



## Evidence (Audio And Audio Visual Links) Amendment Bill.

### Second Reading

**Mr TONY STEWART** (Bankstown—Parliamentary Secretary) [10.22 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Evidence (Audio and Audio Visual Links) Amendment Bill amends the Evidence (Audio and Audio Visual Links) Act 1998. This will clarify the discretion of the court to order that an accused person appear in court by audio visual link in a criminal hearing where serious security concerns have been identified. The bill makes a number of other minor technical amendments to the Act and consequential amendments to the Evidence Legislation Amendment (Accused Child Detainees) Act 2003 to ensure that there is a consistent approach in the Evidence (Audio and Audio Visual Links) Act 1998 as finally amended. The Evidence (Audio and Audio Visual Links) Act 1998 facilitates the use of audio and audio visual technology in the courts, and allows New South Wales to participate in a substantially uniform interstate scheme for the taking or receiving of evidence and the making or receiving of submissions from or in other participating States.

Part 1B of the Act sets out the circumstances in which evidence or submissions can be presented to a New South Wales court by audio visual link [AVL] where an accused person is held in custody in New South Wales. The part creates a presumption in favour of accused detainees using AVL for certain preliminary criminal proceedings and a presumption in favour of physical attendance at court for substantive criminal proceedings. Recently a number of high-profile criminal matters have raised the issue of the court's discretion to order that an accused detainee appear by audio visual link where serious security concerns have been identified. Matters before the courts have involved threats being made to the safety of judicial officers and other court users.

The community has a right to expect that court proceedings will be conducted in an environment that is safe for all court users. The Government takes its obligations in this respect very seriously. A wide range of measures are in place at courthouses throughout the State to deal with potential breaches of security. In cases where a high-security risk has been identified, arrangements are made with the court, the Sheriff's Office, the Department of Corrective Services and New South Wales Police to put in place any additional safeguards necessary to respond to the risk. Furthermore, as part of this Government's ongoing commitment to enhancing court security, in excess of \$7 million in additional funding was allocated to the Sheriff's Office in February this year, allowing that office to implement a range of operational improvements over the next four years, including the appointment of more than 40 new sheriff's officers around the State.

The Government will continue its commitment to improving court security and access to justice for all members of our community. However, it is recognised that in exceptional cases that raise particularly serious security concerns, requiring an accused detainee to appear by AVL may realistically be the only appropriate option available to our courts. The amendments proposed in the bill will put beyond doubt the capacity of the court to make such an order in the unusual and extreme circumstances where it may be necessary. Under section 5BA of the Evidence (Audio and Audio Visual Links) Act 1998 there is already a presumption that the court will use AVL in all preliminary criminal hearings. Physical appearance by the accused is only permitted if appropriate equipment is unavailable, or if an opposing party is able to satisfy the court that using AVL is not in the interests of justice. By contrast, section 5BB of the Act creates a presumption in favour of physical attendance by an accused detainee in more substantive criminal proceedings such as trials, committal hearings, sentencing hearings and appeals.

The presumption in favour of physical appearance will not apply in cases where all parties to the proceedings consent to the use of AVL. However, in all other cases the court may only make a direction overturning the presumption in favour of physical appearance if it is satisfied that it is in the interests of justice that the accused detainee appear by AVL. Advice provided by the Crown Solicitor's Office indicates that any decision by a court as to whether a certain course of action 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 alongside matters such as the security of the court system and the health and safety of other court users.

The Crown Solicitor's Office is of the view that evidence that court staff or members of the public may be endangered by the presence of the accused in court could be a relevant factor in tipping the interests of justice in favour of requiring AVL to be used. Nevertheless, the outcome in these cases will continue to be uncertain without a clear legislative statement. Accordingly, it is proposed that a number of specific factors be inserted into section 5BB of the Act to guide the court in making such determinations. The factors to consider include, but are not limited to, the risk that the physical security of any particular person or persons will be endangered by the presence of the accused; the risk of the accused person escaping, or attempting to escape, from custody when attending court; the past behaviour of the accused person at court appearances; and the conduct of the accused person while in custody, including the accused person's

conduct during previous imprisonment if applicable.

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 retention of the basic presumption in favour of physical appearance in "relevant criminal proceedings", including all first bail appearances, as such physical appearance will continue to be the default option to be applied by the court in the vast majority of cases. The court will not be limited to considering the factors specified in the bill in determining whether an order to appear by AVL is in the interests of the administration of justice.

The court will be directed to consider only such of the factors specified in the bill as are relevant to the particular circumstances of each case in determining whether an order to appear by AVL is in the interests of the administration of justice. It is a well-recognised principle of law that the right of the accused to be physically present at his or her trial must be balanced against the need to protect all participants in the justice system, including judicial officers and members of the public, and to preserve the integrity of the due administration of justice. Accordingly, the proposed amendment will ensure that our courts are able to continue to secure these aims.

I turn to the other amendments that are proposed by the bill, which are largely technical in nature. Items [4], [5] and [7] of schedule 1 to the bill amend the Act to make it clear that the presumptions concerning AVL usage apply to all accused detainees whether or not the proceedings concern the offence for which the detainee is actually in custody. By way of example, where an accused person is serving a custodial sentence for sexual assault and burglary and is subsequently required to appear in court on an unrelated charge of fraud, the policy considerations favouring the use of an AVL are no less pertinent than they would be if the appearance related to those initial charges of sexual assault and burglary. In addition, these amendments will ensure that this State's legislation is consistent with that found in other similar jurisdictions such as Victoria and Western Australia.

Item [1] of schedule 1 to the bill amends the Act to make it clear that an appellant's entitlement, under section 14 of the Criminal Appeal Act 1912, to appear at the hearing of his or her appeal, may be satisfied by that person appearing by AVL in accordance with the provisions of the Evidence (Audio and Audio Visual Links Act) 1998. This amendment reaffirms the discretion of the Court of Criminal Appeal to apply the provisions of the Evidence (Audio and Audio Visual Links Act) 1998 to criminal appeal proceedings. This will extend to the proposed new provisions that facilitate the use of an AVL where proceedings raise serious security concerns.

Items [6] and [8] of schedule 1 to the bill amend the Act to ensure the consistent use of the term "interests of the administration of justice" throughout all parts of the legislation. The concurrent use of references to both the "interests of the administration of justice" and to the "interests of justice" alone, has the potential to create unintended confusion in the interpretation of analogous provisions under the Act. The intention of the legislation is to facilitate the use of an AVL and in doing so to balance questions of security and expedition with the right to a fair trial. Accordingly, it is appropriate that the phrase "interests of the administration of justice" be used consistently throughout the Act as it most accurately conveys the aims of the legislation.

Finally, schedule 2 to the bill provides for corresponding amendments to be made to the Evidence Legislation Amendment (Accused Child Detainees) Act 2003, which also amends the Evidence (Audio and Audio Visual Links Act) 1998, to ensure consistency of approach in the Act as finally amended. This bill will provide timely guidance to the courts in the exercise of their existing discretion to order that an accused detainee appear in criminal proceedings by way of an audiovisual link. The amendments affirm a court's power to act in exceptional circumstances where serious security concerns make such an order necessary.

At the same time, the bill preserves the right of an accused detainee to make a physical appearance in substantive criminal proceedings by retaining the presumption in favour of physical appearance as the default position for most cases. The amendments in this bill will ensure that the court is equipped to meet community expectations that court proceedings will be conducted in a secure environment that will ensure the physical safety of all court users. I commend the bill to the House.

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