



New South Wales

Evidence (Audio and Audio Visual Links) Amendment Bill 2007

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The *Evidence (Audio and Audio Visual Links) Act 1998* (the **Principal Act**) facilitates the giving and receiving of evidence, and the making of submissions, in proceedings in NSW courts, by audio and audio visual links from places other than the places where the courts are sitting and makes provision with respect to appearances in such proceedings by persons by audio and audio visual links from such places.

Part 1B of the Principal Act sets out certain requirements concerning the appearance of accused detainees in NSW courts in proceedings for offences alleged to have been committed by the detainees. An adult accused detainee is required to appear by audio visual link in preliminary proceedings and physically in relevant criminal proceedings (sections 5BA and 5BB, respectively). Relevant criminal proceedings are defined to include (among other proceedings) any trial or hearing of a charge, committal proceedings, sentencing proceedings, hearings of appeals arising out of a trial or hearing and certain bail proceedings before, and on, the person's first appearance. Preliminary criminal proceedings include other bail proceedings, interlocutory proceedings and any arraignment other than on the day appointed for the trial of a person. An accused detainee who is a child is required to appear physically in both preliminary and relevant criminal proceedings (section 5BBA). In

each case a court may direct that the accused detainee concerned appear otherwise than as required by the relevant provision if it considers, taking into account certain specified, and other relevant, factors, that it is in the interests of the administration of justice to do so. Provision is made for rules of court to specify special factors to be taken into account before making a direction in relation to an accused child detainee.

The object of this Bill is to amend the Principal Act as follows:

- (a) so that in certain criminal proceedings both adult and child accused detainees will be required to appear physically before the court on their first appearance in relation to the alleged offence and by audio visual link (if available) on any second or any subsequent appearance in relation to the alleged offence unless the court otherwise directs in the interests of the administration of justice,
- (b) to specify additional factors to be taken into account by a court in deciding whether to make such a direction in respect of the appearance of an accused detainee (whether an adult or a child) and to provide for such a court to take into account special factors specified in rules of court in the case of child accused detainees,
- (c) to enable designated government agencies to apply for the making of such a direction,
- (d) to require certain government witnesses to give evidence to a NSW court by audio or audio visual links (subject to any applicable rules of court and unless the court otherwise directs),
- (e) to make it clear that Children's Registrars may make directions for use of audio visual links in care proceedings.

The Bill also makes various consequential amendments to the Principal Act and to certain other statutory instruments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 is a formal provision that gives effect to the amendments to the *Evidence (Audio and Audio Visual Links) Act 1998* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts and a Rule set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

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

Use of audio visual links within places in NSW for appearances of accused detainees in proceedings in NSW courts

Schedule 1 [2] inserts a definition of *designated government agency* into section 3 of the Principal Act. The definition is used in proposed sections 5BA (4) and 5BB (3).

Schedule 1 [3] inserts a definition of *physical appearance proceedings* into section 3 of the Principal Act. These proceedings are:

- (a) any trial (including an arraignment on the day appointed for the trial) or hearing of charges, and
- (b) any inquiry into a person's fitness to be tried for an offence, and
- (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.

The definition refers to the criminal proceedings in which an accused detainee would appear physically before a court.

Schedule 1 [13] and **[14]** omit sections 5BA and 5BB (which apply to adult accused detainees) and 5BBA (which applies to accused child detainees) of the Principal Act and replace them with two new sections (sections 5BA and 5BB). The two new sections apply to both adult and child accused detainees.

Proposed section 5BA replaces section 5BB of the Principal Act. It provides that 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. It differs from existing section 5BB in the following respects:

It applies to all accused detainees not only adult accused detainees.

Unlike existing section 5BB it does not require accused detainees to appear physically in committal proceedings, sentencing hearings (including redeterminations of sentence) or in hearings of appeals arising out of trials or hearings.

Under section 5BB the requirement to appear physically does not apply to any bail proceedings that occur during a weekend or on a public holiday. Proposed section 5BA provides also that the requirement does not apply if the bail proceedings relate to an accused detainee who is being held in custody at a place prescribed by the regulations.

Section 5BB provides that the requirement to appear physically is subject to any direction of a court to the contrary that the accused detainee appear by audio visual link. A direction may be given on the court's own motion or on the application of a

party to a proceeding. Under proposed section 5BA an application for a direction will also be able to be made by a designated government agency. This will enable applications to be made by any person on behalf of the Department of Corrective Services, the Department of Juvenile Justice or any other government agency prescribed by the regulations.

As in existing section 5BB, under proposed section 5BA a court may only make a direction for an accused detainee to appear by audio visual link if satisfied that it is in the interests of the administration of justice to do so. In addition to the factors specified in existing section 5BB to be taken into account in determining whether to make a direction, proposed section 5BA also requires the court to take into account 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, safety and welfare considerations in transporting the accused detainee to the courtroom or place where the court is sitting, the efficient use of available judicial and administrative resources and any other relevant matter raised by a party to the proceeding or other applicant for the making of the direction.

These factors are required to be taken into account for both adult and child accused detainees. Proposed section 5BA (7) requires the court, in the case of a child accused detainee, to also take into account such additional factors as are relevant in the circumstances of the case and that are specified in rules of court.

Proposed section 5BB replaces section 5BA of the Principal Act. It provides that 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. The effect of this is that an accused detainee will be required to appear by audio visual link on his or her second or any subsequent appearance in relation to the alleged offence unless the court directs otherwise. This will include committal proceedings and sentencing hearings (including redeterminations of sentence). As in proposed section 5BA, the court may make a direction on its own motion, on the application of a party or by a person on behalf of a designated government agency. A direction may only be made if the court is satisfied that it is in the interests of the administration of justice for the accused detainee to appear physically before the court. The court is required to take into account such factors as are relevant in the circumstances of the case together with any factors that are specified in rules of court.

The accused detainees are only required to appear by audio visual link if the necessary links are available or can reasonably be made available.

Schedule 1 [1], [5], [9]–[11] and [15] make consequential amendments to the Principal Act.

Schedule 2 makes consequential amendments to other Acts and a Rule.

Government agency witnesses

Schedule 1 [12] inserts proposed section 5BAA. Proposed section 5BAA provides that government agency witnesses must (subject to any applicable rules of court and unless the court otherwise directs) give evidence by audio links or audio visual links from any place within NSW if these links are available or can reasonably be made available. A government agency witness is defined as 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, a police officer called to give evidence in proceedings to corroborate evidence in chief given by another police officer for the prosecution and any other witness of a class prescribed by the regulations. The court may direct that such a witness appear physically if it is satisfied that the evidence to be given is likely to be contentious and it is in the interests of the administration of justice for the witness to so appear.

Children's Registrars

Schedule 1 [4] amends the definition of "NSW court" in section 3 of the Principal Act to make it clear that Children's Registrars may make directions for use of audio visual links in care proceedings.

Savings, transitional and other provisions

Schedule 1 [6] omits a superfluous note.

Schedule 1 [7] and [8] are savings and transitional provisions consequent on the amendment concerning appearances of accused detainees.

Schedule 1 [16] enables the making of savings and transitional regulations.

First print



New South Wales

Evidence (Audio and Audio Visual Links) Amendment Bill 2007

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New South Wales

Evidence (Audio and Audio Visual Links) Amendment Bill 2007

No. , 2007

A Bill for

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.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Evidence (Audio and Audio Visual Links) Amendment Act 2007</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6
3 Amendment of Evidence (Audio and Audio Visual Links) Act 1998 No 105	7
The <i>Evidence (Audio and Audio Visual Links) Act 1998</i> is amended as set out in Schedule 1.	8 9
4 Amendment of other Acts and rule	10
The Acts and Rule set out in Schedule 2 are amended as set out in that Schedule.	11 12
5 Repeal of Act	13
(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.	14 15
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	16 17

Schedule 1	Amendments to Evidence (Audio and Audio Visual Links) Act 1998	1
		2
	(Section 3)	3
[1] Section 3 Interpretation		4
	Omit the definitions of <i>accused child detainee</i> , <i>preliminary criminal proceeding</i> and <i>relevant criminal proceeding</i> from section 3 (1).	5
		6
[2] Section 3 (1)		7
	Insert in alphabetical order:	8
	<i>designated government agency</i> means the following:	9
	(a) the Department of Corrective Services,	10
	(b) the Department of Juvenile Justice,	11
	(c) any other government agency prescribed by the regulations.	12
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	<i>government agency</i> means any person, department or body exercising executive or administrative functions on behalf of the Government.	14
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[3] Section 3 (1)		17
	Insert in alphabetical order:	18
	<i>physical appearance proceedings</i> means the following:	19
	(a) any trial (including an arraignment on the day appointed for the trial) or hearing of charges,	20
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	(b) any inquiry into a person's fitness to be tried for an offence,	22
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	(c) any proceeding relating to bail:	24
	(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	25
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	(ii) on a person's first appearance before a court in relation to the offence.	29
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[4] Section 3 (1), definition of “NSW court”	1
Insert at the end of the definition:	2
, or	3
(d) a Children’s Registrar exercising any function of the	4
Children’s Court conferred or imposed on the Registrar by	5
or under the <i>Children’s Court Act 1987</i> .	6
[5] Section 3A Appearances and entitlements to be present before courts	7
Omit “preliminary criminal proceedings and relevant” from the note to section	8
3A (1).	9
[6] Section 5 Application of Act	10
Omit the note to section 5 (1A).	11
[7] Section 5 (4A)	12
Insert after section 5 (4):	13
(4A) Part 1A (as amended by the <i>Evidence (Audio and Audio Visual</i>	14
<i>Links) Amendment Act 2007</i>) extends to any proceedings pending	15
in a NSW court after the commencement of subsection (4) and on	16
the commencement of this subsection.	17
[8] Section 5 (5C)	18
Insert after section 5 (5B):	19
(5C) Part 1B (as amended by the <i>Evidence (Audio and Audio Visual</i>	20
<i>Links) Amendment Act 2007</i>) extends to any criminal	21
proceedings pending in a NSW court after the commencement of	22
subsection (5) and at the commencement of this subsection.	23
[9] Section 5B Taking evidence and submissions from outside courtroom or	24
place where court is sitting—proceedings generally	25
Omit “and subsection (2A)” from section 5B (1).	26
Insert instead “, subsection (2A) and section 5BAA”.	27
[10] Section 5B (2A)	28
Omit “preliminary criminal proceeding or relevant”.	29
[11] Section 5B (2A), note	30
Omit “preliminary criminal proceedings and relevant”.	31

[12] Section 5BAA	1
Insert after section 5B:	2
5BAA Taking evidence of government agency witnesses from outside courtroom or place where court is sitting—proceedings generally	3 4
(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.	5 6 7 8
(2) Subsection (1) does not apply unless the necessary audio links or audio visual links are available or can reasonably be made available.	9 10 11
(3) The court may make a direction under subsection (1) on its own motion or on the application of a party to the proceedings.	12 13
(4) The court may make such a direction only if it is satisfied:	14
(a) that the evidence to be given is likely to be contentious, and	15 16
(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.	17 18 19
(5) In this section:	20
<i>expert</i> , 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.	21 22 23 24
<i>expert's report</i> 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.	25 26 27 28
<i>government agency witness</i> means the following:	29
(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,	30 31 32 33 34 35
(b) a police officer called to give evidence in proceedings to corroborate evidence in chief given by another police officer for the prosecution,	36 37 38
(c) any other witness of a class prescribed by the regulations.	39

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.

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[13] Sections 5BA and 5BB

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Omit the sections. Insert instead:

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5BA Accused detainee to appear physically in physical appearance proceedings

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(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.

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

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(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.

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(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.

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(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.

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(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.

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(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:

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(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,	1 2 3
(c)	the behaviour of the accused detainee when appearing before a court in the past,	4 5
(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,	6 7 8 9 10
(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,	11 12 13 14
(f)	safety and welfare considerations in transporting the accused detainee to the courtroom or place where the court is sitting,	15 16 17
(g)	the efficient use of available judicial and administrative resources,	18 19
(h)	any other relevant matter raised by a party to the proceeding or other applicant for the making of the direction.	20 21 22
(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.	23 24 25 26
(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.	27 28 29 30 31
5BB	Accused detainee to appear by audio visual link in criminal proceedings other than physical appearance proceedings	32 33
(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.	34 35 36 37 38
	Note. <i>accused detainee</i> and <i>physical appearance proceedings</i> are defined in section 3.	39 40

(2)	Subsection (1) does not apply unless the necessary audio visual links are available or can reasonably be made available.	1 2
(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.	3 4 5
(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.	6 7 8 9 10 11
(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.	12 13 14 15 16
[14]	Section 5BBA Appearances of accused child detainee by audio visual link in preliminary criminal proceedings and relevant criminal proceedings	17 18 19
	Omit the section.	20
[15]	Section 5BC Facilities for private communication	21
	Omit “preliminary criminal proceeding or a relevant”.	22
[16]	Schedule 1 Savings, transitional and other provisions	23
	Insert at the end of clause 1 (1):	24
	<i>the Evidence (Audio and Audio Visual Links) Amendment Act 2007</i>	25

Schedule 2	Amendment of other Acts and Rule	1
	(Section 4)	2
2.1	Children’s Court Rule 2000	3
[1]	Clause 32A Additional factors for appearance by audio visual link: section 5BA of Evidence (Audio and Audio Visual Links) Act 1998	4 5
	Omit “specified as factors” from clause 32A (1).	6
	Insert instead “specified as additional factors”.	7
[2]	Clause 32A (1)	8
	Omit “section 5BBA (1)”. Insert instead “section 5BA (1)”.	9
[3]	Clause 32A (1) (g), (k) and (n)–(q)	10
	Omit the paragraphs.	11
2.2	Crimes (Administration of Sentences) Act 1999 No 93	12
	Section 55 Hearing of charges by Visiting Magistrate	13
	Omit “section 5BB (1)” from section 55 (5H).	14
	Insert instead “section 5BA (1)”.	15
2.3	Criminal Procedure Act 1986 No 209	16
	Section 306U Vulnerable person entitled to give evidence in chief in form of recording	17 18
	Omit “Section 5BBA” from section 306U (5). Insert instead “Section 5BA”.	19