



New South Wales

Evidence (Audio and Audio Visual Links) Amendment Act 2007 No 75

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New South Wales

Evidence (Audio and Audio Visual Links) Amendment Act 2007 No 75

Act No 75, 2007

An Act to amend the *Evidence (Audio and Audio Visual Links) Act 1998* to make further provision with respect to appearances by accused detainees; and for other purposes. [Assented to 7 December 2007]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence (Audio and Audio Visual Links) Amendment Act 2007*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Evidence (Audio and Audio Visual Links) Act 1998 No 105

The *Evidence (Audio and Audio Visual Links) Act 1998* is amended as set out in Schedule 1.

4 Amendment of other Acts and rule

The Acts and Rule set out in Schedule 2 are amended as set out in that Schedule.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendments to Evidence (Audio and Audio Visual Links) Act 1998

(Section 3)

[1] Section 3 Interpretation

Omit the definitions of *accused child detainee*, *preliminary criminal proceeding* and *relevant criminal proceeding* from section 3 (1).

[2] Section 3 (1)

Insert in alphabetical order:

designated government agency means the following:

- (a) the Department of Corrective Services,
- (b) the Department of Juvenile Justice,
- (c) any other government agency prescribed by the regulations.

government agency means any person, department or body exercising executive or administrative functions on behalf of the Government.

[3] Section 3 (1)

Insert in alphabetical order:

physical appearance proceedings means the following:

- (a) any trial (including an arraignment on the day appointed for the trial) or hearing of charges,
- (b) any inquiry into a person's fitness to be tried for an offence,
- (c) any proceeding relating to bail:
 - (i) brought before a Magistrate or justice in respect of the period between the person being charged with the offence and the person's first appearance before a court in relation to the offence, or
 - (ii) on a person's first appearance before a court in relation to the offence.

[4] Section 3 (1), definition of “NSW court”

Insert at the end of the definition:

, or

- (d) a Children’s Registrar exercising any function of the Children’s Court conferred or imposed on the Registrar by or under the *Children’s Court Act 1987*.

[5] Section 3A Appearances and entitlements to be present before courts

Omit “preliminary criminal proceedings and relevant” from the note to section 3A (1).

[6] Section 5 Application of Act

Omit the note to section 5 (1A).

[7] Section 5 (4A)

Insert after section 5 (4):

- (4A) Part 1A (as amended by the *Evidence (Audio and Audio Visual Links) Amendment Act 2007*) extends to any proceedings pending in a NSW court after the commencement of subsection (4) and on the commencement of this subsection.

[8] Section 5 (5C)

Insert after section 5 (5B):

- (5C) Part 1B (as amended by the *Evidence (Audio and Audio Visual Links) Amendment Act 2007*) extends to any criminal proceedings pending in a NSW court after the commencement of subsection (5) and at the commencement of this subsection.

[9] Section 5B Taking evidence and submissions from outside courtroom or place where court is sitting—proceedings generally

Omit “and subsection (2A)” from section 5B (1).

Insert instead “, subsection (2A) and section 5BAA”.

[10] Section 5B (2A)

Omit “preliminary criminal proceeding or relevant”.

[11] Section 5B (2A), note

Omit “preliminary criminal proceedings and relevant”.

[12] **Section 5BAA**

Insert after section 5B:

5BAA Taking evidence of government agency witnesses from outside courtroom or place where court is sitting—proceedings generally

- (1) Subject to any applicable rules of court, a government agency witness must, unless the court otherwise directs, give evidence to the court by audio link or audio visual link from any place within New South Wales.
- (2) Subsection (1) does not apply unless the necessary audio links or audio visual links are available or can reasonably be made available.
- (3) The court may make a direction under subsection (1) on its own motion or on the application of a party to the proceedings.
- (4) The court may make such a direction only if it is satisfied:
 - (a) that the evidence to be given is likely to be contentious, and
 - (b) that it is in the interests of the administration of justice for the government agency witness to give evidence by appearing physically before the court.
- (5) In this section:

expert, in relation to any issue, means a person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence.

expert's report means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion and the facts, and assumptions of fact, on which the opinion is based and includes a hospital report.

government agency witness means the following:

- (a) a member of staff of the Government Service or the NSW Health Service, or a person employed in or engaged by any government agency, who has provided an expert's report for use in evidence in proceedings or proposed proceedings or who is called as an expert to give opinion evidence in proceedings,
- (b) a police officer called to give evidence in proceedings to corroborate evidence in chief given by another police officer for the prosecution,
- (c) any other witness of a class prescribed by the regulations.

hospital report means a written statement concerning a patient, made by or on behalf of a hospital, that the party serving the statement intends to adduce in evidence in chief at the trial.

[13] Sections 5BA and 5BB

Omit the sections. Insert instead:

5BA Accused detainee to appear physically in physical appearance proceedings

- (1) An accused detainee who is charged with an offence and is required to appear (or be brought or be present) before a NSW court in physical appearance proceedings concerning the offence must, unless the court otherwise directs, appear physically before the court.

Note. *accused detainee* and *physical appearance proceedings* are defined in section 3.

- (2) Subsection (1) does not apply to any bail proceedings that occur during a weekend or on a public holiday or that relate to an accused detainee who is being held in custody at a place prescribed by the regulations.
- (3) Subsection (1) does not apply if the parties to the proceeding consent to the accused detainee appearing before the court by audio visual link from any place within New South Wales at which the accused detainee is in custody other than the courtroom or place where the court is sitting.
- (4) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding or of any person on behalf of a designated government agency.
- (5) The court may make such a direction only if it is satisfied that it is in the interests of the administration of justice for the accused detainee to appear before the court by audio visual link from a place within New South Wales at which the person is in custody other than the courtroom or place where the court is sitting.
- (6) Without limiting the factors that the court may take into account in determining whether it is in the interests of the administration of justice to make a direction under subsection (1), the court must take into account such of the following factors as are relevant in the circumstances of the case:
- (a) the risk that the personal security of a particular person or persons (including the accused detainee) may be endangered if the accused detainee appears in the courtroom or place where the court is sitting,

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- (b) the risk of the accused detainee escaping, or attempting to escape, from custody when attending the courtroom or place where the court is sitting,
 - (c) the behaviour of the accused detainee when appearing before a court in the past,
 - (d) the conduct of the accused detainee while in custody, including the accused detainee's conduct during any period in the past during which the accused detainee was being held in custody in a correctional centre or detention centre,
 - (e) the potential for disruption of the accused detainee's participation in a rehabilitation or education program if the accused detainee were to be transported to, and appear in, the courtroom or place where the court is sitting,
 - (f) safety and welfare considerations in transporting the accused detainee to the courtroom or place where the court is sitting,
 - (g) the efficient use of available judicial and administrative resources,
 - (h) any other relevant matter raised by a party to the proceeding or other applicant for the making of the direction.
- (7) If the accused detainee is a child, the court must also take into account such additional factors to those specified in subsection (6) as are relevant in the circumstances of the case and that are specified in rules of court.
- (8) A person who was a child when a direction was made under this section to appear before a court by audio visual link is entitled to continue to appear before the court by audio visual link in accordance with the direction even if the person becomes an adult before the conclusion of the proceeding concerned.

5BB Accused detainee to appear by audio visual link in criminal proceedings other than physical appearance proceedings

- (1) An accused detainee who is charged with an offence and is required to appear (or be brought or be present) before a NSW court in criminal proceedings concerning the offence (other than physical appearance proceedings) must, unless the court otherwise directs, appear before the court by audio visual link.

Note. *accused detainee* and *physical appearance proceedings* are defined in section 3.

- (2) Subsection (1) does not apply unless the necessary audio visual links are available or can reasonably be made available.
- (3) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding or of any person on behalf of a designated government agency.
- (4) The court may make such a direction only if it is satisfied, after taking into account any factors that are relevant in the circumstances of the case together with any factors that are specified in rules of court, that it is in the interests of the administration of justice for the accused detainee to appear physically before the court.
- (5) A person who was a child when a direction was made under this section to appear physically before a court is entitled to continue to appear before the court in accordance with the direction even if the person becomes an adult before the conclusion of the proceeding concerned.

[14] Section 5BBA Appearances of accused child detainee by audio visual link in preliminary criminal proceedings and relevant criminal proceedings

Omit the section.

[15] Section 5BC Facilities for private communication

Omit “preliminary criminal proceeding or a relevant”.

[16] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

the Evidence (Audio and Audio Visual Links) Amendment Act 2007

Schedule 2 Amendment of other Acts and Rule

(Section 4)

2.1 Children’s Court Rule 2000

**[1] Clause 32A Additional factors for appearance by audio visual link:
section 5BA of Evidence (Audio and Audio Visual Links) Act 1998**

Omit “specified as factors” from clause 32A (1).

Insert instead “specified as additional factors”.

[2] Clause 32A (1)

Omit “section 5BBA (1)”. Insert instead “section 5BA (1)”.

[3] Clause 32A (1) (g), (k) and (n)–(q)

Omit the paragraphs.

2.2 Crimes (Administration of Sentences) Act 1999 No 93

Section 55 Hearing of charges by Visiting Magistrate

Omit “section 5BB (1)” from section 55 (5H).

Insert instead “section 5BA (1)”.

2.3 Criminal Procedure Act 1986 No 209

**Section 306U Vulnerable person entitled to give evidence in chief in form
of recording**

Omit “Section 5BBA” from section 306U (5). Insert instead “Section 5BA”.

[Second reading speech made in Legislative Council on 15 November 2007

Agreement in principle speech made in Legislative Assembly on 30 November 2007]

BY AUTHORITY