

A BILL

ENTITLED

AN ACT to provide for the admissibility in criminal and civil proceedings and Coroner's inquests of evidence by the use of special measures, and for matters connected therewith and purposes incidental thereto.

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BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

PART I. *Preliminary Provisions*

1.—(1) This Act may be cited as the Evidence (Special Measures) Act, 2012, and subject to subsection (2), shall come into operation on a day or days to be appointed by the Minister, by notice published in the *Gazette*.

Short title,
construction
and com-
mencement.

(2) Different days may be appointed for the commencement of different provisions of this Act and for different purposes of a particular provision.

Interpretation.

2.—(1) In this Act—

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

“civil proceedings” means any proceedings, other than criminal proceedings, before—

- (a) the Supreme Court or the Court of Appeal;
- (b) a Resident Magistrate;
- (c) a Family Court or a Children’s Court;
- (d) any other court designated by the Minister by order, for the purposes of this Act; or
- (e) where applicable, a foreign court pursuant to Part V;

“Coroner” has the same meaning as “the appropriate Coroner” in the Coroners Act;

“court” means any court of law in Jamaica, and includes a Coroner exercising jurisdiction under the Coroners Act;

“criminal proceedings” means criminal proceedings before—

- (a) the Gun Court, a Circuit Court or the Court of Appeal;
- (b) a Resident Magistrate on indictment or in the exercise of a special statutory summary jurisdiction;
- (c) a Family Court or a Children’s Court;
- (d) any other court designated by the Minister by order, for the purposes of this Act; or
- (e) where applicable, a foreign court pursuant to Part V;

“live link” means a technological arrangement whereby a witness, without being physically present in the place where proceedings are held, is able to see and hear and be seen and heard by the following persons present in such place—

- (a) the judge, Resident Magistrate or Coroner;
- (b) the parties to the proceedings;
- (c) an attorney-at-law acting for a party to the proceedings;
- (d) the jury, if there is one;
- (e) an interpreter or any other person permitted by the court to assist the witness; and
- (f) any other person having the authority to hear and receive evidence;

“medical practitioner” means a medical practitioner registered pursuant to the provisions of the Medical Act;

“proceedings” means civil proceedings, criminal proceedings or a Coroner’s inquest;

“special measure” means the giving of evidence by a witness in proceedings, by means of a live link or video recording, in the manner and circumstances provided for pursuant to the provisions of this Act;

“video recording” means a recording on any medium from which a moving image may be produced by any means and includes any accompanying soundtrack;

“witness” means in relation to any proceedings, a person who has given, has agreed to give or has been summoned or subpoenaed by the court to give evidence.

(2) For the purposes of Part II, a witness is a vulnerable witness if—

- (a) the witness is a child witness at the time that an application or a motion under Part II is being determined by the court;

- (b) the witness is a complainant in criminal proceedings relating to a sexual offence; or
- (c) the court determines in accordance with subsection (3) that the evidence of the witness is unlikely to be available to the court, or the quality of the evidence if given in court by the witness is likely to be diminished as regards its completeness, coherence or accuracy, by reason of—
 - (i) fear or distress on the part of the witness in connection with testifying in the proceedings; or
 - (ii) the fact that the witness has a physical disability, physical disorder or suffers from a mental disorder within the meaning of the Mental Health Act.

(3) In determining whether the evidence of the witness is unlikely to be available to the court or the quality of his evidence is likely to be diminished under subsection (2)(c), the court shall consider—

- (a) in the case of criminal proceedings, the nature and circumstances of the offence to which the criminal proceedings relate;
- (b) the age of the witness;
- (c) any threat of harm made to the witness, a family member of the witness or any other person closely associated with the witness, or to any property of the witness;
- (d) any views expressed by or submissions made on behalf of the witness; and
- (e) any other matter that the court considers relevant.

PART II. *Applicability of Special Measures*

Special
measures
applicable to
witnesses.

3.—(1) Subject to the provisions of this section, in any proceedings, on application by a party to the proceedings or on its own motion, the court may issue a direction that a special measure,

or a combination of special measures, shall be used for the giving of evidence by a witness if—

- (a) in the case of a witness in criminal proceedings other than the accused, the court is satisfied that the special measure is appropriate in the interests of the administration of justice, in accordance with subsections (5) and (6); and—
 - (i) the witness is a vulnerable witness; or
 - (ii) the witness is available to testify, but it is not reasonably practicable to secure his physical attendance at the proceedings;
- (b) in the case of a witness in civil proceedings, or at a Coroner's inquest, the court is satisfied that the special measure is appropriate in the interests of the administration of justice.

(2) The court shall not issue a direction under subsection (1) unless arrangements to implement the special measure are available to the court.

(3) Where a vulnerable witness is a complainant in criminal proceedings relating to a sexual offence, he may inform the court, in writing, that he does not wish to have a special measure apply to him.

(4) For the purposes of subsection (1)(a)(ii), in determining whether or not it is reasonably practicable to secure the physical attendance of the witness at the proceedings, the court may take into account—

- (a) the expense that would be incurred in bringing the witness to attend the proceedings; and
- (b) any logistical difficulties in the witness attending the proceedings; and
- (c) any other factors which the court considers relevant.

(5) Subject to subsection (6), in determining whether a special measure is appropriate in the interests of the administration of justice under subsection (1), the court shall consider—

- (a) any views expressed by or submissions made on behalf of the witness;
- (b) the nature and importance of the evidence to be given by the witness;
- (c) whether the special measure would be likely to facilitate the availability or improve the quality of that evidence;
- (d) whether the special measure may inhibit the evidence given by the witness from being effectively tested by a party to the proceedings; and
- (e) any other matter that the court considers relevant.

(6) If a vulnerable witness is a child witness, each of the special measures or a combination of them shall be deemed to be appropriate in the interests of the administration of justice and a direction to that effect shall be made by the court unless—

- (a) the court is satisfied that the special measures would not be likely to improve the quality of the evidence of the child witness in the circumstances of the case; or
- (b) the child witness requests that one or both of those special measures, as the case may be, not be made and the court is satisfied that the quality of the evidence of the child witness would not be diminished as a result.

(7) In making a determination under subsection (6), the court shall consider—

- (a) the age and maturity of the child witness;
- (b) the ability of the child witness to understand what is involved in giving evidence by means of the special measure; and
- (c) any other matter that the court considers relevant.

4.—(1) In any criminal proceedings, on application by an accused or on its own motion, the court may issue a direction that the special measure under section 6 (which relates to live link evidence) shall apply in relation to the evidence given by the accused, if the court is satisfied that—

Special measure applicable to evidence of accused in criminal proceedings.

- (a) the accused—
 - (i) is a child; or
 - (ii) has a physical disability, physical disorder or suffers from a mental disorder within the meaning of the Mental Health Act, which renders it impracticable for him to be physically present to give evidence in court;
- (b) the special measure would enable the accused to participate more effectively in the proceedings;
- (c) arrangements to implement the special measure are available to the court; and
- (d) the special measure is appropriate in the interests of the administration of justice, in accordance with subsection (2).

(2) In determining whether a special measure is appropriate in the interests of the administration of justice under subsection (1)(d), the court shall consider—

- (a) any views expressed by or submissions made on behalf of the accused;
- (b) whether the special measure would be likely to facilitate the availability or improve the quality of the evidence to be given by the accused;
- (c) whether the special measure may inhibit the evidence given by the accused from being effectively tested by a party to the proceedings; and
- (d) any other matter that the court considers relevant.

PART III. *Special Measures*

Meaning of
"party".

5. For the purposes of this Part, "party" includes a person who is entitled or permitted to examine a witness at a Coroner's inquest.

Evidence by
live link.

6.—(1) A direction issued under Part II may provide for a witness to give evidence by means of a live link.

(2) Where a direction under subsection (1) provides for a witness to give evidence by means of a live link, the witness may not give evidence in any other way in the proceedings unless the court revokes or varies the direction.

(3) The court may, on an application by a party to the proceedings or on its own motion, revoke or vary a direction that provides for a witness to give evidence by means of a live link, if the court is satisfied that—

- (a) there has been a material change in the circumstances since the direction under subsection (1) was issued; or
- (b) it is otherwise appropriate in the interests of the administration of justice.

Video recorded
evidence.

7.—(1) A direction issued under Part II may provide for all or part of a video recording of an interview of a witness, whether recorded before or after the commencement of proceedings, to be admitted as evidence in chief in the proceedings.

(2) The court may exclude part of a video recording from the direction issued under subsection (1), if the court is of the opinion, having regard to all the circumstances of the case, that the prejudicial effect of that part outweighs its probative value.

(3) Subject to subsection (4), if a direction provides for a video recording of an interview of the witness to be admitted as evidence in chief, the court may direct that any other evidence to be given by the witness in the proceedings be given by means of a live link.

(4) Where video recorded evidence is admitted under this section, the witness shall be called by the party that tenders the

evidence to give testimony in person under cross-examination unless—

- (a) the court directs under subsection (3) that evidence given by the witness on cross-examination shall be by means of a live link; or
- (b) the parties agree that there is no need for the witness to be available for cross-examination.

(5) A witness who gives evidence in chief by means of a video recording may not give additional evidence in chief without the permission of the court pursuant to subsection (6).

(6) The court may give permission for the purposes of subsection (5) on its own motion or on application by a party to the proceedings if the court is satisfied that—

- (a) the evidence concerns a matter that is not dealt with in the witness's recorded testimony; or
- (b) it is appropriate to do so in the interests of the administration of justice.

(7) On the court's own motion or on application by a party to the proceedings, the court may revoke or vary a direction that provides for a witness to give evidence in chief by means of a video recording if—

- (a) it appears to the court that the witness is not available for cross-examination, and the parties do not agree that there is no need for the witness to be available for cross-examination;
- (b) a condition of the direction or an applicable rule of court has not been complied with to the satisfaction of the court;
- (c) there has been a material change in circumstances since the direction was given; or
- (d) the court is otherwise satisfied that it is appropriate in the interests of the administration of justice to revoke or vary the direction.

PART IV. *Evidentiary Issues Regarding Special Measures*

Issues regarding evidence given in accordance with special measures.

8.—(1) A court may sit at a place designated by the Minister under section 12(2) during any part of the proceedings—

- (a) in which evidence is to be given by means of a live link pursuant to a direction of the court under Part II in the proceedings; and
- (b) where facilities to implement that direction are not available at the location where the court usually sits.

(2) Evidence given by a witness in accordance with a direction issued under Part II shall be admissible to the same extent and effect as if it were given in direct oral testimony.

(3) Unless the context otherwise requires, for the purposes of this Act or any other law, a witness is deemed to be physically present at the proceedings when he gives evidence by means of a live link pursuant to a direction issued under Part II.

(4) Where evidence is given in accordance with a direction issued under Part II in criminal proceedings involving a trial by jury, the court shall give the jury any warning, that it considers necessary, to ensure that the fact that the direction was given does not prejudice the accused.

(5) Nothing in this Part or in Part II affects—

- (a) the power of a court, apart from the provisions of this Part, to make an order, give directions or give leave in relation to a witness; or
- (b) the admissibility of evidence by a video recording that would be admissible under any other law.

PART V. *Providing Evidence by Live Link to Foreign Court and Receiving Evidence by Live Link from Foreign Court*

Evidence by live link in civil or criminal proceedings

9.—(1) Subject to subsection (3), if a person in Jamaica is to give evidence by means of a live link, in civil or criminal proceedings conducted in a foreign state, the party who intends to

call the person as a witness may apply, without notice, to a Judge of the Supreme Court, or a Resident Magistrate, in Chambers for a summons or subpoena, as the case may be, requiring the person—

conducted in a foreign state.

- (a) to attend at the place fixed by the Judge or Resident Magistrate for the taking of the evidence by means of a live link and to remain in attendance until he is excused by the person in charge of the proceedings in the foreign state; and
- (b) to bring any document or other article specified in the summons or subpoena, that is in his possession or under his control with him for that purpose.

(2) The Judge or Resident Magistrate who hears an application under subsection (1) shall issue a summons or subpoena, as the case may be, for the giving of evidence by means of a live link, if he is satisfied that—

- (a) there are legal proceedings in the foreign jurisdiction in relation to the evidence requested; and
- (b) the facilities for providing the evidence by means of a live link are available.

(3) The place fixed by the Judge or Resident Magistrate under subsection (1) shall be a place designated by the Minister under section 12(2).

(4) This section shall not apply to proceedings in connection with which a request is made under the Mutual Assistance (Criminal Matters) Act.

10.—(1) Pursuant to the provisions of section 9, where a witness in Jamaica gives evidence by means of a live link in proceedings conducted in a foreign state, the witness shall not be compelled to give any evidence which he could not be compelled to give—

Application of law for witness giving evidence by live link in proceedings conducted in a foreign state.

- (a) in criminal or civil proceedings in Jamaica; or
- (b) in criminal or civil proceedings in the foreign state.

(2) Without prejudice to subsection (1), a witness shall not be compelled under this Part to give any evidence if his doing so would be prejudicial to the security of Jamaica; and a certificate signed by or on behalf of the Minister responsible for national security to that effect shall be conclusive evidence of that fact.

(3) Subject to subsection (1), for the purposes of the laws relating to evidence, procedure, perjury and contempt of court, the witness referred to in subsection (1) shall be deemed to be physically present before the court or tribunal in the foreign state when giving evidence pursuant to this Part.

(4) This section shall not apply to proceedings in connection with which a request is made under the Mutual Assistance (Criminal Matters) Act.

Application of law for witness giving evidence by live link in proceedings conducted in Jamaica.

11.—(1) Where a witness in a foreign state gives evidence by means of a live link in proceedings that are conducted in Jamaica, the witness shall not be compelled to give any evidence which he could not be compelled to give—

- (a) in criminal or civil proceedings in the foreign state; or
- (b) in criminal or civil proceedings in Jamaica.

(2) Subject to subsection (1), for the purposes of the laws relating to evidence, procedure, perjury and contempt of court, the witness referred to in subsection (1) shall be deemed to be physically present before the court or tribunal in Jamaica when giving evidence pursuant to this Part.

PART VI. Miscellaneous Provisions

Regulations.

12.—(1) Subject to subsection (3), the Minister may make regulations generally for giving effect to the purposes and provisions of this Act.

(2) The Minister may designate any place in Jamaica, where facilities to give evidence by means of a live link or video recording are available, as a place where—

- (a) the court may sit under Part IV; or

- (b) Judges or Resident Magistrates may require the attendance of witnesses under Part V.

(3) Rules of court may be made, dealing generally with matters of practice and procedure for the purposes of this Act, including rules—

- (a) respecting the procedure to be followed in connection with—
 - (i) applications under Part II;
 - (ii) giving evidence by means of a live link; or
 - (iii) giving evidence by means of a video recording;
- (b) respecting arrangements (including arrangements falling within subsection (4)) to be put in place to implement a direction issued pursuant to the provisions of this Act.

(4) Arrangements falling within this subsection are those relating to the provision for the use by a witness of such devices as the court may consider appropriate with a view to enabling questions or answers to be communicated to or by the witness, despite any disability, disorder or other impediment that the witness has or suffers from.

MEMORANDUM OF OBJECTS AND REASONS

The Evidence (Special Measures) Bill, 2012, seeks to introduce special measures that can be used to facilitate the giving of evidence by vulnerable witnesses and other witnesses specified.

Provision is made for the making of special measures directions by the courts in criminal and civil proceedings and Coroners at Coroners' inquests. The special measures directions will allow for the admission in any such proceedings or inquests of—

- (a) evidence by means of a live audio visual link;
- (b) a video recording of an interview with a witness which may be admitted as evidence;
- (c) evidence of both categories in the same proceedings or inquest.

The special measures would be used in instances where the witness is a vulnerable witness, by virtue of being—

- (a) a child;
- (b) a complainant in criminal proceedings relating to a sexual offence;
or
- (c) a witness whose evidence the court determines is unlikely to be available to the court, or the quality of whose evidence if given in court by the witness is likely to be diminished as regards its completeness, coherence or accuracy, by reason of—
 - (i) fear or distress on the part of the witness in connection with testifying in the proceedings; or
 - (ii) the fact that the witness suffers from a mental disorder within the meaning of the Mental Health Act, has a physical disability or is suffering from a physical disorder.

In determining whether the evidence of a witness is unlikely to be available to the court or is likely to be diminished, the court shall consider—

- (a) in the case of criminal proceedings, the nature and circumstances of the offence to which the criminal proceedings relate;
- (b) the age of the witness;
- (c) any threat of harm made to the witness, a family member of the witness or any other person closely associated with the witness, or to any property of the witness;

- (d) any views expressed by or submissions made on behalf of the witness; and
- (e) any other matter that the court considers relevant.

In the case of civil proceedings or a Coroner's inquest the court may direct that a special measure shall apply in relation to a witness if the court is satisfied that it is necessary so to do in the interests of the administration of justice.

In each case, the court must ensure that arrangements to implement the special measures are available to the court, before a direction is issued.

Rules of court may be made to ensure practical implementation of these special measures.

Mark J. Golding
Minister of Justice.

ABILL

ENTITLED

AN ACT to provide for the admissibility in criminal and civil proceedings and Coroner's inquests of evidence by the use of special measures, and for matters connected therewith and purposes incidental thereto.

As introduced by the Honourable Minister of Justice.

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