

A BILL

entitled

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

TABLE OF CONTENTS

PART 1  
PRELIMINARY

1 Citation

PART 2  
AMENDMENT OF CRIMINAL CODE ACT 1907

2 Amends section 3  
3 Amends section 55  
4 Amends section 176A  
5 Inserts section 176B  
6 Repeals and replaces section 177  
7 Repeals section 179  
8 Amends section 181  
9 Amends section 182  
10 Inserts section 182FA  
11 Inserts section 182HA  
12 Amends section 182J  
13 Amends section 183  
14 Amends section 184  
15 Amends section 185  
16 Inserts section 185A  
17 Amends section 186  
18 Amends section 187  
19 Amends section 188  
20 Amends section 189  
21 Amends section 191  
22 Repeals section 192  
23 Amends section 193  
24 Amends section 199  
25 Amends section 202  
26 Amends section 329D  
27 Amends section 329FA  
28 Amends section 464B

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

---

- 29 Amends section 476A
- 30 Repeals section 542
- 31 Amends section 542A
- 32 Repeals section 543
- 33 Amends section 554

PART 3  
AMENDMENT OF THE CHILDREN ACT 1998

- 34 Repeals and replaces section 5
- 35 Amends section 7
- 36 Amends section 8
- 37 Amends section 9
- 38 Inserts section 10A
- 39 Inserts section 11A
- 40 Inserts section 20A
- 41 Amends section 21
- 42 Inserts section 21A
- 43 Amends section 23

PART 4  
AMENDMENT OF EDUCATION ACT 1996

- 44 Amends section 23

PART 5  
AMENDMENT OF EVIDENCE ACT 1905

- 45 Amends section 2
- 46 Repeals and replaces section 42; inserts section 42A
- 47 Inserts Part IIIAA
- 48 Inserts Part IIIAB
- 49 Amends Second Schedule

PART 6  
AMENDMENT OF YOUNG OFFENDERS ACT 1950

- 50 Amends section 2
- 51 Amends section 5
- 52 Amends section 6
- 53 Amends section 7
- 54 Amends section 16
- 55 Inserts section 16B
- 56 Amends sections 17, 18, 20, 23, 24, 25, 26, 39, 40, 41 and 54
- 57 Amends section 78

PART 7  
AMENDMENT OF PROCEEDS OF CRIME ACT 1997

- 58 Amends section 55A

PART 8  
FINAL PROVISIONS

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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59 Commencement

WHEREAS it is expedient to amend the Criminal Code Act 1907, the Children Act 1998, the Young Offenders Act 1950, the Evidence Act 1905, the Education Act 1996 and the Proceeds of Crime Act 1997 to enhance provisions and measures for the protection of children and other persons from sexual exploitation and sexual abuse and connected matters;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

PART 1  
PRELIMINARY

Citation

1 This Act may be cited as the Child Safeguarding (Miscellaneous Amendments) Act 2019.

PART 2  
AMENDMENT OF CRIMINAL CODE ACT 1907

Amends section 3

2 Section 3 of the Criminal Code Act 1907 is amended

(a) by inserting in the appropriate alphabetical order the following—

“child” means a person under the age of eighteen years;

“severe mental impairment” has the meaning given in section 183(3);”;

(b) by repealing the definition of “defective”.

Amends section 55

3 Section 55 of the Criminal Code Act 1907 is amended by inserting after subsection (2)(f)(ii) the following—

“(fa) the presence of any aggravating circumstances relating to a serious personal injury offence as defined in section 329D, or an offender where the victim is a child, including—

(i) evidence that the offender seriously wounded, maimed or disfigured another person or endangered the complainant's life;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (ii) evidence that the offender preceded or accompanied the offence with acts of torture or serious violence;
- (iii) evidence that the offence was committed against a particularly vulnerable victim;
- (iv) evidence that the offence was committed against a member of the family, against a child cohabiting with the offender or while abusing his position of trust;
- (v) evidence that there were one of two or more persons jointly committing the offence;
- (vi) evidence that the offender was acting within the framework of unlawful gang activity as defined under section 70JA;
- (vii) evidence that the offender has previously been convicted of offences of the same nature;”.

Amends section 176A

4 Section 176A of the Criminal Code Act 1907 is amended by inserting in the appropriate alphabetical order the following—

“pornographic performance ” means a live exhibition addressed to an audience, including by means of communications medium, of—

- (a) a child who is, or is depicted as being engaged in real or simulated explicit sexual activity;
- (b) which the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or anal region of a child;

“prostitute” means a person who on at least one occasion and whether or not compelled to do so engages, or offers to engage, in sexual activity with another person in return for payment or a promise of payment to the person or a third person, and “prostitution” shall be construed accordingly.

Inserts section 176B

5 The Criminal Code Act 1907 is amended by inserting after section 176A the following—

“Jurisdiction in cases of offences against a child committed abroad

176B (1) Where any person is charged with having committed any sexual offence, and the victim as defined under section 63(8) is a child, then—

- (a) if he is—
  - (i) a British citizen or a British overseas territory citizen possessing Bermudian status;
  - (ii) a permanent resident in Bermuda within the meaning of the Bermuda Immigration and Protection Act 1956;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (iii) a person employed in Bermuda pursuant to a work permit as defined in the Bermuda Immigration and Protection Act 1956;
- (b) if the child is—
  - (i) a person within the meaning of paragraph (a);
  - (ii) a person with permission to reside in Bermuda who is a child of a person within the meaning of paragraph (a), (b) or (c),

and he is found to be within the jurisdiction of any court in Bermuda which would have had jurisdiction in relation to the offence, within the limits of its ordinary jurisdiction to try the offence, that court shall have jurisdiction to try the offence as if it had been so committed.

(2) No prosecution shall be instituted under this section without the consent of the Director of Public Prosecutions. ”

Repeals and replaces section 177

6 Section 177 of the Criminal Code Act 1907 is repealed and replaced as follows—

“Unlawful anal intercourse; attempts

177 (1) Subject to subsection (2), any person who—

- (a) engages in an act of anal intercourse is guilty of an offence and liable on conviction by a court of summary jurisdiction to imprisonment for five years and on conviction on indictment to imprisonment for twenty years; and
- (b) attempts to engage such an act is guilty of an offence and is liable on conviction by a court of summary jurisdiction to imprisonment for five years and on conviction on indictment to imprisonment for a term not exceeding ten years.

(2) Subsection (1) does not apply to any act engaged in, in private between any two persons, each of whom is eighteen years or above the age of eighteen years, both of whom consent to the act.”.

Repeals section 179

7 Section 179 of the Criminal Code Act 1907 is repealed.

Amends section 181

8 Section 181 of the Criminal Code Act 1907 is amended by repealing subsection (3).

Amends section 182

9 Section 182 of the Criminal Code Act 1907 is amended—

- (a) in the heading by deleting the words “young girl” and substituting the words “child”;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (b) by deleting the word “girl” wherever it appears and substituting the word “child”;
- (c) by deleting the word “man” wherever it appears and substituting the word “person”.

Inserts section 182FA

10 The Criminal Code Act 1907 is amended by inserting after section 182F the following—

“Procuring child to participate in pornographic performances

182FA Any person who—

- (a) procures or attempts to procure a child to engage in a pornographic performance;
- (b) by threats or intimidation of any kind, procures, or attempts to procure a child to engage in a pornographic performance;
- (c) by false pretence, procures, or attempts to procure a child to engage in a pornographic performance;
- (d) administers to a child, or causes a child to take, or attempts to administer or cause a child to take, a drug or other thing with intent to stupefy or overpower the child to enable a pornographic performance to be engaged in with the person; or
- (e) profits from procuring a child to engage in a pornographic performance;

is guilty of an offence, and is liable on summary conviction to imprisonment for five years and on conviction on indictment to imprisonment for ten years.”

Inserts section 182HA

11 The Criminal Code Act 1907 is amended by inserting after section 182H the following—

“Attendance at pornographic performance involving a child

182HA (1) A person who knowingly attends a pornographic performance in or from within Bermuda shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable—

- (a) on summary conviction to imprisonment for three years;
- (b) on conviction on indictment to imprisonment for five years. .

(3) It is not a defence to a charge under this section that the accused believed that the person was over the age of sixteen years unless the accused took all reasonable steps to ascertain the age of the person.”

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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Amends section 182J

12 Section 182J of the Criminal Code Act 1907 is amended by inserting under subsection (4)(b) the following—

“and in addition such penalty imposed pursuant to paragraph (a) or (b), the Court may recommend the following with respect to the body corporate—

- (c) exclusion from entitlement to public benefits or aid;
- (d) temporary or permanent disqualification from the practice of commercial activities;
- (e) placing under judicial supervision;
- (f) judicial winding-up order;”.

Amends section 183

13 Section 183 of the Criminal Code Act 1907 is amended—

- (a) in the heading, by deleting the word “defective” and substituting the words “person with severe mental impairment”;
- (b) in subsection (1), by deleting the words “a woman who is a defective” and substituting the words “a person with severe mental impairment”;
- (c) in subsection (2), by deleting the words “woman to be a defective” and substituting the words “person has severe mental impairment”;
- (d) by repealing subsection (3) and replacing that subsection as follows—

“(3) In this Act, “severe mental impairment” means a person suffering from a state of arrested or incomplete development of mind within the meaning of section 1 of the Mental Health Act 1968.”.

Amends section 184

14 (1) Section 184(1) of the Criminal Code Act 1907 is amended as follows—

- (a) by deleting the words “girl or woman who is under the age of eighteen years” and substituting the word “child”;
- (b) by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”;
- (c) by deleting the word “she” and substituting the word “the child or other person”;
- (d) by deleting the word “her” and substituting “the child or other person’s”.
- (e) by deleting the words “a man” and substituting the words “any person”;
- (f) by deleting the words “twelve months” and substituting the words “eighteen months”;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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(g) by deleting the words “two years” and substituting the words “three years”.

(2) Section 184 of the Criminal Code Act 1907 is amended by inserting as subsection (3) the following—

“(3) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment to two years and on conviction on indictment to imprisonment for four years. ”

Amends section 185

15 Section 185 of the Criminal Code Act 1907 is amended—

(a) in the heading, by deleting the words “woman or girl” and substituting the word “person”;

(b) in subsection (1)—

(i) by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”;

(ii) by deleting the words “a man” wherever it appears and substituting the words “any person”;

(iii) by deleting the word “her” wherever it appears and substituting the words “the child or other person”;

(iv) by deleting the words “is liable to imprisonment for three years”, and substituting the words “ is liable on conviction by a court of summary jurisdiction to imprisonment for eighteen months and on conviction on indictment to imprisonment for three years”;

(c) by inserting as subsection (3) the following—

“(3) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment to three years and on conviction on indictment to imprisonment for six years.”;

Inserts section 185A

16 The Criminal Code Act 1907 is amended by inserting after section 185 the following—

“Obtaining prostitution from child

185A (1) Any person who obtains or attempts to obtain prostitution from a child and who the person knows, or ought to reasonably to know, is not an adult, is guilty of an offence and is liable on conviction by a court of summary jurisdiction for a term not exceeding five years.

(2) If the child who provides or is to provide the prostitution is under the age of fourteen years, the offender is liable on conviction on indictment to imprisonment for a term not exceeding twenty years. ”



## CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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### Amends section 186

17 Section 186 of the Criminal Code Act 1907 is amended as follows—

- (a) by deleting the word “male” wherever it appears;
- (b) by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”;
- (c) by inserting after subsection (1) the following—

“(1A) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment for two years and on conviction on indictment to imprisonment for four years.”.

- (d) in subsection (2), by deleting the word “her” and substituting the words “the person’s”.

### Amends section 187

18 Section 187 of the Criminal Code Act 1907 is amended—

- (a) in the heading, by deleting the words “woman or girl” and substituting the word “person”, and by deleting the word “her”;
- (b) in subsection (1)—
  - (i) by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”;
  - (ii) by deleting the word “her” and substituting the words “the person’s”;
  - (iii) by deleting the words “six months” and substituting the words “twelve months”;
- (c) by inserting after subsection (1) the following—

“(1A) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment to two years and on conviction on indictment to imprisonment for four years.”

- (d) in subsection (2), by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”.

### Amends section 188

19 Section 188 of the Criminal Code Act 1907 is amended as follows—

- (a) in the heading, by deleting the words “girl under eighteen” and substituting the word “child”;
- (b) in subsection (1)—
  - (i) by deleting the words “girl under the age of eighteen years” and substituting the word “child”;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (ii) by deleting the word “man” wherever it appears and substituting the word “person”;
- (iii) by deleting the word “her” and substituting the words “the child” or the “child’s” as the case may be;
- (c) in subsection (2), by deleting the words “girl was of or above the age of eighteen years” and substituting the words “person taken was not a child”.

Amends section 189

20 Section 189 of the Criminal Code Act 1907 is amended—

- (a) by deleting the words “woman or girl” and substituting the words “child or other person”;
- (b) by deleting the word “man” and substituting the word “person”;
- (c) by deleting the word “her” and substituting the word “the child or other person”;
- (d) by numbering the existing provision as subsection (1) and thereafter inserting the following—

“(2) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment to two years and on conviction on indictment to imprisonment for four years.”

Amends section 191

21 Section 191 of the Criminal Code Act 1907 is amended—

- (a) by deleting the heading, and substituting as the heading “Incest”;
- (b) by repealing subsection (1) and replacing that subsection as follows—

“(1) Any person who has carnal knowledge of a person who is to his knowledge by blood relationship his grandparent, grandchild, child, brother or sister, or parent, is guilty of a misdemeanour, and is liable on conviction on indictment to imprisonment for twenty years:

Provided that if, on an indictment for any such offence, it is alleged in the indictment and is proved that the offence was committed in respect of a child under the age of fourteen years the offender is liable to imprisonment for twenty-five years.”

- (c) in subsection (2), by deleting the words “woman or girl” and substituting the words “child or other person”;
- (d) by repealing subsection (5).

Repeals section 192

22 Section 192 of the Criminal Code Act 1907 is repealed.

## CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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### Amends section 193

23 Section 193 of the Criminal Code Act 1907 is amended deleting the words “and 192”.

### Amends section 199

24 Section 199 of the Criminal Code Act 1907 is amended—

- (a) by deleting the words “woman or girl” wherever they appear and substituting the words “child or other person”;
- (b) by deleting the word “her” wherever it appears and substituting the word “that person”.
- (c) by inserting after subsection (2) the following—

“(2A) If the victim is a child, he is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment to five years and on conviction on indictment to imprisonment for twenty years.”

### Amends section 202

25 Section 202 of the Criminal Code Act 1907 is amended—

- (a) in subsection (1)—
  - (i) by deleting the word “girl” wherever it appears and substituting the word “child”;
  - (ii) by deleting the words “under sixteen years of age” wherever they appear;
  - (iii) by deleting the word “her” wherever it appears and substituting the word “his”;
- (b) in subsection (2), by deleting the word “girl” and substituting the words “person taken”; and
- (c) in subsection (3),
  - (i) by deleting the word “girl” and substituting the word “child”; and
  - (ii) by deleting the word “her” wherever it appears and substituting the word “his”.

### Amends section 329D

26 Section 329D of the Criminal Code Act 1907 is amended in the definition of “sexual offence”—

- (a) in paragraph (v), by deleting the words “by a male person”;
- (b) by repealing paragraph (vi);

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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(c) by deleting the full stop after paragraph (xviii) and inserting the following—

- “(xix) unlawful anal intercourse (section 177);
- “(xx) procuring children to participate in pornographic performances (section 182FA);
- “(xxi) attendance at pornographic performance involving a child (section 182HA);
- “(xxii) intercourse with a person with a severe mental impairment (section 183);
- “(xxiii) obtaining prostitution from person who is not an adult (section 185A).”

Amends section 329FA

27 (1) Section 329FA of the Criminal Code Act 1907 is amended—

(a) by inserting in subsection (1) after paragraph (c) the following—

“(ca) a DNA profile relating to a sex offender which is derived from a DNA sample obtained in accordance with the provisions of the Police and Criminal Evidence Act 2006 and all relevant Codes of Practice thereunder;”

(b) by inserting after subsection (4) the following—

“(4A) No person whose name is entered in the sex offender register shall be employed in any of the professions listed under section 20(2) of the Children Act 1998.”

Amends section 464B

28 Section 464B of the Criminal Code Act 1907 is amended by inserting after subsection (2) the following—

“(3) There shall be paid into the Confiscated Assets Fund established under section 55A of the Proceeds of Crime Act 1997, money forfeited to the Crown under this section. ”

Amends section 476A

29 Section 476A of the Criminal Code Act 1907 is amended by inserting after subsection (1) the following—

“(1A) Without prejudice to the generality of subsection (1), any criminal proceedings or other similar matters for proceedings for sexual offences relating to a child shall be treated as a priority for case management purposes.”.

## CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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Repeals section 542

30 Section 542 of the Criminal Code Act 1907 is repealed.

Amends section 542A

31 Section 542A of the Criminal Code Act 1907 is amended by repealing subsections (1) and (2).

Repeals section 543

32 Section 543 of the Criminal Code Act 1907 is repealed.

Amends section 554

33 Section 554(1) of the Criminal Code Act 1907 is amended as follows—

- (a) by deleting the words “under sixteen years of age” wherever they appear;
- (b) by deleting the words “offence constituted by Part X (offences against morality) relating to women or girls” and substituting the words “sexual offence as defined in section 329D”;
- (c) by deleting the word “girl” wherever it appears and substituting the word “child”;
- (d) by deleting the word “her” and substituting the words “the child’s”;
- (e) by deleting the words “master, or mistress,” wherever they appear.

### PART 3

#### AMENDMENT OF THE CHILDREN ACT 1998

Repeals and replaces section 5

34 Section 5 of the Children Act 1998 is amended by repealing and replacing as follows—

“Purposes of the Act

5 The purposes of the Act are to—

- (a) protect children from harm;
- (b) promote the integrity of the family;
- (c) provide protection for the rights of children amongst persons who have regular contact with children; and
- (d) ensure the welfare of children.”

Amends section 7

35 Section 7 of the Children Act 1998 is amended by numbering the provision as subsection (1) and by inserting thereafter the following—

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

---

“(2) Investigations for sexual offences, and any subsequent prosecution, relating to a child should be progressed and concluded with as little delay as possible.”

Amends section 8

36 Section 8 of the Children Act 1998 is amended by renumbering the existing provision as subsection (1) and thereafter inserting the following—

“(2) With respect to serious personal injury offences as defined under section 329D of the Criminal Code Act 1907 where the victim or offender, or both, is a child, the Minister is responsible for promoting and supporting the coordination between the government departments responsible for managing, protecting, preventing and reducing the said offences under the Criminal Code Act 1907.”.

Amends section 9

37 Section 9(1) of the Children Act 1998 is amended by—

(a) inserting after paragraph (a)—

“(aa) arrange for the delivery of physical and psychosocial assistance to a child—

(i) that may be the victim of a sexual offence as defined under section 329D of the Criminal Code Act 1907;

(ii) who, by his conduct, has shown a failure to control his sexual impulses and there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses;

(iii) who has committed a serious personal injury offence as defined in section 329D of the Criminal Code Act 1907;

(ab) arrange for the investigation of any allegation or report that a child has demonstrated a pattern of repetitive behaviour he has failed to control and there is a likelihood of the child causing injury, pain or other evil to other persons through a failure to control such impulses.”

(b) inserting after paragraph (b)(v)(D)—

“(vi) arrange for the delivery of physical and psychosocial assistance for a child that may be the victim of a serious personal injury offence defined under section 329D of the Criminal Code Act 1907, whether or not the age of that child is required to be determined;”

(c) inserting after paragraph (c)—

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

---

- “(ca) implement a public awareness campaign to boost awareness about the harm and dangers of sexual exploitation and sexual abuse of children;”.

Inserts section 10A

38 The Children Act 1998 is amended by inserting after section 10 the following—

“Training of professionals involved in child sex abuse proceedings

10A Persons involved in a professional capacity in any respect with proceedings relating to sexual offences committed against children shall participate in such educational and training courses designed to improve their knowledge of issues, and ability to effectively support children who are victims of such offences.”

Inserts section 11A

39 The Children Act 1998 is amended by inserting after section 11 the following—

“National Child Safeguarding Committee

11A (1) In order to give effect to the Minister’s responsibilities under this Act, the Minister shall establish a National Child Safeguarding Committee (the “Committee”), for the purpose of—

- (a) the development of a national plan of action to include making recommendations on effective mechanisms to enable the authorities in Bermuda to coordinate with each other concerning the development of policies and activities with respect to combating sexual exploitation and abuse of children;
- (b) making policy recommendations to the Minister safeguarding and the welfare of children;
- (c) coordinating activities to identify, assess and better understand Bermuda’s risks in relation to sexual abuse of children, and taking the necessary steps to ensure that such risk assessments are kept up-to-date,
- (d) educating the public on, and increasing the public awareness of, the need to safeguard and promote the welfare of children;
- (e) providing an annual report on child safeguarding to the Minister, including any information and recommendations requested,
- (f) such other functions as requested by the Minister,

and the Committee shall meet as often as is necessary to carry out its duties.

(2) The members of the National Child Safeguarding Committee shall be—

- (a) the Solicitor General;
- (b) the Director of Child and Family Services;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (c) the Director of Court Services;
- (d) the Commissioner of Police,
- (e) the Director of Public Prosecutions;
- (f) the Permanent Secretary of the Ministry responsible for justice;
- (g) the Commissioner of Prisons;
- (h) the Commissioner of Education;
- (i) the Chief Medical Officer;
- (j) such other persons as the Minister may from time to time appoint.

(3) The Minister may appoint a person to act as alternate to any member of the Committee appointed under subsection (2).

(4) Any Committee established under this section may regulate its own proceedings.”

Inserts section 20A

40 The Children Act 1998 is amended by inserting after section 20 the following—

“Investigations or prosecution of sexual offences where the victim or complainant withdraws statement

20A Investigations or prosecution of sexual offences where the victim or complainant is a child, shall not be dependent upon the report or accusation made by the victim or complainant, and that the investigations or proceedings that have been commenced may continue even if the victim at any time after the commencement thereof, decides to withdraw his statement or complaint.”

Amends section 21

41 Paragraph (b) of section 21(2) of the Children Act 1998 is repealed and replaced as follows—

“(b) that person is convicted of a serious personal injury offence against a child as defined in section 329D of the Criminal Code Act 1907.”.

Inserts section 21A

42 The Children Act 1998 is amended by inserting after section 21 the following—

“Persons disqualified from working with children

21A (1) A person whose name appears in the Register shall not seek employment as, or be employed in one of the professions listed under section 20(2).



CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

---

(2) A person whose name appears in the Register shall not carry on, or be otherwise concerned in the management of, or have any financial interest in, an institution that cares for children.

(3) A person who engages in a profession listed under section 20(2) shall not knowingly employ a person whose name appears in the Register.

(4) A person who contravenes subsection (1), (2) or (3), is guilty of an offence and on summary conviction is liable to a fine not exceeding \$10,000, or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.”

Amends section 23

43 Section 23 of the Children Act 1998 is amended by inserting after subsection (4)(b) the following—

“(c) an employer who is considering employing a person in one of the professions listed under section 20(2),”

PART 4

AMENDMENT OF EDUCATION ACT 1996

Amends section 23

44 Section 23 of the Education Act 1996 is amended by inserting after “health education” the words “which shall include information on the risks of, and means of protecting students from sexual exploitation and sexual abuse,”

PART 5

AMENDMENT OF EVIDENCE ACT 1905

Amends section 2

45 Section 2 of the Evidence Act 1905 is amended by inserting in the appropriate alphabetical order, the following—

“ “child” means a person under the age of 18 years;”.

Repeals and replaces section 42; inserts section 42A

46 Section 42 of the Evidence Act 1905 is repealed and replaced as follows—

“Determining whether child witness to be sworn

42 (1) Any question whether a witness in criminal proceedings who is a child may be sworn for the purpose of giving evidence on oath, whether raised—

(a) by a party to the proceedings; or

- (b) by the court of its own motion,  
shall be determined by the court in accordance with this section.
- (2) The witness may not be sworn for that purpose unless—
- (a) he has attained the age of 14 years; and
  - (b) he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath.
- (3) The witness shall, if he is able to give intelligible testimony, be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party).
- (4) If any such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the court that, on a balance of probabilities, the witness has attained the age of 14 years and has a sufficient appreciation of the matters mentioned in subsection (2)(b).
- (5) Any proceedings held for the determination of the question mentioned in subsection (1) shall take place in the absence of the jury (if there is one).
- (6) Expert evidence may be received on the question.
- (7) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties, provided that the court shall exercise such measures available to it under Part IIIAA for the purposes of this subsection.
- (8) For the purposes of this section—
- (a) a person is able to give intelligible testimony if he is able to
    - (i) understand questions put to him as a witness; and
    - (ii) give answers to them which can be understood;
  - (b) “in the presence of the parties” includes by means of a video recording or audio visual link as set forth in Part IIIAA.

Reception of unsworn evidence of child

- 42A (1) Subsections (2) and (3) apply to a child who—
- (a) is competent to give evidence in criminal proceedings; but
  - (b) by virtue of section 42(2) is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings.
- (2) The evidence in criminal proceedings of a child to whom this section applies shall be given unsworn.

(3) A deposition of unsworn evidence given by a child to whom this subsection applies may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(4) A court in criminal proceedings shall accordingly receive in evidence any evidence given unsworn in pursuance of subsection (2) or (3).

(5) Where a child (the “witness”) who is competent to give evidence in criminal proceedings gives evidence in such proceedings unsworn, no conviction, verdict or finding in those proceedings shall be taken to be unsafe for the purposes of section 2 of the Criminal Appeal Act 1952 or section 17 of the Court of Appeal Act 1964 (which relate to grounds for allowing appeals) by reason only that it appears to the Court of Appeal that the witness was a child falling within section 42(2) (and should accordingly have given his evidence on oath).

(6) If such a witness wilfully gives false evidence in such circumstances that, had the evidence been given on oath, he would have committed perjury, he commits an offence and is liable on summary conviction to such fine as may be imposed on him under the Young Offenders Act 1950. ”

Inserts Part IIIAA

47 (1) The Evidence Act 1905 is amended by inserting after the new section 42A the following—

“PART IIIAA

SPECIAL MEASURES FOR CHILD WITNESSES IN CRIMINAL CAUSES

Chapter 1

Preliminary

Interpretation of this Part

42B (1) In this Part—

“audio visual link” means facilities that enable audio visual communication whereby a party or a witness, while not present in the courtroom or other place where the proceeding is being held, is able to be seen and heard—

- (a) by a judicial officer and the jury (if there is one);
- (b) by a member of a special court;
- (c) by legal representatives acting in the proceeding;
- (d) by any person appointed by a judicial officer to assist the party or the witness; or
- (e) by parties to the proceedings;

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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“court” means any court in Bermuda;

“evidence” means evidence-in-chief or evidence given in cross-examination or re-examination;

“judicial officer” means—

- (a) the Chief Justice;
- (b) a Puisne Judge;
- (c) an Assistant Justice;
- (d) a magistrate;
- (e) the Registrar of the Court of Appeal or the Supreme Court;

“preliminary hearing” means a hearing under section 42F or a case management hearing under the Criminal Code Act 1907;

“proceeding” means any criminal proceeding, including a preliminary hearing;

“Registrar” means the person appointed to hold that office pursuant to section 48 of the Supreme Court Act 1905;

“relevant proceeding” means a criminal proceeding for a relevant offence, whether or not the proceeding also relates to other offences;

“relevant offence” means—

- (a) a sexual offence;
- (b) another offence committed with respect to a child; or
- (c) any other offence where a child is a witness;

“sexual offence ” means an offence as defined in section 329D of the Criminal Code Act 1907, and any attempt to commit such an offence;

“special measure” means the giving of evidence by a child in criminal proceedings by a video recording, or audio visual link;

“video recording” means the recording by the use of any device in animated images of objects, events, organizations and persons, either in a moving or talking form, which can be reproduced and presented by the use of any technical means.

(2) Where it is stated that a person shall be guilty of contempt of court, he shall be deemed to have committed an offence under section 5 of the Administration of Justice (Contempt of Court) Act 1979.

Principles for dealing with a child witness

42C (1) Because a child tends to be vulnerable in dealings with a person in authority, it is the intention that a child who is a witness in a relevant proceeding be given the benefit of special measures when giving the child's evidence.

(2) The following general principles apply when dealing with a child witness in a proceeding—

- (a) the child is to be treated with dignity, respect and compassion;
- (b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
- (c) the child should not be intimidated in cross-examination;
- (d) the proceeding should be resolved as quickly as possible.

(3) The provisions of this Part are subject to the need to ensure that there is a fair trial, and to any other factor that is relevant to the just determination of the matters at issue in the trial.

*Evidence of children*

Child witness eligible for special measures

42D (1) The purposes of this Part are, in the best interests of a child—

- (a) to preserve, to the greatest extent practicable, the integrity of an child's evidence; and
- (b) to require, wherever practicable, that a child's evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence.

(2) For the purposes of this Part, where a child witness is a person other than the accused in criminal proceedings relating to a sexual offence—

- (a) the child's evidence is to be prerecorded by video recording in accordance with this Part in advance of the hearing; and
- (b) if the measure in paragraph (a) cannot be given effect, the child's evidence is to be given at the proceeding, but with the use of an audio visual link or with the benefit of a screen.

(3) Subsection (2) applies to a proceeding whether or not the proceeding also relates to offences other than the relevant offence.

Chapter 2

Prerecording of a child's evidence

Presentation of indictment

42E If the child's evidence is to be taken by video recording for a trial on indictment, the indictment shall be presented before the evidence can be taken under this Part.

Video recording of child's evidence

42F (1) In any criminal proceeding where a child is a witness, the child's evidence shall be taken and video recorded at a hearing under this Part (a preliminary hearing) presided over by a judicial officer.

(2) The video recording shall be presented, if taken for a trial, to the court at the trial.

(3) To facilitate the operation of this section for the taking of the child's evidence in a proceeding, the judicial officer may direct that the preliminary hearing be conducted by audio visual link.

(4) The provisions of chapter 3 relating to the use of an audio visual link in criminal proceedings apply for, and are not limited by, subsection (3).

(5) To facilitate the operation of this section for a trial, the judicial officer shall, if it is not practicable at the place of the trial to take and video record the child's evidence—

- (a) adjourn the trial to an appropriately equipped place to allow the evidence to be taken and video recorded; or
- (b) give such other direction the judicial officer considers appropriate including, for example, an order that the preliminary hearing be conducted by audio visual link.

(6) If the taking and video recording of the child's evidence is done at a place that is not a courtroom, the place is taken to be a courtroom for all purposes for the preliminary hearing.

(7) It does not matter whether or not the judicial officer presiding and the counsel appearing at the preliminary hearing are the same judicial officer presiding and counsel appearing at an adjourned preliminary hearing or at the proceeding in which the video recording is presented to the court.

(8) Also, it does not matter if, while the preliminary hearing is conducted, the judicial officer, counsel, parties and witnesses are at different places.

(9) In this section—

“appropriately equipped place”, for the taking and video recording of a child's evidence, means a court, or another place that is not a court, that—

- (a) is equipped to take and video record the child's evidence; and
- (b) allows the defendant, or his counsel, to see and hear the child while the child is giving evidence, for example, through an audio visual link.

Court to give directions for taking a child's evidence

42G (1) The judicial officer presiding at the preliminary hearing may make any order the judicial officer considers appropriate in relation to taking and video recording the child's evidence.

(2) Without prejudice to the generality of subsection (1), the judicial officer may give directions, with or without conditions, as to the conduct of the preliminary hearing, including directions as to—

- (a) whether the child is to be in the courtroom or a separate room when the child's evidence is being taken; and
- (b) the persons who may be present in the same room as the child when the child's evidence is being taken.

(3) Subsection (2)(b) is subject to section 42Q.

(4) At the preliminary hearing—

- (a) the defendant—
  - (i) shall not be in the same room as the child when the child's evidence is being taken;
  - (ii) shall be capable of seeing and hearing the child while the child is giving evidence; and
- (b) subject to the judicial officer's control, the child is to give his evidence-in-chief and be cross-examined and re-examined; and
- (c) except as otherwise provided by this Part, the usual rules of evidence apply.

(5) The judicial officer may adjourn the preliminary hearing from time to time until the taking and video recording of the child's evidence is complete.

Use of prerecorded evidence

42H (1) The court may direct that all or part of a child's evidence contained in a video recording made under this Part for a proceeding, or in a lawfully edited copy of the video recording—

- (a) is as admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court; and
- (b) is, unless the relevant court otherwise orders, admissible in—

- (i) any rehearing or retrial of, or appeal from, the proceeding; or
- (ii) another proceeding in the same court for the relevant charge or for another charge arising out of the same, or the same set of, circumstances.

(2) The admissibility of the evidence for a proceeding is not affected only because the child turns 18 years before the evidence is presented at the proceeding.

(3) A reference in subsection (1) to a video recording made under this Part for a proceeding includes a reference to a copy of the video recording on a separate data storage medium if—

- (a) the video recording is a digital recording; and
- (b) the copy of the video recording on the separate data storage medium has been made by—
  - (i) the Registrar of a court; or
  - (ii) a person authorised by the Registrar of the court to copy the video recording onto the separate data storage medium.

#### Giving of further evidence

42I (1) This section applies if the child has given evidence under this Part for a proceeding and has been excused from further attendance as a witness at the proceeding.

(2) A party to the relevant proceeding may apply to the court for an order that the child—

- (a) give further evidence under this Part at another preliminary hearing; or
  - (b) attend at the proceeding to give further evidence, but in such a case, the child's attendance shall be by audio visual link.
- (3) The court shall not make the order unless satisfied that—
- (a) if the child were giving evidence before a court in the ordinary way, the child could be recalled to give further evidence; and
  - (b) it would be in the interest of justice to make the order.

#### Court order that evidence not to be taken and recorded under this Part

42J (1) This section applies if a child is to give evidence in a criminal proceeding for a relevant offence.

(2) A party may apply to the court for an order that the child's evidence not be taken and video recorded under this Part.

(3) The court may make the order for good reason, having regard to the child's wishes and the purposes of this Part.



Chapter 3

Taking of child's evidence using audio visual link or screen

Audio visual links or screening arrangements shall be used

42K (1) This section applies subject to any direction that a child's evidence be taken by audio visual link.

(2) If there is an audio visual link within the court precincts, the judicial officer presiding at the relevant proceeding for the giving of evidence by the child shall direct that—

- (a) the child give evidence outside the courtroom and the evidence be transmitted to the courtroom by means of the audio visual link; or
- (b) while the child is giving evidence, the defendant be held in a room apart from the courtroom and the evidence be transmitted to that room by means of the audio visual link.

(3) It is not necessary that the place outside the courtroom at which the child gives evidence under subsection (2)(a) be within the court precincts.

(4) If a direction is given under subsection (2)(a) or (b) and the audio visual link enables video recording, the child's evidence shall be video recorded.

(5) If a direction cannot be given under subsection (2)(a) or (b), a screen, one-way glass or other thing shall be so placed in relation to the child while he is giving evidence that the child cannot see the defendant.

(6) A video recording of the child's evidence made under this section, or a lawfully edited copy of the video recording, is, unless the relevant court otherwise orders, admissible in—

- (a) any rehearing or retrial of, or appeal from, the proceeding; or
- (b) another proceeding in the same court for the relevant charge or for another charge arising out of the same, or the same set of, circumstances.

(7) A reference in subsection (6) to a video recording made under this section includes a reference to a copy of the video recording on a separate data storage medium if—

- (a) the video recording is a digital recording; and
- (b) the copy of the video recording on the separate data storage medium has been made by—
  - (i) the Registrar of the court; or
  - (ii) a person authorised by the Registrar of the court to copy the video recording onto the separate data storage medium.

General criteria; use of audio visual links

42L (1) When giving a direction to allow the use of audio visual link for the appearance of a party or a witness in any proceeding, a judicial officer shall consider—

- (a) the nature and alleged circumstances to which the proceeding relates;
- (b) the religious beliefs of the party or the witness;
- (c) the absence or likely absence of the party or witness from Bermuda;
- (d) the availability, quality and security of the technology to be used; and
- (e) any other relevant matters, including the effective maintenance of the right of a party to a fair hearing.

(2) The availability, quality and security of technology shall be verified by the Registrar of the Supreme Court on the advice of the appropriate person qualified to advise on such quality and security.

*General*

Director of Public Prosecutions or applicant to advise that a child is to give evidence

42M (1) The Director of Public Prosecutions or applicant in a relevant proceeding shall inform the court, before the relevant proceeding starts, that a child may give evidence in the proceeding.

(2) For a trial on indictment, the Director of Public Prosecutions shall inform the court at the time the indictment is presented.

(3) A failure to comply with subsection (1) or (2) does not prevent a child's evidence being taken or video recorded under this Part or affect the admissibility of the evidence.

Identification of persons or things by child

42N (1) This section applies if a child is required to identify a person, including the defendant, or thing when the child is giving evidence.

(2) The court may make the orders or give such directions it considers appropriate to ensure that the identification is carried out in a way that limits the distress or trauma that might be suffered by the child when making the identification.

(3) The court shall also decide at what point during the giving of the child's evidence the identification is to be made.

Exclusion of public

- 42O (1) This section applies if—
- (a) a child is to give evidence under chapter 2 or this chapter in a relevant proceeding; or
  - (b) the evidence of a child contained in either of the following is to be presented at a relevant proceeding—
    - (i) a video recording made under chapter 2 or this chapter, or a lawfully edited copy of the video recording;
    - (ii) the usable sound track of a video recording, or a lawfully edited copy of a video recording, mentioned in subparagraph (i), or a lawfully edited copy of the usable sound track.
- (2) The court shall make an order excluding from the room in which it is sitting all persons, other than essential persons, while—
- (a) the child is giving the evidence mentioned in subsection (1)(a); or
  - (b) the evidence mentioned in subsection (1)(b) is being presented.
- (3) However, subsection (2) does not apply if—
- (a) the evidence to be given by the child, or presented at the proceeding, is other than in relation to a sexual offence; and
  - (b) the court is satisfied that the interests of justice require the evidence to be heard in open court.
- (4) In this section—
- “essential person”, for a proceeding, means any of the following persons—
- (a) a party to the proceeding and the party’s counsel;
  - (b) the Director of Public Prosecutions;
  - (c) a person whose presence is, in the court’s opinion, necessary or desirable for the proper conduct of the proceeding;
  - (d) a support person for the child under section 42P;
  - (e) a person who applies to the court to be present and whose presence, in the court’s opinion—
    - (i) would serve a proper interest of the person; and
    - (ii) would not be prejudicial to the best interests of the child.

Child entitled to support

- 42P (1) A child, while he is giving evidence in a relevant proceeding, is entitled to have near to him a person who may provide the child with support (a “support person”).

(2) A person may be the child's support person only if the person is approved by the court on application by the party proposing to call the child.

(3) The support person shall be permitted to be in close proximity to the child, and within the child's sight, while the child is giving evidence.

(4) A child may, with the agreement of the court, waive the entitlement to a support person under subsection (1).

(5) The court shall not agree to the waiver if the court considers the waiver is not in the child's best interests.

Instructions to be given to jury where special measures are used

42Q (1) This section applies to a relevant proceeding on indictment if any of the following measures are taken—

- (a) a child's evidence is taken in a way provided for under chapter 2 or this chapter;
- (b) a person is excluded under section 42O while a child gives evidence or a video recording, or usable sound track of a video recording, containing the evidence of a child is presented;
- (c) a child has a support person under section 42P while the child gives evidence.

(2) The judicial officer presiding at the proceeding shall instruct the jury that—

- (a) the special measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it;
- (b) the probative value of the evidence is not increased or decreased because of the special measure; and
- (c) the evidence is not to be given any greater or lesser weight because of the special measure.

Orders, directions and rulings concerning child witnesses

42R The court may make any orders or give any directions or rulings it considers appropriate for this Part on the court's own initiative or on an application made to the court by a party to the proceeding.

#### Chapter 4

#### Dealing with recordings

Interpretation of Chapter 4

42S In this chapter—

“presiding judicial officer”, in relation to a recording, means the judicial officer presiding at—

- (a) the proceeding in which the recording is made;
- (b) the proceeding in which the recording is presented or to be presented, or case management rulings or directions or pretrial rulings or directions pursuant to this Part;

“recording” means a—

- (a) video recording of a child’s evidence made under chapter 2; or
- (b) copy of a video recording mentioned in paragraph (a).

Approval to edit or otherwise change a recording

42T (1) An original recording shall not be edited or otherwise changed in any way.

(2) The presiding judicial officer may, on application, give approval for a copy of an original recording to be edited or changed in a stated way.

Court to give directions about the use or safe-keeping of a recording

42U (1) The presiding judicial officer may make any order the judicial officer considers appropriate about the use or safe-keeping of a recording.

(2) Without limiting subsection (1), the presiding judicial officer may give directions, with or without conditions, as to—

- (a) the persons, or classes of persons, who are authorised to have possession of a recording; and
- (b) the giving up of possession of a recording.

(3) The presiding judicial officer shall have regard to the following matters when deciding the persons, or classes of persons, who are authorised to have possession of a recording—

- (a) the need for counsel involved in the proceeding to have access to the recording;
- (b) the need to ensure that persons authorised to have possession of the recording are able to take appropriate special measures to ensure there is no unauthorised access to the recording.

(4) In this section, “use”, of a recording, includes copying of the recording.

Unauthorised possession of, or dealing with, recording

42V (1) A person commits an offence if he, without authority—

- (a) has a recording in his possession;

- (b) supplies, or offers to supply, a recording to any person other than an authorised person; or
- (c) plays, copies or erases a recording or permits a person to play, copy or erase a recording.

(2) A person has authority for subsection (1) only if the person has the possession or does the thing mentioned in subsection (1)—

- (a) in the case of a public official for a purpose connected with the proceeding for which the recording was made or any rehearing or re-trial of, or appeal from, the proceeding, or civil proceeding in which the recording may be presented in evidence; or
- (b) in any case, as authorised by a judicial officer under section 42U, or the Registrar of the Court.

(3) A person who contravenes this section shall be guilty of contempt of court and shall be proceeded against accordingly.

#### Publishing a recording prohibited

42W (1) A person shall not publish all or part of a recording other than with the approval of the relevant court and in accordance with any condition attached to the court's approval.

(2) An approval under subsection (1) may be given only in exceptional circumstances.

(3) In subsection (1)—

“publish” means disseminate to the public by radio or television or otherwise by the transmission of light or sound;

“relevant court” means the court presiding at the proceeding or preliminary hearing at which the recording is made or the court of trial or appeal at which the recording is presented.”

#### Inserts Part IIIAB

48 The Evidence Act 1905 is amended by inserting after the new Part IIIAA the following—

#### “PART IIIAB

#### SEXUAL ASSAULT COUNSELLING PRIVILEGE

#### Interpretation of Part IIIAB

42X In this Part—

“counsel a person” means—

- (a) to listen to and give verbal or other support, help or encouragement to the person, whether one-on-one or in a group; or
- (b) to advise, give therapy to or treat the person, whether one-on-one or in a group;

“counselled person” means a person who—

- (a) is being, or has at any time been, counselled by a counsellor; and
- (b) is, or has at any time been, a victim or alleged victim of a sexual offence as defined in section 42B;

“counsellor” means a person who—

- (a) has undertaken training or study, or has experience, that is relevant to the process of counselling other persons; and
- (b) in the course of the person’s paid or voluntary employment, other than as a religious representative, counsels another person;

“essential person”, for a proceeding, means any of the following persons—

- (a) the Director of Public Prosecutions;
- (b) a witness giving evidence;
- (c) a person whom a child witness is entitled to have present in court under section 42P;
- (d) a person whose presence is, in the court’s opinion, necessary or desirable for the proper conduct of the proceeding;
- (e) a person who applies to the court to be present and whose presence, in the court’s opinion—
  - (i) would serve a proper interest of the counselled person; and
  - (ii) would not be prejudicial to a counselled person’s interests;

“protected counselling communication” has the meaning given in section 42Y.

Meaning of protected counselling communication

42Y (1) A protected counselling communication is an oral or written communication made in confidence—

- (a) by a counselled person to a counsellor;
- (b) by a counsellor to or about a counselled person to further the counselling process; or
- (c) about a counselled person by a parent, carer or other support person who is present to facilitate communication between the

counselled person and a counsellor or to otherwise further the counselling process.

(2) But, a communication made to or by a medical practitioner about a physical examination of the counselled person conducted in the course of an investigation into an alleged sexual offence is not a protected counselling communication.

(3) For subsection (1), it does not matter whether the communication was made—

- (a) before or after the act or omission constituting the sexual offence committed or allegedly committed against the counselled person occurred; or
- (b) in connection with the sexual offence, or a condition arising from the sexual offence, committed or allegedly committed against the counselled person.

(4) A reference in this Part to a protected counselling communication includes a reference to—

- (a) a document to the extent it contains a protected counselling communication; or
- (b) evidence to the extent it discloses a protected counselling communication.

#### Sexual assault counselling privilege

42Z A person shall not do any of the following things in connection with a proceeding, other than with the leave of the court hearing the proceeding—

- (a) compel, whether by subpoena or otherwise, another person to produce a protected counselling communication to a court;
- (b) produce to a court, adduce evidence of or otherwise use, a protected counselling communication; or
- (c) otherwise disclose, inspect or copy a protected counselling communication,

for the trial or sentencing of a person for a sexual offence.

#### Application for leave

42Z.1 (1) A party to the proceeding may apply for leave of the court under this subsection.

(2) As soon as reasonably practicable after the application is made, the applicant shall give the following persons a notice complying with subsection (3)—

- (a) each other party to the proceeding;



- (b) if the counsellor to whom the protected counselling communication relates is not a party to the proceeding, the counsellor.
- (3) For the purposes of subsection (2), the notice is a written notice—
  - (a) stating that an application for leave under this Part has been made in relation to a protected counselling communication; and
  - (b) providing a description of the nature and particulars of the protected counselling communication (other than particulars disclosing the content of the communication).
- (4) If the counselled person to whom the protected counselling communication relates is not a party to the proceeding, the Director of Public Prosecutions shall, as soon as practicable after a notice is given under subsection (2), give the counselled person a copy of the notice.
- (5) But, the court may waive the requirement to comply with subsection (2) if, in relation to the proceeding—
  - (a) notice has been given of a previous application for leave under this Part relating to the same protected counselling communication;
  - (b) the counselled person to whom the protected counselling communication relates has consented to the waiver of the requirement; or
  - (c) the court is satisfied that—
    - (i) exceptional circumstances exist that require the waiver of the requirement; and
    - (ii) it is in the public interest to waive the requirement.
- (6) For the purposes of subsection (5)(b), the consent shall be given—
  - (a) in writing; or
  - (b) if the counselled person cannot give written consent because of a disability, orally.

Deciding whether to grant leave

42Z.2 (1) The court may grant an application for leave under this Part if the court is satisfied that—

- (a) the protected counselling communication the subject of the application will, by itself or having regard to other documents or evidence produced or adduced by the applicant, have substantial probative value;
- (b) other documents or evidence concerning the matters to which the protected counselling communication relates are not available; and

- (c) the public interest in admitting the protected counselling communication into evidence substantially outweighs the public interest in—
  - (i) preserving the confidentiality of the protected counselling communication; and
  - (ii) protecting the counselled person from harm.

(2) In deciding the matter mentioned in subsection (1)(c), the court shall have regard to the following matters—

- (a) the need to encourage victims of sexual offences to seek counselling;
- (b) that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship;
- (c) the public interest in ensuring victims of sexual offences receive effective counselling;
- (d) that disclosure of the protected counselling communication is likely to damage the relationship between the counsellor and the counselled person;
- (e) that the disclosure of the communication is likely to infringe a reasonable expectation of privacy;
- (f) the extent to which the communication is necessary to enable the accused person to make a full defence;
- (g) any other matter the court considers relevant.

(3) When deciding the application, the court may consider a written or oral statement made to the court by the counselled person outlining the harm the person is likely to suffer if the application is granted.

(4) If an oral statement is made by the counselled person under subsection (3), while the statement is being made the court shall exclude from the room in which the court is sitting—

- (a) anyone who is not an essential person; and
- (b) an essential person, if—
  - (i) the counselled person asks that the essential person be excluded; and
  - (ii) the court considers excluding the essential person would serve a proper interest of the counselled person.

(5) The court shall not disclose, or make available to a party to the proceeding, a statement made to the court under subsection (3).

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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(6) The court shall state its reasons for granting or refusing to grant the application.

(7) If the proceeding is a trial by jury, the court shall hear and decide the application in the absence of the jury.”.

Amends Second Schedule

49 The Second Schedule of the Evidence Act 1905 is amended—

(a) in Part 1 by deleting the words “section 177 (unnatural offences and attempts to commit such offences)” and substituting the words “section 177 (unlawful anal intercourse)”;

(b) in Part 2—

(i) by deleting the words “section 177 (unnatural offences and attempts to commit such offences)” and substituting the words “section 177 (unlawful anal intercourse)”;

(ii) by deleting the words “section 179 (the commission of acts of gross indecency between male persons)”;

(iii) by deleting the words “section 182 (a householder permitting the unlawful carnal knowledge of a young girl on his premises)” and substituting the words “section 182 (a householder permitting the unlawful carnal knowledge of a child on his premises)”;

(iv) by inserting in the appropriate alphabetical order the following—

“section 182FA (Procuring children to participate in pornographic performances);

section 182HA (Attendance at pornographic performance involving a child);

section 185A (Obtaining prostitution from person who is a child);”

(v) by deleting the words “section 183 (unlawful sexual intercourse with defective woman, and attempts to commit such offence) and substituting the words “section 183 (unlawful sexual intercourse with a person with severe mental impairment, and attempts to commit such offence)”;

(vi) by deleting the words “section 184 (the procurement and attempted procurement of a woman or girl for immoral purposes)” and substituting the words “section 184 (the procurement and attempted procurement of a person for immoral purposes)”;

(vii) by deleting the words “section 185 (the procurement or attempted procurement of a woman or girl for immoral purposes by threats or drugs)” and substituting the words “section 185 (the procurement or attempted procurement of a person for immoral purposes by threats or drugs)”;

- (viii) by deleting the words “section 187 (exercising control over a woman or girl with a view to her prostitution)” and substituting the words “section 187 (exercising control over person with a view to his prostitution)”;
- (ix) by deleting the words “section 188 (abduction of girls under the age of eighteen years with intent to have unlawful carnal knowledge)” and substituting the words “section 188 (abduction of child with intent to have carnal knowledge)”;
- (x) by deleting the words “section 189 (conspiracy to induce a woman or girl to permit unlawful carnal knowledge)” and substituting the words “section 189 (conspiracy to induce person to permit unlawful carnal knowledge)”;
- (xi) by deleting the words “section 191 (incest by a male person; and attempts to commit incest)” and substituting the words “section 191 (incest)”;
- (xii) by deleting the words “section 192 (incest by a woman);”.

PART 6

AMENDMENT OF YOUNG OFFENDERS ACT 1950

Amends section 2

50 Section 2 of the Young Offenders Act 1950 is amended as follows—

- (a) in the definition of “child”, by deleting “sixteen” and substituting “eighteen”;
- (b) in the definition of “guardian”, by deleting the words “or young person” wherever they appear;
- (c) by inserting in the appropriate alphabetical order the following—  
“juvenile offender” means a child under the age of sixteen years;”.

Amends section 5

51 Section 5 of the Young Offenders Act 1950 is amended, by deleting the word “child” and substituting the words “juvenile offender”.

Amends section 6

52 Section 6 of the Young Offenders Act 1950 is amended—

- (a) in subsection (1), by deleting the word “child” and substituting the words “juvenile offender”;
- (b) in subsection (2)—

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (i) by deleting the words “person who (though not a child) is under the age of eighteen years” and substituting the words “child (though not a juvenile offender)”;
- (ii) by deleting the words “such person” wherever it appears and substitute the words “such child”.
- (c) in subsection (3) by deleting the words “person under the age of eighteen years” and substituting the words “child (though not a juvenile offender).”

Amends section 7

53 Section 7 of the Young Offenders Act 1950 is amended in the definition of “punishable with imprisonment”, by deleting the word “child” wherever it appears and substituting the words “juvenile offender”.

Amends section 16

54 Section 16 of the Young Offenders Act 1950 is amended by deleting the word “child” wherever it appears and substituting the word “juvenile offender”.

Inserts section 16B

55 The Young Offenders Act 1950 is amended by inserting after section 16 the following—

“Remand of offender for assessment

16B (1) Where a child is convicted of a serious personal injury offence under the Criminal Code Act 1907, the court may remand the child for a period not exceeding 60 days to the custody of the Director of Child and Family Services before a sentence is imposed in order to cause an assessment to be completed, having regard to the following—

- (a) the age and character of the child;
- (b) the nature of the offence; and
- (c) the circumstances surrounding its commission.

(2) The Director of Child and Family Services, in consultation with the offender risk management team established under section 329FA of the Criminal Code Act 1907, shall cause an assessment to be conducted by a qualified professional to determine if the child constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence establishing—

- (a) in the case of a sex offender, that—
  - (i) the child, by his conduct in any sexual matter, including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses; and

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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- (ii) there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses; or
  - (b) in any other case, that—
    - (i) the child has demonstrated a pattern of repetitive behaviour, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour; or
    - (ii) the child has demonstrated behaviour of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.
- (3) The person charged with the conduct of an assessment under subsection (2) shall report his findings and recommendations for sentence to the court.”

Amends sections 17, 18, 20, 23, 24, 25, 26, 39, 40, 41 and 54

56 Sections 17, 18, 20, 23, 24, 25, 26, 39, 40, 41 and 54 of the Young Offenders Act 1950 is amended by deleting the word “child” wherever it appears and substituting the words “juvenile offender”.

Amends section 78

57 Section 78 of the Young Offenders Act 1950 is amended in subsection (2), by deleting the word “sixteen”, and substituting the word “eighteen”.

PART 7

AMENDMENT OF PROCEEDS OF CRIME ACT 1997

Amends section 55A

58 Section 55A of the Proceeds of Crime Act 1997 is amended—

- (a) in subsection (2), by inserting after paragraph (c) the following

“(ca) money forfeited under section 464B of the Criminal Code Act 1907;”

- (b) in subsection (3), by inserting after subparagraph (v) the following—

“(vi) education and training of officials in the effective implementation of the provisions of Part IIIAA of the Evidence Act 1905 in relation to child witnesses in criminal cases

CHILD SAFEGUARDING (MISCELLANEOUS AMENDMENTS) ACT 2019

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relating to sexual exploitation of children and related measures, and for prevention and assistance programmes.”

PART 8

FINAL PROVISIONS

Commencement

59 (1) This Act comes into operation on a date to be appointed by the Minister by notice in the Gazette.

(2) The Minister may appoint different dates for the coming into operation of different provisions of this Act.

## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

### EXPLANATORY MEMORANDUM

This Bill amends the Criminal Code Act 1907, the Children Act 1998, the Young Offenders Act 1950, the Evidence Act 1905, the Education Act 1996 and the Proceeds of Crime Act 1997 to enhance provisions and measures for the protection of children from sexual exploitation and sexual abuse and connected matters.

Clause 1 provides a title for the Bill.

Clause 2 amends section 3 of the Criminal Code Act 1907 (the “Criminal Code”) to insert a definition of “child” which, unless the context otherwise requires, means a person under the age of 18 years. This clause also inserts other definitions.

Clause 3 amends section 55 of the Criminal Code to provide for aggravating circumstances that will be considered in sentencing.

Clause 4 amends section 176A of the Criminal Code to insert definitions of “pornographic performance”, “prostitute” and “prostitution”.

Clause 5 inserts section 176B in the Criminal Code to provide for jurisdictional matters with respect to sexual offences where the victim is a child.

Clause 6 repeals and replaces section 177 of the Criminal Code to replace the offence of unnatural offences .

Clause 7 repeals section 179 of the Criminal Code, further to the amendment of section 177.

Clause 8 amends section 181 of the Criminal Code to remove the requirement that a prosecution for a sexual offence commence within 12 months after the offence is committed.

Clause 9 amends section 182 of the Criminal Code to delete certain references such that the provision is applicable to persons generally regardless of their gender.

Clause 10 inserts section 182FA in the Criminal Code to create an offence relating to pornographic performances involving a child.

Clause 11 inserts section 182HA in the Criminal Code to create an offence where persons attend a pornographic performance involving a child.

Clause 12 amends section 182J of the Criminal Code in relation to offences committed by a body corporate.

Clause 13 amends section 183 of the Criminal Code to delete references to “defective”, an outdated term, and substitute the term with “person with severe mental impairment” within the meaning of section 1 of the Mental Health Act 1968.

Clause 14 amends section 184 of the Criminal Code in respect of references to gender such that the provision is applicable to persons generally regardless of their gender.



## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

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Clause 15 repeals and replaces section 185 of the Criminal Code in respect of references to gender such that the provision is applicable to persons generally regardless of their gender.

Clause 16 inserts section 185A in the Criminal Code to create an offence of obtaining prostitution from a child.

Clause 17 repeals and replaces section 186 of the Criminal Code to delete references to gender such that the provision is applicable to persons generally regardless of their gender.

Clause 18 repeals and replaces section 187 of the Criminal Code to delete references to gender such that the provision is applicable to persons generally regardless of their gender.

Clause 19 repeals and replaces section 188 of the Criminal Code to delete references to gender such that the provision is applicable to persons generally regardless of their gender.

Clause 20 amends section 189 of the Criminal Code to delete references such that the provision is applicable to persons generally regardless of their gender.

Clause 21 amends section 191 of the Criminal Code with respect to the offence of incest to broaden its scope. The penalty for incest will increase from seven years to twenty years, and for incest against a child under 14 years the penalty will increase from ten years to twenty-five years.

Clause 22 repeals section 192 of the Criminal Code, pursuant to the amendment to section 191.

Clause 23 amends section 193 of the Criminal Code, pursuant to the repeal of section 192.

Clause 24 amends section 199 of the Criminal Code to delete references to gender such that the provision is applicable to all persons regardless of their gender.

Clause 25 amends section 202 of the Criminal Code to delete a reference to “girl” and substitute “child” such that the provision is applicable to all persons regardless of their gender.

Clause 26 amends section 329D of the Criminal Code. The definition of “sexual offence” is expanded to include additional offences to reflect the amendments being made to the Criminal Code by this Bill.

Clause 27 amends section 329FA of the Criminal Code to require that the DNA profile of a sex offender be added to the sex offender register.

Clause 28 amends section 464B of the Criminal Code to require that money forfeited under this section to be paid to the Confiscated Assets Fund under section 55A of the Proceeds of Crime Act 1997.

Clause 29 amends section 476A of the Criminal Code to require that any criminal proceedings for sexual offences relating to a child to be brought before the courts as quickly as possible.

Clause 30 repeals section 542 of the Criminal Code due to special measures being introduced under the Evidence Act 1905.

## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

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Clause 31 amends sections 542A of the Criminal Code due to special measures to be introduced under the Evidence Act 1905. Provisions allowing complainants to apply to the court to have their identities concealed, and for the court to make an order directing that the identity of a witness shall not be published or broadcast, in the interest of protecting the complainant, have been retained.

Clause 32 repeals section 543 of the Criminal Code due to special measures to be introduced under the Evidence Act 1905.

Clause 33 amends section 554 of the Criminal Code to delete references to gender such that the provision is applicable to persons generally regardless of their gender.

Clause 34 repeals and replaces section 5 of the Children Act 1998 to include in the purposes of the Act the responsibility to encourage awareness and protection of children from sexual exploitation and sexual abuse.

Clause 35 amends section 7 of the Children Act 1998 to require that investigations and any subsequent prosecutions for sexual offences be progressed and concluded with as little delay as possible.

Clause 36 amends section 8 of the Children Act 1998 with respect to the coordination between the government departments responsible for the welfare of child victims of a sexual offence under the Criminal Code.

Clause 37 amends section 9 of the Children Act 1998 in relation to the responsibility of the Director of Child and Family Services to provide assistance to child victims of sexual offences. The Director will also be responsible for implementing a public awareness campaign on the harm and dangers of child sexual exploitation and sexual abuse.

Clause 38 inserts section 10A in the Children Act 1998 to require that persons who are involved as professionals in proceedings relating to sexual offences against children participate in education and training courses in order to improve their knowledge and ability to effectively support child victims of sexual offences.

Clause 39 inserts section 11A in the Children Act 1998 pursuant to which the Minister shall establish a National Child Safeguarding Committee.

Clause 40 inserts section 20A to the Children Act 1998 to make provision for an investigation or prosecution of a sexual offences against a child to continue even if the statement or complaint is withdrawn.

Clause 41 amends section 21 of the Children Act 1998 to require that the name of a person be entered in the Child Abuse Register maintained under the Children Act if the person is convicted of a serious personal injury offence, as defined in section 329D of the Criminal Code Act 1907, against a child.

Clause 42 inserts section 21A in the Children Act 1998 regarding disqualification of persons whose names appear on the Child Abuse Register from employment in certain professions.

Clause 43 amends section 23 of the Children Act 1998 with respect to disclosure to a potential employer in one of the professions listed under section 20(2) of the Children Act, of the name of person whose name appears in the Child Abuse Register.

## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

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Clause 44 amends section 23 of the Education Act 1996 provide that the curriculum of aided and maintained schools include information on the risks of and means of protecting children from sexual exploitation and sexual abuse.

Clause 45 amends section 2 of the Evidence Act 1905 to insert a definition of “child” which includes a person under the age of 18 years.

Clause 46 repeals and replaces section 42 of the Act, and adds a new section 42A. Section 42 provides that the question of whether a child is eligible to swear an oath may be raised by either party to the proceedings; i.e. prosecution or defence, or by the court itself. A child who is 14 or older is only eligible to be sworn if he understands two matters: the solemnity of a criminal trial and the particular responsibility to tell the truth which is involved in taking an oath. Section 42A provides for the reception of unsworn evidence of a child in criminal proceedings in the circumstances provided therein. Though there is no longer a requirement for the evidence to be corroborated, judicial discretion to seek corroboration is preserved.

Clause 47 inserts a new Part IIIAA into the Evidence Act 1905 to include special measures for child witnesses in criminal proceedings relating to sexual offences as follows:

- Section 42B inserts definitions for the interpretation of Part IIIAA.
- Section 42C sets out the general principles to be applied when dealing with a child witness.
- Section 42D contains general provision regarding the application of special measures in respect of child witnesses.
- Section 42E requires the presentation of the indictment where a child’s evidence is intended to be taken for a trial on indictment.
- Section 42F provides how a video-taped recording of the evidence of a special witness is to be taken.
- Section 42G empowers the court to give directions for taking a child’s evidence.
- Section 42H makes provision relating to the use of prerecorded evidence.
- Section 42I makes provision for an order for further evidence to be given.
- Section 42J empowers the Court to make an order that evidence should not to be taken and pre-recorded under this Part of the Evidence Act. The court may have regard to the child’s wishes and the purposes of this Part.
- Section 42K provides for the use of audio visual links or screening arrangements for taking a child’s evidence.
- Section 42L allows for the use of audio visual link in a proceeding on the application of any party or on the judicial officer’s own motion where the judicial officer considers the criteria.
- Section 42M requires the Director of Public Prosecutions or applicant in a relevant proceeding to inform the court, before the proceeding starts, that a child may give evidence in the proceeding.
- Section 42N empowers the court to make orders and give directions relating to identifying persons or things by children.

## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

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- Section 42O empowers the court to exclude the public.
- Section 42P makes provision for a child to have a support person near him when giving evidence.
- Section 42Q sets out instructions to be given to jury where special measures are used.
- Section 42R empowers the court to make orders, directions and rulings concerning child witnesses.
- Section 42S inserts definitions for the interpretation of Chapter 4 on Dealing with recordings.
- Section 42T provides that an original recording of a child's evidence shall not be edited or otherwise changed.
- Section 42U empowers the court to give directions about the use or safe-keeping of a recording.
- Section 42V establishes a offence of the unauthorised possession of, or dealing with a recording.
- Section 42W establishes a prohibition on publishing a recording without the approval of the relevant court.

Clause 48 inserts a new Part IIIAB into the Evidence Act 1905 to provide for sexual assault counselling privilege as follows:

- Section 42X inserts definitions for the interpretation of Part IIIAB.
- Section 42Y sets out the meaning of protected counselling communication.
- Section 42Z provides for sexual assault counselling privilege.
- Section 42Z.1 makes provision for a party to the proceeding to apply for leave of the court in relation to a protected counselling communication.
- Section 42Z.2 empowers the court to determine whether to grant leave in relation to a protected counselling communication.

Clause 49 amends the Second Schedule to the Evidence Act 1905 consequentially upon amendments to the Criminal Code effected by this Bill.

Clause 50 amends section 2 of the Young Offenders Act 1950 to include a definition of child and of juvenile offender, and to amend other definitions for the purposes of that Act. A juvenile offender is a child under the age of sixteen years

Clause 51 amends section 5 of the Young Offenders Act 1950 to refer to juvenile offenders.

Clause 52 repeals and replaces section 6 of the Young Offenders Act 1950 to take account of the differences between a child and a juvenile offender.

Clause 53 amends section 7 of the Young Offenders Act 1950 in the definition of "punishable with imprisonment" to delete the word "child" and substitute the word "juvenile offender".

## CHILD PROTECTION (MISCELLANEOUS AMENDMENTS) BILL 2019

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Clause 54 amends section 16 of the Young Offenders Act 1950 to refer to juvenile offenders.

Clause 55 inserts a new section 16B of the Young Offenders Act 1950 to provide for assessment of a child convicted of a serious personal injury offence.

Clause 56 amends sections 17, 18, 20, 23, 24, 25, 26, 39, 40, 41, and 54 of the Young Offenders Act 1950 to refer to “juvenile offender”.

Clause 57 amends section 78 of the Young Offenders Act 1950 to increase the age referred to in that section from 16 years to 18 years.

Clause 58 amends section 55A of the Proceeds of Crime Act 1997 to allow funds confiscated in the forfeiture of things used for child pornography to be paid into the Confiscated Assets Fund. That section is also amended to authorise payments to be made out of the Fund for education and training in relation to child witnesses in criminal cases of sexual exploitation of children and related measures, and for victims of sexual offences.

Clause 59 provides for commencement.