# Evidence (Audio and Audio Visual Links) Amendment Bill 2007

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**EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) AMENDMENT BILL 2007**

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**Agreement in Principle**

**Debate resumed from an earlier hour.**

**Mr GREG SMITH** (Epping) [10.41 a.m.]: I speak on behalf of the Opposition on the Evidence (Audio and Audio Visual Links) Amendment Bill 2007. The Opposition does not oppose the bill, despite strong opposition from the Law Society, which I will refer to shortly. The bill amends the Evidence (Audio and Audio Visual Links) Act 1998 in the following ways. It provides that all accused detainees, adult or child, charged with an offence must, unless the court otherwise directs, appear in all court proceedings not defined as "physical appearance proceedings" by audiovisual link. The bill defines "physical appearance proceedings" as any trial or hearing of charges, any inquiry into a person's fitness to be tried for an offence, or any proceeding relating to bail, first, in respect of the period between the person being charged with the offence and the person's first appearance before the court or, second, on a person's first appearance before a court in relation to the offence that does not occur on a weekend or a public holiday or that relates to an accused detainee who is being held in custody at a place prescribed by the regulations.

The bill specifies additional factors to be taken into account by a court in deciding whether to make a direction for the accused who is detained to appear in person. It also specifies special factors to be taken into account by a court when deciding whether to make a direction for the appearance of a person in the case of a child accused. It enables government agencies to apply for the making of directions for appearances in person, which is a significant change. It requires government witnesses to give evidence via audio or audiovisual link, with certain exceptions. They are not all government witnesses but they are specifically defined witnesses. Finally, the bill clarifies that children's registrars may give directions for the use of audiovisual links in care proceedings.

This bill is a significant departure from standard legal practice relating to the presence of the accused. Under the proposed Act, detainees will no longer be required to appear physically in committal proceedings, sentencing hearings or hearings of appeals, with a displaceable presumption in favour of appearance via audiovisual link. Furthermore, physical appearance shall not be required for bail appearances occurring during public holidays or weekends, or that relate to an accused detainee who is being held in custody at a place prescribed by the regulations. Discretion is given to the court to displace this presumption and make a direction that the accused detainee appear in person, and sets out factors to be taken into account in making such a direction.

The bill also provides that government agency witnesses must give evidence by audio links or audiovisual links from any place in New South Wales. However, the court may direct that such witnesses appear physically if it is satisfied that the evidence is likely to be contentious and that it is in the interests of the administration of justice for the government agency witnesses to give evidence by appearing physically before the court. The argument in favour of this legislation is that it will significantly increase the use of audiovisual appearances in New South Wales courts and reduce the need for accused persons to be transported to courts. This should lead to significant financial savings, as well as reducing the transportation of prisoners.

In the second reading speech in the other place the Attorney General specifically mentioned the safety and welfare of child detainees during transportation where there are attempted or actual escapes, violent altercations and so forth. It is argued that the procedures to transport accused persons to court causes unnecessary disruptions to their work, rehabilitation and education programs, and that videoconferencing will enable them to participate in court proceedings just as effectively. The main reason they are in custody is that they have been charged with the offence which brings them before the court, so it seems a little ironic that they will not be before the court.

One argument against the legislation—I will come to the Law Society's arguments shortly—is that the proposed changes are a significant departure from centuries of legal precedent allowing the accused to face his accusers and that the presumption should remain in favour of personal appearances. Also, it may be argued that the provisions relating to the mandating of government agency witnesses to give evidence by audio or audiovisual link

may be seen as overly broad. The discretion to mandate physical appearance only if the evidence is likely to be contentious or problematic, particularly as in many instances it may be unknown whether the evidence is likely to be contentious, may be interpreted as reducing the rights of a defendant to be able to provide a robust debate.

It may also be argued that it is more difficult to interpret body language via audiovisual link—that is certainly correct—and it makes it more difficult for solicitors or barristers for accused people to get instructions and adequately communicate, particularly with child offenders. The Law Society's Criminal Law Committee has provided me with a detailed submission dated 28 November, in which it acknowledges the benefits associated with audio or video link appearances for brief administrative and interlocutory appearances, and it supports the further installation of audiovisual links to all local courts in New South Wales. The committee says that this will minimise the current difficulties for practitioners and their clients associated with matters being transferred from a Local Court lacking audiovisual link facilities to another Local Court with such facilities.

However, the committee says that the amendments in the bill extend well beyond audio or audiovisual link appearances for brief administrative and interlocutory appearances to committal proceedings, sentencing hearings and appeals which are substantial criminal proceedings. For such proceedings it is essential that the legislative presumption is in favour of an accused being physically present in court unless the court determines otherwise. The committee is therefore opposed to the bill. The committee has specific concerns relating to the impact of the amendments on children, and it details those concerns. It says that new section 5BB revises the existing presumption that an accused person is to appear physically before the court in committal proceedings, sentencing hearings and appeals. The committee also says that the amendment will mean that accused detainees, both adults and children, will appear via audiovisual links in those proceedings where the equipment is available unless the court orders otherwise in the interests of the administration of justice.

From my experience, audiovisual links sometimes malfunction. Often a witness is giving evidence by audiovisual link and an accused is at court some distance away. If the equipment malfunctions the hearing has to be adjourned. It might be said that this is only a rare occurrence. I know that the Government is spending more money but court staff are not technically trained or knowledgeable and often prosecutors, police and defence people are forced to try to get machinery working. This may have more to do with video surveillance equipment and cassette tapes that monitor conversations, whether by telephone interception or listening devices but it also applies to video link facilities. Therefore, it may take some considerable time before these proposals work efficiently. The Law Society stated:

> The Committee is deeply concerned about the significant expansion of AVL appearances that the Bill seeks to introduce. The Committee's view is that, in relation to substantial criminal proceedings, the presumption should be in favour of an accused being physically present in court unless the court determine otherwise.

I must concede that the cases I am talking about were trials. I wonder whether that will be the next step because we have moved to committals. Admittedly, most committals are paper committals. I would have thought that the Act should have specifically accepted committals where the magistrate has directed that witnesses be called for cross-examination because it is vital in those cases that instructions are available from the accused person to his or her counsel. Nevertheless, there is provision for the magistrate to exercise his or her discretion to order the appearance of the defendant in those proceedings. However, it would be better if defendants were always present when evidence is given involving cross-examination. The Law Society states:

> The Second Reading Speech of the Attorney General refers to persons in custody travelling great distances to and from court for appearances which last no longer than a minute. The Committee appreciates that there are benefits of AVL appearances for brief administrative and interlocutory appearances. However, the amendments in the Bill relate to committal proceedings, sentencing hearing and appeals which are substantial criminal proceedings.

I note the provisions already in the Audiovisual Evidence Act 2002 to cover appeals. Accused persons do not have a right to appear at the Court of Criminal Appeal, although in my experience it is the norm that appellants are present. The Law Society further correctly states:

> It is a fundamental right of the accused to appear physically before the court to participate in these proceedings—

that has always been the understanding of the common law, but it is being varied here—

> Contrary to the Second Reading Speech AVL appearances in these proceedings are *not* "a perfectly viable and pragmatic alternative approach" to the physical appearance of an accused in court.
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> An accused person must have the capacity to provide confidential written and oral instructions to his or her practitioner throughout the proceedings and AVL appearances do not facilitate this.

On occasions in sentencing procedures, evidence may be led on the question of disputed facts. It is not common but it does happen. Sometimes it is difficult to anticipate when this will happen, particularly when there is a change

in defence counsel. New counsel may take issue with the facts of the case whereas the former counsel had not given notice of any dispute. In those cases it is clear that the accused should be present. Generally an adjournment would be granted if previous notice had not been given that the facts are disputed. The Law Society continued:

> AVL appearances seriously inhibit an accused's ability to communicate with his or her representative. It is vital for the proper conduct and expeditious dealings of the proceedings that the accused is physically present in court.

Indeed, one practitioner said to me that the only time practitioners, particularly country practitioners, are able to obtain proper instructions from clients before the actual hearings is during bail or committal proceedings. It is expensive for lawyers to travel, sometimes hundreds of kilometres, to obtain instructions. There may be a saving to government through prison's revenue, but it can cost government if an accused is granted legal aid and counsel has to visit more often to obtain instructions because the accused does not trust the mail or the telephone system. The Law Society further stated:

> It is clear that the principal reason for the amendment is to save on transport and security costs. If the Bill proceeds this will occur at the expense of the rights of the accused, and will in many cases result in court time and legal costs being wasted on applications requesting the physical appearance of the accused.

That was the primary submission of the Law Society. However, the society included a document entitled "Impact of the Amendments on Children", which states:

> The Bill revises the presumptions that an accused child will appear in person for committal proceedings, sentencing hearings and appeals. In future, "accused detainees will appear via audio and visual link in those proceedings where such equipment is available unless the court orders otherwise in the interests of the administration of justice."
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> **Present positionPresent position**
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> 2002 amendments to the *Evidence (Audio and Audio Visual Links) Act 1998* created a legislative presumption that accused detainees should appear in person in first bail hearings, unless these occur on a weekend or public holiday, in trial proceedings, inquiries into fitness to be tried, committal proceedings, sentencing hearings, and in appeals. The 2002 amendments introduced presumption in favour of accused detainees appearing before the court via audio and visual links for all other bail proceedings and interlocutory proceedings. The amendments were equally applicable to children and adults. Submissions were made to the Attorney General that the 2002 amendments were contrary to established principles of juvenile justice, and would place children in a worse position than adults. These amendments have now been implemented.

Section 9 of the Children (Criminal Proceedings) Act 1987 calls for expedition where a child is in custody. Section 9 (1) states:

(1) If criminal proceedings are to be commenced against a child otherwise than by way of court attendance notice, and the child is not released on bail under the Bail Act 1978, the child shall be brought before the Children's Court as soon as practicable.

(2) Without limiting the generality of subsection (1), a child who is not released on bail under the *Bail Act 1978* shall, for the purposes of making a further determination of bail, be brought before an authorised justice:

(a) no later than the next day, or

(b) if the next day is a Saturday, Sunday or public holiday—no later than the next day that is not a Saturday, Sunday or public holiday,

if, within that time, the child has not been brought before the Children's Court.

It seems that the use of video and audio may well impinge upon that provision. The Law Society committee continued:

> An AVL weekend bail hearings trial commenced at Parramatta Children's Court on 19 May 2007. The stated purposes of the trial were to:

Reduce transport time for detainees,
Ensure legal representation for all detainees,
Obtain more consistency in weekend bail decisions,
Benefit from the expertise of children's legal services and the Children's Court,
Reduce the security risk of transporting detainees, and
Save costs associated with transporting detainees.

The Evidence (Audio and Audio Visual Links) Act 1988 provided the legal basis for the commencement and expansion of the trial, which will be extended and made a permanent feature of the work of the courts as soon as

courts and Juvenile Justice Centres have installed the necessary equipment, and provided the equipment is in good operational order.

Since May 2007, all children and young people refused bail and admitted to custody on a weekend or a public holiday to Acmena (Grafton) and Riverina (Wagga Wagga) JJCs have participated in bail hearings while remaining at the JJC. Following the evaluation of the first two months of the trial, the scheme was extended to children and young people at Baxter (Central Coast) and Orana (Dubbo) JJCs.

Children who are arrested and refused bail by police in Sydney continue to appear in person at Parramatta, Campbelltown and Bidura Children's Courts. Children who are arrested and refused bail in rural and regional areas of NSW are taken to the nearest JJC.

Some of the pressing issues raised by the trial include:

The lack of privacy afforded to children in the JJC when giving instruction to solicitors over the 'phone (there is no way for the solicitor to be fully confident that calls are not being recorded),
Difficulties in building rapport and trust with the child over the phone and on the screen,
The lack of privacy for the child and the child's solicitor in taking further instructions during the course of the bail hearing, and
The standing of the judicial officer. During the initial trial period, Children's court registrars presided at the hearings. Since then, Local Court Magistrates have been presiding at some of the hearings. This raises this issue of whether this is a breach of section 7 of the *Children's Court Act* 1987 (NSW), which stipulates that only specially appointed magistrates, with expertise in the fields of children's law and child development, can sit in the Children's court. Where there are inconsistencies between them, the *Bail Act* prevails over the *Children (Criminal Proceedings) Act*. No similar provision applies to any inconsistencies between the *Bail Act* and the *Children's Court Act*.

**The problems with the amending Bill in its application to childrenThe problems with the amending Bill in its application to children**

The criticisms of the application of the 2002 amendments to children and the issues raised by the trial are strongly applicable to the amending Bill.

The legislation remains contrary to established principles of juvenile justice, and moves NSW further from compliance with these principles than the 2002 amendments.

The Law Society's Criminal Law Committee further reported:

Separate provisions for childrenSeparate provisions for children
The Bill is specifically applicable to both children and adults. If the Bill is passed by Parliament, the separate provisions for children in the original Act will be removed and replaced by provisions that are applicable generally.

Those previous provisions included section 5BB of the Act; the bill omits sections 5BA and 5BB and inserts new sections 5BA and 5BB in the Act. The committee report continued:

This is inconsistent with the *Beijing Rules*, which stipulate that separate and special provisions should be made for children alleged to have breached the criminal law.

UN Convention on the Rights of the ChildUN Convention on the Rights of the Child
No mention is made in the second reading speech about the long accepted principle from the UN Convention on the Rights of the Child that all actions concerning children should be in the best interests of the child.

Rule 2.3 of the Beijing Rules states:

Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

(a) To meet the varying needs of juvenile offenders, while protecting their basic rights;

(b) To meet the needs of society;

(c) To implement the following rules thoroughly and fairly.

The Law Society's Criminal Law Committee report continued:

Instead, the amendments speak of the "interests of the administration of justice," which the court is not specifically required to balance with the best interests of the child.

Article 12: Right to participate:
Section 6 of the *Children (Criminal Proceedings) Act* 1987 enshrines article 12 of the UN Convention on the Rights of the Child. Section 6 (a) states: "children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and right to participate, in the processes that lead to decisions that affect them.

Section 12 (4) of the *Children (Criminal Proceedings) Act* 1987 requires that: "A court shall give the child the fullest opportunity practicable to be heard and to participate in the proceedings."

The right to participation includes the child's right to be kept fully informed about the progress of a matter. When the child appears via video link, the child's legal representative will have little opportunity or time to ensure that the child has understood the outcome of the appearance. It is not apparent from the Bill that any time or facilities will be available for children's solicitors to ensure that children in custody understand what has happened after they have appeared by video link.

I urge the Government to implement systems and financial assistance so that children may be more fully aware of what has been going on in relation to the case. Referring to the Law Society's representation principles the report continued:

The Principles are extremely difficult to honour when instructions are taken from the child over the telephone or via AVL. In particular the principle that legal representatives should see the child in person in all but exceptional circumstances cannot be honoured in AVL "circumstances", which are not those envisaged in the Principles.

The health surveys of children in custody and on community orders indicate that children in custody are more likely to have mental illnesses or disabilities, hearing problems, to have left school before completing grade 10 and have low reading ages. Identifying that the child is in one of these high needs categories (and getting appropriate support for the child) is challenging enough for solicitors when children are seen in person on busy list days. Taking instructions from these children by telephone or video link makes these tasks even more difficult, and diminishes a solicitor's capacity to act professionally and competently.

**Discrimination against children in custody and children in rural and regional NSWDiscrimination against children in custody and children in rural and regional NSW**

The proposal further disadvantages children in custody. Children at liberty, appearing on bail or by a court attendance notice, will continue to instruct their solicitor in person, provided they are in metropolitan Sydney. Under the AVL proposal children in custody must be seen at the convenience of the court and do not have the "fullest opportunity practicable to be heard and to participate in the proceedings".

Children arrested and refused bail in rural and regional NSW are not taken directly to court, but to the nearest juvenile justice centre, and appear at Parramatta Children's Court via audiovisual link from the juvenile justice centre at the convenience of the court. Even if they are granted bail by the court because of access to representation by the specialist children's lawyers in Legal Aid's Children's Legal Service, for some this will mean that they will have spent time in custody waiting for the AVL bail link, when their city cousins will not.

**Standing for Department of Juvenile Justice**

The standing that designated government authorities such as the Department of Juvenile Justice will have to apply to the court for a direction about the appearance of the child will, given the expressed intention to save costs, almost certainly be used to argue against having the child in court. The Bill does not indicate when or how applications can be made, or whether, and if so how, the child's legal representative will be able to take instructions from the child to ascertain whether the application should be opposed. Applications from the Department of Juvenile Justice against transporting a child to court will almost certainly need to be opposed in some instances. Identifying who is the child's lawyer and how and when they will be able to take instructions from the child for this purpose are issues that are not addressed in the second reading speech or the Bill. In deciding whether the child should be present, the court will be required to take the interests of the administration of justice, rather than the best interests of the child, into account.

**Rationale for the Bill**

The Bill is transparently and primarily a further cost saving measure for the Department of Juvenile Justice. No consideration has been given in the Bill to the costs for children, or to the additional costs that will be incurred by the courts or by Legal Aid.

The Committee is strongly of the view that the presumption in favour of physical appearance by children should remain. It is said that fully implementing this system will lead to increased short-term capital expenditure as more audiovisual systems are set up, with $42.9 million budgeted in 2007-08 for further expanding the network and a

potential for further expenditure in terms of capital and training. In the long term there is the potential for significant cost savings, as the costs associated with the transport of prisoners decline significantly.

On the other hand, as the Law Society points out, consideration must also be given to the costs for children, and perhaps their parents who may be paying for their legal costs, and for the community generally because of the delay that may occur when applications have to be made and adjournments granted. Despite the very persuasive argument put forward by the Law Society, and despite the fact that there are and will continue to be glitches in the system which cause delay, the Opposition does not oppose the bill.

**Mr BARRY COLLIER** (Miranda—Parliamentary Secretary) [11.14 a.m.], in reply: I thank the member for Epping for his considered contribution to this debate. The Evidence (Audio and Audio Visual Links) Amendment Bill better facilitates the appropriate use of audiovisual link technology for appearances by accused detainees before New South Wales courts. The bill also improves the taking and receiving of evidence via audiovisual links in New South Wales. In this way, it is an important and progressive step towards further modernising judicial administration in this State. As the Attorney General pointed out in his speech in reply in the other place, the bill is largely modelled on the Western Australian provisions, which have worked effectively in Western Australia.

The member for Epping raised issues in relation to the Law Society. It is important to point out that consultation regarding the bill has occurred with the Chief Justice, the Chief Judge, the Chief Magistrate, the New South Wales Bar Association, the Law Society of New South Wales, the Legal Aid Commission, Aboriginal Legal Services, and the Director of Public Prosecutions. Where possible those stakeholders' views have been taken into account. Further consultation will take place with those groups regarding implementation issues prior to commencement of the legislation.

The Law Society's criticism about the difficulty of country solicitors getting access to their clients if they appear via audiovisual link is somewhat misplaced. The first appearance of the accused will always be in person. So, even if the solicitor has not met with the client beforehand, he or she will still be able to do that at the court. Furthermore, with the extension of audiovisual link facilities across the State—with almost 200 audiovisual link systems implemented, including at legal aid offices—it is becoming increasingly easier for lawyers to have remote access to their clients via this new technology.

As part of the expansion of the audiovisual link network, the Government is committed to increasing the number of audiovisual link legal suites to ensure that legal practitioners are able to effectively and confidentially obtain legal instructions from their clients. There are currently audiovisual link legal suites in more than half of the Department of Corrective Services correctional facilities, and there are plans to install further legal suites in the immediate future. Additional audiovisual link legal suites will shortly also be installed in a number of juvenile justice centres, including Cobham, Frank Baxter and Reiby, to better facilitate legal practitioners obtaining confidential legal instructions from their clients. In cases where these facilities are not available the presumption in favour of appearance by audiovisual link will not come into effect and there will be a return to the previous situation whereby physical appearance before the court is the norm.

The member for Epping and the Law Society raised issues about the time-honoured legal principle of the accused facing his or her accuser and appearing in court in person. It is important to point out that the amendments in the bill do not alter in any way the right of the accused detainee to be physically present before the court at his or her own trial. As is the case under the current Act, the bill contains a legislative presumption that the accused detainee is to appear physically before the court for "any trial (including an arraignment on the day appointed for the trial) or hearing of charges". The bill also provides that the accused is to appear physically before the court in inquiries into a person's fitness to be tried and first appearance bail hearings. The right of the accused person to be tried in his or her presence is not affected by the bill.

However, as is the case under the current Act, the bill preserves the residual discretion of the court to order that the accused detainee appear at trial via audiovisual link if to do so would be in the interests of the administration of justice. At common law, while the right of an accused person to be physically present at his or her trial is a paramount consideration, it is not without qualification and may be displaced if the accused's conduct is such that the orderly procedure of a trial is not permitted to function. The relevant authority for this is *Eastman v The Queen* (1997) 158 ALR 107 at 138. I note that the member for Epping nods in agreement. The right of the accused to be physically present at his or her trial must be balanced against the need to protect participants in the justice system, including judicial officers and members of the public, and to preserve the integrity of the due administration of justice.

Rather than radically overhauling the conduct of criminal proceedings, the amendments in the bill merely revise the default position for appearances by accused detainees in committal proceedings, and sentence hearings and appeals—where such equipment is available—thereby encouraging and better facilitating the use of the available audiovisual link technology. Those default presumptions will not always be invoked. If the necessary audiovisual link equipment is not available or cannot reasonably be made available then the presumptions will not apply. The court may also make a direction on its own motion or on the application of any party to the proceedings that the presumption is not to apply and that the accused detainee is to appear physically in the interests of the

administration of justice.

In relation to committal proceedings, the restriction on permitting witnesses to give oral evidence means that a large number of committals are conducted as paper committals, that is, no oral evidence is given by prosecution witnesses. In a paper committal the magistrate determines the matter on the basis of written evidence. The magistrate may excuse the accused person from attending during the taking of prosecution evidence if he or she is represented by a legal practitioner or if the evidence is not applicable to the accused person. There are no compelling reasons to require an accused detainee to appear physically before a court for most committal proceedings. The proposed amendments will remove the current presumption in favour of the accused detainee appearing physically before the court in these proceedings.

Applying a presumption of appearance by audiovisual link to committal proceedings will not, however, override the court's inherent jurisdiction to generally control proceedings and to protect the rights of the accused. The need to protect the rights of the accused in criminal proceedings where the accused may be in danger of losing his or her liberty is recognised by the ability of the court to override the presumption. The court will retain the power to make a direction that the accused person appears physically in committal proceedings where this would be in the interests of the administration of justice. A direction can be made to that effect. Such directions are most likely to be made where prosecution witnesses are called to give oral evidence, that is, in non-paper committals. In these circumstances the interests of the administration of justice are likely to be served by having the accused detainee physically present at court in order to face his or her accusers. Therefore, a direction for the accused detainee's physical attendance could be made.

For the benefit of members, where a person is charged with an indictable offence a magistrate will conduct committal proceedings to ascertain whether or not there is a prima facie case to justify committing the accused for trial to the district or supreme courts. Under the Criminal Procedure Act 1986 the accused person may apply to have the committal hearing waived. The magistrate may direct prosecution witnesses to attend committal proceedings to give oral evidence; however, the scope for this to occur is rather limited. Generally, unless all parties consent, the magistrate will give a direction only if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.

In relation to sentencing hearings and redetermination of sentence proceedings, once an offender is found guilty, or pleads guilty, the court imposes a sentence. In the local court the magistrate usually passes sentence immediately after the hearing or as soon as the accused pleads guilty. However, if the case goes to the District Court or Supreme Court there may be a special sentencing hearing. At the sentencing hearing the court will be presented with the facts of the case. The court may also order that a pre-sentence report be provided. Both the prosecution and the defence may present such other reports and evidence as may be considered appropriate, including the accused's previous criminal record and victim impact statements.

Sentencing is significantly more procedural in nature than a trial or hearing. It usually involves a judicial officer, the defence and the prosecution. There is no jury involved. It is the judicial officer who must make a determination as to what is the most appropriate sentence based on the evidence presented to him or her. Most of the evidence is paper based: for example, sentencing reports, psychiatric reports and victim impact statements. In these circumstances there really are no compelling reasons for retaining a presumption in favour of the offender being physically present in the courtroom for sentencing hearings. It is recommended instead that the presumption in favour of appearance by audiovisual link be the default position.

Applying a presumption of appearance by audiovisual link to sentencing hearings will not, however, override the court's inherent jurisdiction to generally control proceedings and protect the rights of the accused. The need to protect the rights of the accused in criminal proceedings where the accused may be in danger of losing his or her liberty is recognised by the ability of the court to override the presumption. The presumption of appearance by audiovisual link can be displaced where the court is satisfied that it is in the interests of the administration of justice to do so. This may be so, as mentioned by the member for Epping, where there are disputed facts in relation to sentencing proceedings.

In relation to appeal proceedings against conviction or sentence, the Court of Criminal Appeal hears appeals against conviction and sentence from the District and Supreme courts. In the Court of Criminal Appeal there is no automatic right for the appellant to be present during proceedings. Legally represented appellants can only be present with the leave of the court where special circumstances are shown. The proposed amendments accordingly will have no impact on appeals to the Court of Criminal Appeal because the amendments only apply where there is a requirement for the accused detainee to appear before the court.

In other proceedings on appeal against conviction or sentence the amendments will create a presumption in favour of appearance by audiovisual link. This will not, however, override the court's inherent jurisdiction to generally control proceedings and protect the rights of the accused. The need to protect these rights in criminal proceedings where the accused may be in danger of losing his or her liberty is recognised by the ability of the court to override the presumption. The presumption of appearance by audiovisual link can be displaced where the court is satisfied that it is in the interests of the administration of justice to do so. One example that comes to mind

where the court might make such a decision is in a fresh evidence case in the Court of Criminal Appeal.

In relation to presumptions being applied to children, in the years since the introduction of the presumption that accused child detainees are to appear physically before the court in all criminal proceedings it has become apparent that this presumption is in fact operating against the best interests of the child. The image of transporting young people in a cramped and caged environment over vast distances to and from courts, for a brief appearance, clearly illustrates this. Of particular concern are considerations around the safety and welfare of child detainees during transportation where there are attempted and actual escapes, violent altercations with other juvenile detainees, and sometimes further offences committed while in transit or at the court.

Equally concerning is the fact that the physical attendance of child detainees at brief court proceedings unduly and unnecessarily disrupts the child detainee's rehabilitative and education programs and may sometimes even interfere with the child's ability to complete such programs and attain educational qualifications. A recent survey conducted by the Department of Juvenile Justice found that approximately 80 per cent of court appearances by juveniles were brief mentions, administrative or interlocutory proceedings. In a large number of instances child detainees had travelled long distances to attend court. As an example, a child detainee was recently flown from Sydney to Wagga Wagga in order to withdraw an appeal. This was a disruptive movement that could easily have been managed by way of audiovisual link. The bill accordingly removes the requirement for an accused child detainee to always appear physically before the court in criminal proceedings. In relation to the reference by the member for Epping to the Beijing rule, it should be noted that, as required by this rule, there are special arrangements made for children charged with criminal offences in comparison with adult accused.

In recognition of the special nature of proceedings before the Children's Court, the bill refers to special factors to be considered by the court in determining whether it is "in the interests of the administration of justice" for the accused child detainee to appear before the court otherwise than in accordance with the presumption. In addition to the factors that the court considers when applying the test to adult detainees, the court is to consider additional factors pertaining to children as specified in rules of court. These include the right of the accused child detainee to be given the fullest opportunity to be heard and to participate in the proceedings; the need for the accused child detainee's lawyer to obtain initial or detailed instructions from the accused child detainee; the maturity of the accused child detainee; and the wishes of the accused child detainee. It should be noted in this respect that additional audiovisual link legal suites are being installed in a number of juvenile justice centres, including Cobham, Frank Baxter and Reiby, to better facilitate legal practitioners obtaining confidential legal instructions from their clients.

I stress that, whilst the default position for committals, sentencing hearings and appeals is to be revised by the bill, the ultimate discretion rests with the court. The court will ultimately decide whether the accused detainee is to appear physically or via audiovisual link. I think we should have confidence that the courts will exercise that function properly, making directions that are in the best interests of the administration of justice, and of course in the best interests of child detainees.

In relation to the efficient use of available judicial and administrative resources as a cost factor, any decision by a court as to whether a certain course will be in the interests of justice will always involve a balancing exercise. In making such a determination the court will weigh issues such as procedural fairness to the accused with matters such as security of the court system and the health and safety of users. A number of specific factors are currently contained in the Act, and two further factors will be inserted by the bill to guide the court in making such determinations. However, the court is not limited to considering the factors specified in the bill in deciding whether to make a determination regarding appearance "in the interests of the administration of justice".

The reason that "the efficient use of available judicial and administrative resources" is included as an additional factor is that sometimes it will not be a good use of resources, or even viable, for currently limited audiovisual link facilities to be utilised exclusively on one particular matter. For example, a sentencing hearing in the District Court may last for several hours or even up to a day. Having an accused detainee on an audiovisual link for that entire time may mean that the audiovisual link equipment cannot be used for other matters. In those instances, the court will be able to consider the efficient use of available judicial and administrative resources and, if necessary, direct that the accused detainee appear before the court in person.

In relation to the additional factors that come into play in "the interests of the administration of justice" test, the bill makes provision for a number of additional factors. These include: safety and welfare considerations in transporting the accused detainee to the courtroom or place where the court is sitting, and the efficient use of available judicial and other resources. The Government appreciates the importance of ensuring both court staff and the staff of correctional facilities are appropriately trained in the use of audiovisual link technology. We are continuing to work with agencies and court staff in relation to ongoing training in that technology.

It is also important to recognise that to date the Government has installed almost 200 audiovisual link systems in courtrooms, correctional facilities and other justice agency sites. Audiovisual link equipment is currently installed in 40 courtrooms around the State, every Corrective Services detention centre, every juvenile justice centre, and numerous Legal Aid offices. The Government's 2007-08 budget allocated $2.9 million to further expand and

improve its audiovisual network. This is a priority project for the Attorney General's Department. Some of the courts where audiovisual links are installed include: Bidura, Burwood, Campbelltown, Central, the Downing Centre, Dubbo, Goulburn, Lidcombe, Liverpool, Newcastle, Parramatta, Sutherland, Penrith, the Supreme Court, Wollongong and Woy Woy. These courts are capable of providing audiovisual links to correctional and juvenile justice facilities and other justice agencies such as the police, Director of Public Prosecution's offices and the Legal Aid Commission across the State. There are also legal suites in most of the correctional facilities, with more planned in the near future.

The amendments in the bill remove the existing presumption that accused detainees are to appear physically before the courts in committal proceedings, sentencing proceedings and appeals. The court makes appearances by audiovisual links a default position in such proceedings where the necessary equipment is available. Importantly, the bill preserves the court's residual discretion to displace the presumption and direct a detainee to appear physically before the court where to do so "would be in the interests of the administration of justice". The court may make such a direction on its own motion or the application of a party or designated agency. The bill does not affect the right of a person to be present at his or her trial.

The amendments to the bill reflect the Government's continuing commitment to supporting and facilitating the appropriate use of audiovisual link technology in the administration of justice in this State. The bill will see the benefits of modern audiovisual technology being more fully realised, while importantly safeguarding the rights of accused persons to a fair trial. I commend the bill to the House.

**Question—That this bill be now agreed to in principle—put and resolved in the affirmative.**

**Motion agreed to.**

**Bill agreed to in principle.**

**Passing of the Bill**

**Bill declared passed and returned to the Legislative Council without amendment.**

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