well beyond the rights that a suspect would be advised of as is the common law and practice; and (iii) the requirement of advising of the right against self-incrimination and right to remain silent under proposed section 12F(a)(iii) and (iv) on the one hand and the proposed 12F(b) appear to be superfluous, and it is submitted that the proposed section 12F(b) should replace the proposed section 12F(a)(ii) and (iii).

It is submitted that the nine hours’ notice required to be given to the representative to attend an identification procedure under the proposed section 12G(3) may be problematic to the investigators given that time is running from the detention of the suspect and generally speaking

he should be charged or released within forty-eight hours. It is submitted that a reasonable opportunity, in the discretion of the identification officer, be permitted to have the suspect's representative attend and failing that, a Justice of the Peace may then be appointed to protect his interests.

It is submitted that on a review of the proposed section 12 H (3), that it is difficult to see how a Justice of the Peace can "ensure" that the identification officer does certain things, in the absence of a coercive power. It is submitted that the Justice of the Peace should certify on the prescribed form whether the identification officer has discharged his obligations under the proposed section 12F, and if the identification officer has not done so, for the Justice of the Peace to notify the suspect of that himself.

It is also submitted that an identification parade should not be stopped because a member refuses to comply with a request under the proposed section 12 L (5) but that the identification officer should have the power to remove and replace that member of the parade.

It is noted that the Bill places considerable reliance on Justices of the Peace who are in short supply in this Office's observation. This reliance can be lessened by the adoption of the formula in Rule 6 of Appendix B of the Judges' Rules on the taking of statements ('Tab F') which permits a "responsible member of the community" to safeguard the investigative procedure.

E. REPRESENTATIVES AND VIDEO MEDIUM IDENTIFICATION

The proposed section 12J of the Bill treats with identification by video medium which is listed in the Bill as the premier identification procedure. The suspect is explicitly excluded from being present at this procedure by the proposed section 12 J (5), which is understandable in terms of minimizing the risk of intimidation of the eye-witness. There is, however, no provision for even a representative of the suspect to witness this procedure as it is not covered by the proposed section 12G (1), so there is no independent person who can verify that the identification officer has properly carried out the video procedure, for instance, that he/she has not drawn the attention of the eye-witness in such a way as to cause him to falsely identify the image of the suspect. The moving images are not archived as with photographs, by virtue of proposed section 12B (4), or with a parade, by virtue of proposed section 12K(7)(a) for possible later courtroom production so that the tribunal of fact can determine whether the other participants in the particular procedure indeed resembled the suspect. In that regard the involvement of a suspect's representative to make objections on the grounds of dissimilarity to the moving images of the persons in the procedure is crucial for fairness, as is provided for parades at the proposed section 12K(4). It is submitted that a representative of the suspect and failing that, a Justice of the Peace should be present at an identification by video medium. It is also submitted that these moving images should be similarly archived as with photographs and a parade.

It is also submitted that the proposed section 12J(3) should impose a requirement similar in terms to the proposed section 12K(3) that the array consists of persons resembling the suspect in terms of height as well.

In cases of multiple eye-witnesses in a video medium procedure it is submitted that the similar protections provided for parades at 12L(1), (2)(a), (2)(c), (2)(d), and (3) should be given.

F. IDENTIFICATION PARADES AND PUBLIC IDENTIFICATION

It is submitted that, on a review of proposed section 12K (1), that parades should always be held in a room where the eye-witness can see the parade without being seen and there should be no "normal room" option. This is submitted on the basis of concerns about witness intimidation. It is submitted that the requirement of the identification officer to remain impassive in demeanour and expression at parades and indeed all identification procedures as was provided at **Rule 15 of the Judges' Rules** on identification ('Tab G') be included in the Bill so as to bar any improper signaling of the suspect.

It is submitted that for public identification procedures that the protective provisions at 12L (1), (2)(a), (2)(c), 2(d) and (3)(b) be applied for cases of multiple eye-witnesses with appropriate modifications.

G. CONFRONTATION

It is submitted that the definition of confrontation in the proposed section 12 is problematically worded. A confrontation is held by the proposed section 12O (1) when the suspect refuses to consent to any other identification procedure, therefore it is wrong to say, it is respectfully submitted, that a confrontation occurs "without the consent of the suspect". It is indeed by his choice that resort is had to a confrontation. It is therefore submitted that the words "without the consent of the suspect" in the proposed section 12 definition of confrontation be deleted.

H. SUGGESTION FOR REFORM- VERIFICATION

There has been the practice where eye-witnesses may know suspects quite well but only know them by their alias or first name and the police need to simply confirm that the person the witness is speaking about in their statement is in fact the person in custody. The police have described this practice as a verification procedure. It is submitted that this informal practice be legislated, and as this is a case where identification is not, in its true sense, an issue, it is submitted that the procedure may involve officers who conducted the inquiry but should be conducted by an identification officer who, akin to a confrontation simply asks the eye-witness, "is this the person you referred to as X in your statement." It is submitted that this process be an identification procedure in the proposed section 12E (1).

I. INTERVIEWS AND ORAL ADMISSIONS

It is submitted that it is a quite welcome proposal to have interviews primarily video and audio recorded by virtue of the proposed sections 12Q(2)-(4) because of the sheer volume of allegations made against the police by suspects concerning their conduct. The proposed section 12Q(8), it is submitted respectfully, is unclear in that the way it is written, it seems to suggest that all interviews, including video and audio recorded ones, should be recorded in the approved form and station diary, as it reads "shall record...any interview under this section...". This provision as worded seems to be superfluous. It is submitted, that it is impractical, owing to the importance of the station diary to the general operation of a police station and space constraints, because of how long suspect interviews generally are, to record interviews in the station diary.

It is also submitted that it may be dangerous to as the proposed section 12W requires to place the master copy of the recording of interviews into the hands of the suspect himself.

It is submitted that it should be included in the proposed section 12S(2), as was a salutary requirement of the common law under Rule 8 of Appendix B of the Judges' Rules on the taking of statements ('Tab H'), that a suspect be informed of his rights to speak to a friend or counsel before and during questioning. It is submitted that the provisions of Rule 3 of that Appendix also be included in the proposed section 12S (2) to codify the duty of the interviewing officer to make reasonable arrangements for comfort and refreshment of the suspect and his representative.

Indeed, it is submitted that the general principles in the *Judges' Rules* at Rule I and II should be incorporated in the Bill. It is submitted that Rule III of the *Judges' Rules* should not be, as the rationale for it is tenuous once the suspect has been clearly advised of his rights before questioning on a review of authorities such as the Privy Council decision of Miguel v The State [2012] 1 AC 361 ('Tab I') at paragraphs 16 to 19 and the local Court of Appeal decision of London v The State, Cr App 24/01 ('Tab J') at pages 6 to 7.

With respect to oral admissions, it is submitted that the wording of the proposed section 12X (1) (a) poses some difficulty because it seems to suggest that a caution should be applied only after an admission is made. It is submitted as above that Rule I and II of the *Judges' Rules* be written into the Bill and that proposed section 12X (1) (a) be deleted.

It is submitted that the penalties for the offences at the proposed section 12Z are too low for acts that may constitute attempts or the commission of the common law offence of perverting the course of public justice, see Blackstone's Criminal Practice 2019 at paragraphs B14.35 and B14.37 ('Tab K'), which is treated as quite serious, offending as is demonstrated by the fact that the sentence is at large by virtue of section 7 of the Criminal Offences Act, Chap. 11:01 ('Tab L'). It is also submitted that "lawful authority" as defined in the proposed section begs the question as to who that authority is. It is submitted that that lawful authority should be clearly defined and should include the Commissioner of Police and the Director of Public Prosecutions.

J. SUGGESTION FOR REFORM- ADVERSE INFERENCES FROM SILENCE

It is submitted that a crucial measure that should assist in terms of fairer prosecution is the adoption of the English model of drawing adverse inferences from a suspect's silence in certain circumstances, see Murphy on Evidence, 13th Edition, ('Tab M') at pages 377 to 401. These provisions would lead to a conviction of the guilty by avoiding manufactured defences crafted to fit the evidence of the prosecution after being fully disclosed at trial. It may also acquit the innocent in that information revealed by a suspect in the interview may destroy the prima facie evidence collected by the police and may lead to him/her not being charged at all. This requirement for an early statement of defences already exists, albeit in a limited form, by virtue of a practice direction of the learned Chief Justice in the Disclosure of the Defence under the Criminal Procedure Rules 2016 in the Gazette Volume 56 Number 138 ('Tab N') which was approved in the High Court decision of O'Brien v Chief Justice, CV2018-00854 ('Tab O'). An instructive Privy Council authority on this issue is the decision of AG v Sexius [2017] LRC 349 ('Tab P').

K. SPECIAL MEASURES AND CCTV FOOTAGE

The proposed sections 12AA to 12AH of the Bill enabling the court to grant special measures, testimony by video link and anonymity orders are very welcome and proportionate additions to the criminal justice landscape given the reality the prosecution faces of unwilling and hostile witnesses, including even family members of deceased persons at trials of the latter's accused killer. The provisions are drawn from the English experience which allows for the court to obtain ready jurisprudential guidance, see Blackstone's at paragraph D14.19 ('Tab Q').

It is submitted that the proposed section 12AA (3) should contain a specific provision for witnesses in gang and terrorism prosecutions to be deemed vulnerable witnesses, because of the inherent problem of fear in those matters. It is also submitted that there should be a sweeping section, again in the proposed section 12AA (3), allowing the court to consider any other factor it deems fit in the interests of justice.

It is submitted that the proposed section 12AI making CCTV footage automatically admissible is a quite welcome proposal given the multitude of views judicially on its admissibility and its importance to modern day crime detection. The accused person can always as a matter of weight challenge the quality of the video, its operation and in particular whether its time stamp is correct which may be important in certain situations, e.g. proving or disproving an alibi, so in my respectful view, the measure is proportionate.

L. FORMS AND PROCEDURE

It is submitted respectfully, with regard to the proposed section 12AJ that having regard to the impact the material covered by that section could have on the criminal justice system that the Director of Public Prosecutions is also consulted by the Minister along with the Commissioner of Police.

M. THE EXCLUSIONARY DISCRETION

With regard to the proposed section 12AL creating a statutory discretion to exclude prosecution evidence, it is submitted that consideration be given to preserving expressly the common law discretion of a trial judge to exclude evidence which is differently worded to the proposed section namely, that the evidence is more prejudicial than probative. This was done in the English legislation, presumably to avoid any unintended consequences of relying only on the statutory discretion alone and displacing long settled common law, see Murphy on Evidence at pages 46 to 51 ('Tab R').

N. SUGGESTION – SUBSTANTIVE ACT, RIGHT OF REPLY

It is respectfully submitted that consideration be given on a review of section 15(2) of the substantive Evidence Act, Chap. 7:02 ('Tab S'), which is connected to section 40 of the Criminal Procedure Act, Chap. 12:02 ('Tab T'), to give the prosecution an independent right to give a closing address and not have it tied to whether or not the defence have given a closing address. In this regard the legal framework is addressed in a local Court of Appeal decision of Guerrero v The State, Cr App 33/07 ('Tab U') at paragraphs 56 to 62. The prosecution case at the opening of a trial is almost never the one that goes to a tribunal of fact, and the prosecutor should be able to address them on any inconsistencies or discrepancies that arise on its case, particularly as the prosecution bears the burden of proof. It is submitted that there is no unfairness in this proposal because the defence can always request to address themselves.

Yours respectfully,



/s/ Roger K. Gaspard, S.C.

Director of Public Prosecutions

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COMMENTS ON THE EVIDENCE (AMENDMENT) BILL 2019

NOVEMBER 15, 2019

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A. Introduction

The Evidence (Amendment) Bill, 2019 seeks to amend the Evidence Act, Chap. 7:02 ("the Act") to provide for the use of different identification procedures, interviews and oral admissions, special measures, the taking of evidence by video link and witness anonymity orders.

The following reflects comments and recommendations by members of the Judiciary after having considered the Bill.

B. General Comments

1. Section 3

The recommendations made for the definitions in Section 3 1A are as follows:

- 1.1. The term "document" must include the information, which is retrieved from a device, as well as information retrieved by a device in which information is recorded or stored.
- 1.2. In the Act, "statement" refers to "any representation of fact, whether made in words or otherwise. Judicial officers have suggested that this definition include oral or written admissions sworn or unsworn. Additionally, it may be difficult to state "or otherwise" by way of further explanation whether it includes but is not limited to the use of sign language and any language other than that of the spoken language of the land. Further to this, there ought to be foundation requirements to ensure authenticity, particularly if this definition includes photographs and videos.
- 1.3. Clear protocols or guidelines should accompany the obtaining of statements such as the circumstances under which the statements were obtained, the persons present, the methodology used to obtain the statement, the cautions administered, chain of custody issues, condition and treatment of the suspect or accused, and the qualifications and rank of the person obtaining the statement.

2. Section 4 Part 1A POLICE AND CRIMINAL EVIDENCE Division 1 General

- 2.1. A Judicial Officer recommended that the definition of "appropriate adult" in this section, be extended to include item:
 - (g) "adopted parent" or guardian;
 - (h) "fit person as appointed by the Court"; and
 - (i) "foster parent" (as defined by section 29 (3) (c) of the Children's Community Residences, Foster Care and Nurseries Act).

Issues which increasingly accompany the use of “the appropriate adult” include the educational capacity and level of understanding of that adult, the relationship to the suspect given that cases have arisen where the suspect was not trusting of that “appropriate adult”, and protocols which allow the “appropriate adult” to consult with the suspect in private and to thereby render advice. Guidelines may include a consent form to be signed by the “appropriate adult” and witnesses by a senior police officer or Justice of the Peace.

- 2.2. With regards to the current clause (h), which states “within the last ten years”, the Judiciary asserts that no person with previous convictions in relation to a child or affecting that child should be included as an appropriate adult. There must be no nexus that is tainted between the “appropriate adult” and the suspect or the accused.
- 2.3. The definition for “audio recording” can include other sounds rather than be limited to persons speaking. The audio recording must therefore be the subject of strict guidelines associated with its creation and chain of custody and authentication.
- 2.4. The definition of “Court” comprises of District Court Judge, Registrar and Marshal, Senior Magistracy Registrar and Clerk of the Court and Coroner.
- 2.5. The Judiciary proposes that the definition of “representative” include “adopted parent”, “fit person as appointed by the Court” and “foster parent” as synonymous with the definition of appropriate adult stated earlier.
- 2.6. It has been noted that the current definition of “video recording” simply states any video recording with sound, however it is suggested that the definition in the Interpretation Section 3 (1) of the Children’s Act be utilized instead. This definition states a “video recording means any recording on any medium from which a moving image may by any means be produced or transmitted whether or not accompanied by a sound track”.

3. Division 2 Identification Procedures

- 3.1. With regards to 12A(1), the Judiciary suggests that before any identification procedure occurs, a record shall be taken by the investigating officer of the first description of the suspect given by the eye witness. This record of the first description of the suspect should also be made in the Police Station Diary and signed by the eye-witness. Additionally, the term “eye-witness” should be defined to include any witness who is able to give a description of the suspect.
- 3.2. The approach referred to in paragraph 3.1 is standard best practice which police officers in Trinidad and Tobago are frequently asked about at a trial in circumstances where identification is in issue. Unfortunately it is just as frequently ignored by investigating officers. It is at the core of the identification procedures stipulated in the 1984 PACE Act of the UK. Additionally as support for the

first description, the person giving the first description should as soon as practicable be video taped and/or audio taped giving that first description. Too frequently with the passage of time the witnesses who give a first description become hostile witnesses when their relationship with the suspect or the suspect's family changes.

- 3.3. With respect to Clause 12(A)(2)(C), the Committee may consider including *"the length of time elapsed between the original observation and the subsequent identification to the police"* as a requirement in the record of the first description. This recommendation follows the Turnbull guidelines for identification evidence. This is crucial and will in any event be at the core of legal directions required at the trial.¹
- 3.4. Section 12A(3) specifies that before any photographs are shown to the eye-witness for the purpose of identification, the investigating officer must confirm that the approved form has recorded the first description of suspect by the eyewitness. The judicial officers recommend that a procedure for the verification of the identity of a suspect by a witness be included in this amendment. Added to this, suggestions are made for the phrase "or any computerized composite or artist's composite or similar likeness" be inserted after the word "paragraphs" as was done in section 12C(6). (For ease of reference please see CODE D of the PACE Act of the UK)
- 3.5. Clause 12B concerns the use of photographs to assist in identifying suspects. Consider specifying whether digital photographs or print photographs will be used, or whether the word photograph includes both print and digital photographs. Information should also be presented on the source of photographs and the manner in which they are destroyed and verification that they have been destroyed rather than moved elsewhere. Questions have been raised regarding the feasibility of finding and photographing multiple persons with similar characteristics to the first description of the suspect. We are a small country and compiling a suitable list of photographed persons for this purpose may prove difficult at best. Consideration may be given to obtaining photographs from Caricom States to supplement this procedure and enhance the integrity of the procedure.
- 3.6. Section 12C pertains to the conduct of identification procedure. With respect to 12C(1), 12C 4(iii) and 12C(5), the suggestion is that an identification procedure of some sort ought still to be conducted notwithstanding the suspect has admitted to being the person the witness claims to have seen or is able to identify: Please see CODE D of the PACE Act of the UK. Notwithstanding this, the integrity of the procedure may be enhanced by the admission of the suspect being adequately documented and recorded to minimize later allegations of misconduct of the investigators.
- 3.7. Specifically, Clause 12C(4)(iv) states that an identification procedure should not be conducted if it "would otherwise serve no useful purpose in proving or disproving the suspect was involved in committing the offence". It is observed that this clause is very broad and can be interpreted

¹ See Turnbull [1977] QB 224

subjectively since there can be varying degrees of purposefulness. An identification officer may become uncertain as to when an identification procedure would serve a “useful purpose”.

- 3.8. Circumstances in which it may serve no useful purpose to conduct an identification procedure MUST first be documented by the identification officer. A court may years later rely on the reasons stated within the station diary or other recorded medium to evaluate the admissibility of the identification evidence. If the identification procedure served no useful purpose, for example if the parties are close relatives who grew up together, that should be clearly articulated by the identification officer and the investigating officer and must be derived from statements obtained not just from the VC but from other persons or from the suspect. The admissibility of identification evidence is predicated upon carefully documented steps taken in the course of an investigation. A court relies upon such documented steps to evaluate the admissibility of identification evidence: CODE D of the PACE Act of the UK again refers.
- 3.9. Whether a witness expresses an ability to identify the suspect or there is a reasonable chance of him being able to do so is, of course, a matter of fact, but it is suggested that the police should err on the side of caution² save for when you have irrefutably proof that would allow for an inference that an identification procedure proved no useful purpose.
- 3.10. If an eyewitness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification [procedure]. If an eyewitness may be able to identify clothing worn by a culprit, but not the culprit himself, it will probably be futile to mount an identification [procedure] rather than simply inviting the witness to identify the clothing. If a case is one of pure recognition of someone well known to the eyewitness, it may again be futile to hold an identification [procedure]. But save in cases such as these, or other exceptional circumstances, the effect of [Code D] is clear:
- if (a) the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and (b) an eyewitness has identified or may be able to identify that person, and (c) the suspect disputes his identification as a person involved in the commission of that offence, an identification [procedure] must be held: **Forbes [2001] 1 AC 473 at p. 486, per Lord Bingham.**

Additionally on too many occasions at trials in Trinidad and Tobago, there is no documentation, which forms part of the prosecution’s evidence as to the circumstances which lead the police investigator to the suspect. Evidence is routinely given as to the suspect being “magically” arrested at the police station in the district with no clear documented pathway, which lead to his arrest. This makes for folly the identification procedure which subsequently follows. The integrity of any ID procedure is buttressed by the actions taken prior to the procedure being undertaken.

² Blackstone’s Criminal Practice 2019 at para. D.1.134.

- 3.11. It should also be noted that regardless of Section 12C(4)(iv) of the Bill, the identification officer must proceed with caution. **Blackstone's Criminal Practice 2019 at para. D.1.134** states as follows:

Code D PACE was revised after the decision in Forbes so that an identification procedure does not have to be held if it would serve no useful purpose. However, it was held in R v Callie [2009] EWCA Crim 283 that this does not permit the police to carry out a proportionality exercise. The question is whether an identification procedure might produce relevant evidence. Thus, for example, the fact that one witness has made a positive identification does not mean that inviting other witnesses to view an identification procedure would serve no useful purpose: Gojra [2010] EWCA Crim 1939. This reasonably forms part of effective police investigation. It also assists as additional evidence for the prosecution. Unfortunately it may also result in these witnesses being unable to identify the suspect and may be used to cast doubt on the identification evidence.

- 3.12. Another example that justifies the questioning of whether an identification procedure would serve a useful purpose has arisen in cases where there has previously been a positive identification, and also where the circumstances are on the cusp of recognition. In Harris [2003] EWCA Crim. 174 it was held that a formal identification procedure would have served a useful purpose where a purported recognition, based upon the accused having attended the same school as the witnesses two years previously, was disputed by the accused.

- 3.13. With respect to Identification Parades, in Ronald John v The State [2009] UKPC 12 (Trinidad and Tobago) the Privy Council considered identification parades. From the discussion three instances where an identification parade may be found useful can be gleaned. That is:

- (a) where the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so);
- (b) where the suspect and the witness are not well known to each other and neither of them disputes this; and
- (c) when the witness claims to know the suspect but the suspect denies this.

RECOMMENDATION: Consider including in Section 12C the above situations. The rule of thumb should always be that an ID procedure should be embarked upon in circumstances where there exists the possibility that the ID evidence may be deemed inadmissible by a court or where, though admitted by the court, the ID evidence is of such a nature that the Turnbull directions highlight the failure of the police to conduct an ID the procedure in the given circumstances.

Trends in the United Kingdom - Informal identification: Facebook identification (social media):

- 3.14. In a society where many citizens may have access to a social media account (including Facebook) it can be a helpful step in informally identifying perpetrators after which the relevant identification procedure will be taken. The Committee may consider including in this Bill provisions concerning informal identification methods pertaining to social media.
- 3.15. Another judicial officer in response to the comment at paragraph 3.14 shared concern about the guidelines, which would accompany such an approach in a very small society. The increasing tendency of some sectors of the police service to publicly show “persons of interest” on TV or Facebook, a tendency that may have the unintended consequence of tainting the pool of witnesses capable of identifying the suspect must be addressed. The Social Media approach it was felt is insufficiently tested and unaccompanied by the safeguards of a first description of the suspect and documented procedures capable of protecting the integrity of the ID procedure.
- 3.16. In the United Kingdom a frequent problem encountered by the Youth Court is whether a Facebook identification is sufficient. Assistance can be found in the case of **R v McCullough [2011] EWCA Crim 1413**. In McCullough, a man, Marsland, was struck in the head with the side of a machete in order to effect the theft of his motorcycle. Days after the incident, Marsland was prompted to look on Facebook for a likely suspect: He looked at a picture of McCullough — a man with notable scarring across his face — and some other males as individuals and groups, and identified McCullough as the person who rode his motorcycle away.
- 3.17. The police were told, and a VIPER (Video Identification Parade Electronic Recording) conducted, at which McCullough was again identified. At the trial, the defence applied to exclude the identification evidence. The Judge refused the application, concluding it was for the jury to decide what weight to place on that evidence. Despite the absence of at least a print-out of the relevant Facebook page, details as to the manner of identification, the identity of his brother's friend, or any real safeguards of the type imposed by PACE Code D, the Court of Appeal held in a short judgment that the identification evidence had been properly placed before the jury.
- 3.18. Similarly, in **Alexander and McGill [2012] EWCA Crim 2768** a differently constituted Court of Appeal came to a similar conclusion on similar facts where the Court held:
- The jury had a detailed account of how the identification occurred and they knew that there were photographs from Facebook that were available but which they did not have. But, in our judgment, it was entirely proper for the trial to proceed; for the Judge appropriately to sum up and for the jury to be able to reach a decision in a fair and just way.
- 3.19. Based on the above case, one writer submits the following principles to be derived from the case:
- (a) An initial informal identification will not necessarily render a subsequent VIPER inadmissible and, except in cases of bad faith on the part of the police or prosecution, will not amount to an abuse of process (even if the police or prosecution have been incompetent);

- (b) At the very least the prosecution ought to be able to produce, if required, a properly exhibited print of the Facebook pages or images viewed. Equally, an investigating officer should be prepared to explain if they are unavailable. Social media is fluid and word may well have reached the suspect of the impending arrival of criminal proceedings, leading to the photographs being deleted or removed, although older cached pages may assist the prosecution;
- (c) The court is likely to be assisted by hearing evidence as to the circumstances of the initial identification; and
- (d) The disadvantage to the defendant in the lack of PACE Code D safeguards inherent in an informal ID procedure ought to be made clear in summing up to a jury, or by the legal adviser to a Bench.

3.20. The relevance of this trend to Trinidad and Tobago is that in a society where many citizens may have access to a social media account (including Facebook) it can be a helpful step in informally identifying perpetrators after which the relevant identification procedure will be taken.

3.21. Another judicial officer stated that given the prevalence and pervasive nature of group chats through which hourly information is shared amongst citizens and residents, group chats which see the frequent exchange of crime related photos and video, careful consideration must be given to this approach. Such an approach should not be the default but the exception acted on a case by case basis and robust guidelines imposing sufficient safeguards to protect suspects and the integrity of the procedure would be required.

3.22. A continued review of the Bill by Judicial Officers reveals that the term “reasonably practicable” used in Section 12C(7) should be amended to a specified period as it may be open to a myriad of interpretations.

3.23. Section 12E(2) identifies the need for recording the circumstances that are deemed unsuitable for conducting an identification procedure and the offer of when another such procedure is possible. It is advised that the appropriate register or Police Station Diary be inserted as the specific options in which this detailed record is made. Police investigators are frequently asked for notes which address their decision not to conduct an ID parade. This is not new. Investigating officers frequently fail to document the circumstances accompanying their inability at a particular time to conduct an ID parade. The result is the tainting of the integrity of the ID evidence.

3.24. Section 12 F (2) addresses the representative signing and confirming receipt of the form but does not address the representative signing the form in which the refusal to participate was recorded. It is suggested that provision should be made for the representative to sign the record of refusal. It was recommended that all refusals to participate mentioned throughout the Act should be cosigned by the accused and/or representative and a senior police officer who confirms the events that transpired.

- 3.25. With respect to Section 12G(3) which speaks of the suspect being given a reasonable opportunity to have a representative present during the identification procedure, there ought to be a justification for specifying the time frame of nine hours. Of assistance here would be detailed notes by the investigating officer of the reason for the delay and the efforts made to secure the attendance of the representative.

4. **Division 3: Interviews And Oral Admissions**

- 4.1. Section 12 S (4) seems superfluous as the content may be reflected in section 12Q (1).
- 4.2. One judicial officer suggested that Section 12 X be amended to make provision for the absence of a pocket diary, for example by allowing the use of a personal diary. In response another pointed out that the use of the pocket diary informally exists. However, the issue is the proclivity of investigating officers to (a) take no notes either in the station diary, or the pocket diary or their personal diary, or (b) make no copies of such notes or (c) to carelessly misplace them. It may be possible that this approach is steeped in an unwillingness to be accountable and an unrealistic assumption that when the matter comes up for hearing ten years later the jury or the court will accept the evidence without question. It is recommended that investigator body cams streaming live to a remote area may possibly be of greater assistance.
- 4.3. There is need to identify the forum, Coram, the circumstances and procedure under which the evidence is recorded as it applies to Section 12Y. There is also the need to specify the applicability of these details to both the Summary Court and the High Court processes.

5. **Division 4 – Special Measures, Evidence by Video Link and Witness Anonymity orders.**

- 5.1. In the United Kingdom there has been much discussion about the whether the use of the term “*special measures*” is helpful. Cooper and Norton opined that it may be appropriate to reconsider the term “*special measures*”³.
- 5.2. Within the field of disability, the term “*special*” has been strongly challenged for decades. For example, the concept of “*special education needs*” has been criticized for unhelpfully framing the “problem” as within the child, meaning that insufficient attention has been given to the barriers to all children’s learning and inclusion in schools. The term “*special*” has also become a fairly widespread colloquial insult. More generally, there has been a sustained challenge to models of disability which focus on individual deficits and the social model of disability has gained ground internationally. This approach challenges barriers to inclusion, breaking these down to increase

³ Cooper, Penny; Norton, Heather. “*Vulnerable People and the Criminal Justice System: A Guide to Law and Practice*”. Oxford University Press (2017) at 10.12.

access for everyone.⁴ The recommendation therefore is that the Committee rephrases the term “special measures”.

- 5.3. Another judicial officer saw no issue with the term special measures and felt that context is everything. Special measures it was felt in the context of this proposed legislation brings clarity without judgmental assumption.
- 5.4. Section 12AG details the circumstances under which a court may grant a Witness Anonymity Order. Subsection 3 lists conditions which ought to be met before the order can be granted. Subsection 4 details considerations the court should bear in mind in determining whether the conditions of subsection 3 are met. Comments and Recommendations for this section are as follows:
 - (a) Consider including in subsection 4 “whether there exists any evidence of an attempt at witness tampering.”
 - (b) Consider including a clause which specifies that the witness’ anonymity should continue after the trial has come to an end. This is key especially in our small society.
 - (c) Consider including after subsection (4)(c) that where the proposed anonymous evidence is not the sole or decisive evidence, the court should consider the nature and extent of the corroborating evidence.
 - (d) Consider adding a subsection which specifies that all documents regarding the Anonymity Order be clearly labelled “SENSITIVE” or allow the court to order the document sealed, so as to avoid an inadvertent leak of information concerning the witness’ identity.
 - (e) Consider including a requirement for a risk assessment report from the police which should include an assessment of the reasonableness of the witness’ fear and an explanation why any other protection or special measures are inadequate thereby triggering a need for an Anonymity Order. See Osman v UK (2000) 29 EHRR 345.
 - (f) Consider including a section which allows every party to the proceedings the opportunity to be heard on an application for a witness anonymity order.

⁴ Ibid. fn. 6



Evidence Amendment Bill, 2019

COMMENTS

We have been asked to provide recommendations/comments with respect to the Trinidad and Tobago Evidence Amendment Bill, 2019.

INTRODUCTION:

The Evidence Act laid its foundation on English soil and the apparent intention is to continue to knit its growth on English jurisprudence. The importance of Evidence in criminal proceedings is seen as properly securing a conviction against persons who are brought before the Court.

Although the Bill brings more clarity in the procedure and measures to be adopted in properly taking evidence, the practicality of enforcing these provisions in a credible fashion may be questionable. The synopsis of the Evidence (Amendment) Bill includes procedures that are instrumental relating to various identification procedures, interviews, oral admissions, special measures, the taking of evidence by video link and witness anonymity orders. The amendments are a clear codification of the Police and Criminal Evidence Act in the UK and the Police Service Standing Orders.

Although the amendments seem to be adding colours to the Evidence Act the issue remains, what are the implications in failure to comply with these codified procedures on the person before the Court considering our common practices and conventions touching and concerning the subject amendments. In our present system the issues of fairness to admit oral admission and interviews seems to be common and may remain common although the amendments are in place. The failure and shortcomings are imminent because in some cases oral admissions, interviews and caution statements are not being admitted into evidence because it was not obtained voluntarily, or it was obtained through oppressive or other means.

These failures and short comings may continue if suspects are not properly represented on all occasions and at all stages during an investigation. Failure of a suspect to provide representation within a certain time can be detrimental to them since the State can select a Justice of the Peace to represent their interest. It is not an attack on the Justice of the

Peace but rather it creates an atmosphere which gives an authoritative influence rather than legal representation for suspects. The absence of legal representation to suspects can draw adverse inferences that the evidence was obtained through improper means during court proceedings. The Legal Aid Advisory Act provides for duty counsel representation for persons in custody under limited categories of offences and under certain circumstances rather than all suspects for criminal offences under the Act.

In respect to oral admissions the standing orders are clear as to the procedure that should be adopted by police officers. In practice most of the time the pocket diary or station diary extract is not available at the trial or upon request. The Standing Orders set out the implications this may have on the credibility of witnesses. It is safe to say that codifying the Standing Orders does not change the common practice.

RECOMMENDATIONS/COMMENTS

The following are our recommendations:

1. SECTION 12A (1)

Before any identification procedure takes place, a record shall be taken by the investigating officer of the first description of the suspect given by the eye-witness.

Recommendation: That a standardised description sheet be established and after the investigating officer details the description of the suspect from the eye-witness that said description is read over by the eye-witness who should verify the contents of same by affixing their signature on said document together with the signature of the Investigating Officer. This would avoid the possibility of an Investigating Officer providing an inaccurate description or being creative in the description of the suspect.

2. SECTION 12B (2)

Where photographs are used pursuant to section (1), a minimum of twelve (12) photographs shall be shown to an eye-witness at a time.

Recommendation: This should be more specific as it opens up the possibility of the witness being shown excessive amount of photos within one (1) day. This in turn can affect a witness accuracy of the purported accused. Since there is a minimum requirement a maximum requirement should also be stated. Section 12 should also

specify the time period over which such photos should be shown. For example a witness should not be shown more than twelve (12) pictures every three hours and there should only be two (2) additions to those photos every hour.

3. **SECTION 12B (4)**

Where a suspect has been positively identified by an eye-witness, the investigating officer shall, in respect of the matter under investigation, take all necessary steps to ensure that all photographs used are kept securely and the movement of the photographs is carefully accounted for.

Recommendation: There should be a specified procedure for movement of photographs. For example having a separate database or ID Log book.

4. **SECTION 12C (2)**

Subject to subsection (3), an identification procedure may also be conducted where the investigating officer in charge of a criminal investigation considers that it would be necessary to do so.

Recommendation: This is a wide discretion afforded to an investigating officer. It allows an investigator to go on a fishing expedition. Therefore the investigation officer should be subject to at least satisfying one (1) of the criteria outlined in section 12 C before invoking this discretion.

5. **SECTION 12D (ii)**

Conduct an identification procedure in respect of an investigation and not be in any way involved in the investigation.

Recommendation: Conduct an identification procedure in respect of an investigation and not be in any **OTHER** way involved in the investigation.

6. **SECTION 12J (1) C (ii)**

Ensuring that the eye-witness is shown at least fourteen (14) images before an identification is made.

Recommendation: The word ensuring should be replaced with ensure. The section should read as follows:

Ensure that the eye-witness is shown at least fourteen images before an identification is made.

7. SECTION 12AH

The amendments relating to special measures, evidence by video link and witness anonymity orders can be described as similar measures that are in place regarding the procedure involved in the treatment of hostile witnesses. However, Clause 12AH cannot be taken lightly. Although the Court may give directions to the jury to avoid any prejudice it is inevitable that inferences will be drawn against the person before the Court in the presence of the jury. Therefore, the person before the Court may not be granted a fair trial.

It is the present position that the present Evidence Act as well as the common law gives the Judge or Magistrate a wide discretion in deeming a witness hostile subsequent to a fear application including where there is a previous inconsistent statement. The source of the problem is usually a fearful witness. To avoid such problems the proper enforcement of witness protection programmes should be effectively implemented. The witness Anonymity Orders and Evidence of video link may not shed any light in securing a favorable testimony because the likelihood of a witness being vulnerable may still exist. The witnesses do not trust the level of protection and security offered and it may be challenging to gain the trust from the State to protect them and to alleviate whatever fear or other circumstances that prevents them from giving a true testimony. Practically there are cases where witnesses gave their testimony through video conferencing and there were some level of anonymity and the witness did not give consistent evidence as per their previous statement. This gives rise to the outstanding issues as to whether the statement has been obtained through reliable sources.

The use of photographs prior to conducting the identification procedure to assist in identifying suspects is commendable. However, it does not eliminate the current weaknesses when considering the reliability of an eye witness evidence and testimony.

Using authorities, the principles that is observed in the case of *Khan and Hunt v The State* ¹ that in *R v Turnbull [1977] Q.B. 224* Lord Widgery, Chief Justice issued guidelines to trial judges when dealing particularly with identification evidence. The relevant passage in this appeal reads as follows at pages 228-231:

¹ Paragraphs 83-86

*"All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, **but the poorer the quality, the greater the danger**".*

*"In our judgment when the **quality is good**, as for example when the identification is made after a **long period of observation**, or in **satisfactory conditions** by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be made to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however that adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur..."*

*"when, in the judgment of the trial judge, the **quality of the identifying evidence is poor**, as for example when it **depends solely on a fleeting glance** or on a **longer observation made in difficult conditions**, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification"*

In the case of *Reg. v Turnbull*² is observed as follows:

"The only evidence of identification in this case was that of the police constable who caught a fleeting glimpse at Turnbull, the co-accused whom he knew, outside the bank. The finding of the jury involved a decision that this identification was genuine and accurate. It was alleged at the trial that it was merely put in to bolster up an otherwise weak case. That submission is repeated.

"As to the accuracy of the identification, there is a possibility of a mistake because it was a fleeting glimpse, albeit of a face known to the witness. A mistake is just as likely as in the case of a longer look at an unknown face. The fleetingness of the glimpse puts this on the same plane as any ordinary identification case.

"Reasonable doubt arises unless there are other substantial matters to dispel it. If the nature of the evidence had come out earlier a submission would have been made that there was no case to go to the jury on the ground that evidence on identification alone, although honest, is insufficient to ground a conviction"

After *R v Turnbull* the position concerning trial judges' response to no case submissions was still undefined. Then came *R v Galbraith* [1981] 1 W.L.R. 1039

² page 226 para. D –F

which put the matter to rest. Lord Lane CJ issued a two-limb solution at page 1042 *supra*.

R v Galbraith was followed by the Privy Council in *Taibo v R (Ellis)* (1996) 48 W.I. R. 74. In the opinion of Lord Mustill the principles in *Turnbull supra* and *Galbraith supra* “are able to live together”. The two cases can co-exist since *Galbraith* contemplates a situation where a trial judge considers the prosecution case as unworthy of credit and therefore takes it out of the jury’s hands. *Turnbull* on the other hand deals with cases where the witness’ credit is not necessarily in issue but where the evidence even if taken to be honest has a base that is so slender, that it is unreliable and therefore insufficient to find a conviction.

In the case of *Daley v The Queen (P.C.)* Lord Mustill noted at page 129 (which was observed in the case of *Khan and Hunt supra*) as follows:

“ ...A reading of the judgment in *Regina v Turnbull et al* [1981] 1 W.L.R. 1039...in the kind of identification case dealt with *Reg. v Turnbull* [1977] QB 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction...”

In the case of *R v Fergus* [1994] Cr App. R. 313 which concerned a case of visual identification, Lord Steyn addressed the distinction between *Galbraith* and *Turnbull* as follows at page 318:

“...the trial judge’s duty to withdraw the case from the jury in an identification case is wider than the general duty of a trial judge in respect of a submission of no case to answer as enunciated in *Galbraith* (1981) 73 Cr. App. R. [1981] 1 W.L.R. 1039. Moreover, *Turnbull* plainly contemplates that the position must be assessed not only at the end of the prosecution case but also at the close of the accused’s case: at pp. 137,138 and 228H-229A.”

In the case of *Daley v The Queen supra* page 129F it was explained that when assessing the “quality” of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence, which, if believed, experience has shown to be a possible source of injustice.

The above authority suggests that the amendment does not cure the issues relating to reliability and quality of identification evidence. To cure the issue of reliability and quality of identification evidence the alternate method of securing forensic

evidence can be adopted. However, these measures can only be adopted once properly carried out on a timely manner. The relevant resources including technological advancement and competent man power must be available within this jurisdiction to secure timely accumulation of evidence readily available when required. The implementation of DNA and compulsory methods of fingerprinting involving all citizens and visitors in Trinidad and Tobago should be readily available working together with DNA capabilities. This initiative will not only provide a reliable evidential source, but it will also act as a deterrent in curbing criminal activities.

The Evidence Amendment Bill provides clarity and intention, but it does not provide a cure for the shortcomings and deficiencies that exist as a result of the lack of capabilities and resources. In a world that has technological advancement and resources which provides for both criminal elements and the State there will always be a race to an infinite finish line. In this regard the allocation should always be towards resources and ideas directed to enforcement and then improvement.

8. SECTION 12 F

This section speaks to the suspect being informed of his right to legal representation under the Legal Aid & Advice Act. There is no relevance in referring to the Legal Aid & Advice Act unless the intention is to give practical effect to that right by allowing a Legal Aid attorney to be accessed by the suspect for the purposes of representing him at the ID Parade.

The support infrastructure (not only the types of cameras and video cameras but the servicing of such equipment) and guidelines set out in relation to photographs and video recorded evidence ought to be standardized. The working order of the apparatus is a common area attacked in cross-examination and therefore the above suggestion would make sense. Standardized Guidelines are also necessary to ensure that photographic deception does not occur. Perhaps it may be worth having an independent facility which is able to verify that images have not been doctored/manipulated with persons able to provide expert evidence is necessary.

9. SECTION 12K

Where an identification parade involves the use of a screen, which permits an eye witness to see the composition of the identification parade without being seen, the

identification parade shall be conducted and ever said to, or by, an eye-witness shall be said in the hearing of the suspect, his representative or a Justice of Peace.

Recommendation: The suspect should not be allowed to hear the witness' voice unless it is being modulated.

10. SECTION 12J

(a)- showing an eye-witness moving images of the suspect together with similar images of at least eight other persons who resemble the suspect;

(b) - ensuring that the eye witness is shown at least nine images before an identification is made;

Recommendation: There should also be a maximum amount of images that the witness is being shown so as to prevent confusion in witnesses mind and accuracy. There should also be a specific standardised timeline for showing of such images. For. Example within first hour six images is shown after one hour the six images and two other images are shown etc.

11. SECTION 12M

An identification in a public place under this section may be conducted with the suspect which shall be recorded in the approved form where the suspect is not in police custody or it is impossible or impractical to make use of any other identification procedure

Recommendation: This section introduces bias and can be considered as an unfair procedure. A more objective approach would be to include four other persons whose demeanour and characteristics are similar to those of the accused so as to ensure this form of identification is fairly and objectively conducted. Further, as the identification is not being performed in a control environment the only method of recording of such observations should be by video set up secretly.

12. SECTION 12N

An identification in a public place under this section may be conducted without the consent of the suspect.

Recommendation: Since the identification is being conducted without the consent of the suspect at least three to four persons of similar resemblance should be included in the process to ensure the partiality of the process and to further prevent a witness identifying the suspect without certainty but rather for the fact that there were no other choices.

13. SECTION 12O

Where a suspect who is in police custody refuses to consent to any other identification procedure, an identification by confrontation may be used, and a detailed recorded of the refusal shall be made by the identification officer in the approved form,

Recommendation: In such circumstances the suspect's representative and/or the justice of the peace should be present before the suspect signs the detailed form. Also where this procedure is adopted in order to ensure fairness at least six other persons of similar resemblance and demeanour should be included.

14. SECTION 12Q (1)

Subject to subsections (2) to (4), an investigating officer shall record the interview of any person suspected of, or charged with, committing an offence.

Recommendation: All interviews should be recorded by video and audio and also be transcribed. The investigating officer should be required to make at least three copies of each form of recording. This is imperative to ensure the preservation of the information and the manner in which same was conducted.

15. SECTION 12AG

Where there are reasonable grounds to believe that the identity of a witness should be concealed from an accused person and the public so as to protect the witness, any of his relatives or any other person, the Court may grant a Witness Anonymity Order.

Recommendation: Witness Anonymity Orders can become a dangerous practice as it infringes upon the defendants' opportunity to see his accuser. In the case of *R v Davis* (Appellant) [2008] UKHL it was stated that the right to be confronted by

one's accusers is a right recognized by common law for centuries, and it is not enough if counsel sees the accusers, if they are unknown to and unseen by the defendant. This is an attempt by the state to pass its responsibility and burden to the defendant in protecting state witnesses and other persons close to them. Separate measures need to be taken to deal with the specific issue of safety for witnesses even if it means creating new identities for them and their families etc. This is a special issue that cannot simply be incorporated and/or copied and pasted into the Evidence Amendment Bill. It is not merely about concealing the witness' identity from the one whom they accuse. Both witness and accused are owed more than this. According to Lord Hewart CJ in the UK case *Coles v Odhams Press Ltd* [1936] 1 KB 416, to take blind shots at a hidden target in a trial so conducted cannot be regarded as meeting [even] **ordinary** standards of fairness.

16. SECTIONS 13 - 15

The current Evidence Act speaks specifically to criminal proceedings only from Sections 13 to 15. Although Section 15 being a more recent amendment attempted to encompass a number of critical areas including Bad Character and the Admissibility of Statements in court proceedings authored by witnesses unable to attend the proceedings, the impression has always been that the legislature has been playing catch up.

It is however, important to note the trend that the Evidence Act has been evolving in a manner which allows the Defence less latitude and room for maneuvering. Gone are the days when a main witness could come to court and state that they were mistaken in identifying the Accused as the assailant and the case would collapse on that basis.

The present Evidence Amendment Bill continues that evolution and almost seems like an attempt to follow the example of UK PACE legislation in seeking introduce proactive legislation to revolutionize the investigative stage of criminal proceedings.

It seems that the Bill also attempts to crystallize or canonize certain "fair practices" already encouraged within the Police Standing Orders which do not have the force of law.

If followed to the letter by investigators the ultimate effect would be that it strengthens tremendously the prosecution's position at trial by adding integrity to

the investigation in the eyes of the jury.

The current educational requirements for entry into the TTPS and the adverse reputation suffered by the TTPS through the actions of rogue officers means that the public and thus trial juries are often influenced by scepticism to cases investigated and presented by the police.

Thus, the ultimate intent here is to restore faith in police and the criminal justice system, but notably from the Defence perspective the ultimate goal is to allow for less maneuverability and latitude in mounting defenses based on attacking police conduct in the course of their investigation by re-branding the TTPS as an investigative body who follow principles of fairness.

17. STANDARDIZED DESCRIPTION SHEET

In relation to the standardized description sheet in relation to Clause 10 and 11 would move further to suggest that in as many instances as possible there should be attached Forms in the Appendices to the Bill which would result in a consistent or standardized document to be disclosed to the Defence. This would again result in less maneuverability for the Defence.

Dated the 29th October, 2019

Comments Mr. Derrick Sankar Director (Ag) Trinidad and Tobago Forensic Science Centre on the Bill to amend the Evidence Act, Chapter 7:02

Date 1st November, 2019

	Section	Page	Comment
1	12 R. (2) Cf 12 F(1) suspect to be informed of his legal right to representation	33	• This section suggests that the interviewee or his representative can request a copy of the entry in the register of interviews in relation to his interview. • How will the interviewee know he is entitled to this? • There must be provisions for the interviewing Officer to inform him of his right to have a copy and a note to this effect made in the station diary of this. • If he requested same than a note shall be made of this in the Station Diary and the person receiving sign the station diary on receiving same. • The Section mentions a representative (or his representative). The Constitution of Trinidad and Tobago States that a person arrested is entitled to have an Attorney-at-Law, friend or relative present, as such any of these could be present. There have always been allegations by the accused that he was never informed of this rights when he is brought before a court charged with an offence . Provisions should be made to have the accused contact a legal advisor by phone, such as a legal aid lawyer or a duty council or be given names of Attorneys-at-Law to contact in order to receive advice as to his rights as to the interview and the possibility of retaining their services for the interviews. • The Suspect/interviewee should also request that legal officer/ Attorney-at-Law contact a friend or relative to visit him at the place he is detained if he so desires , by giving to him a contact number to contact this person, in addition he must also be given

			the opportunity to do so and a note be made in the station diary to this effect. • This would ensure he is properly advised before the interview commences, he has the opportunity to legal representation, he is given his rights under the constitution and that the interview was done fairly . • A note of this call and to who the suspect spoke to should be made in the Station Diary. • In most cases the suspect or his friend or his relative do not have knowledge of a person's legal rights and would follow instructions of the Police who are the persons in authority, as such as far as possible it is necessary that a person being interviewed speak to a legal representative before he is interviewed. • In addition as far as possible the interviewing officer should have an independent person present when a suspect is being interviewed, if he does not have a Legal Representative, more so a Justice of the Peace, should be present so as to minimize allegations of oppression by Police and to ensure that the interview is done fairly.
	12.S.(2)(c)	34	This caution should after being given to the interviewee, be explained to him in simple language; • Where the accused has a legal advisor he would be advised that this means that he has the right to silence and he need not give the interview and it is voluntary to do so, however if he does not have a legal advisor, he or a person representing him who is not a legally trained person may not be aware of this and hence the need for a legal advisor to be contacted on behalf of the interviewee to advise him on this.. • If communications cannot be made with a legal representative a Justice of the Peace should be present to inform the accused

			of his rights and explain the caution to him, however a note should be made in the station diary of the efforts made by the interviewer to contact a legal advisor \ legal representative and the numbers called be recorded. • If no Justice of the Peace (JP) is present then a legal Officer from the Police Service who is an attorney-at-law who is not part of the investigation team should inform the interviewee what this means and do so in simple words and a note made in the Station Diary. This allows for fairness in the interviewing process.
	12 X.(1)	38	Where a suspect or person charged makes an oral admission and a note of this is made in the station diary; • If the admission is made before he is legally advised by a legal representative or in the absence of a legal representative, the interviewing officer or the officer in charge of the investigation should as soon as possible thereafter make all efforts as mentioned above to communicate with a legal representative and have him present at station , and there and then in the presence of the legal representative the note should be read to suspect of his oral admission AND AT THE END OF READING THE NOTE HE SHOULD BE GIVEN THE OPPORTUN ITY to state whether the note is true and if he made it of his own free will and if he signed to same. A note of what transpired should then be made in the station diary and the accused and his legal advisor be asked to sign. Should they refuse to sign then another note should be made to this effect. • <u>Note</u> the reason for this second note to be made in the presence of the accused Legal representative or Justice of the Peace is to prevent or minimize allegations that the accused, did not make this admission or he did not sign or that the note was not read to him and he was just asked to sign.

			DIVISION 4 page 41 to 52
	12AA	41	In full support of this measure that should apply to Forensic Experts as we are vulnerable.
	12AA(2)	41	The Forensic expert is a vulnerable witness since we can be intimidated in matters we are required to present for evidence in chief AND cross examination.
	12AB(1&2) 12AC	42	Forensic Experts should fall within this category of witness and in full support of same
	12AD(1)	43	TTFSC in full support of THE <u>Video Link</u> as applicable beneficial and relevant to us. This will also assist former forensic experts who have left the public service or end of contracts and have also migrated or left the jurisdiction for other reasons.
	12 AE	44	TTFSC is in support of a <u>support person</u> to ensure our expert witnesses are secure and comfortable. TTFSC is also in support of the factors the Court can consider in its determination if a Forensic expert is to appear in person.
	12 AF (4)+ (5)	46	TTFSC is in full support of the assessment of risk of endangerment being considered to the witness criminal cases. In support of video link were are deemed to be present in court
	12AG(1)		We are in full support of a witness Anonymity Order and the factors the Court will consider in granting one especially part c
			Division 5 page 53 to 56
	12AI	53	I am in support of close circuit Television if this can apply to presenting expert evidence as this methods prevents direct interaction in court with the accused in serious criminal cases.
	12A J	53	These regulations will assist the Forensic Expert in presenting notes and photographs and other printed results from instruments taken during the analysis phase.

PS: 1/3/16



PRISON ADMINISTRATIVE OFFICES
#10-14 PHILIP STREET,
Port-of-Spain
Trinidad
Phone No: 612-0308 ext. 5314

October 02nd, 2019

The Secretary
SSG Evidence (Amendment) Bill 2019
Office of the Parliament
Level 3, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road
Port of Spain

Dear Secretary,

Re: Comments the Evidence Amendment Bill 2019

The subject at caption refers.

In this regard, the Office of the Commissioner of Prisons has had the opportunity to review to Evidence Amendment Bill 2019, and my thoughts were that the use of legislation is always and I might add strong legislation is needed to assist with fighting crime. The proposed amendments this Bill is important as it would give put law enforcement and prosecutors on even keel in the fight against crime.

The comments and views of the public on how the state and it agencies tackle the crime problem are well known. Therefore the state must use ingeniously its resources to turn the tide, and legislation as a resource is a powerful tool in this regard.

It is understood in a modern democratic society a balance must be struck with fundamental rights of citizens in light of the circumstances we as a nation face, and my first observation is that citizens' rights will be affected where a person is a suspect in the commission of an offence.

I will now comment on the specific clauses in the key features of the Bill below:

1. Clause 3- the definitions replicates the Section 14B 1 (a), (b) and (c) in the present Act and is rightly placed at this part and separated from section 14(1) which was repealed. In division 1 in the Bill useful definitions which are fully explained.
2. Clause 4- Part 1A Police and Criminal Evidence; the insertion of this section is akin to PACE in the United Kingdom and I have no issue to it being adopted and modified to fit into our existing legislation. It is noteworthy that Section 12k consistent with other pieces of child legislation the staff of a Rehabilitation Centre are not "Appropriate Adults"
- We are however concerned that this section did not adequately address children committed to Rehabilitation Centres. Section 12AK of the Bill states all other children legislation applies as necessary. More specific attention should be paid to where police and may have to interview a child, and whether an Attorney-at-Law can interview a resident who is under the age of 18 on his own volition. Our Rehabilitation Centres Regulations suggest that they cannot. I suggest that these issues should be looked at in connection with Judges Rules for Children and other existing legislation.
3. Clause 4 12A Division 2 seeks to plug the evidential gaps currently experienced by investigators and prosecutors. Thus outlining of identification procedures the appropriate agencies will be better placed to manage evidence in more professional way thus increasing the conviction rate. Implemented effectively these new procedures for identification of suspects should eliminate concerns whether Identification Parades are conducted fairly.
- What is also appreciated by the Prison Service is the proposed Witness Anonymity Orders at 12AA Division (4). This will be boost to our prison officers who in the environment face threats daily. Being able to have their Identities withheld will provide an avenue for them to give evidence where may be reluctant to do so or their

lives or the lives of their family members may be under imminent threat of death or serious bodily harm. This section should be to both criminal and civil cases. Sections 12AB-12AG appears to achieve this purpose.

The counter argument for the accused is that the his right to be able to ascertain the identities of person prosecution witnesses will be a contention and rightly so and Section 12AG will be challenged thus robust criteria for such an order to be made must strike a balance which will agreeable by all concerned

This Bill has limited application to the Prison Service however we do support the proposed the Bill. The Main concerns of the Prison Service in this Bill is the treatment of juveniles committed to our Rehabilitation Centres, and the protection of Prisons Officer who are required to give evidence and their lives are under threat. I may further suggest that any law enforcement personnel should as a rule be granted in the instance of the concerns raised anonymity orders where there is a report made by such an officer that his life because of his duty is in danger.

These amendments are useful as especially video evidence from CCTV which is common place in many households and business places today. These cameras capture a lot of criminal activity. The footage from the said CCTVs will be admitted more easily into evidence; we hope this leads to higher conviction rates. The Bill in our view make great effort to strike a balance with competing rights this is seen in the checks in the Bill.

In closing, I thank you for the opportunity to make comments on this Bill and do hope it will assist the Committee in its deliberations.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Dame Doreen Lawrence', written over a horizontal line.

f/Commissioner of Prisons



TRINIDAD & TOBAGO POLICE SERVICE

Office of the Deputy Commissioner of Police CRIME & SUPPORT

Police Administration Building, 6th Floor, Corner Edward & Sackville Streets
P.O. Box 387, Port of Spain, Trinidad, Republic of Trinidad & Tobago
Telephone: 1 (868) 623-8440 Facsimile: 1 (868) 624-0551 Email: DCPCrime@ttps.gov.tt

Monday 23rd September 2019

The Secretary

SSC Evidence (Amendment) Bill 2019
Office of the Parliament
Level 3 Tower D
The Port of Spain International Waterfront Centre
1A Wrightson Road
Port of Spain.

Dear Secretary,

**Request for Written Comments to the Special Select Committee (Senate) appointed to
consider and report on the Evidence (Amendment) Bill 2019.**

I refer to your correspondence dated September 17th 2019 and hereby submit the Trinidad and Tobago Police Service (TTPS) comments relative to the Evidence (Amendment) Bill 2019.

These comments were compiled after reviewing the Police Service Act Chapter 15:01, The TTPS Standing Orders, the Archbold, the Police and Criminal Evidence Act among other documents.

The changes made to the Bill based on our previous submissions are noted.

Submitted for your perusal and comments.

Regards,

Harold Phillip
Deputy Commissioner of Police (Ag)
Crime and Support



Comments Re the Evidence (Amendment) Bill 2019

Part 1A Police and Criminal Evidence

Division 1

General

Clause 12

The definition of Identification Procedure within the Evidence (Amendment) Bill 2019 (hereinafter referred to as the said Bill) seems to encompass various identification procedures inclusive of the use of photographs to identify suspects. As such, the words “prior to the conduct of” which appears at the beginning of Clause 12 B (1) which relates to the conduct of an identification procedure should be replaced with the words “As part of.” ✓

Additionally, it is recommended that the role of the investigating officer in this instance be replaced with the Identification Officer who is not below the rank of Sergeant. For the purposes of this procedure, the Identification Officer may direct another Police Officer who is not involved in the investigation, to conduct this procedure. For the purposes of Clause 12 B (4), the role of the Investigating Officer remains unchanged. ✓

Moreover, this recommendation is in keeping with the responsibilities outlined in Clause 12 D for the Identification Officer which includes being responsible and making arrangements for identification procedures and directing Police Officers to assist with the identification procedures. ✓

Clause 12 B (7)

In relation to the destruction of Photographs where suspects have not been identified, it is recommended that a similar provision as outlined in the Police Service Act chapter 15:01 with regard to fingerprint impressions be implemented. Therefore, it is recommended that photographs be kept for a period of five years and thereafter destroyed. Notwithstanding, a Court may order that the photograph not be destroyed if it is satisfied that the photographs might reasonably be required for the investigation and/or prosecution of an offence. Additionally, the ✓



photographs may be used as evidence in any other matter involving the person to whom the data relates.

Clause 12 E (1)

Clause 12 E (1) states “*where an identification procedure is to be conducted...*” It is recommended that the words, ‘other than the use of photographs to assist in the identifying suspects’ should be inserted immediately after. This is necessary as the use of photographs can be included as an identification procedure as outlined in the said definition in Part 1A Police and Criminal Evidence Division 1 General Clause 12 – Definitions of the Bill. ✓

Additionally, it is submitted that the order of priority be rearranged to place identification parade in accordance with 12 K as the first priority, identification in a public place with consent in accordance with Clause 12 M as the second order of priority while Video medium drops to third order of priority and identification in a public place without consent and identification by confrontation retain their fourth and fifth respective rankings. ✓

Clause 12 F (1) (b)

General Observation

This clause outlines a caution to the effect “*that he is not obliged to say anything unless he wishes to do so and that **anything he says may be put into writing or otherwise recorded and may be given in evidence.***” (Emphasis mine)

It is noted that the caution contained within this bill is different to the caution outlined at Rule 2 of the Judges Rules which has been incorporated into Police practice and has been accepted by the Courts of Trinidad and Tobago. ✓

Clause 12 L

It is recommended that an identification parade not be aborted based on the non-compliance of a member of the identification parade where the witness can identify the suspect based on physical appearance. In so doing, suspects would not be able to frustrate the process by their non-compliance based on ancillary requests as outlined in sub Clause (4). ✓



Division 3

Interviews and Oral Admissions

Clause 12 Q (2) and (3)

General Comment

These clauses provide specifically for the video recording of interviews and where not reasonably practicable, to instead record the interview by audio recording.

It is noted that the Judge's Rules, which are established guidelines, contemplate the writing of statements from suspects. Therefore, these provisions appear to be in conflict with these rules and remove the requirement to write the statements of suspects in these instances.

Clause 12 U

This clause should include a requirement to note the persons present during the interview for example, the representative or other Police Officer (s) present and the place/location of interview.

General

The various Approved Forms mentioned throughout the Bill should be scheduled.

The introduction of adverse inferences from silence

The TTPS recognises that the right to silence is closely bound to the presumption of innocence and the privilege against self-incrimination plays an important role in protecting citizens. Therefore, at present, no evidential significance is attached to a suspect/accused exercise of his right to silence during the Police investigation. However, we submit that adverse inferences should be drawn from a suspect's silence in the face of police questioning under certain circumstances and recommend that consideration be given to apply similar provisions in this Bill.



The United Kingdom's Criminal Justice and Public Order Act 1994, sections 34, 36 and 37 as amended by the Youth Justice and Criminal Evidence Act 1999, section 58 describes the condition under which adverse inferences may be drawn from a person's failure or refusal to say anything about their involvement in the offence when interviewed, after being charged or informed that they may be prosecuted.

The object of Section 34 is to deter late fabrication of defences and to encourage early disclosure of genuine defences. Section 35 details the circumstances in which adverse inferences may be drawn from an accused's failure to give evidence at their trial. Section 36 permits inferences to be drawn from an arrested person's failure to account for suspicious objects, substances and marks. Section 37 permits inferences to be drawn from an arrested person's failure to account for their suspicious presence at a particular place around the time that an offence was committed. Section 38(3) provides that a person shall not have a case to answer found against them, or be convicted of an offence solely on an inference drawn under the aforementioned provisions. Section 58 amended the 1994 legislation so that no adverse inference could be drawn under the provisions unless the accused first has had an opportunity to consult a legal advisor.

Silence can be seen as suspicious and therefore it is appropriate to draw inferences from silence in certain circumstances. It may be regarded as imposing an indirect sanction for a suspect/accused failure to mention a fact in interview

In furtherance to permitting adverse inferences to be drawn in certain circumstances, the law in the United Kingdom has introduced a special caution to the suspect as outlined in Police and Criminal Evidence Act 1984 (PACE) Code C Revised (August 2019) - Code of Practice for the Detention, treatment and questioning of Persons by Police Officers Code C. The caution is as follows "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

APPENDIX VII

MINORITY REPORT

**MINORITY REPORT on the REPORT OF THE SPECIAL SELECT COMMITTEE OF THE SENATE
APPOINTED TO CONSIDER AND REPORT ON A BILL ENTITLED, "AN ACT TO AMEND THE
EVIDENCE ACT, CHAP. 7:02.**

The Member undersigned submits the following Minority Report for the consideration of the Committee, which is filed in accordance with the Committee's decision that same be submitted on 01st June 2020 before 4pm.

After due consideration of the Final Report which was circulated on 30th May 2020 at 5.39pm, the stakeholders' submissions and the Consolidated Bill with amendments, the following concerns and issues were identified:

Division 2- IDENTIFICATION PROCEDURES

1. Records to be made in the Station Diary

It is acknowledged that a record of the first description of the suspect which is given by the eye-witness has to be recorded in the Station Diary in accordance with Clause 12A(4). This will offer additional safeguards and preserve the integrity of the identification procedure.

It is further recommended that records be made in the Station Diary in the following instances:

Clause 12(5)- where the investigating officer provides a record of the first description to the eyewitness and a record shall also be made in the event that he refuses to confirm receipt of same.

Clause 12(5)- where the investigating officer provides a record of the first description to the suspect or his representative and a record shall also be made in the event that he or the representative refuses to confirm receipt of same.

2. Clause 12A(3) -Computerised or artist composite

Definitions for the terms computerised or artist composite should be given. This is also found at Clauses 12G(11) and 12H(6).

This is further keeping with the recommendations of the DPP.

3. Clause 12B-

This provision is similar to what is found in **PACE UK Code D at para. 3.3**, where it is stated that:

"An eye-witness must not be shown photographs, computerised or artist's composite likenesses or similar likenesses or pictures (including "E-fit" images) if in accordance with paragraph 3.1A, the identity of the suspect is known and they are available to take part in one of the procedures under paragraphs 3.5 to 3.10. If the suspect's identity is not known, the showing of any such images to an eye-witness to see if they can identify a person whose image they are shown as the person they saw on a previous occasion must be done in accordance with Annex E."

This particular Clause 12(3) must also prescribe the circumstances in which photographs, computerised or artist's composite or similar likenesses should be shown to the eyewitness. It must only be shown where the identity of the suspect is not known and can only be used when the identity of the suspect is known and the suspect is available to take part in an identification procedure in accordance with Clause 12E.

This point is also supported by the position of the DPP.

Further, the showing of photographs to the eyewitness should also be done in accordance with Annex E of PACE (A copy of which is appended), of particular mention the rank of the officer supervising the procedure should be prescribed.

4. Clause 12C:

It is proposed that Cause 12C(6) be deleted based on the recommendation found at paragraph 3 hereinabove, that no eyewitness should be shown a photograph or composite of the suspect as long as the suspect is available for identification in accordance with Clause 12E.

5. Clause 12E

The mode of identification by verification has not been included.

6. Clause 12F

It is submitted that the Police inform the suspect of his right to a Duty Counsel under the Legal Aid and Advice Act, Cha. 7:07 where applicable, as a suspect is allowed representation under this scheme in certain circumstances, e.g. Capital matter and prescribed indictable offences.

Clause 12F(b) should not be reworded but it should revert to what is previously was to read- "ensure that the suspect is cautioned to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put in writing or otherwise recorded and may be given in evidence"

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

7. Clause 12G

The notice of 9 hours for the attendance of the representative of the suspect has to be enlarged as it is unfair to the suspect. The existing guidelines according to the Police Standing Order is 12 hours.

It is further recommended that everything done inclusive of the objections and statements made by the suspect pursuant to this section should be recorded in the Station Diary.

8. Clause 12H

Where the procedure for conducting the identification procedure was not done in accordance with the provision of the Act, the JP should be mandated to state same and inform of the suspect. It is noted that Clause 6 (the prescribed form) was amended to include same, but it is submitted that a positive obligation be placed on the JP through primary legislation to do same.

Further, the Form should be further amended for the JP to indicate exactly which procedure was not followed.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

9. Clause 12H

Clause 12H(3)(b) should not be reworded but it should revert to what is previously was, to read- "ensure that the suspect is cautioned to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put in writing or otherwise recorded and may be given in evidence".

10. Clause 12J

Presence of suspect or representative at the video identification- there is no provision for the suspect, his representative or the JP to be present at the video identification. To ensure fairness, the suspect must be properly represented to ensure that the process was done fairly.

Preservation of the video used: it is recommended that there be a provision to ensure that the video is preserved for later production in criminal proceedings.

Objection to images on the video: the representative or the JP should be given the ability to make objections to the use of images on the video to ensure a level of fairness in the procedure. Therefore, a reasonable opportunity should be given to the suspect or his representative to view the video in advance before it is viewed by the eyewitness to make objections and state their grounds of objections. This is consistent with Part G of the Judge's Rules for Children.

Likeness- it is submitted that the at subsection (3) it be amended to include colour and height to be consistent with section 12K(3).

Multiple eyewitnesses- there must be a provision as found in Clause 12L for multiple eyewitnesses to ensure the fairness and integrity of the identification procedure.

Rule 15 of the Judge's Rules should be included to ensure that the identification officer remains impassive in demeanor and expression.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

11. Clause 12K-

Deletion of 6B- if a restriction is now placed on only one-way mirrors being used it is inconsistent to include Clause 12K(6B).

Multiple eyewitnesses- there must be a provision as found in Clause 12L for multiple eyewitnesses to ensure the fairness and integrity of the identification procedure.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

12. Clause 12M-

Presence of suspect or representative at the video identification- there is no provision for the suspect, his representative or the JP to present at the video identification. To ensure fairness, the suspect must be properly represented to ensure that the process was done fairly.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary and Pocket Diary.

13. Clause 12O

Clause 12O(3)(b) should not be reworded but it should revert to what is previously was to read- "to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put in writing or otherwise recorded and may be given in evidence.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

Division 3- INTERVIEWS AND ORAL ADMISSIONS

1. Clause 12Q-

There is a priority list of the mode in which the interview may be recorded, firstly by video, secondly by audio and thirdly written, the proviso being the previous mode was not reasonably practicable.

It should be amended to reflect the importance of the video recording as such, where it is not reasonably practicable for the officer to record by video, an obligation should be placed on him to certify before he records by any other means he must have taken all possible steps to have the interview recorded by video and if he is not successful the reasons must be provided by the interviewing officer and those reasons must be in writing in the prescribed form and in the Station Diary.

The wording of subsection (10) seems to make it mandatory that once an interview is conducted procedurally in accordance with Clause 12R it will be admissible.

The common law provides that a statement made by an accused person will only be admissible if same was made voluntarily. The section should be amended to reflect the common law position, that the recording of the interview "**may**" be admissible as evidence to preserve the court's discretion to pronounce on the admissibility of a statement or interview given by the suspect or accused.

It should further include the prescription found in **section 76 of PACE (UK)**:

Confessions.

1. In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

To preserve the authenticity of the recordings and to reduce challenge, consideration should be given to having the recording devices certified by the Commissioner of Police as is done with the speed guns and breathalyzer tests.

2. **Clause 12S**

At **Clause 12S(2)(c)**- revert to the original draft- to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put in writing or otherwise recorded and may be given in evidence"

Clause 12S(2B)- the drafting of the clause is problematic and has to be revisited.

Clause 12S(4)- this does not contemplated written interviews, where same must be read over to the interviewee or he be given an opportunity to read same and certify it was read over to him or he read it personally.

It is further recommended that everything done pursuant to this section should be recorded in the Station Diary.

3. Clause 12T

There is potential in this section for some level of unfairness to the suspect or accused person. Guidance should be taken from PACE Code E, when the accused person objects to the recording of the interview by video or audio:

PACE Code E states:

"3.9 If the suspect or an appropriate adult on their behalf, objects to the interview being audibly recorded either at the outset, during the interview or during a break, the interviewer shall explain that the interview is being audibly recorded and that this Code requires the objections to be recorded on the audio recording. When any objections have been audibly recorded or the suspect or appropriate adult have refused to have their objections recorded, the relevant officer shall decide in accordance with paragraph 2.3(d) (which requires the officer to have regard to the nature and circumstances of the objections) whether a written record of the interview or its continuation, is to be made and that audio recording should be turned off. Following a decision that a written record is to be made, the interviewer shall say they are turning off the recorder and shall then make a written record of the interview as in Code C, section 11. If, however, following a decision that a written record is not to be made, the interviewer may proceed to question the suspect with the audio recording still on. This procedure also applies in cases where the suspect has previously objected to the interview being visually

recorded, see Code F paragraph 2.7, and the investigating officer has decided to audibly record the interview. (See Notes 2F and 3D.)"

4. Clause 12W:

At subsection (7) it is recommended to have a visual record of the breaking the seal of the master copy and resealing same where the interviewee or his representative is not present.

This is following **PACE Code E, 3.28:**

"If one or more of the parties is not present when the master copy seal is broken because they cannot be contacted or refuse to attend or paragraph 3.29 applies, arrangements should be made for an independent person such as a custody visitor, to be present. Alternatively, or as an additional safeguard, arrangements should be made to visually record the procedure".

5. Clause 12X:

It seems as though the caution will only be administered after the person makes an admission, an amendment must be reflected to suggest that he be cautioned in accordance with Judge's Rule 1 or 2 prior to making the admission.

Clause 12X(1)(a) should not be reworded but it should revert to what is previously was to read- "to the effect that he is not obliged to say anything unless he wishes to do so and that anything he says may be put in writing or otherwise recorded and may be given in evidence".

DIVISION 4- SPECIAL MEASURES, EVIDENCE BY VIDEO LINK AND WITNESS ANONYMITY ORDERS

1. Clause 12AC- Screened Witness

It is proposed at this Clause that during examination of the witness at examination in chief, cross-examination and re-examination, that the witness be screened from the Accused, however, everyone else in the courtroom will be able to see the witness.

This particular Clause is objectionable due to the prejudicial effect it will have against the accused person. The jury will draw conclusions which are prejudicial against the Accused such as the Accused person being a dangerous person and the witness being someone who is in need of protection.

In **Archbold Criminal Pleading, Evidence and Practice (1999)** at para 4-261 referred to the case of *R. Ricketts [1991] Crim. L.R. 915, CA*, it is opined that where an Accused person has been prejudiced in that the jury was made aware that a statement of the Accused was read due to fear then the jury should be discharged.

No direction given to the jury by the trial judge will be able to cure the prejudice suffered by the Accused.

2. Clause 12AE- Support persons and devices

No definitions of the devices where given and is vague.

3. Clause 12AG- Witness Anonymous Orders

In Trinidad and Tobago there is a constitutional right found at **section 5 of the Constitution** which affords every person a right to a fair hearing in accordance

with the principles of fundamental justice for the determination of his rights and obligations and any person charged with a criminal offence a right to a fair and public hearing by an independent and impartial tribunal.

The House of Lords in the UK, in the popular case of **R v Davis [2008] UKHL 36** (18 June 2008) found that the use of anonymous witnesses prevented the accused from adequately examining his accusers, and thereby denied him a fair trial in accordance with both the common law and Art 6(3)(d) of the *European Convention on Human Rights*. Further, the House of Lords held that a conviction should not be based solely, nor to a decisive extent, upon the evidence of anonymous witnesses.

The Court made the following points:

- a) the ability of the appellant's counsel to cross-examine the witnesses on points essential to the defence had been severely compromised by the special procedures, and as such the trial was unlawful and unfair.
- b) The court recognized the 'long-established principle of English common law' of a defendant in a criminal trial to be confronted by his or her accusers.
- c) It was accepted that although the court has an inherent jurisdiction to control its own proceedings, there is a 'strong imperative in favour of open justice'. The Lords indicated that, contrary to the position argued by the prosecution, there is no authority for the court to 'make far-reaching inroad[s] into the common law rights of a defendant'.¹

¹ <https://www.hrlc.org.au/human-rights-case-summaries/r-v-davis-2008-ukhl-36-18-june-2008>

In the case of **Jarvie v Magistrates Court of Victoria [1995] 1 VR 84** it was held that the identity of a witness should never be withheld from a defendant when disclosure might be of substantial assistance to the defendant.

It is believed that the introduction of anonymous witnesses found in Division 4 is problematic in that it violates an individual's constitutional right to a fair trial and public hearing.

There is no objection to the witness giving evidence by video link which currently occurs.

However, concealing the identity of a witness is extremely dangerous which will lead to an unfair trial resulting in unsafe convictions which can unlawfully deny a person of his property or liberty.

Character of the Witness- one of the most important piece of disclosure that the prosecution must disclose to the defence is the antecedent (previous convictions or pending matters) or disciplinary proceedings of the prosecution witnesses. Where the identity of the prosecution witness is withheld and not disclosed it can be difficult for a bad character application to be made and to cross-examine the witness on his credibility.

Voice modulation/ distortion- This particular **Clause AG(5)** is objectionable, where it is proposed that where an Order is made to conceal the identity of the witness, the voice of the witness is also distorted. This will seriously trample on the fair trial right of the Accused person in that the evidence which is being given by an anonymous witness is distorted. A jury when examining the demeanor of a witness considers the tone, modulation and volume of the witness to determine whether the witness shows credibility. If the voice is distorted it significantly impedes the jury's ability to do same.

Conclusion

Based on the foregoing issues and concerns, the undersigned Member is not inclined to associate himself with the Majority Report and the Amended Bill in its current form.

And I so submit,

Dated 01st June 2020.

A handwritten signature in blue ink, appearing to read 'S. Hosein', is written over a horizontal line.

Saddam Hosein
Member



ANNEX E SHOWING PHOTOGRAPHS TO EYE-WITNESSES

(a) Action

1. An officer of sergeant rank or above shall be responsible for supervising and directing the showing of photographs. The actual showing may be done by another officer or police staff, see *paragraph 3.11*.
2. The supervising officer must confirm the first description of the suspect given by the eye-witness has been recorded before they are shown the photographs. If the supervising officer is unable to confirm the description has been recorded they shall postpone showing the photographs.
3. Only one eye-witness shall be shown photographs at any one time. Each witness shall be given as much privacy as practicable and shall not be allowed to communicate with any other eye-witness in the case.
4. The eye-witness shall be shown not less than twelve photographs at a time, which shall, as far as possible, all be of a similar type.
5. When the eye-witness is shown the photographs, they shall be told the photograph of the person they saw on a specified earlier occasion may, or may not, be amongst them and if they cannot make an identification, they should say so. The eye-witness shall also be told they should not make a decision until they have viewed at least twelve photographs. The eye-witness shall not be prompted or guided in any way but shall be left to make any selection without help.
6. If an eye-witness makes an identification from photographs, unless the person identified is otherwise eliminated from enquiries or is not available, other eye-witnesses shall not be shown photographs. But both they, and the eye-witness who has made the identification, shall be asked to attend a video identification, an identification parade or group identification unless there is no dispute about the suspect's identification.
7. If the eye-witness makes a selection but is unable to confirm the identification, the person showing the photographs shall ask them how sure they are that the photograph they have indicated is the person they saw on the specified earlier occasion.
8. When the use of a computerised or artist's composite or similar likeness has led to there being a known suspect who can be asked to participate in a video identification, appear on an identification parade or participate in a group identification, that likeness shall not be shown to other potential eye-witnesses.
9. When an eye-witness attending a video identification, an identification parade or group identification has previously been shown photographs or computerised or artist's composite or similar likeness (and it is the responsibility of the officer in charge of the investigation to make the identification officer aware that this is the case), the suspect and their solicitor must be informed of this fact before the identification procedure takes place.
10. None of the photographs shown shall be destroyed, whether or not an identification is made, since they may be required for production in court. The photographs shall be numbered and a separate photograph taken of the frame or part of the album from which the eye-witness made an identification as an aid to reconstituting it.

(b) Documentation

11. Whether or not an identification is made, a record shall be kept of the showing of photographs on forms provided for the purpose. This shall include anything said by the eye-witness about any identification or the conduct of the procedure, any reasons it was not practicable to comply with any of the provisions of this Code governing the showing of photographs and the name and rank of the supervising officer.
12. The supervising officer shall inspect and sign the record as soon as practicable.