

EVIDENCE OF CHILD WITNESS (AMENDMENT) BILL 2024

AMENDMENT IN COMMITTEE

ENGLISH LANGUAGE TEXT

Clause 4

Clause 4 of the Bill is amended in the new section 2B—

- (a) in subsection (1), by substituting for the words “has a sufficient appreciation of the solemnity of the occasion and understands the duty of speaking the truth” the words “understands the nature of an oath”; and
- (b) in subsection (2), by substituting for the words “and has no sufficient appreciation of the solemnity of the occasion and does not understand the duty of speaking the truth” the words “or does not understand the nature of an oath”.

EXPLANATORY STATEMENT

The amendment to *clause 4* of the Bill seeks to amend the new subsections 2B(1) and (2) to substitute the complex provision with a clearer provision on the requirement of a child witness in giving evidence upon oath or otherwise. With this amendment, it is sufficient to provide that a child witness may give evidence upon oath if he has attained the age of twelve years and understands the nature of the oath. A child witness who has not attained the age of twelve years or does not understand the nature of an oath may give evidence not upon oath and the Court shall inform the child witness that he has a duty to speak the truth and make the child witness promise to speak the truth.

A BILL

i n t i t u l e d

An Act to amend the Evidence of Child Witness Act 2007.

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ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Evidence of Child Witness (Amendment) Act 2024.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Amendment of long title

2. The Evidence of Child Witness Act 2007 [Act 676], which is referred to as the “principal Act” in this Act, is amended by substituting for the long title the following long title:

“An Act relating to evidence of child witnesses.”.

Amendment of section 2

3. Section 2 of the principal Act is amended in the definition of “child witness” by deleting the words “an accused or”.

New Parts IA and IB

4. The principal Act is amended by inserting after section 2 the following parts:

“PART IA**COMPETENCY OF CHILD WITNESS, EVIDENCE OF CHILD WITNESS GIVEN UPON OATH OR OTHERWISE AND UNCORROBORATED EVIDENCE OF CHILD WITNESS****Competency of child witness**

2A. (1) All child witnesses shall be presumed to be competent to give evidence in any proceedings.

(2) A child witness is not competent to give evidence in a proceedings if the Court finds, based on the inquiry conducted under section 2c, that the child witness is not able to understand the questions put to him or give rational answers to the questions put to him in that proceedings.

Evidence of child witness given upon oath or otherwise

2B. (1) A child witness shall give evidence upon oath in a proceedings if he has attained the age of twelve years and has a sufficient appreciation of the solemnity of the occasion and understands the duty of speaking the truth.

(2) A child witness who has not attained the age of twelve years and has no sufficient appreciation of the solemnity of the occasion and does not understand the duty of speaking the truth may give evidence not upon oath in a proceedings and the Court shall, before the child witness gives evidence, inform the child witness that he has the duty to speak the truth and require the child witness to promise to speak the truth.

(3) When a child witness is giving evidence in a proceedings and in the course of giving his evidence he attains the age of twelve years, he may continue giving his evidence provided that he takes oath and his failure to take oath upon attaining the age of twelve years shall not render his evidence as inadmissible.

(4) The evidence of a child witness given not upon oath under subsection (2) shall, if admitted by the Court, be treated in the same manner as if the evidence had been given upon oath.

Inquiry on competency of child witnesses and ability of child witnesses to understand nature of oath

2c. (1) Subject to subsection (2), where the competency of a child witness to give evidence or the ability of a child witness to understand the nature of the oath when giving evidence is called into question, the Court may conduct an inquiry on the competency of the child witness to give evidence or on the ability of the child witness to understand the nature of the oath when giving evidence.

(2) The inquiry under this section shall be conducted before a child witness commences the giving of his evidence and where the Court thinks necessary, at any time after the child witness has commenced the giving of his evidence but before the child witness concludes the giving of his evidence.

(3) The Court shall conduct the inquiry in the presence of the parties to the proceedings and may, where necessary, require evidence from any other witnesses to be given during the inquiry in order for the Court to arrive at its decision as to the competency of the child witness to give evidence or the ability of the child witness to understand the nature of the oath when giving evidence.

(4) For the purposes of this section—

(a) the questioning of the witnesses shall only be carried out by the Court; and

(b) where the witness to be called is a child, all measures provided under this Act shall be applicable to facilitate the giving of evidence by the child witness.

Uncorroborated evidence of child witness

2D. (1) Notwithstanding anything contrary in any other written law, an accused may be liable to be convicted or a child charged with any offence may be found guilty for an offence on the basis of the uncorroborated evidence of a child witness given upon oath or otherwise.

(2) Any rule providing that an accused cannot be convicted or a child charged with any offence cannot be found guilty for an offence on the basis of the uncorroborated evidence of a child witness given upon oath or otherwise shall cease to apply.

(3) Any rule requiring the Court to warn itself before convicting an accused or finding a child charged with any offence guilty for an offence on the basis of the evidence of a child witness given upon oath or otherwise merely because the evidence is given by a child shall also cease to apply.

PART 1B**CASE MANAGEMENT****Case management**

2E. (1) When the Court commences a case management process under section 172B of the Criminal Procedure Code [*Act 593*] and a child witness is proposed to be called to give evidence in a proceedings, the Court may, during the case management, give directions regarding the manner of giving evidence by the child witness and the conduct of the examination of the child witness in the proceedings so as to enable the examination of the child witness to be carried out effectively and to promote a fair and expeditious trial.

(2) Notwithstanding subsection (1), where the case management is in respect of any offence under the Sexual Offences against Children Act 2017 [*Act 792*], or any offence specified in the Schedule to the Sexual Offences against Children Act 2017 where the victim is a child, and a child witness is proposed to be called to give evidence in the proceedings relating to the offence, the Court shall give the directions referred to in subsection (1).

- (3) The directions referred to in subsection (1) may include—
- (a) the manner of questioning the child witness and questions that may or may not be asked in relation to a particular issue and phrasing of questions, to the child witness;
 - (b) the estimated duration of the examination of the child witness including rest breaks; and
 - (c) the use of any equipment or tools to help communicate a question to a child witness and to obtain an answer from a child witness.
- (4) During the case management, the Court—
- (a) shall accord all parties an opportunity to be heard; and
 - (b) may call for and receive expert evidence to assist the Court in forming an opinion relating to—
 - (i) the best means of communicating with the child witness; and
 - (ii) any measures that may be required to assist the child witness to give evidence.
- (5) In giving the directions referred to in subsection (1), the Court may have regard to—
- (a) the age of the child witness;
 - (b) any special needs of the child witness;
 - (c) the nature of the offence in question;
 - (d) the relationship between the child witness and the accused or the child charged with any offence;
 - (e) the wishes of the child witness; and
 - (f) the availability of any necessary equipment, tools or facilities to assist the child witness to give evidence.

(6) The provisions of this section shall be in addition to, and not in derogation of, the provisions of section 172B of the Criminal Procedure Code.”.

Amendment of section 6

5. Section 6 of the principal Act is amended—

(a) by inserting after subsection (2) the following subsection:

“(2A) Notwithstanding subsection (2), a video recording may be admitted without being accompanied by the transcript of the original language used in the video recording and translation of the transcript if the Court is satisfied that the transcript of the original language is not feasible to be prepared.”; and

(b) by deleting subsections (7) and (8).

EXPLANATORY STATEMENT

This Bill seeks to amend the Evidence of Child Witness Act 2007 (“Act 676”) with the main objective to make better provisions in relation to evidence of child witnesses. Currently, Act 676 contains provisions regarding the manner of giving evidence by a child witness whilst substantive provisions relating to the competency of a child witness and evidence of a child witness given upon oath or otherwise as well as provision on the corroboration of evidence of a child witness are specified in the Evidence Act 1950 [Act 56]. Apart from the Evidence Act 1950, other legislations, namely the Sexual Offences against Children Act 2017 [Act 792], the Oaths and Affirmations Act 1949 [Act 194], the Security Offences (Special Measures) Act 2012 [Act 747] and the Armed Forces Act 1972 [Act 77] also contain provisions on evidence given by a child witness.

With the amendments to Act 676 to provide for both substantive and procedural provisions on evidence of a child witness, Act 676 will be the main legislation focusing on the evidence of a child witness. Hence, consequential amendments need to be made to the Evidence Act 1950, the Sexual Offences against Children Act 2017, the Oaths and Affirmations Act 1949, the Security Offences (Special Measures) Act 2012 and the Armed Forces Act 1972 to remove the provisions on evidence given by a child witness.

Since the definition of “child witness” under Act 676 does not include a child charged with any offence, with regards to evidence given by a child charged with any offence, the related provisions are already provided for under the Child Act 2001 [Act 611]. Despite the fact that Act 676 will be the main legislation providing for the substantive and procedural aspects of evidence of a child witness, Act 676 still needs to be read together with the Evidence Act 1950 and the Criminal Procedure Code [Act 593].

2. *Clause 1* contains the short title and the provision on the commencement of the proposed Act.
3. *Clause 2* seeks to substitute the long title of Act 676 to be in line with the expansion of scope of Act 676 to provide for both the substantive and procedural aspects of evidence of a child witness.
4. *Clause 3* seeks to amend section 2 of Act 676 in the definition of “child witness” to rectify the definition by deleting the reference to an accused.
5. *Clause 4* seeks to introduce new Parts 1A and 1B into Act 676. Part 1A contains sections 2A, 2B, 2C and 2D whilst Part 1B contains section 2E.

The new section 2A seeks to provide for the competency of a child witness to give evidence in any proceedings. This section provides that all child witnesses shall be presumed to be competent to give evidence unless based on the inquiry conducted under section 2C the Court finds the child witness is not able to understand the questions put to him or not able to give rational answers to such questions.

The new section 2B seeks to require a child witness to give evidence upon oath if he has attained the age of twelve years and has sufficient appreciation of the solemnity of the occasion and understands the duty of speaking the truth. A child witness who does not meet the requirement for giving evidence upon oath may give evidence not upon oath and the Court shall inform the child witness that he has a duty to speak the truth and make the child witness promise to speak the truth. This section also ensures that the evidence from a child witness, whether given upon oath or otherwise, is treated equally, enhancing the participation and protection of a child witness in a judicial process. In this regards, the Court shall have a discretion to assess the credibility of a child witness and to determine the weight of evidence given by the child witness on a case-to-case basis.

The new section 2C outlines the procedures for the Court in conducting an inquiry to determine whether a child witness is competent to give evidence in a proceedings and whether a child witness understands the nature of the oath when giving evidence. This inquiry by the Court shall take place in the presence of all parties to ensure transparency and may involve other witnesses being called if the Court thinks necessary. During the inquiry, only the Court can question witnesses to ensure the efficient conduct of the inquiry and at the same time accommodating the needs of the child witness.

The new section 2D seeks to repeal the mandatory requirement that the evidence of a child witness given not upon oath must be corroborated to secure a conviction in criminal proceedings. This section stipulates that despite any conflicting provision in other written law, an accused may be convicted or a child charged with any offence may be found guilty for an offence on the basis of the uncorroborated evidence of a child witness, whether given upon oath or otherwise and any rule providing that an accused cannot be convicted or a child charged with any offence cannot be found guilty for an offence on the basis of the uncorroborated evidence of a child witness given upon oath or otherwise shall cease to apply.

This new section further provides that the rule which requires the Court to warn itself before convicting an accused or finding a child charged with any offence guilty for an offence on the basis of the evidence of a child witness given upon oath or otherwise merely because the evidence is given by a child shall cease to apply. The mandatory requirement for corroboration of evidence of a child witness has already been removed for the purposes of conviction of an accused charged with any offence under the Sexual Offences against Children Act 2017, or any offence specified in the Schedule to the Act where the victim is a child and the conviction of an accused charged with any security offence as specified in the Security Offences (Special Measures Act) 2012.

The new section 2E seeks to guide the Court when commencing a case management under section 172B of the Criminal Procedure Code to give directions regarding the manner of giving evidence by the child witness and how the examination of the child witness will be conducted. The giving of such directions will be mandatory when the case management is in respect of any offence under the Sexual Offences against Children Act 2017, or any offence specified in the Schedule to the Act where the victim is a child. This section further provides that in giving such directions, the Court may have regard to, among others, the age of the child witness and special needs of the child witness.

It is the aim of this provision to ensure consideration of what measures under Act 676 will be used to assist the child witness to give evidence so that appropriate arrangements can be made so as to ensure smooth running of the proceedings. In addition, the giving of directions during case management will allow the parties sufficient time to prepare accordingly and reduce objections and interruptions during the giving of evidence by the child witness which are distressing to the child witness and prolong the examination process.

6. *Clause 5* seeks to amend section 6 of Act 676 to introduce a new subsection (2A) which allows a video recording of evidence of a child witness to be admitted into evidence without being accompanied by a transcript in the original language used in the video recording or translation of the original language used in the video recording, provided that the Court is satisfied that the transcript of the original language is not feasible to be prepared. Additionally, consequential to the insertion of section 2A into Act 676, this *clause* also seeks to delete subsection 6(7) of Act 676 on admission of the statement of a child witness made in a video recording and subsection 6(8) on the assessment of a child witness of tender years by the Court in considering the statement made by the child witness in the video recording.

FINANCIAL IMPLICATIONS

This Bill will not involve the Government in any extra financial expenditure.

[PN(U)3324]