

**MATTERS TO BE TAKEN INTO CONSIDERATION WHILE HANDLING CHILD WITNESS IN MALAYSIA**

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**Abstract:** *There has been an increasing number of children, giving evidence in court about crimes against them, most frequently sexual abuse crimes. At present criminal courts are rarely able to benefit from children's memories of events because of restrictions on their competency, which may be given due to their accounts and through the fact that the process of giving evidence is a traumatizing experience for children. Added to this, children are more likely to relate their experiences when relaxed, free from coercive pressure or anxiety the opposite qualities to those found in a courtroom designed for 'adult' proceedings. The objective of Evidence of Child Witness Act 2007 is to provide special procedures (more child-friendly methods) for giving evidence, to ensure that a child witness can testify comfortably, and not been traumatized by the complex technicalities or settings of the courtroom. Generally, what children fear most is a confrontation or facing the accused or the abuser. The role of an intermediary under Section 8(2) of the Evidence of Child Witness Act 2007, is very crucial during the trial to ensure that appointed intermediary can assist the child effectively while ensuring the smooth flowing of the court process. There is no specific mention of the qualification of the intermediary in the act. We would like to recommend that there should be clear provision stipulated in the act to mention that the intermediaries should possess qualification, experience and background related to a child, for example, a child psychologist. We recommended that there should be an amendment to Video recording of a child witness under Section 8(2) of the Evidence of Child Witness Act 2007, in which initial video recording should take place within 48 hours of when the crime has been reported, due to the memory and evidence of the event is still fresh in the children memory thus its crucial to obtain the best quality of evidence.*

**Keywords:** Child, Evidence, Criminal Courts

**Research Area:** Law and Social Science

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## 1. INTRODUCTION

Over the past decade, there has been an increasing number of children, giving evidence in court about crimes against them, most frequently sexual abuse crimes. As more and more children come before the courts as witnesses, the problems they face in an accusatory, adult-oriented system have become increasingly evident<sup>1</sup>. In relation to that, children are remarkably capable of recalling and accurately relating events which they have witnessed or experienced and this quality is present even in the very young<sup>2</sup>. At present criminal courts are rarely able to benefit from children's memories of events because of restrictions on their competency, which may be given to their accounts and through the fact that the process of giving evidence is a traumatizing experience for children<sup>3</sup>. Added to this, children are more likely to relate their experiences when relaxed, free from coercive pressure or anxiety the opposite qualities to those found in a courtroom designed for 'adult'

proceedings<sup>4</sup>. According to Westcott et al. (2002:203), concerns about the stressful and potentially harmful effects on children and the possible detrimental effects on the reliability and completeness of the child's evidence have led to a number of changes in court procedures<sup>5</sup>.

## 2. LITERATURE REVIEW

Moving on, child abuse was recognized as a social problem in Malaysia in 1991 with the passing of the Child Protection Act 1991 (Act 468)<sup>6</sup>. A more focused effort on child protection was made after the ratification of the CRC, in 1995 and in 2001, the Child Act 2001 was passed, which provide for a child-friendly procedure before the court for children<sup>7</sup>. CRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

Evidence of Child Witness Act 2007 was gazette on 30 August 2007 to govern procedural laws pertaining to evidence given by a child in a trial and it consists of 3 parts and encompasses 16 provisions<sup>8</sup>. The objective of Evidence of Child Witness Act 2007 is to provide special procedures (more child-friendly methods) for giving evidence, in order to ensure that a child witness is able to testify comfortably, and not been traumatized by the complex technicalities or settings of the courtroom. This Act covers provisions on all child witnesses under the age of 16 years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence<sup>9</sup>.

Generally, what children fear most is a confrontation or facing the accused or the abuser<sup>10</sup>. Under Section 4 of the Evidence of Child Witness Act 2007, the court may set up a special screen for the purpose to prevent a child witness giving evidence in court from seeing the accused<sup>11</sup>. A survey conducted in the United States indicated that the single greatest fear of the overwhelming majority of child witnesses was the sight of the accused<sup>12</sup>. Another survey conducted in Aberdeen also found anxieties in children in giving evidence in open court, delays and postponements and fear of cross-examination<sup>13</sup>. Research also has shown that in the vast majority of cases, child witness suffers great trauma when testifying in an adult-centred adversarial environment<sup>14</sup>. Strain, intimidation, and emotional distress can be eased with some change in procedure which does not at the same time compromise justice and procedure should be child-friendly to take away at least some of the discomfort of a child witness<sup>15</sup>. However, no specific provision in the said Act on how a screen must be set up to prevent the child from seeing or being seen by the accused.

Following that, in Malaysia, a child witness may give evidence through the following manner; having a screen between him and the accused or a child charged with an offence, live link or video recording under Section 3(1) of the Evidence of Child Witness Act 2007,<sup>16</sup> and that video recording of a child witness is admissible in trial as evidence of examination-in-chief of the child witness subject to provision of the Evidence Act 1950 and it shall be accompanied by the transcript of the original language used in the video recording and accompanied by a translation of the transcript, if the language used in the video recording is other than the national language under Section 6 (1) of the Evidence of Child Witness Act 2007,<sup>17</sup>. However, the child could still be challenged by the counterparty, by way of live cross-examination.

Proponents of videotaping as an investigative device cite several benefits. According to the Advisory Group on Video Evidence in England headed by Judge Pigot videotaping is important to ensure the child to give an account of what happened while it's still fresh in mind and protecting the child victim from repeating detail of a sexual assault or traumatism

experience because the interview was conducted in a relaxed atmosphere<sup>18</sup>. Despite that, it can enhance the therapeutic relationship by allowing the therapist and the child to watch together and can deter retractions by “converting” disbelieving parents to supportive parents<sup>19</sup>. In addition, videotapes capture children’s body language and facial expressions as compared to watching the child when he gives live evidence at the trial. Finally, compelling videotapes reportedly encourage defendants to enter guilty pleas, thereby eliminating all need for a long trial<sup>20</sup>.

The Evidence of Child Witness Act 2007 also provides for the establishment of Witness Support Service which aims to reduce fright and trauma towards the children who are to be a witness in the court proceedings<sup>21</sup>. This is important to ensure that the children are able to give their best evidence in criminal proceedings with the minimum level of distress. In 2002, the government of Malaysia entered into a project with the UK on “Collaborative Action Towards the Preparation of Children for Court Procedures<sup>22</sup>.” This project involves the setting up of a police child protection team to manage the video recording suite, the establishment of child-friendly procedures by the judiciary and a witness support program for child witnesses by the Social Welfare Department and the streamlining of record-keeping in relevant agencies. The Child Protection Unit cum Victim Care Centre run by the Royal Malaysia Police has been in operation since January 2003 by specially-trained officers who are responsible for taking and recording a victim’s statement<sup>23</sup>.

In many jurisdictions, videotapes are being used as a form of aid or support for the prosecution, particularly in sexual abuse cases. In England, videotaped evidence in chief has been allowed since the 1990’s. A video recording of a previous interview could supplement evidence in chief at trial and the child must undergo live cross-examination<sup>24</sup>. In 1999, the Youth Justice and Criminal Evidence Act was passed, and this Act introduced “special measures” for vulnerable witnesses and the focus of the child is on the age of the child. Children under 17 now qualify automatically for a range of special measures in specific types of cases and these measures include the use of CCTV and screens and the admission of pre-trial videotaped evidence.

Based on a research conducted by David P. H. Jones, a consultant psychiatrist, in his article “The Evidence of a Three-Year-Old”. In this case, Suzie, three years old, who was not only able to relate her experience but also to identify the accused whom she called the “bad man” five days after she was abducted and she also able to pick out the suspect from a group of six photographs shown to her by the police<sup>25</sup>. Suzie, in this case, was able to describe to her psychiatrists and demonstrate graphically with dolls the abusive act done. At the fifteen months after her kidnap, the accused confessed and produced the same details as had been established in the early interview with Suzie<sup>26</sup>.

Furthermore, Section 272B Criminal Procedure Code (Act 593)<sup>27</sup> of the allows a witness, with the leave of the court, to give video evidence or live evidence through a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so. The said section covers not only child victims and adult victims but also any other witnesses whom the court decides to fall within the category of “vulnerable witnesses.” The scope of section 272B (2)<sup>28</sup> is wide and can include any other offences apart from the above, making the provision more meaningful for other witnesses. However, according to Section 272B (4) <sup>29</sup>“if, in the opinion of the court, to do so would be inconsistent with the court’s duty to ensure that proceedings are conducted fairly to the parties to the proceedings.” This provision is vague, and guidelines are needed on issues such as who should provide evidence that there will be an adverse effect if the witness is forced to give evidence in court and

whether an expert should be called to give evidence on this matter<sup>30</sup>. Continuing with that, under Section 272B(3a), the court can also give leave to the child to be accompanied by a companion while giving evidence and this is where the victim support service should play its role<sup>31</sup>.

Section 8(2) of the Evidence of Child Witness Act 2007 provides for an intermediary function to assist the child witness in their communication with the court with the objective of providing evidence in the trial. The intermediary's primary responsibility is to facilitate two-way communication between the witness and others. They are neutral and independent, offering assistance to the court and responsible to the court. Their presence is designed to assist the courts and the witness to ensure that they all understand each other<sup>32</sup>. Reports and recommendations are based on their assessment of the witness's communication abilities advise on how the best is to adapt communication and the environment in which it takes place to the witness's individual needs. Intermediaries appointed for prosecution witnesses facilitate communication at the investigative interview, at meetings between witnesses and the police, during identification procedures and at trial. Intermediaries also assist communication between defence witnesses or defendants and defence lawyers and other criminal justice personnel<sup>33</sup>.

The child will, therefore, only talk to the intermediary during the court proceedings. Intermediaries, or specialist child examiners, are used in a number of different jurisdictions. Sometimes their involvement is throughout the criminal justice system and sometimes their role is restricted to when children are questioned during the trial. For example, in the England and Wales, the service provided by intermediaries includes assessing witnesses' communication needs; assisting at the police interview if requested; preparing a report from the assessment; and assisting at the trial. When assisting at trial, the intermediary communicates and explains the questions to the witness and communicates their answers back to the questioner. Where else in Austria, child witnesses are usually questioned at a pre-trial hearing, either by the Judge or an expert psychologist. The child is usually questioned in a separate room, with the parties watching via CCTV from a separate room. The Judge, prosecutor and defence lawyer put questions, via the expert, during the course of the hearing. The pre-trial hearing is recorded and usually played at the trial.

Child psychologists use their expertise in counseling, assessment and human behavior to help kids and teens cope with their problems and grow into successful, well-adjusted adults. Relying on research-backed techniques, these professionals help their clients to better understand the reasons behind problematic feelings and behaviors and to replace these with positive skills and strategies<sup>34</sup>. This makes them suitable as immediately in child criminal cases as they possess the special ability to deal with children, they are able to put a child at ease, able to give them attention and able to gain evidence from them. In the USA, for the criminal division, psychologists provide expert psychological evaluations for both juveniles and adults. Psychologists also provide counseling and psychotherapy for juveniles and adults accused of criminal acts, and post-conviction counseling for individuals on probation. Finally, psychologists provide counseling and psychotherapy for the victims of crimes, especially violent crimes. In child abuse cases, a psychological evaluation of the defendant may identify psychological problems underlying the criminal acts, and treatment recommendations are often part of any plea agreements. Additionally, if a young child is a primary witness in a criminal case, psychologists are often asked to testify regarding the reliability of the child witness.

Section 9 of the Evidence of Child Witness Act 2007 provides for an adult to accompany a child witness. The practice can be seen in Canada in which the child is allowed to a support person to accompany him or her in the court proceedings. The comforting reassurance of a support person's presence can lessen the stress typically associated with testifying. When children feel secure and less anxious, they provide better quality evidence to the Court<sup>35</sup>.

### 3. CONCLUSION

The role of an intermediary under Section 8(2) of the Evidence of Child Witness Act 2007, is very crucial during the trial to ensure that appointed intermediary can assist the child effectively while ensuring the smooth flowing of the court process. There is no specific mention of the qualification of the intermediary in the act. We would like to recommend that there should be clear provision stipulated in the act to mention that the intermediaries should possess qualification, experience and background related to a child, for example, a child psychologist. This is to ensure that only competent and qualified people are hired to assist in child-related cases. Besides that, government also should consider adopting a code of conduct and training packages to further sharpen their abilities to ensure smooth delivery of their services. This is also in line with current demands to recognize children as individual and to deal with them like individuals<sup>30</sup>, so by having qualified intermediaries the children get the required assistance in giving the evidence.

We recommended that there should be an amendment to Video recording of a child witness under Section 8(2) of the Evidence of Child Witness Act 2007, in which initial video recording should take place within 48 hours of when the crime has been reported, due to the memory and evidence of the event is still fresh in the children memory thus its crucial to obtain the best quality of evidence. Currently, in some cases, there lapses of time in the video recording which leads to eroding of the quality of evidence.

We are in point of view that there should be greater flexibility in procedural rules when children are required to give evidence in which judges should consider modifying the courtroom environment in ways that benefit witnesses' without abridging the defendant's right. A simple and specially designed courtroom would facilitate the child to gain self-confidence to contribute effectively to the court process. In enhancing the child evidence procedures, we would like to suggest the Malaysian government to consider perhaps sending their team to visit Canada and the UK to perhaps learn and seek experience over there on how child victim is handled in their court process and to implement the enhancement to our current system over here.

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#### ENDNOTE:

<sup>1</sup>H. Westcott, G. Davies, & R. Bull (Eds.) *Children Testimony : A Handbook of Psychological Research on Forensic Practice* (pp245-260). West Sussex, England: Wiley.

<sup>2</sup> Davies G., Stevenson-Robb & Flinn R. (1986), "The Reliability of Children's Testimony," *International Legal Practitioner*, at pp.95-103; Goodman G. S. & Helgeson V. S. (1985), "Child Sexual Assault: Children's Memory and The Law," *University of Miami Law Review*, 40 at pp. 181-208.

<sup>3</sup> Jones D. P. H (1987), *The Evidence of a Three-Year-Old Child*, *The Criminal Law Review*, pp.677.

<sup>4</sup> Ibid.,

<sup>5</sup> H. Westcott, G. Davies, & R. Bull (Eds.) *Children Testimony : A Handbook of psychological research and forensic practice* (pp245-260). West Sussex, England: Wiley.

<sup>6</sup> Norbani M Nazeri, (2007, May), *The Importance of Live Link in Child Abuse Cases (Incest)*. Paper presented at the International Law and Trade Conference: International Law and Trade Bridging the East-West Divide .

<sup>7</sup> Ibid.,

<sup>8</sup> Evidence of Child Witness Act 2007 (Act 676).

<sup>9</sup> Ibid.,

<sup>10</sup> J.R. Spencer & Rhona Film (1990). *The Evidence of Children*. London, England, Blackstone Press Limited.

<sup>11</sup> Section 4 of Evidence of Child Witness Act 2007 (Act 676).

<sup>12</sup> Graham Davies (1992). 'Protecting the Child Witness in the Courtroom', *Child Abuse-Review*. Vol.1:33-4137.

<sup>13</sup> Ibid.,

<sup>14</sup> Chew, S.Y. (19 July 2007). Human Rights and the Law: When a child takes the witness stand. Retrieved from <http://www.malaysiabar.org.my/Human Rights and the Law When a Child Takes the Witness Stand. Html>.

<sup>15</sup> Norbani M. Nazeri (2007, January), *Development of Child Evidence in Malaysia*. Paper presented at the University of Malaya-Griffith University Conference, Kuala Lumpur, Malaysia.

<sup>16</sup> Section 3(1) of Evidence of Child Witness Act 2007 (Act 676).

<sup>17</sup> Section 6(1) of Evidence of Child Witness Act 2007 (Act 676).

<sup>18</sup> Report of the Advisory Group on Video Evidence (1989), para 2.10.

<sup>19</sup> Norbani M Nazeri, (2007, May), *The Importance of Live Link in Child Abuse Cases (Incest)*. Paper presented at the International Law and Trade Conference: International Law and Trade Bridging the East-West Divide. pp 28.

<sup>20</sup> Ibid.,

<sup>21</sup> Evidence of Child Witness Act 2007 (Act 676).

<sup>22</sup> Norbani M Nazeri, (2007, May), *The Importance of Live Link in Child Abuse Cases (Incest)*. Paper presented at the International Law and Trade Conference: International Law and Trade Bridging the East-West Divide. pp 27.

<sup>23</sup> Norbani M Nazeri, (2007, May), *The Importance of Live Link in Child Abuse Cases (Incest)*. Paper presented at the International Law and Trade Conference: International Law and Trade Bridging the East-West Divide. pp 27.

<sup>24</sup> Ibid., pp 29.

<sup>25</sup> Jones D. P. H (1987), *The Evidence of a Three-Year-Old Child*, *The Criminal Law Review*, pp.677-681.

<sup>26</sup> Ibid.,

<sup>27</sup> Section 272B Criminal Procedure Code (Act 593).

<sup>28</sup> Section 272B(2) Criminal Procedure Code (Act 593).

<sup>29</sup> Section 272B(4) Criminal Procedure Code (Act 593).

<sup>30</sup> Norbani M. Nazeri (2007, January), *Development of Child Evidence in Malaysia*. Paper presented at the University of Malaya-Griffith University Conference, Kuala Lumpur, Malaysia. pp 32.

<sup>31</sup> Section 272B(3a) Criminal Procedure Code (Act 593).

<sup>32</sup> Judge Lord (2013) *The Evidence of Child Victims: the next stage* Bar Council Annual Law Reform Lecture

<sup>32</sup> Judge Lord (2013) The Evidence of Child Victims: the next stage Bar Council Annual Law Reform Lecture

<sup>33</sup> Making most of working with an Intermediary –Toolkit- (2014, November) -pp3

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- Making most of working with an Intermediary –Toolkit- (2014, November) -pp3
- Making most of working with an Intermediary –Toolkit- (2014, November) -pp3

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