

CAYMAN ISLANDS



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**A BILL FOR A LAW TO AMEND THE EVIDENCE LAW (2007
REVISION) TO MAKE FURTHER PROVISION FOR THE GIVING OF
EVIDENCE THROUGH TELEVISION LINKS; TO MAKE PROVISION
FOR SPECIAL MEASURES IN RELATION TO VULNERABLE AND
INTIMIDATED WITNESSES; AND FOR INCIDENTAL AND
CONNECTED PURPOSES**

THE EVIDENCE (AMENDMENT) BILL, 2010

MEMORANDUM OF OBJECTS AND REASONS

This Bill amends the Evidence Law (2007 Revision) to make further provision for the giving of evidence through television links.

It also provides for special measures in relation to vulnerable and intimidated witnesses. These measures include orders for special protection of witnesses, the giving of evidence in chief via video recording, cross examination and re-examination by video recording or live television links and the giving of evidence screened from the accused.

CAYMAN ISLANDS

A BILL FOR A LAW TO AMEND THE EVIDENCE LAW (2007 REVISION) TO MAKE FURTHER PROVISION FOR THE GIVING OF EVIDENCE THROUGH TELEVISION LINKS; TO MAKE PROVISION FOR SPECIAL MEASURES IN RELATION TO VULNERABLE AND INTIMIDATED WITNESSES; AND FOR INCIDENTAL AND CONNECTED PURPOSES

ENACTED by the Legislature of the Cayman Islands.

1. This Law may be cited as the Evidence (Amendment) Law, 2010. Short title

2. The Evidence Law (2007 Revision) is amended in section 37 as follows - Amendment of section 37 of the Evidence Law (2007 Revision) - evidence through television links
 - (a) by repealing subsection (1) and substituting the following subsection -

“(1) A person other than an accused person may give evidence through a live television link in proceedings to which subsection (2) applies if -

 - (a) the witness is outside the Islands;
 - (b) the witness is a child, or is to be cross examined following the admission under section 39 of a video recording of testimony from him and the offence is one to which section 39(2) applies; or

- (c) the witness is to give evidence as to a violent or sexual offence,

but such evidence may not be given without the leave of the court.”;

- (b) in subsection (2)(c) by deleting the word “and”;
- (c) in subsection (2)(d) by deleting the full stop and substituting “; and”;
- (d) by inserting after subsection (2)(d) the following paragraph -
“(e) preliminary inquiries.”.

Insertion of new Part IIIA in the Evidence Law (2007 Revision) - special measures directions in cases of vulnerable and intimidated witnesses

3. The Evidence Law (2007 Revision) is amended by inserting after Part III the following Part -

“PART IIIA - Special Measures Directions in Cases of Vulnerable and Intimidated Witnesses

Witnesses eligible for assistance on grounds of age or incapacity

41A. (1) For the purposes of this Part a witness in criminal proceedings, other than the accused, is eligible for assistance by virtue of this section -

- (a) if under the age of seventeen at the time of the hearing; or
- (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are -

- (a) that the witness -
 - (i) suffers from a mental disorder within the meaning of the Mental Health Law (1997 Revision); or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
or
- (b) that the witness has a physical disability or is suffering from a physical disorder.

(1997 Revision)

(3) In subsection (1)(a) "the time of the hearing", in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 41D(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court shall consider any views expressed by the witness.

(5) In this Part references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

Witnesses
eligible for
assistance on
grounds of fear
or distress about
testifying

41B. (1) For the purposes of this Part a witness in criminal proceedings, other than the accused, is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of 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.

(2) In determining whether a witness falls within subsection (1) the court shall take into account, in particular -

- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
- (b) the age of the witness;
- (c) such of the following matters as appear to the court to be relevant, namely -
 - (i) the social and cultural background and ethnic origins of the witness;
 - (ii) the domestic and employment circumstances of the witness; and
 - (iii) any religious beliefs or political opinions of the witness; and
- (d) any behaviour towards the witness on the part of -
 - (i) the accused;
 - (ii) members of the family or associates of the accused; or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court shall in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual

offence is a witness in proceedings relating to that offence, or to that offence and any other offences, the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this subsection.

Special measures
available to
eligible
witnesses

41C. (1) For the purposes of this Part and subject to subsection (2) -

- (a) the provision which may be made by a special measures direction by virtue of each of sections 41H to 41K is a special measure available in relation to a witness eligible for assistance by virtue of section 41A; or
- (b) the provision which may be made by such a direction by virtue of each of sections 41H to 41K is a special measure available in relation to a witness eligible for assistance by virtue of section 41B.

(2) Where, apart from this subsection, a special measure would, in accordance with subsection (1)(a) or (b), be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless -

- (a) the court has been notified by the Director of Public Prosecutions that relevant arrangements may be made available in the area in which it appears to the court that the proceedings will take place; and
- (b) the notice has not been withdrawn.

(3) In subsection (2)(a) "relevant arrangements" means arrangements for implementing the measure in question which cover the witness and the proceedings in question.

(4) The withdrawal of a notice under that subsection relating to a special measure shall not affect the availability of that measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the court before the notice is withdrawn.

(5) The Governor in Cabinet may by order make such amendments of this Part as he considers appropriate for altering the special measures which, in accordance with subsection (1)(a) or (b), are available in relation to a witness eligible for assistance by virtue of section 41A or, as the case may be, section 41B, whether -

- (a) by modifying the provisions relating to any measure for the time being available in relation to such a witness;
- (b) by the addition -
 - (i) with or without modifications, of any measure which is for the time being available in relation to a witness eligible for assistance by virtue of any other section; or
 - (ii) of any new measure; or
- (c) by the removal of any measure.

Special measures
direction relating
to eligible
witness

41D.(1) This section applies where in any criminal proceedings -

- (a) a party to the proceedings makes an application for the court to give a direction under this section in relation to a witness in the proceedings other than the accused; or
- (b) the court of its own motion raises the issue whether such a direction should be given.

(2) Where the court determines that the witness is eligible for assistance by virtue of section 41A or 41B, the court shall then -

- (a) determine whether any of the special measures available in relation to the witness, or any combination of them, would, in its opinion, be likely to improve the quality of evidence given by the witness; and
- (b) if so -
 - (i) determine which of those measures, or combination of them, would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
 - (ii) give a direction under this section providing for the measure or measures

so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Part whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court shall consider all the circumstances of the case, including in particular -

- (a) any views expressed by the witness; and
- (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction shall specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

(5) Nothing in this Part is to be regarded as affecting any power of a court to make an order or give leave of any description, in the exercise of its inherent jurisdiction or otherwise -

- (a) in relation to a witness who is not an eligible witness; or
- (b) in relation to an eligible witness where for example, in a case where a foreign language interpreter is to be provided, the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

Further provisions about directions : general

41E. (1) Subject to subsection (2) and section 41F(8), a special measures direction has binding effect from the time it is made until the proceedings for the purposes of which it is made are either -

- (a) determined by acquittal, conviction or otherwise; or
- (b) abandoned,

in relation to the accused, or if there is more than one, in relation to each of the accused.

(2) The court may discharge or vary or further vary a

special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either -

- (a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or
- (b) of its own motion.

(3) In subsection (2)(a) "the relevant time" means -

- (a) the time when the direction was given; or
- (b) if a previous application has been made under that subsection, the time when the application, or last application, was made.

(4) Nothing in section 41I(2) and (3), 41J(4) to (7) or 41K(4) to (6) is to be regarded as affecting the power of the court to vary or discharge a special measures direction under subsection (2).

(5) The court shall state in open court its reasons for -

- (a) giving or varying;
- (b) refusing an application for, or for the variation or discharge of; or
- (c) discharging,

a special measures direction and, if it is a court of summary jurisdiction, the magistrate shall cause the reasons to be entered in the register of its proceedings.

(6) Rules of court may make provision -

- (a) for uncontested applications to be determined by the court without a hearing;
- (b) for preventing the renewal of an unsuccessful application for a special measures direction except where there has been a material change of circumstances;
- (c) for expert evidence to be given in connection with an application for, or for varying or discharging, such a direction; and
- (d) for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to, or

withheld from, a party to the proceedings.

Special
provisions
relating to child
witness

41F. (1) For the purposes of this section -

- (a) a witness in criminal proceedings is a "child witness" if he is an eligible witness by reason of section 41A(1)(a), whether or not he is an eligible witness by reason of any other provision of section 41A or 41B;
- (b) a child witness is "in need of special protection" if the offence, or any of the offences, to which the proceedings relate is -
 - (i) a sexual offence;
 - (ii) a kidnapping or abduction offence;
 - (iii) an assault offence;
 - (iv) a firearm offence; or
 - (v) a violent offence; and
- (c) a "relevant recording", in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

(2) Where the court, in making a determination for the purposes of section 41D(2), determines that a witness in criminal proceedings is a child witness, the court shall -

- (a) first have regard to subsections (3) to (7); and
- (b) then have regard to section 41D(2);

and for the purposes of section 41D(2), as it then applies to the witness, any special measures required to be applied in relation to him by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 41D(2)(a) and (b)(i), to be ones that, whether on their own or with any other special measures, would be likely to maximise, so far as practicable, the quality of his evidence.

(3) The primary rule in the case of a child witness is that the court shall give a special measures direction in relation to the witness which complies with the following requirements -

- (a) it shall provide for any relevant recording to be admitted under section 41J; and
- (b) it shall provide for any evidence given by the witness in the proceedings which is not given by means of a video recording,

whether in chief or otherwise, to be given by means of a live link in accordance with section 41I.

(4) The primary rule is subject to the following limitations -

- (a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability within the meaning of section 41C(2) of the special measure in question in relation to the witness;
- (b) the requirement contained in subsection (3)(a) also has effect subject to section 41J(2); and
- (c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable, whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason.

(5) Subsection (4)(c) does not apply in relation to a child witness in need of special protection.

(6) Where a child witness is in need of special protection by virtue of subsection (1)(b)(i), any special measures direction given by the court which complies with the requirement contained in subsection (3)(a) shall in addition provide for the special measure available under section 41K to apply in relation to -

- (a) any cross-examination of the witness otherwise than by the accused in person; and
- (b) any subsequent re-examination.

(7) The requirement contained in subsection (6) has effect subject to the following limitations -

- (a) it has effect subject to the availability, within the meaning of section 41C(2), of that special measure in relation to the witness; and
- (b) it does not apply if the witness has informed the court that he does not want that special

measure to apply in relation to him.

(8) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 41A(1)(a), then -

- (a) subject to subsection (9); and
- (b) except where the witness has already begun to give evidence in the proceedings,

the direction shall cease to have effect at the time when the witness attains the age of seventeen.

(9) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 41A(1)(a) and -

- (a) the direction provides -
 - (i) for any relevant recording to be admitted under section 41J as evidence in chief of the witness; or
 - (ii) for the special measure available under section 41K to apply in relation to the witness; and
- (b) if it provides for that special measure to so apply, the witness is still under the age of seventeen when the video recording is made for the purposes of section 41K,

then, so far as it provides as mentioned in paragraph (a)(i) or (ii), the direction shall continue to have effect in accordance with section 41F(1) even though the witness subsequently attains that age.

Extension of provision of section 41F to certain witnesses over seventeen

41G. (1) For the purposes of this section -

- (a) a witness in criminal proceedings, other than the accused, is a "qualifying witness" if he -
 - (i) is not an eligible witness at the time of the hearing, as defined by section 41A(3); and
 - (ii) was under the age of seventeen when a relevant recording was made;
- (b) a qualifying witness is "in need of special protection" if the offence, or any of the offences, to which the proceedings relate is -

- (i) a sexual offence;
 - (ii) a kidnapping or abduction offence;
 - (iii) an assault offence;
 - (iv) a firearm offence; or
 - (v) a violent offence; and
- (c) a "relevant recording", in relation to a witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

(2) Subsections (2) to (7) of section 41F shall apply as follows in relation to a qualifying witness -

- (a) subsections (2) to (4), so far as relating to the giving of a direction complying with the requirement contained in subsection (3)(a), shall apply to a qualifying witness in respect of the relevant recording as they apply to a child witness within the meaning of that section;
- (b) subsection (5), so far as relating to the giving of such a direction, shall apply to a qualifying witness in need of special protection as it applies to a child witness in need of special protection within the meaning of that section; and
- (c) subsections (6) and (7) shall apply to a qualifying witness in need of special protection by virtue of subsection (1)(b)(i) as they apply to such a child witness as is mentioned in subsection (6).

Screening
witness from
accused

41H.(1) A special measures direction may provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.

(2) The screen or other arrangement shall not prevent the witness from being able to see, and to be seen by -

- (a) the magistrate or judge, or both, and the jury, if there is one;
- (b) legal representatives acting in the proceedings; and
- (c) any interpreter or other person appointed in pursuance of the direction or otherwise to

assist the witness.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

(4) The provisions of this section shall not apply in relation to a witness who is the subject of an order under the Criminal Evidence (Witness Anonymity) Law, 2010.

(Law 11 of 2010)

Evidence by live link

41I. (1) A special measures direction may provide for the witness to give evidence by means of a live link.

(2) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the court.

(3) The court may give permission for the purposes of subsection (2) if it appears to the court to be in the interests of justice to do so, and may do so either -

- (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or
- (b) of its own motion.

(4) In subsection (3)(a) "the relevant time" means -

- (a) the time when the direction was given; or
- (b) if a previous application has been made under that subsection, the time when the application, or last application, was made.

Video recorded evidence in chief

41J. (1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this section if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not

be so admitted.

(3) In considering for the purposes of subsection (2) whether any part of a recording should not be admitted under this section, the court shall consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if -

- (a) it appears to the court that -
 - (i) the witness will not be available for cross-examination, whether conducted in the ordinary way or in accordance with any such direction; and
 - (ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(5) Where a recording is admitted under this section -

- (a) the witness shall be called by the party tendering it in evidence, unless -
 - (i) a special measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court; or
 - (ii) the parties to the proceedings have agreed as mentioned in subsection (4)(a)(ii); and
- (b) the witness may not give evidence in chief otherwise than by means of the recording -
 - (i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony; or
 - (ii) without the permission of the court, as

to any other matter which, in the opinion of the court, is dealt with in that testimony.

(6) Where in accordance with subsection (2) a special measures direction provides for part only of a recording to be admitted under this section, references in subsections (4) and (5) to the recording or to the witness's recorded testimony are references to the part of the recording or testimony which is to be so admitted.

(7) The court may give permission for the purposes of subsection (5)(b)(ii) if it appears to the court to be in the interests of justice to do so, and may do so either -

- (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or
- (b) of its own motion.

(8) In subsection (7)(a) "the relevant time" means -

- (a) the time when the direction was given; or
- (b) if a previous application has been made under that subsection, the time when the application, or last application, was made.

(9) The court may, in giving permission for the purposes of subsection (5)(b)(ii), direct that the evidence in question is to be given by the witness by means of a live link; and, if the court so directs, section 41I shall apply in relation to that evidence as they apply in relation to evidence which is to be given in accordance with a special measures direction.

(10) Nothing in this section affects the admissibility of any video recording which would be admissible apart from this section.

Video recorded
cross-
examination or
re-examination

41K. (1) Where a special measures direction provides for a video recording to be admitted under section 41J as evidence in chief of the witness, the direction may also provide -

- (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and

- (b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be.

(2) A recording pursuant to subsection (1) shall be made in the presence of such persons as rules of court or the direction may provide and in the absence of the accused, but in circumstances in which -

- (a) the magistrate or judge, or both, and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made; and
- (b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(a) and (b) are to be regarded as satisfied in relation to those representatives if at all material times they are satisfied in relation to at least one of them.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of subsection (2) or rules of court or the direction has not been complied with to the satisfaction of the court.

(5) Where in pursuance of subsection (1) a recording has been made of any examination of the witness, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceedings, whether in any recording admissible under section 41J or this section or otherwise than in such a recording, unless the court gives a further special measures direction making such provision as is mentioned in subsection (1)(a) and (b) in relation to any subsequent cross-examination, and re-examination, of the witness.

(6) The court may only give such a further direction if it appears to the court -

- (a) that the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of subsection (1), of a matter which that party could not with reasonable diligence have ascertained by then; or
- (b) that for any other reason it is in the interests of justice to give the further direction.

(7) Nothing in this section shall be read as applying in relation to any cross-examination of the witness by the accused in person in a case where the accused is to be able to conduct any such cross-examination.

Warning to jury

41L. Where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge shall give the trier of fact such warning, if any, as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

Interpretation

41M. In this Part -

"special measures direction" means a direction under this Part"; and

"live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 41H(2)(a) to (c)."

Passed by the Legislative Assembly the day of , 2010.

Speaker.

Clerk of the Legislative Assembly.