

# BILL ESSENTIALS

BILL ESSENTIALS NO. 8 2020–2021

1<sup>ST</sup> SESSION, 12<sup>TH</sup> PARLIAMENT

## The Evidence (Amendment) Bill, 2020



THE PARLIAMENT OF  
TRINIDAD AND TOBAGO

### BILL ESSENTIALS

Date Introduced: 8 December, 2020

House: Senate

Minister: Attorney General and  
Minister of Legal Affairs

Bill No: 7 of 2020

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Links: The links to the Bill, and its progress can be found on the Bill's home page through the Parliament's Website

<http://www.ttparliament.org/legislations/b2020s07g.pdf>

## BACKGROUND

1. **The Evidence (Amendment) Bill, 2020** (hereinafter referred to as “**the Bill**”) seeks to amend the **Evidence Act, Chap. 7:02**<sup>1</sup> (hereinafter referred to as “**the Act**”) to provide for the use of different identification procedures, interviews and oral admissions, special measures evidence taken by video link and other matters related thereto.
2. This Bill was introduced in the Senate by the Honourable Attorney General and Minister of Legal Affairs on December 8 2020.

## KEY FEATURES OF THE BILL

### COMMENCEMENT

3. The Bill would come into effect on such date as fixed by the President by Proclamation.

### INTERPRETATION

4. **Clause 3** of the Bill proposes to amend the Act by introducing after existing Section 1, a new Clause 1A with the following definitions of certain terms used in the Bill:-
  - “Business” which includes every kind of business, profession, occupation, calling, operation or activity whether carried on for profit or otherwise;
  - “Document” which includes any device by means of which information is retrieved, recorded or stored;
  - “Statement” includes any representation of fact sworn or unsworn, made in words or otherwise.

### PART IA – POLICE AND CRIMINAL EVIDENCE

5. **Clause 4** of the Bill proposes to amend the Act by inserting the **New Part IA Police and Criminal Evidence** after Section 11.

#### Division 1 - General

6. **Clause 4** of the Bill proposes to amend the Act by inserting a new Section 12 which defines certain terms used in the Bill, *inter alia*:
  - “appropriate adult” means a person eighteen years of age and over and who is a –

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<sup>1</sup> [http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical\\_List/lawspdfs/7.02.pdf](http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/7.02.pdf)

- a) social worker;
- b) welfare worker;
- c) Justice of the Peace;
- d) Children’s Attorney as defined under section 88 of the Children Act<sup>2</sup>;
- 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;
  - 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 interpreter” means any person who holds a valid licence under the Interpreters Act or who is appointed under section 8 of the Interpreters Act<sup>3</sup>;

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<sup>2</sup> [https://rgd.legalaffairs.gov.tt/laws2/alphabetical\\_list/lawspdfs/46.01.pdf](https://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/46.01.pdf)

<sup>3</sup> [https://rgd.legalaffairs.gov.tt/laws2/Alphabetical\\_List/lawspdfs/6.54.pdf](https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/6.54.pdf)

- “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);
- “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);
- “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;
- “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;
- “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 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;
- “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

7. **Clause 4** of the Bill also proposes to amend the Act by inserting sixteen (16) new Clauses after Section 12.

### First Description

8. **Clause 12A** establishes the requirement for the investigating officer to record the first initial description of a suspect provided by an eye-witness before any identification procedure occurs. This record would be made and kept in an approved form to enable details of the description to be accurately produced in a visible, audible or legible form which can then be given to the suspect or his representative.

9. This record would include details such as:

- the distance the eye-witness was from the suspect;
- weather and lighting conditions at the time of the commission of the offence;
- the length of time during which the eye-witness observed the suspect;
- whether the eye-witness saw the suspect previously and the number of such occasions;
- whether anything impeded the eye-witnesses view;
- the length of time which elapsed between the original observation and subsequent identification to the police; and
- other particulars which the investigating officer thinks fit.

10. Additionally, the investigating officer must confirm that the first description of the suspect given by the eye-witness was recorded in the approved form before the eye-witness is shown any photographs, a computerised or artist's composite or similar likeness for identification purposes. The Investigating officer must also ensure that the eye witness's first description of the suspect is recorded in the Station Diary and have a video or audio recording of the eye witness providing this first description.

11. The record of the first description must be provided to the eye-witness for him to confirm and sign it. In circumstances where the eye-witness refuses to confirm and sign the first description the investigating officer must record this refusal in the approved form in the Station Diary.

12. The record of the first description must also be given to the suspect or his representative for either of them to sign and confirm receipt of the record. Where the suspect or his representative refuses to sign and confirm receipt of the record of the first description the investigating officer must record this refusal in the approved form in the Station Diary.

### Use of photographs to assist in identifying suspects

13. **Clause 12B** provides for an investigating officer to utilise photographs to assist the eye-witness in establishing the suspect's identity, prior to the conduct of an identification procedure. Where such photographs are used, only a minimum of twelve (12) photographs must be shown to an eye-witness at a time.

14. The investigating officer must ensure that:

- only one (1) eye-witness is shown photographs at any one time;
- that an eye-witness is not shown photographs in the presence or hearing of another eye-witness and
- all photographs which are shown to an eye-witness are images of persons with characteristics similar to the first description (Section 12A(1)).

15. Additionally, in instances where a suspect has been positively identified by an eye-witness, the investigating officer must take all necessary steps to ensure that all photographs which are used are kept securely and the movement of the photographs are carefully accounted for.

16. Furthermore, a detailed record of the proceedings shall be made and kept by the investigating officer in approved form and recorded in the Police Station Diary whether or not any identification of the suspect is made. Such record includes anything said by the eye-witness about any identification and the names of all persons present while photographs were being shown to the eye-witness.

17. Finally, in instances where a person has not been positively identified by an eye-witness as a suspect, the Commissioner of Police must ensure that any photograph used under this section is preserved for use in all criminal proceedings to which the photograph relate.

### Conduct of identification procedure

18. **Clause 12C** establishes when an identification procedure should be conducted. An identification procedure must not be conducted unless a suspect is

- known;

- available;
- an eye-witness claims or purports to have seen the suspect, or there is an eye-witness available who expresses an ability to identify the suspect;
- there is a reasonable chance of an eye-witness being able to identify the suspect and
- the suspect does not admit to being the person which the eye-witness claims to have seen or is able to identify.

19. An identification procedure can also be conducted if considered to be useful by the investigating officer in charge of a criminal investigation.

20. In instances where an eye-witness and a suspect participate in an identification procedure relating to the investigation of an offence, a subsequent identification procedure involving the same eye-witness and the same suspect must not be conducted in relation to the same offence.

21. However, an identification procedure in relation to the same offence, may be conducted with the same eye-witness and another suspect or the same suspect and another eye-witness.

22. An identification procedure need not be conducted where:

- it is impracticable to hold one;
- where it is not disputed that the suspect is already well known to the eye-witness;
- if the eye-witness merely describes a piece of clothing or provides an insufficient description of the person he claims to have seen; or
- the identification procedure would serve no useful purpose in proving or disproving the suspects involvement in committing the offence.

23. An identification parade can also be carried out where:

- 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;
- An eye-witness with no prior knowledge of a suspect in police custody, saw the suspect commit the crime or saw him in circumstances where there was a likelihood that he would have done so;
- The suspect and the witness are not well known to each other and neither party disputes this; or

- The witness claims to know the suspect but the suspect denies this.
24. Also, in instances where an eye-witness previously made an identification using photographs, computerised or artist's composite sketches or similar likeness then he must not be reminded of such photograph, composite likeness or any description of the suspect once the suspect is available for identification by other means.
25. Lastly, in instances where an identification procedure is required then it should be conducted as soon as is reasonably practicable in the interest of fairness to a suspect or an eye-witness.

### Identification Officer

26. **Clause 12D** establishes the specific responsibilities of the identification officer which includes responsibility for making arrangements for an identification procedure; conducting an identification procedure in relation to an investigation without being involved in the investigation; and directing one or more police officers who are not involved in the investigation in any way, to assist him in conducting an identification procedure.

### Types of identification procedures

27. **Clause 12E** establishes the six (6) main types of identification procedures and the order of priority under which such procedures should be conducted. An identification procedure which is to be conducted is subject to practicability or the availability or cooperation of the suspect. It should be conducted in the following order of priority:

- i. Identification parade (clause 12K);
- ii. Identification using video medium (clause 12J);
- iii. Identification in a public place with consent of the suspect (clause 12M);
- iv. Identification in a public place without consent of the suspect (clause 12N);
- v. Identification by confrontation (clause 12O).
- vi. Identification by verification where the eye-witness is asked:

“Is this the person you referred to as X in your statement?”

28. In instances where it is impractical or circumstances are unsuitable to conduct an identification procedure in such order of priority under clause 12E, the identification



officer must offer the next identification procedure in order of priority which is reasonably practicable in such circumstances and record detailed reasons for doing so.

29. Additionally, an identification officer is responsible for ensuring that the proceedings of an identification procedure is recorded in approved form and in the police station diary.

### Rights, consent and caution

30. **Clause 12F** establishes that before an identification procedure is to be conducted there are certain rights, consent and caution which the identification officer must ensure that the suspect is aware of. In instances where an identification procedure is to be conducted, the identification officer must inform the suspect of his right to have a representative present before he consents to the identification procedure.

31. The identification officer must also ensure that the suspect is cautioned that he is not mandated to say anything but if he wishes to do so voluntarily then anything he says will be put into writing or otherwise recorded and may be admitted into evidence.

32. Additionally, the identification officer must record in approved form his compliance with these requirements and give a copy of the form to the suspect who must also sign and confirm receipt of the form. However, where the suspect refuses to sign and confirm receipt of the form, then such refusal must be recorded in approved form.

33. In instances where the consent of the suspect is required to participate in an identification procedure and the suspect has been informed of all his rights, then the suspect must be given the opportunity to consent to participating in an identification procedure and the type of identification procedure to be used. He must also be allowed to obtain advice from his representative if practicable and his consent or refusal must be recorded in approved form and a copy of this form must be given to the suspect or his representative who must also sign and confirm receipt of the form.

34. Any refusal by the suspect to give consent would not be a bar to an identification procedure being conducted (under clauses 12N or 12O). If a suspect refuses to participate in an identification procedure or requests another identification procedure then he must be asked whether he wishes to state his reasons for refusing and such reasons, if any, for requesting another identification procedure. The identification officer must record in detail and in the approved form, such refusal and the reasons given for such refusal.

## Suspect may have a representative

35. **Clause 12G** establishes that in instances where a suspect is involved in an identification parade, then he should be given a reasonable opportunity to have his representative present before an identification procedure is conducted and shall be permitted to make a telephone call to contact his representative to attend the identification parade. The suspect must also be given at least nine (9) hours' notice of the time and place the identification procedure is to be conducted. However, such identification procedure may be conducted before expiration of the period of notice referred to, if his representative is present.
36. Where the suspect's representative is unable to attend the identification procedure within the nine (9) hour period of notice the identification officer must make a record of the reasons for the delay and all efforts made to secure the representative's attendance. Additionally, the identification officer may appoint a Justice of the Peace to protect the suspect's interests.
37. If the suspect's representative is present for the identification procedure then the identification officer must inform the representative in the suspect's presence and prior to the commencement of the identification procedure of the suspect's rights along with other matters which the officer is required to inform the suspect under clause 12F and also whether or not the suspect consented to the identification procedure. This information given to the representative must be recorded in the approved form by the identification officer and a copy given to the representative who must sign and confirm receipt of the form. However, if the representative refuses to sign and confirm receipt of the form then such refusal must be recorded in the approved form.
38. The identification officer must record in the approved form any objections or statements made by the suspect and any unusual occurrences during the identification procedure, a copy of which must be provided to the suspect or his representative who would be asked to sign confirming receipt. However, if the suspect or representative refuses to sign then such refusal must be noted in the approved form by the identification officer.
39. Additionally, the suspect or his representative must be provided with details of the first description of the suspect given by each eye-witness participating in the identification procedure. The suspect or his representative would be asked to sign in the approved form confirming receipt of this description. However, if the suspect or representative refuses to sign the approved form then such refusal must be noted in the approved form by the identification officer.

40. Furthermore, if any material in the form of an image, composite, sketch or video has been published, broadcasted or released to the media by the Police for the purpose of recognising or tracing the suspect, then the identification officer must obtain a copy of such material and allow the suspect and his representative to view the material once it is practical and would not unreasonably delay the identification procedure. However, if the suspect or representative refuses to sign in the approved form then the identification officer must ensure that a Justice of the Peace is present to witness the identification procedure and the Justice of the Peace must sign in the approved form.

#### Where suspect does not have a representative

41. **Clause 12H** establishes the procedure to be followed by the identification officer where a suspect is unable to secure the attendance of a representative in accordance with clauses 12G (1) to (3). Under such circumstances the identification officer is responsible for ensuring that a Justice of the Peace is present to witness the procedure.
42. Where a Justice of the Peace is present at the identification procedure, he must ensure prior to the procedure that the suspect was informed of his rights, has consented to the identification procedure and has been cautioned by the identification officer in accordance with clause 12F. The Justice of the Peace must certify that these requirements were followed in the prescribed form.
43. The Justice of the Peace must record any objections or statements made by the suspect and any unusual occurrences during the course of the identification procedure. The Justice of the Peace shall also notify the suspect of any failure of the identification officer to discharge his functions under clause 12F.
44. Additionally, the Justice of the Peace must be provided with details of the first description of the suspect given by each eye-witness participating in the identification procedure.
45. Furthermore, if any material in the form of an image, composite, sketch or video which has been published, broadcasted or released to the media by the Police for the purposes of recognising or tracing the suspect, then the identification officer must obtain a copy of such material and allow the Justice of the Peace to view the material once it is practical and would not unreasonably delay the identification procedure.

## Eye-witness to be informed that person he saw may not be in identification procedure

46. **Clause 12I** provides that prior to the conduct of an identification procedure, the investigation officer must inform an eye-witness that the person he claims to have seen may or may not be present in the identification procedure and that if the persons he claims to have seen is or is not in the identification procedure then it should be reported to the identification officer.

## Identification using video medium

47. **Clause 12J** prescribes the process of an identification procedure using video medium. Before an identification is made, an eye-witness must be shown moving images of the suspect together with similar images of at least eight (8) other persons who resemble the suspect or at least nine (9) images. However, where there are two suspects of roughly similar appearance then the eye-witness must be shown moving images of the suspects together with similar images of at least twelve (12) other persons who resemble the suspects, ensuring that the eye-witness is shown at least fourteen (14) images before an identification is made.

48. Where there is more than one witness the identification officer must ensure that only one eye-witness is shown the video images at a time.

49. Additionally, where a video identification procedure is used, the persons to be utilised shall as far as possible resemble the suspect in terms of race, colour, age and general appearance. All such images must be shown to the witness individually and sequentially.

50. The suspect must not be present during an identification using video medium.

## Identification parade

51. **Clause 12K** establishes the process where an identification procedure using an identification parade is to be conducted. The identification parade must be conducted in a police station or other building under the control of the police in the normal course of their duties, in a room equipped with a screen that allows the witness to view the suspect without being seen.

52. The identification parade must also comprise a line-up of persons as follows:

- one suspect and at least eight (8) other persons resembling the suspect; or

- two suspects resembling each other and at least twelve (12) other persons resembling the suspects.

53. Where an identification parade is conducted, the participants must as far as possible, resemble the suspect in relation to race, colour, age, height and general appearance.

54. Additionally, the suspect, his representative or a Justice of the Peace must be given an opportunity to object to any one or more persons being used in the line-up of persons or to any arrangements for the identification parade. Objections raised must be recorded by the identification officer. Once there is an objection by the suspect, his representative or a Justice of the Peace, the identification officer must take steps to remove the grounds for the objection where practicable. Where it is not practicable to take such steps to remove the grounds for objection, the suspect, his representative or the Justice of the Peace must be informed that such objections cannot be resolved and this must be recorded in the approved form.

55. Moreover, if an identification parade involves the use of a screen which allows an eye-witness to view the composition of participants in the identification parade without being seen, then the identification parade must be conducted with everything said to, or by, a witness being said within the hearing of the suspect, his representative or the Justice of the Peace.

56. Lastly, the identification officer must ensure that the identification parade is recorded by video recording. Such recordings would also be admissible in evidence. A copy of these original recordings must be supplied on request to the suspect or his representative within seven (7) days.

### Eye-witness in identification parade

57. **Clause 12L** establishes the procedure to be followed in relation to an eye-witness participating in an identification parade. Each eye-witness to an identification procedure must be brought into the parade room one at a time and only one eye-witness must be in the parade room at a time while the identification parade is being conducted.

58. The identification officer tasked with conducting the identification parade is responsible for making proper arrangements to ensure that prior to an eye-witness attending an identification parade he is not able to communicate with other eye-witnesses about the case, overhear another eye-witness who has already seen the identification parade, see any member of the identification parade, see or be reminded of any photograph/description of the suspect or be given any other indication of the suspect's identity or see the suspect before or after the identification parade.

59. The identification officer must ensure that prior to an identification parade being conducted, the composition of the identification parade and whether an eye-witness participating in the identification parade has made a previous identification, is not discussed with an eye-witness.
60. In instances where an eye-witness requests that a participating member of the identification parade speak, move or adopt any specified posture then the identification officer must require that all participants of the parade comply with the request, regardless of whether the eye-witness is able to identify the suspect by appearance only. If a participating member refuses to comply with the request then the identification officer must temporarily stop the parade and record in detail and in approved form the refusal and the reason the identification parade was stopped. When this information is recorded, the participating member who made this refusal must be removed and replaced and the identification officer can resume the identification parade.
61. Additionally, if during the course of an identification parade a suspect informs the identification officer that he no longer wants to participate in the parade then the identification officer must stop the parade and record in detail and in the approved form such refusal and the reason the identification parade was stopped. The suspect must sign a copy of the form confirming receipt.

#### Identification in public place with consent of suspect

62. **Clause 12M** states the process to be followed where an identification in a public place, with the suspect's consent, is to be conducted. An identification in a public place may be conducted with the suspect's consent, where the suspect is not in police custody, or it is impossible or impractical to make use of any other identification procedure. This type of identification parade must be recorded in the approved form. The identification officer must also provide a copy of said form to the suspect who is required to sign confirming receipt.
63. Where such an identification procedure is being conducted the identification officer may take an eye-witness to a public place in any area where other people are passing by or waiting around informally in groups so the suspect can join them and be capable of being seen by an eye-witness at the same time as the other persons in the group; or, in an area where the suspect lives, is employed or frequents or may be seen under normal conditions so the eye-witness may or may not identify him. Additionally, such an identification procedure may also be valid if at the time of being seen by an eye-witness the suspect was on his own rather than in a group.

## Identification in public without consent of suspect

64. **Clause 12N** identifies the process to be followed when an identification in a public place, without the suspect's consent, is to be conducted. Where an identification procedure is to be done without the consent or co-operation of the suspect then the identification officer must ensure that it is done in the presence of a Justice of the Peace. An identification procedure without the suspect's consent may be conducted in circumstances where the suspect is not in custody, or the suspect has refused to give consent to conducting such procedure under clause 12M, or it is impossible or impractical to obtain the suspect's consent.

## Identification by confrontation

65. **Clause 12O** sets out the procedure to be followed when an identification by confrontation is to be conducted. If a suspect in police custody refuses to consent to any other identification procedure then an identification by confrontation may be used. A detailed record of the suspect's refusal must be made by the identification officer in the approved form. The identification officer must provide a copy of said form to the suspect who is required to sign confirming receipt.

66. In instances where an identification by confrontation is to be utilised, the suspect must be informed by the identification officer that due to his refusal to consent to any identification procedure he must be confronted by each eye-witness and he must also be cautioned by the identification officer that he is not required to say anything unless it is voluntary and anything which he says may be reduced into writing and tendered into evidence.

67. Such procedure must be conducted in a police station or other building under the control of the police in the normal course of their duties. It can be done in either a normal room or in one equipped with a screen which would allow the witness to view the suspect without being seen. This identification procedure must be recorded by the identification officer by video recording.

## Destruction of forms and recordings

68. **Clause 12P** requires the Commissioner of Police to consult with the Director of Public Prosecutions prior to destroying any approved forms and recordings of identification procedures.

## Division 3 – Interviews and Oral Admissions

### Recording of interviews

69. **Clause 12Q** provides that the investigating officer must record the interview of any person suspected of or charged with the commission of an offence. The process to be followed by the investigating officer recording the interview is also established. Such interview must be recorded by video recording unless it is not reasonably practicable to do so. Where it is not reasonably practicable to record the interview by video recording, audio recording must be used. Moreover, where it is not reasonably practicable to utilise video or audio recording, then the interview should be recorded in writing.
70. In instances where a video recording of an interview is being made, the camera should be situated to ensure coverage of as much of the surroundings as practicably possible whilst the interview is taking place. Additionally, any ‘removable recording medium’<sup>4</sup> utilised in recording the interview must be new and previously unused.
71. The interviewing officer must record in approved form and in the police station diary any interview and any reason why it was not reasonably practicable to comply with any provisions under this section. Such interview recordings would also be admissible as evidence.

### Register of interviews

72. **Clause 12R** prescribes that the Commissioner of Police must establish and maintain a register at each Police Station known as the “Register of Interviews” which would record and contain specific information. Such information to be recorded includes inter alia the reference number of the interview, the name of the interviewee, the name, number and rank of the interviewing officer, the date, time and place of the interview, the time of commencement and completion of the interview, the manner in which the interview is recorded and such other information as prescribed by regulations.
73. Additionally, the interviewee or his representative must on request, be provided with a copy of the entry in the Register of Interviews in relation to his interview.

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<sup>4</sup> This includes magnetic tape, optical disc, solid state memory or any removable physical recording medium which can be played and copied.



### Recording of interview

74. **Clause 12S** establishes the procedure to be followed by the interviewing officer during an interview. Such interview must be recorded in its entirety by the interviewing officer.
75. At the commencement of an interview, the interviewing officer must first state his name, number and rank including that of any other officer present, the name of the interviewee, the date and time of commencement of the interview and location of the interview and the offence for which the interview is being conducted. The interviewing officer must also inform the interviewee about the live recording and demonstrate such sign or indicator that the recording equipment is activated and recording. The interviewing officer must ask the interviewee and any other person present including his representative to identify themselves and he must then caution the interviewee that he is not obliged to say anything unless it is voluntary and anything that is said would be reduced into writing or recorded and may be tendered into evidence.
76. When the interview is concluded the interviewee must be offered the opportunity to clarify (add or correct) anything that he may have said during the interview and such clarification must also be recorded.

### Objection by interviewee to video or audio recording

77. **Clause 12T** provides for circumstances where an interviewee objects to a video or audio recording of the interview either before or during the interview. In such instances where an interviewee objects to a video or audio recording of the interview at the outset or during the interview then the objection of the interviewee must be recorded on recording media.
78. Where such objections have been recorded or the interviewee has refused to have such objections recorded then the interviewing officer must state orally that the recording equipment will be turned off, along with his reasons for doing so. After turning off the equipment a written record of the interview must then be made.

### Requirements of interviewing officer at conclusion of interview

79. **Clause 12U** prescribes the procedure to be followed by an interviewing officer at the conclusion of an interview. When an interview is concluded the interviewing officer must make a note in his pocket diary and in the police station diary that the interview has taken place and has been recorded and the time, date and duration of the interview.
80. For interviews recorded by audio or video recording, the interviewing officer must place his marking on the recording medium, label it as the master copy, and request the interviewee or his representative to sign it. He must then make two copies of the master copy in the presence of the interviewee or his representative and label each copy as a working copy with one copy given to the interviewee and the other copy given to the investigating officer. The master copy must then be sealed in the presence of the interviewee or his representative and the required information must be entered into the Register of Interviews. If the interviewee or his representative refuses to sign the master copy of the recording medium then such refusal must be noted in the Register of Interviews by the interviewing officer.
81. Additionally, where a transcript of the recording of an interview is made, the interviewee or his representative must be given a copy within seven (7) days of making the transcript.

### Master copy

82. **Clause 12V** proposes the procedure to be followed where a master copy of an interview is to be used for copies and is retained or destroyed. The interviewing officer must submit the sealed and marked master copy to a police officer of the rank of Assistant Superintendent or above. The Commissioner of Police must make necessary arrangements to ensure that all master copies are securely kept and their movements are fully accounted for, regardless of whether any court proceedings have commenced in relation to the specific interviewee.
83. The master copy must be retained until final determination of the court matters in which the recordings are to be used. The Commissioner of Police must also consult with the Director of Public Prosecutions prior to the destruction of any master copy.

### Breaking the seal of a master copy

84. **Clause 12W** establishes the procedure to be followed where the seal of a master copy is to be broken. The seal of a master copy must only be broken if it is done in accordance with the procedures set out in the clause.
85. If it becomes necessary to break the seal of a master copy in order to make a copy of it because the working copy has been destroyed or is otherwise unavailable the seal must be broken by a police officer of the rank of Assistant Superintendent or above in the presence of a Justice of the Peace and if practicable the interviewee or his representative. The interviewee or his representative must also be informed of the intention to break the seal of the master copy and they should be afforded a reasonable opportunity to be present. If the interviewee or his representative is not present when the seal of the master copy is broken then the seal must be broken in the presence of a Justice of the Peace who must also reseal the master copy and sign the seal. If the interviewee or his representative is present at the breaking of a seal then either of them should be invited to reseal the master copy and sign the seal. However, where the interviewee or his representative refuses to reseal the master copy and sign the seal then the Justice of the Peace must reseal the master copy and sign the seal.
86. If the seal of the master copy is broken and a copy is made of the master copy which is then resealed, the police officer of the rank of Assistant Superintendent or above must record the procedure followed in approved form including the date, time and place as well as all persons present when the seal of the master copy was broken and when it was subsequently resealed.

### Oral admission

87. **Clause 12X** states the procedure to be followed by an investigating officer where a person suspected of or charged with committing an offence makes an oral admission. Such a person suspected of or charged with committing an offence who makes an oral admission must immediately be cautioned by the investigating officer. The investigating officer must record the oral admission by video or oral recording and also immediately make a note in his pocket diary and police station diary. Such note must be read to the person who would be asked to sign it along with the police officer taking the note. If a suspect refuses to sign

the note then a written record must be taken of the request being made and such refusal to accede to the request.

88. If it is not practicable to make an immediate note of the oral admission then the investigating officer must as soon as reasonably practicable, make a note of the oral admission in his pocket diary and police station diary. Such note made in the police station diary must be read to the person in the presence of a police officer senior in rank to the investigating officer which the person would be required to sign along with the police officer senior in rank.
89. However, if the person refuses to sign the note as required then a written record must be taken of the request made and the person's refusal. Additionally, if the person is unable to affix his signature then the investigating officer must read the oral admission to the person and request that the person put their mark or thumbprint on it. The oral admission shall also contain a declaration that it was read to the person and he appeared to understand and agree to it.

#### **Video or audio recorded evidence of witness**

90. **Clause 12Y** provides that video or audio recordings of the whole or part of a witness statement shall be admissible as evidence.
91. Video or audio recordings may be made of the examination-in-chief, cross-examination or re-examination of a witness and the whole or part of such recording would be admissible as evidence of the witness' testimony. If the video or audio recordings are admitted as evidence then all such evidence are admissible to the same extent and would have the same effect as evidence given in direct oral testimony.
92. The admission of such video or audio recordings as evidence is not a bar to the same witness in appropriate circumstances being allowed to give direct oral testimony. Where direct oral testimony is given, the witness should not be asked to address any issue in examination-in-chief, cross-examination or re-examination where the Court deems that it was already adequately addressed in the recording. The audio visual recording rules would apply once the necessary changes have been made to video or audio recordings of the part or whole of a witness statement.

## Offences

93. **Clause 12Z** creates an offence where any person without lawful authority possesses, plays or offers to supply a recording of an interview to any person under this Division or copies, tampers with, modifies, erases or publishes a recording of an interview under this Division. Such a person is liable on summary conviction to a fine of fifty thousand dollars (TTD \$50,000.00) and imprisonment for one (1) year on conviction or on indictment to a fine of five hundred thousand dollars (TTD \$500,000.00) and to imprisonment for seven years.

## Division 4 – Special Measures and Evidence by Video Link

### Vulnerable witnesses and special measures accorded to them

94. **Clause 12AA** proposes that a court can issue a direction that special measures are to be used under certain circumstances. In any criminal proceedings, the court may issue a direction that a special measure or a combination of special measures are to be used for giving evidence by a witness, on an application made by any party to the proceedings or on its own motion.

95. However, before issuing such a special measure direction, the court must be satisfied that the witness is a vulnerable witness<sup>5</sup> and the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the witness' part in relation to testifying in the proceedings.

### Closed Proceedings

96. **Clause 12AB** establishes for circumstances under which a court may issue a special measure direction that closed proceedings are to be utilised. In instances where the court considers it appropriate to protect the identity of a witness from the public or to protect a witness from being intimidated by other persons present in the courtroom, the court may issue a special measure direction that closed proceedings are to be utilised.

97. Where such closed proceedings are utilised, no person other than the Judge, Master, Magistrate or Attorneys-at-Law acting in the proceedings and the jury, court interpreter

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<sup>5</sup> Vulnerable witness means any witness whose ability to give evidence or the quality of whose evidence is likely to be affected by the age or immaturity of the witness, the physical disability or mental disorder of the witness, trauma suffered by the witness, fear of intimidation of the witness or the witness being a virtual complainant in proceedings for a sexual offence.

or any other person required to assist the court in the conduct of its proceedings along with the accused should be present in the courtroom whilst testimony is being given.

### Screening witness from accused

98. **Clause 12AC** provides for circumstances under which a court may consider it appropriate to issue a special measure direction for a witness to be prevented by means of a screen or other arrangement from seeing or being seen by the accused whilst giving testimony or being sworn. Such screen or other arrangement should not prevent the witness from being seen by the Judge, Master, jury, Attorney-at-law acting in the proceedings and any court interpreter or other person appointed to assist the witness.

### Evidence of vulnerable witness by video link

99. **Clause 12AD** empowers the court to issue a special measure direction that a vulnerable witness be allowed to give evidence by video link. Any witness appearing by video link is deemed to be present in the courtroom.

100. However, in the interest of justice, the court may refuse the use of video link as a special measure where the court considers that such special measure is not likely to improve the quality of the evidence or the witness requests that such special measures not be used and the court is satisfied that the quality of the evidence would not be diminished as a result.

101. Additionally, the court in determining whether to allow evidence of a child witness by video link must take into account the age and maturity of the child, the ability of the child to comprehend what is involved in giving evidence and any other matters which the court considers relevant.

### Support persons and devices

102. **Clause 12AE** states the circumstances under which a court may issue a special measure direction to ensure that a vulnerable witness is provided with such support persons or devices as deemed fit. Such support person should as far as reasonably practicable ensure that a vulnerable witness is comfortable and secure while giving evidence. Where deemed necessary, such vulnerable witness must be provided with or allowed to use devices to assist in overcoming any disability, disorder or impairment which may affect

the ability of the witness to hear or understand questions and to communicate the answers.

### **Appearance or giving of evidence by video link**

103. **Clause 12AF** empowers the court, on application by a party or on its own motion, to issue a special measure direction for a person to appear before the court or to give evidence in criminal proceedings using a video link. In determining whether to issue such a direction, the court must take into account whether or not it is reasonably practicable to secure the person's physical attendance at the proceedings having regard to any expense which would be incurred, any logistical difficulties or any other factors regarding the person's attendance which the court may consider relevant.
104. Additional factors which must also be taken into account includes whether the use of a video link is reasonably practicable to facilitate administrative procedures if the accused is held on remand pending the next court appearance and evidence will not be given at the proceedings and also whether the use of a video link is appropriate in the interest of justice.
105. In determining whether such use of video link is appropriate in the interest of justice the court must consider:
- the views expressed by or submissions made on behalf of the person;
  - the nature of the evidence to be given;
  
  - the availability and quality of the technology to be used;
  - the ability of the person to participate effectively in the proceedings;
  - the ability of the accused to consult and instruct his Attorney-at-Law privately; and
  - any other matter which the court considers relevant.
106. Moreover, the court in determining whether to allow an accused to give evidence by video link must also take into account:
- the risk that the personal security of a particular person including the accused may be endangered if the accused appears in the courtroom or any other place where the court is sitting;

- the risk of the accused escaping or attempting to escape from custody when attending court or any other place where the court is sitting;
- the behaviour of the accused when appearing before a court previously;
- the conduct of the accused while in custody including during any period previously where the accused was held in custody in prison;
- the safety and welfare considerations of transporting the accused to court or any other place where the court is sitting;
- the efficient use of available judicial and administrative resources; and
- any other relevant matter raised by any party to the proceedings for making such a direction.

107. In instances where evidence is given by a person using a video link, the person is deemed to be physically present at proceedings and such evidence shall be admissible to the same extent and effect as if given in direct oral testimony.

### Order not to prejudice accused

108. **Clause 12AG** establishes that where the court gives a direction or makes an Order under Division 4 and the particular proceedings require trial by jury, the Judge may give the jury such warning as deemed appropriate to ensure that the fact that such an order was made does not prejudice the accused.

## Division 5 – Supplemental Provisions

### Closed Circuit Television (CCTV)

109. **Clause 12AH** provides that a video recording captured by means of a closed circuit television camera (CCTV) is admissible as evidence.

### Regulations

110. **Pursuant to Clause 12AI**, the Minister, in consultation with the Director of Public Prosecutions and the Commissioner of Police, is empowered to make Regulations prescribing the procedure to be followed, type of equipment to be used, arrangements to be made if a person is to use any audio or video recording medium, types of photographs, screens and support devices, required forms under this Part and such other



matters as necessary or expedient for giving effect to this Part.

### Provisions of other Acts and Rules to apply

111. **Clause 12AJ** establishes that notwithstanding the provisions of this Part, if such person is a child then the provisions of the Sexual Offences Act<sup>6</sup>, Children Act<sup>7</sup> and Judges Rules for Children 2016<sup>8</sup> and any other written law relating to children shall apply as necessary.

### Exclusion of Unfair Evidence

112. **Clause 12AK** states that having regard to all circumstances, including any breaches of this Part or any Regulations made under Clause 12AJ and the circumstances in which the evidence was obtained, a court may refuse to allow evidence which the prosecution proposes to rely upon if it appears to the court, that the admission of evidence would have such an adverse effect on proceedings that the court ought not to admit it.

### Approved Form Admissible as Evidence

113. **Clause 12AL** provides that a duly completed approved form referred to under this Part, shall be admissible as evidence.

### Amendment of Section 14

114. **Clause 5** of the Bill proposes to amend the Evidence Act by repealing Section 14(1) of the Act which previously sought to define the words “statement”, “document” and “business”.

### Amendment of Section 14B

115. **Clause 6** of the Bill proposes to amend the Evidence Act by repealing section 14B which previously sought to give the requirements for a statement contained in a document produced by a computer to be admissible as evidence substituted with provisions for electronic evidence in criminal proceedings.

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<sup>6</sup> [http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical\\_List/lawspdfs/11.28.pdf](http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/11.28.pdf)

<sup>7</sup> [http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical\\_List/lawspdfs/46.01.pdf](http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/46.01.pdf)

<sup>8</sup> <http://www.ttlawcourts.org/index.php/component/attachments/download/4788>

116. **Clause 14B (1)** states that nothing in any written law or common law can apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.
117. **Clause 14B (2)** proposes that where a device or process ordinarily produces or accurately communicates an electronic record, the court shall presume that the electronic record on the occasion in question from the device or process would produce or accurately communicate the electronic record, unless evidence sufficient to raise doubt about the presumption is adduced.
118. **Clause 14B (3)** proposes that the hearsay rule would not apply to a representation contained in a document recording an electronic communication so far as the representation is to the identity of the person from whom or on whose behalf the electronic communication was sent, the date or the time at which the electronic communication was sent or the destination of the electronic communication or the identity of the person to whom the electronic communication was addressed.
119. **Clause 14B (4)** proposes that person who is trying to admit an electronic record in any criminal proceeding has the burden of proving the electronic record's authenticity by evidence capable of supporting a finding that the electronic record what it claims to be.
120. **Clauses 14B (5)** proposes that where it is intended to prove the authenticity of an electronic record as evidence, it is permissible to have the evidence of the expert relating to the authenticity of an electronic record presented in the form of a certificate.
121. **Clause 14B (6)** proposes that the certificate proving the authenticity of an electronic record shall be prepared by a person occupying a responsible position in relation to the operation or management or a specified security procedure provider or a security procedure provider accepted by the Court or an expert appointed or accepted by the Court.
122. **Clause 14B (7)** proposes that a person who tendered the a certificate proving the authenticity of an electronic record in a Court and makes a statement which he or she knows to be false or does not reasonably believe to be true, commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars (\$100,000) and to imprisonment for a term of two years or on conviction on indictment to a fine of five hundred thousand dollars (\$500,000) and to imprisonment for a term of seven years.

123. **Clause 14B (8)** proposes that the Rules Committee established by the Supreme Court of Judicature Act, may, subject to negative resolution of Parliament, make Rules necessary for this purposes of this section.

124. **Clause 14B (9)** proposes the following definitions for section 14B:

“electronic communication” means any communication that the parties make by means of electronic records;

“electronic record” means a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another;

“information” includes data, text, images, sound, codes, telephone communications, computer programs, software and databases;

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic records, and includes a telephone system.”.

### Amendment of Section 15

125. **Clause 7** of the Bill proposes to amend section 15 (2) of the Evidence Act by deleting the words “confer on” and substituting the words “deny” to now read as

“In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself deny the prosecution the right of reply.”

### Amendment of Section 40

126. **Clause 8** of the Bill proposes to repeal section 40 and substitute it with new clauses.

127. **Clause 40 (1)** establishes that in any civil proceedings that nothing in any written law or the common law shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.

128. **Clause 40 (2)** states that where a device or process ordinarily produces or accurately communicates an electronic record, the court shall presume that the electronic record on the occasion in question from the device or process would produce or accurately communicate the electronic record, unless evidence sufficient to raise doubt about the presumption is adduced.

129. **Clause 40 (3)** provides that the hearsay rule does not apply to a representation in a document recording an electronic communication if the representation is being used for to identity the person who sent the communication, the date or the time the electronic communication was sent or the destination of the electronic communication or to identify who the electronic communication was sent for.
130. **Clause 40 (4)** establishes that person who is trying to admit an electronic record in any civil proceeding has the burden of proving the electronic record’s authenticity by evidence capable of supporting that the electronic record what it claims to be.
131. **Clause 40 (5)** proposes that where it is intended to prove the authenticity of an electronic record as evidence, it is permissible to have the evidence of the expert relating to the authenticity of an electronic record presented in the form of a certificate.
132. **Clause 40 (6)** provides that the certificate proving the authenticity of an electronic record shall be prepared by a person occupying a responsible position related to the operation or management or a specified security procedure provider or a security procedure provider accepted by the Court or an expert appointed or accepted by the Court.
133. **Clause 40 (7)** states that a person who tendered the a certificate proving the authenticity of an electronic record in a Court and makes a statement which he or she knows to be false or does not reasonably believe to be true, commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars (\$100,000) and to imprisonment for a term of two years or on conviction on indictment to a fine of five hundred thousand dollars (\$500,000) and to imprisonment for a term of seven years.
134. **Clause 40 (8)** proposes the following definitions for section 40:
- “electronic communication” means any communication that the parties make by means of electronic records;
  - “electronic record” means a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another;
  - “information” includes data, text, images, sound, codes, telephone communications, computer programs, software and databases;
  - “information system” means a system for generating, sending, receiving, storing or otherwise processing electronic records, and includes a telephone system.”.

### Amendment of Section 41

135. **Clause 9** of the Bill proposes to amend section 41 of the Evidence Act by:

- Deleting the words “section 37, 38, 39 or 40” in the chapeau of subsection 3 and substituting them for the words “section 37, 38 or 39.” The words “;and” at the end of paragraph (b) is to be deleted and substituted a full stop and paragraph (c) is to be deleted; and
- Repealing subsection 5.

### Amendment of Section 43

136. **Clause 10** of the Bill proposes to amend section 43 of the Act by deleting the words:

- “such one or more of the persons concerned as mentioned in section 41(3) (c)” in subsection (2) (a);  
 “40 (1)” and substituting the word “40” in subsection 3(a); and  
 “40 (1)” and substituting the word “40” in subsection 3 (c).

### First Schedule Inserted

137. **Clause 11** of the Bill proposes to amend the Evidence Act inserting the First Schedule made pursuant to Clause 12AH into the Act. Additionally, in Part VII the words “(Repealed by Act No. 28 of 1996)” occurring after the words “First Schedule” is deleted. This Schedule would provide the form for certification by the Justice of the Peace of the conduct of an Identification Procedure.

### Comparative Legislation

SIMILARITIES WITH THE BILL	DIFFERENCES WITH THE BILL
<b>BARBADOS: THE EVIDENCE (AMENDMENT) ACT 2014, CAP. 121</b>	
<ul style="list-style-type: none"> <li>▪ This Act establishes that if a written record of the sound recording is prepared from any interview, a copy of the written record must be made available to the person questioned or his legal representative within seven days after the preparation of the written record.</li> <li>▪ This Act further establishes that where an accused refuses to subject himself to a sound recording but</li> </ul>	<ul style="list-style-type: none"> <li>▪ The Act provides that if in the course of official questioning, in any proceedings against a person for an offence, evidence is given that the accused prior to being charged for the offence and on being questioned under caution by an interviewing officer trying to discover whether or by whom the offence had been</li> </ul>

an oral admission is made by him to an investigating officer in response to a question put or a representation made the document prepared by or on behalf of the officer is not admissible in criminal proceedings to prove the contents of the question, representation or response unless the accused has signed, initialed or otherwise marked the document to acknowledge that the document is a true record of the question, representation or response.

committed, failed to mention any fact relied on in his defence in such proceedings or upon being charged or possibly prosecuted with the offence failed to mention any such fact which in the circumstances existed at the time the accused could reasonably have been expected to mention when so questioned, charged or informed then the court in determining whether there is a case to answer or the court/jury in determining whether the accused is guilty of the offence charged, may draw such inferences from such failure.

- The Act provides that visual identification evidence adduced by any prosecutor is not admissible unless an identification parade was held or a video identification was conducted which included the accused before the identification was made or it would not have been reasonable to have held an identification parade or conducted a video identification or the accused refused to take part in an identification parade or a video identification and such identification was made without the person who made it having been intentionally influenced to identify the accused.
- This Act also provides that in determining whether it was reasonable to hold an identification parade or to conduct a video identification the court must take into account the kind of offence, the gravity of the offence, concerned, the importance of the evidence, the practicality of holding an identification parade or conducting the video identification and the appropriateness of holding an identification parade or conducting a video identification having regard to the relationship, if any between the accused

	<p>and the other person who made the identification.</p>
<p><b>GUYANA: THE EVIDENCE (AMENDMENT) ACT 2008, ACT NO. 19 OF 2008</b></p>	
	<ul style="list-style-type: none"> <li>▪ The Act provides that where a person is arrested on suspicion of a charge of committing an offence and his identification by another individual is considered necessary for the investigation of such offence, the Court having jurisdiction may at the request of the officer in charge of a police station direct the person so arrested to subject himself along with at least three other persons as the investigating police officer may suggest to line-up for identification by the individual in such manner as the Court may deem fit and the Court may permit audio visual link facility to be used for the purpose of the identification parade.</li> </ul>
<p><b>BAHAMAS: EVIDENCE (AMENDMENT) ACT 2014, ACT NO. 11 OF 2014</b></p>	
	<ul style="list-style-type: none"> <li>▪ The Act provides that where the digital image of a person is recorded on closed circuit television, at a place where an offence is alleged to have been recently committed, the accused person shall be presumed to have been present at the material time, at the scene of the crime; unless the accused person shall give some satisfactory explanation of the manner in which the accused person came to be present or the accused person's image was so captured.</li> <li>▪ The Act establishes that the Commissioner must affix in a conspicuous place outside each installed and operational CCTV facility, a notice stipulating the presence of the CCTV recording digital images.</li> </ul>

## References

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### Comparative Legislation

#### BARBADOS

- **The Evidence (Amendment) Act 2014, Cap. 121**

[https://www.barbadosparliament.com/uploads/bill\\_resolution/ddd8df437ac5ebabdfaf83e54898cd2d.pdf](https://www.barbadosparliament.com/uploads/bill_resolution/ddd8df437ac5ebabdfaf83e54898cd2d.pdf)

#### GUYANA

- **The Evidence (Amendment) Act 2008, Act No. 19 of 2008**

[https://web.oas.org/mla/en/Countries\\_Intro/Guyan\\_intro\\_fundtxt\\_eng\\_12.pdf](https://web.oas.org/mla/en/Countries_Intro/Guyan_intro_fundtxt_eng_12.pdf)

#### BAHAMAS

- **The Evidence (Amendment) Act 2014, Act No. 11 of 2014**

<http://laws.bahamas.gov.bs/cms/images/LEGISLATION/AMENDING/2014/2014-0011/EvidenceAmendmentAct2014.pdf>



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