

[Home](#) » [Hansard & Papers](#) » [Legislative Council](#) » [15 November 2007](#) » [Full Day Hansard Transcript](#) » Item 38 of 47 »

Evidence (Audio and Audio Visual Links) Amendment Bill 2007

About this Item

Speakers - [Hatzistergos The Hon John](#)

Business - [Bill, First Reading, Bill Introduced, Second Reading, Motion](#)

EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) AMENDMENT BILL 2007

Page: 4243

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [5.03 p.m.]: I move:

That this bill be now read a second time.

The Evidence (Audio and Audio Visual Links) Amendment Bill 2007 amends the Evidence (Audio and Audio Visual Links) Act 1998 to better facilitate the use of audiovisual link technology for appearances by accused detainees before New South Wales courts. The bill also makes a number of other changes to improve the taking and receiving of evidence via audiovisual links in New South Wales. In doing so the bill represents a progressive step towards further modernising judicial administration in this State.

The Evidence (Audio and Audio Visual Links) Act was introduced in 1998 to provide for the use of audio and audiovisual technology in the courts and to allow New South Wales to participate in an interstate scheme for the taking and receiving of evidence and the making and receiving of submissions from or in other participating States. Since the introduction of that Act, all parties involved in the justice system have acknowledged the important benefits that audiovisual link technology has brought to the administration of justice.

Some of those benefits include significantly improved access to court services, especially for regional and remote court users; matters being dealt with by the court more expeditiously and efficiently; improved court security and safety; reduced witness costs; a decrease in the need for accused detainees to be transported in the caged environment of a prison van, sometimes over vast distances, for brief court appearances, and a concomitant reduction in prisoner transportation costs.

While significant benefits and greater efficiencies have undoubtedly been realised with the use of audiovisual link technology, the audiovisual link network has yet to reach its full potential. This is certainly true for the management of custodial appearances in New South Wales courts. Unfortunately, children and adults in custody are still spending inordinate amounts of time being transported in cramped and uncomfortable conditions to and from court awaiting their court appearances, some of which last no longer than a minute. This causes significant disruption to the care and management of the accused detainee. It interferes with family visits, it has the potential to put the detainee's safety and welfare at risk during transit, and occurs at considerable expense to the taxpayer.

For a typical court appearance, an inmate has to be woken up between 4.30 a.m. and 5.00 a.m., fed, showered and strip-searched; provided with appropriate clothing for a court appearance; accompanied by his or her personal effects, which must be brought together for the trip; assembled for transportation; transported to the court location, which may be far away from the correctional facility, often with other inmates and requiring segregation measures; appropriately accommodated at the courthouse in a holding cell; escorted to the dock; returned to the holding cell and detained until a warrant for the return to the correctional facility has been prepared; transported to the correctional facility, which may not be the one that the inmate left to go to court in the morning; received into a holding area and taken to a new cell. If there is no longer a cell available for the inmate at his or her original correctional facility, he or she will need to be transported to another facility. This process typically consumes a day or longer depending on the availability of suitable transport and accommodation.

The problems are exacerbated where the detainee is in custody in a remote rural area and there are greater distances to be travelled or where the detainee is a high-risk inmate. The disruptions, risks and costs involved in the process are generally not proportionate to the length of the court proceedings and are frequently not justified given the nature of these proceedings. There is a capacity to improve the current situation from both a humanitarian and judicial administration perspective. This bill is designed to do that. Accordingly, the purpose of the bill is to make amendments to the Evidence (Audio and Audio Visual Links) Act regarding custodial appearances in New South Wales courts to better facilitate the appropriate use of audiovisual links in the administration of justice and to ensure that the benefits of modern audiovisual link technology can be fully realised. At the same time the bill ensures that the accused's right to a fair trial and to be physically present at that

trial is in no way jeopardised or undermined.

I turn now to the details of the bill. Part 1B of the Evidence (Audio and Audio Visual Links) Act sets out legislative presumptions concerning the appearance of accused detainees in New South Wales courts and proceedings for offences alleged to have been committed by the detainees. Accused detainees are persons being held in custody in a correctional centre, detention centre, police station or other place of detention. There is currently a legislative presumption in favour of accused detainees appearing before the court physically in first appearance 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. In all other bail proceedings and interlocutory proceedings there is a legislative presumption in favour of accused detainees appearing before the court via audio and visual links.

After consultation with stakeholders, including the Chief Justice at Common Law, the Chief Judge of the District Court, 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, the bill revises certain of these legislative presumptions. Specifically, the bill revises the existing presumption that accused detainees are to appear physically before the court in committal proceedings, sentencing hearings and appeals. The amendments in the bill will mean that accused detainees will appear via audio and visual links in those proceedings where such equipment is available unless the court orders otherwise in the interests of the administration of justice.

In relation to committal proceedings, a large number of committals in New South Wales are conducted as paper committals whereby the magistrate determines the committal purely on the basis of written evidence. On balance, the reasons for an accused detainee to appear physically before the court for such proceedings are not sufficiently compelling to require such a physical appearance. Furthermore, under current laws, the magistrate may already excuse the accused person from attending the committal during the taking of any prosecution evidence if a legal practitioner represents him or her or if the evidence is not applicable to the accused person. For this reason the bill makes appearance via audio video link the default position in committal proceedings where such equipment is available, while preserving the court's residual discretion to act in the interests of the administration of justice in requiring the physical attendance of the detainee where that is appropriate.

In relation to sentencing hearings, the court imposes a sentence only once an offender is found guilty or pleads guilty. In the Local Court the magistrate usually passes sentence immediately after a trial or as soon as possible after an accused pleads guilty. However, if the case goes to the District Court or the Supreme Court there may be a special sentencing hearing. The court may order that a pre-sentence report be provided and that the prosecution and the defence present such other reports and evidence as may be considered appropriate, including the offender's previous criminal record and victim impact statements. Sentencing is significantly more procedural in nature than is a trial. It usually only 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 an appropriate sentence based on the evidence presented.

Most of the evidence is paper based, for example, sentencing reports, psychiatric reports and victim impact statements. On balance, the reasons for an accused detainee to appear physically before the court for sentencing proceedings are not sufficiently compelling to require such a physical appearance. For this reason the bill makes appearance via audio video link the default position in sentencing proceedings where such equipment is available while preserving the court's residual discretion to act in the interests of the administration of justice in requiring the physical attendance of the detainee where that is appropriate.

In relation to appeals, there is no automatic right for the appellant to be present during proceedings in the Court of Criminal Appeal. Legally represented appellants can be present only with the leave of the court where special circumstances are shown. The bill's proposed amendments will accordingly have no impact on appeals to the Court of Criminal Appeal because the amendments 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 audio video link where such equipment is available. This 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 appeal proceedings is recognised by the ability of the court to displace the default position by requiring the physical attendance of the detainee where it is in the interests of the administration of justice to do so. As is the case with the current Evidence (Audio and Audio Visual Links) Act, ultimately the decision of whether to use audio video link technology in a particular case will rest with the court as the court has the residual discretion to make an order regarding appearance. The court may also make such a direction on its own motion or on the application of a party to the proceedings, providing both the prosecution and the defence with the opportunity to advance reasons why the accused detainee should appear before the court otherwise than in accordance with the presumption.

Rather than radically overhauling the conduct of criminal proceedings, the amendments in this bill operate to

revise the default position for appearances by accused detainees in committal proceedings, sentencing hearings and appeals where such equipment is available, thereby encouraging and better facilitating the use of available audio video link technology. The bill applies these presumptions to both adult and child detainees. Child detainees are currently required to appear physically before the court in all criminal proceedings. This presumption can be displaced with the consent of all parties or where the court is satisfied after taking into account any factors that are relevant in the circumstances of the case and that are specified in the rules of court that it is in the interests of the administration of justice for the child to appear via audio video link.

In 2006 the Combined Justice Agencies Video Conferencing Steering Committee reviewed the use of the technology in the Children's Court. It found that while audio video link is being used in some Children's Court mentions, bail reviews and parole matters, the presumption in favour of physical appearance is generally not being disturbed. In the years since the introduction of the presumption for child detainees it has become apparent that requiring accused child detainees to appear physically in all criminal proceedings is in fact operating against the best interests of the child. The image of transporting young people over vast distances in a cramped and caged environment 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 the child detainees at brief court proceedings unduly and unnecessarily disrupts the child detainee's rehabilitative and education programs, and may sometimes even interfere with a 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 and 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 have been easily managed by way of audio video link. Transporting juveniles for such court proceedings is obviously also a costly exercise. The Department of Juvenile Justice reports that it spends up to \$1 million per year on transporting juvenile detainees. The bill accordingly removes the requirement for an accused child detainee to always appear physically before the court in criminal proceedings. Instead, the same presumptions regarding court appearances are applied to both adult and child accused detainees.

The court has the residual discretion to act in the interests of the administration of justice in requiring the physical attendance of the child detainee where it is appropriate. 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 are specified in the rules of court. These include the right of the accused child detainee to be given the maximum 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.

A child's legal representative has the opportunity to advance reasons in support of the application for a direction by the court. In the past one impediment to the taking up audio video link in the Children's Court has been that children's legal representatives were unable to seek proper instructions from their client via audio video link, believing that it is more difficult to gauge body language and to determine whether the child understands what is happening. Encouragingly, however, the experiences of the recent weekend bail audio video link pilot for juveniles demonstrates that these views are gradually shifting. The weekend bail audio video link pilot for juveniles commenced on 19 May 2007 and applies to juveniles at Acmena Juvenile Justice Centre in Grafton and the Riverina Juvenile Justice Centre in Wagga Wagga.

For first appearance bail applications on weekends and public holidays, these children are beamed into the Parramatta Children's Court via audio video link and receive representation from Legal Aid's specialist Children's Legal Service based in Parramatta. The accused child detainees provide all instructions to their legal representatives via audio video link. Before the pilot, bail would have been determined for these children at the local bail court without the benefit of any legal representation. The pilot is an extension of a legal service to an area where one was not previously available. A recent evaluation of the pilot found that the quality of communication with and participation of juveniles using audio video link is the same, if not better than, for those juveniles who appear in person.

Overall, the participants were satisfied that the juveniles' communication with their lawyers was the same as, if not better than, an in-person conference. Legal Aid New South Wales has indicated its support for an ongoing rollout of weekend audio video link bail hearings for juveniles. This evidence is a shift in the mindset of those involved in the process—a move away from traditional response and a new willingness to approach the use of audio video link technology for children in a progressive and open-minded way. The bill makes provision for a number of

additional factors to be considered by the court in determining whether to make a direction in the interests of the administration of justice. These factors are the 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 administrative resources.

Sometimes it will not be a good use of resources, or even viable, for currently limited audio video 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 audio video link for that entire time may mean that the audio video link equipment cannot be used for other matters. In these circumstances 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. The bill also provides designated government agencies with a standing to make an application to the court for a direction regarding the accused detainee's appearance.

Currently, only parties to the proceedings can make an application. In criminal matters the party will generally be the Director of Public Prosecutions or the defendant. Circumstances could arise where the Crown Prosecutor wants the defendant to appear in court but the Department of Corrective Services or the Department of Juvenile Justice may be strongly opposed to transporting the defendant to the court because of the security risk.

The provisions of the bill ensure that when such a conflict arises, those agencies have standing to make an application to the court, which will conduct the balancing test. This implements a recommendation contained in the December 2005 Report of the Statutory Review of the Evidence (Audio and Audio Visual Links) Act. Audio visual link technology plays an important role in ensuring the best possible evidence is before the court through extending the availability of witnesses to courts and encouraging reluctant witnesses to give evidence.

The bill provides for specified government witnesses such as corroborating police officers and staff of the Division of Analytical Laboratories to give evidence via audio and visual link as the default position, subject to any applicable rules of court. The court's residual discretion remains to direct that the witness appear physically where the evidence is likely to be contentious and it is in the interests of the administration of justice for the witness to appear physically. Furthermore, audiovisual link technology can be very useful in care proceedings where a parent involved is in custody. The availability of audiovisual link allows such a parent to participate at interlocutory proceedings without the need to be transported to the Children's Court. The bill clarifies that Children's Registrars may make directions for the use of audio visual link in care proceedings, and in so doing implements a recommendation contained in the December 2005 Report of the Statutory Review of the Evidence (Audio and Audio Visual Links) Act.

The use of audiovisual link technology together with the creation of a cooperative environment between the various participants in the legal process is an important and progressive step in modernising judicial administration. Audiovisual link usage is increasing as both the courts and practitioners become more familiar with the technology and gain greater confidence in the quality of the technology. However, in introducing this bill, I am mindful that legislative amendments are but one way to bring about the necessary changes, and that there also needs to be concomitant investment in appropriate audiovisual link technology and facilities as well as a shift in thinking. In this regard, the Government has to date installed almost 200 audiovisual link systems in courtrooms, correctional facilities and other justice agency sites. Audiovisual link equipment is currently installed at 40 courtrooms around the State, every Corrective Services detention centre, every juvenile justice centre, and numerous Legal Aid Offices. The Government's 2007-2008 budget allocated \$2.9 million to further expanding and improving its audiovisual link network. This is a priority project for the Attorney General's Department.

The bill accounts for the fact that there are not yet sufficient audiovisual link facilities in this State to support the proposed legislative presumptions operating in all instances. For this reason, the bill is drafted in such a way that the presumptions in favour of appearance via audiovisual link are not invoked unless the necessary audiovisual link equipment is available or can reasonably be made available. Consideration is to be had to the efficient use of the resources. The bill is drafted also to accommodate expansions in the audiovisual link network, with provision made for sites to be prescribed by regulation as these become fitted with audiovisual link equipment. Plans are underway to continue to rollout audiovisual link facilities across the State including legal suites at Corrections facilities. In addition to legislative underpinnings and the expenditure of funds on technology, invariably proposals such as this are dependent for their success on attitudinal changes. Changes in approach by the legal profession and others involved in the criminal justice process will ensure that the full benefits of the audiovisual link technology are realised.

I am grateful to the courts for their support of the proposals. In particular, I am grateful to the Chief Magistrate, who is a strong proponent of the use of audiovisual link equipment. A change in mindsets away from the traditional response and an approach to the use of audiovisual link technology that is progressive and open minded will prove most effective. I trust that this bill will go some way towards encouraging that shift in approach and mindset so that a perfectly viable and pragmatic alternative approach can be used in the form of the modern audio visual link technology available to us to achieve significant humanitarian benefits and to further modernise judicial administration in this State. I commend the bill to the House.

Debate adjourned on motion by the Hon. Don Harwin and set down as an order of the day for a future day.

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