

Evidence (Audio Visual and Audio Linking) Bill

EXPLANATORY MEMORANDUM

- Clause 1 states that the purpose of the Act is to facilitate the appearance before, or the giving of evidence or making of submissions to courts by audio visual or audio links.
- Clause 2 provides for the commencement of various provisions of the Act.
- Clause 3 inserts a new Part IIA into the **Evidence Act 1958**.

Division 1—Definitions

A new section 42C provides various definitions which apply throughout this new Part.

Division 2—Witnesses other than the Accused

A new section 42D defines the application of this Division which deals with the appearance before a court or giving of evidence or making of submissions by any person in any legal proceeding other than the accused in a criminal proceeding.

A new section 42E provides that a court may direct that a person may appear, give evidence or make a submission by audio visual link or audio link. The court may make such a direction of its own initiative or upon application of a party. The section provides that the court must not make such a direction unless it is satisfied that specified technical requirements can be met. The court may vary or revoke such a direction at any time including if the link fails. A party may make submissions to the court regarding the making of a direction.

A new section 42F specifies that for children the subject of protection application proceedings or related appeals it is presumed that the child will physically appear before the court. The court may direct the use of an audio visual link if satisfied it is in the best interests of the child and consistent with the interests of justice. This section specifies considerations to be taken into account by the court in making such a determination.

A new section 42G specifies the technical requirements for audio visual links and audio links. These requirements include that all appropriate persons can hear and see (or simply hear in the case of audio links) appropriate persons at the other location; and that requirements for the technical matters concerning the transmission may be prescribed in court rules, or imposed by the presiding judge or magistrate.

A new section 42H provides that the Governor in Council may prescribe the costs of a link payable to a court. The court may determine in its discretion by whom and to what extent these costs are to be paid.

A new section 42I provides that nothing in this Division limits the application of 37B, 37C and 37D of the **Evidence Act 1958** to a proceeding; and nothing in these sections limits the application of this Division to a proceeding.

Division 3—Appearance by Accused

A new section 42J sets out the application of this Division which is to the appearance of the accused in a criminal proceeding, including ancillary proceedings.

A new section 42K provides presumptions as to how an accused person in custody (who is not a child) will appear before the court depending upon whether it is a preliminary matter or a more substantial hearing. Subsection (1) provides that in preliminary matters, (being bail applications, remand hearings, committal mention hearings and status hearings, applications for adjournment, and arraignment on a day other than a day on which the trial is to take place), the accused person is not required to be brought before the court but may appear by audio visual link if reasonably practicable. Sub-section (2) provides a presumption that in a committal proceeding, inquiries into fitness to stand trial, the trial or hearing of the charge, a sentencing hearing, or an appeal, the accused person should be brought physically before the court.

Sub-section (3) provides that for a first remand hearing, an accused person should appear physically before the court unless he or she consents to the use of audio visual link.

Sub-section (4) provides that in any other proceeding to which this Division relates, the court may direct appearance by use of audio visual link if satisfied it is in the interests of justice.

A new section 42L provides that despite the presumption that in preliminary matters an accused person in custody will appear by audio visual link, a court can direct that the person be brought physically before it if satisfied that physical appearance is required in the interests of justice. The section sets out that an application to physically appear should usually be made in writing and served on the other party at least 3 days before the hearing. The court however retains a discretion to allow an application within this time. An application to physically appear may also be made at any time in the course of the proceeding. The court retains a discretion to make a direction for physical appearance at its own initiative. The exercise of the court's power will be subject to practice directions.

A new section 42M provides that despite the presumption that in nominated other matters the accused person will appear physically before the court, a court can direct that the person appear by audio visual link if satisfied that this is consistent with the interests of justice and is reasonably practicable. The section provides that unless the application is

made with the consent of all parties to the proceeding, the court may only grant the application in exceptional circumstances. The section sets out that an application to appear by audio visual link should usually be made in writing and served on the other party at least 14 days before the hearing. The court however retains a discretion to allow an application within this time. An application for the accused to appear by audio visual link may also be made at any time in the course of the proceeding. The court retains a discretion to make a direction for the accused to appear by audio visual link at its own initiative if it is satisfied that exceptional circumstances exist. The exercise of the court's power will be subject to practice directions. Sub-section (8) provides that a victim of the offence may make a submission to the court in respect of an accused's appearance by audio visual link in these cases.

A new section 42N provides that in any other matter, as referred to in section 42K(4), an application for the accused to appear by audio visual link may be made in writing and served on the other party at least 14 days before the hearing. The court however retains a discretion to allow an application within this time. An application for the accused to appear by audio visual link may also be made at any time in the course of the proceeding. The court retains a discretion to make a direction at its own initiative. The exercise of the court's discretion will be subject to practice directions.

A new section 42O provides that an accused person who is a child and who is in custody is required to physically appear before the court.

A new section 42P provides that the court may make a direction for the child to appear by audio visual link if satisfied it is consistent with the interests of justice and is reasonably practicable. Unless the application is made with the consent of all parties to the proceeding, the court may only grant the application in exceptional circumstances. In considering what is in the interests of justice, the court must take into consideration the child's ability to comprehend the proceeding and to communicate with and give instructions to their legal representative. An application should be made in writing and served on the other party 14 days before the hearing, however the court retains a discretion to allow an application within this time. An application for the accused to appear by audio visual link may also be made at any time in the course of the proceeding. The court retains a discretion to make a direction for the accused to appear by audio visual link at its own initiative if it is satisfied that exceptional circumstances exist. The exercise of the court's power will be subject to practice directions. Sub-section (9) provides that a victim of the offence may make a submission to the court in respect of an accused's appearance by audio visual link in a trial or hearing of the charge or a sentencing hearing.

A new section 42Q provides that the senior judicial officer of a court may issue practice directions, statements or notes for the court relating to the exercise of discretion in relation to the applications referred to above.

A new section 42R specifies that the audio visual link must satisfy the technical requirements referred to in section 42G including that appropriate persons can hear and

see appropriate persons at the other location. This section specifies an additional requirement that facilities must be made available to enable private communication to take place between the accused person and their legal practitioner at the court point, including the ability to transmit documents.

A new section 42S provides that communication or a document transmitted between an accused and his or her legal practitioner which takes place by audio visual link or audio link is as confidential and inadmissible as if it took place while in each other's presence.

A new section 42T applies the **Listening Devices Act 1969** to a communication over the link or document transmitted between an accused person and their legal representative.

Division 4—General

A new section 42U provides that a judge may permit a document which needs to be put to a person who is appearing before the court by audio or audio visual link, to be transmitted by any means and that this is evidence without proof that the transmitted copy is a true copy; nothing prevents a document or exhibit being shown to a person over the audio visual link itself.

A new section 42V provides that the judge must warn the jury not to draw adverse inferences or give evidence a greater or lesser weight because of a person's appearance by audio visual link.

A new section 42W provides that the place where a witness gives evidence or an accused person appears must be taken to be a part of the court point and to be court premises for the purposes of giving evidence, making a submission or appearing before the court. This has effect for the purposes of laws relating to evidence, procedure, contempt of court and perjury. Any offence committed at the remote point is taken to be committed at the court point.

A new section 42X provides that an accused person who appears before a court for arraignment by audio visual link must be taken for all purposes to be at the bar of the court.

A new section 42Y provides that a witness may swear an oath or make an affirmation either by means of the audio or audio visual link, or at the direction of the court at the remote point.

Clause 4 amends section 12 and the second schedule of the **Evidence Act 1958** so that gaol orders can provide for a prisoner to appear by audio or audio visual links.

- Clause 5 amends the **Supreme Court Act 1986** by inserting a new provision 25(1)(eb) and (ec) which provide that the court may make rules regarding the technical requirements of the audio visual or audio link and with respect to the applications which may be made to the court.
- Clause 6 amends the **County Court Act 1958** by inserting a new provision 78(1)(hf) and (hg) which provides that the court may make rules regarding the technical requirements of the audio visual or audio link and with respect to the applications which may be made to the court.
- Clause 7 amends the **Magistrates' Court Act 1989** by inserting a new section 141 which provides that the Chief Magistrate together with 2 or more Deputy Chief Magistrates may jointly make rules of court regarding the technical requirements of the audio visual or audio link; with respect to the applications which may be made to the court; and any other matter relating to the practice and procedure of the Court under this Part.
- Clause 8 makes some consequential amendments to the **Magistrates' Court Act 1989**. These amendments provide that a person who has been granted bail but not released in accordance with section 82(2) may be brought before the court by audiovisual link if he or she consents. Section 140(1)(g) of the **Magistrates' Court Act 1989** is **repealed**.
- Clause 9 amends the **Children and Young Persons Act 1989** by inserting new sections 280B and 280C. The new section 280B provides that the Chief Magistrate and the Children's Court Senior Magistrate may jointly make rules of court regarding the technical requirements of the audio visual or audio link; with respect to applications which may be made to the court in accordance with Divisions 2 or 3 of this Part; and any other matter relating to the practice and procedure of the Court under this Part. The new section 280C provides that this power to make rules is subject to the rules being disallowed by a House of Parliament in accordance with section 23 of the **Subordinate Legislation Act 1994**.
- Clause 10 makes consequential amendments to the **Children and Young Persons Act 1989** by amending sections 25(4), 25(5A), and 258(1)(a) to provide that the court may make orders to provide for the audio or audio visual linking of children who are in custody.

- Clause 11 provides that a reference in Acts and subordinate instruments to a person appearing before, or being brought before, a court, includes a reference to a person appearing before, or being brought to a place where facilities exist to enable appearance before, the court by audio or audio visual link.
- Clause 12 provides transitional provisions so that the Bill applies to any proceedings pending after the date of commencement, save for cases commenced to be heard within 21 days after the Bill's commencement.