

Evidence (Audio and Audio Visual Links) Act 1998 No 105

[1998-105]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **See also**
 - [Crimes and Courts Legislation Amendment Bill 2006](#)
 - [Criminal Procedure Amendment \(Vulnerable Persons\) Bill 2006](#)

Authorisation

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New South Wales

Contents

Long title	5
Part 1 Preliminary	5
1 Name of Act	5
2 Commencement	5
3 Interpretation	5
3A Appearances and entitlements to be present before courts	7
4 Notes	7
5 Application of Act	7
Part 1A Use of audio links or audio visual links with places in NSW, non-participating States and foreign countries in proceedings in NSW courts	8
5A Application of this Part	8
5B Taking evidence and submissions from outside courtroom or place where court is sitting—proceedings generally	9
Part 1B Use of audio visual links within places in NSW for appearances of accused detainees in proceedings in NSW courts	10
5BA Appearances of accused detainee (other than accused child detainee) by audio visual link in preliminary criminal proceedings	10

5BB Appearances of accused detainee (other than accused child detainee) by audio visual link in relevant criminal proceedings	10
5BBA Appearances of accused child detainee by audio visual link in preliminary criminal proceedings and relevant criminal proceedings	11
5BC Facilities for private communication	12
Part 1C Provisions applying to Parts 1A and 1B generally	12
5C Premises to be considered part of court	12
5D Administration of oaths and affirmations	12
Part 2 Use of interstate audio links or audio visual links with a participating State in proceedings in or before NSW courts	
6 Application of Part	13
7 NSW courts may take evidence and submissions from outside State	13
8-10 (Renumbered as sections 20A-20C)	14
11 Counsel entitled to practise	14
Part 3 Use of interstate audio links or audio visual links with NSW in proceedings in participating States	
12 Application of Part	14
13 Recognised courts may take evidence or receive submissions from persons in New South Wales	14
14 Powers of recognised courts	14
15 Orders made by recognised court	15
16 Enforcement of order	15
17 Privileges, protection and immunity of participants in proceedings in courts of participating States	15
18 Recognised court may administer oath in the State	16
19 Assistance to recognised court	16
20 Contempt of recognised courts	16
Part 4 Miscellaneous	17
20A Giving evidence or making submissions by audio visual link	17
20B Giving evidence or making submissions by audio link	17

20C Expenses	17
20D Failure of audio link or audio visual link	17
20E Putting documents to a remote person	18
20F Directions	18
21 Proceedings for offences	18
22 Regulations and rules of court.....	18
22A Savings, transitional and other provisions.....	19
23 Review of Act.....	19
Schedule 1 Savings, transitional and other provisions	19

Evidence (Audio and Audio Visual Links) Act 1998 No 105



New South Wales

An Act to facilitate the taking of evidence, and the making of submissions, by audio links and audio visual links.

Part 1 Preliminary

1 Name of Act

This Act is the *Evidence (Audio and Audio Visual Links) Act 1998*.

2 Commencement

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

3 Interpretation

(1) In this Act:

accused child detainee means an accused detainee who is a child.

accused detainee means a person who is being held in custody in a correctional centre, detention centre, police station or other place of detention and includes, in relation to a proceeding for a summary offence, a defendant who is so being held.

audio link means facilities (including telephone) that enable audio communication between persons at different places.

audio visual link means facilities (including closed-circuit television) that enable audio and visual communication between persons at different places.

detention centre has the same meaning it has in the *Children (Detention Centres) Act 1987*.

NSW court means:

- (a) a NSW court within the meaning of the *Evidence Act 1995*, or
- (b) a coroner, or

(c) a tribunal prescribed by the regulations as a NSW court for the purposes of this Act.

Note—

In the *Evidence Act 1995* **NSW court** means:

(a) the Supreme Court, or

(b) any other court created by Parliament,

(including such a court exercising federal jurisdiction) and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

participating State means another State in which provisions of a law in terms substantially corresponding to Parts 2 and 3 are in force.

preliminary criminal proceeding means any of the following criminal proceedings:

(a) any proceeding relating to bail (other than a proceeding relating to bail referred to in paragraph (f) of the definition of **relevant criminal proceeding**),

(b) where a person has previously been remanded in custody, any subsequent proceeding with respect to the remand of the person in custody for the same offence,

(c) any interlocutory proceeding held in connection with any criminal proceeding,

(d) without limiting paragraph (c), any application for an adjournment,

(e) any arraignment on a day other than the day appointed for the trial of a person.

recognised court means a court or tribunal of a participating State that is authorised by the provisions of a law of that State in terms substantially corresponding to Parts 2 and 3 to direct that evidence be taken or submissions made by audio link or audio visual link from New South Wales.

relevant criminal proceeding means any of the following criminal proceedings:

(a) any committal proceeding,

(b) any inquiry into a person's unfitness to be tried for an offence,

(c) any trial (including an arraignment on the day appointed for the trial) or hearing of charges,

(d) any sentencing hearing (including a redetermination of sentence),

(e) any hearing of an appeal arising out of a trial or hearing,

(f) any proceeding relating to bail:

- (i) brought before a Magistrate or justice in respect of the period between a person being charged with an 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 an offence.

State includes Territory.

tribunal of a State means a person or body authorised by or under a law of the State to take evidence on oath or affirmation.

- (2) A reference in this Act (other than Part 1B) to making a submission to a court includes a reference to making an appearance before the court.
- (3) (Repealed)

3A Appearances and entitlements to be present before courts

- (1) A requirement by or under any other Act that a person appear (or be brought or be present) before a court is taken to be satisfied if the person appears before the court by way of an audio link or audio visual link under this Act.

Note—

Part 1B of this Act contains provisions with respect to the appearance by audio visual link of accused detainees who are in custody in preliminary criminal proceedings and relevant criminal proceedings.

- (2) Any entitlement of a person under any other Act or law for a person to be present in proceedings before a court concerning bail is taken to be satisfied if audio visual links are used in relation to the person under this Act.
- (3) Any entitlement of a person under section 14 of the [Criminal Appeal Act 1912](#) to be present in proceedings on the hearing of an appeal is taken to be satisfied if audio visual links are used in relation to the person under this Act.

4 Notes

Notes included in this Act do not form part of this Act.

5 Application of Act

- (1) This Act is not intended to exclude or limit the operation of any other law of the State or a participating State that makes provision for the taking of evidence or making of submissions:
 - (a) outside the State or participating State for the purposes of a proceeding in that State, or
 - (b) in the State or participating State for the purposes of a proceeding outside that State.

(1A) This Act is not intended to exclude or limit the operation of any other law of the State or another place that makes provision for the taking of evidence or making of submissions in the State for the purposes of a proceeding in the State.

Note—

See, for example, Part 4 of the *Evidence (Children) Act 1997*.

- (2) Unless a contrary intention is shown, nothing in this Act limits or otherwise affects any discretion that a NSW court or a recognised court has with respect to the conduct of a proceeding.
- (3) This Act (other than Part 1A or 1B) extends to any proceeding pending in a NSW court or a recognised court on the commencement of this section.
- (4) Part 1A extends to any proceeding pending in a NSW court or court of a place outside New South Wales on the commencement of this subsection.
- (5) Part 1B (as originally enacted) extends to any preliminary criminal proceeding or relevant criminal proceeding pending in a NSW court on the commencement of this subsection.
- (5A) Part 1B (as amended by the *Evidence Legislation Amendment (Accused Child Detainees) Act 2003*) extends to any preliminary criminal proceeding or relevant criminal proceeding pending in a NSW court after the commencement of subsection (5) and at the commencement of this subsection.
- (5B) Part 1B (as amended by the *Evidence (Audio and Audio Visual Links) Amendment Act 2003*) extends to any preliminary criminal proceeding or relevant criminal proceeding pending in a NSW court after the commencement of subsection (5) and at the commencement of this subsection.
- (6) Section 27 of the *Children (Criminal Proceedings) Act 1987* does not apply Part 1B (other than section 5BBA) of this Act (to the extent that it relates to the functions of Local Courts, Magistrates or justices in criminal proceedings) to the Children's Court or any proceedings before the Children's Court.

Part 1A Use of audio links or audio visual links with places in NSW, non-participating States and foreign countries in proceedings in NSW courts

5A Application of this Part

- (1) This Part applies to any proceeding (including a criminal proceeding) in or before a NSW court.
- (2) An application cannot be made, and the court may not give a direction, under this Part for the giving of evidence or making of a submission to the court by audio link or

audio visual link from any place outside New South Wales that is a participating State.

- (3) An application cannot be made, and the court may not give a direction, under this Part for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place in New Zealand.

Note—

Parts 4 and 5 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth make provision for audio links and audio visual links with New Zealand.

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

- (1) Subject to any applicable rules of court and subsection (2A), a NSW court may, either on its own motion in, or on the application of a party to, a proceeding before the court, direct that a person (whether or not a party to the proceeding) give evidence or make a submission to the court by audio link or audio visual link from any place within or outside New South Wales, including a place outside Australia, other than the courtroom or other place at which the court is sitting.
- (2) The court must not make such a direction if:
- (a) the necessary facilities are unavailable or cannot reasonably be made available, or
 - (b) the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting, or
 - (c) the court is satisfied that the direction would be unfair to the party, or
 - (d) the court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission.
- (2A) A court must not make a direction under this Part in relation to the giving of evidence or making of a submission by audio visual link by any accused detainee in any preliminary criminal proceeding or relevant criminal proceeding in relation to the detainee concerning an offence alleged to have been committed by the detainee. However, this subsection does not prevent the making of such a direction in relation to an accused detainee in any other proceeding to which this Part applies.

Note—

Part 1B of this Act contains provisions with respect to the appearance of accused detainees who are in custody in preliminary criminal proceedings and relevant criminal proceedings.

- (3) In a proceeding in which a party opposes the making of a direction for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place within New South Wales other than the courtroom or other place where the court is sitting, the court must not make the direction unless the party making the application satisfies the court that it is in the interests of the administration of justice

for the court to do so.

Part 1B Use of audio visual links within places in NSW for appearances of accused detainees in proceedings in NSW courts

5BA Appearances of accused detainee (other than accused child detainee) by audio visual link in preliminary criminal proceedings

- (1) An accused detainee (other than an accused child detainee) who is required to appear (or be brought or be present) before a NSW court in any preliminary criminal proceedings in relation to the detainee concerning an offence alleged to have been committed by the detainee:
 - (a) must, unless the court otherwise directs, appear 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 at which the court is sitting, and
 - (b) may give any evidence or make any submission to the court by that audio visual link.

Note—

accused detainee and ***preliminary criminal proceeding*** 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.
- (4) 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 physically before the court.

5BB Appearances of accused detainee (other than accused child detainee) by audio visual link in relevant criminal proceedings

- (1) An accused detainee (other than an accused child detainee) who is required to appear (or be brought or be present) before a NSW court in any relevant criminal proceedings must, unless the court otherwise directs, appear physically before the court in any relevant criminal proceedings in relation to the detainee concerning an offence alleged to have been committed by the detainee.

Note—

accused detainee and ***relevant criminal proceeding*** are defined in section 3.

- (2) 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.

- (3) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding.
- (4) 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.
- (5) 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,
 - (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.

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

- (1) An accused child detainee who is required to appear (or be brought or be present) before a NSW court in any preliminary criminal proceedings, or in any relevant criminal proceedings, in relation to the child concerning an offence alleged to have been committed by the child must, unless the court otherwise directs, appear physically before the court in those proceedings.
- (2) Subsection (1) does not apply if:
 - (a) the accused child detainee chooses to give evidence or make any submission by audio visual link from any place within New South Wales at which the accused child detainee is in custody other than the courtroom or place where the court is sitting, and
 - (b) all other parties to the proceeding consent to the accused child detainee appearing before the court by audio visual link from that place.
- (3) The court may make a direction under subsection (1) on its own motion or on the

application of any party to the proceeding.

- (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 and that are specified in rules of court, that it is in the interests of the administration of justice for the accused child detainee to appear before the court by audio visual link from the place within New South Wales at which the child is in custody other than the courtroom or place where the court is sitting.
- (4A) Without limiting rules of court that may be made with respect to factors to be taken into account under subsection (4), rules of court may require a court to take into account in relation to an accused child detainee any factor of a kind referred to in section 5BB (5) (a)–(d).
- (5) A person who was a child when a direction was made to appear before a court by audio visual link as referred to in subsection (4) 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.

5BC Facilities for private communication

Facilities are to be made available for private communication between an accused detainee appearing by audio visual link under this Part in a preliminary criminal proceeding or a relevant criminal proceeding and the person's representative in the proceeding if the person's representative is at the place where the court is sitting.

Part 1C Provisions applying to Parts 1A and 1B generally

5C Premises to be considered part of court

- (1) Any place within or outside New South Wales at which audio link or audio visual link facilities are being used for the purpose of a person giving evidence or making a submission in any proceeding under Part 1A or 1B is taken to be part of the NSW court that is sitting at a courtroom or other place for the purpose of conducting the proceeding.
- (2) Subsection (1) has effect, for example, for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.
- (3) Subsection (1) also has the effect that any offence committed at the place where the person giving the evidence or making the submission is located is to be taken to have been committed at the courtroom or other place where the court is sitting for the purposes of the laws in force in New South Wales.

5D Administration of oaths and affirmations

- (1) Subject to subsection (2), an oath to be sworn or affirmation to be made by a person

giving evidence by audio link or audio visual link under Part 1A or 1B may be administered either:

- (a) by means of the audio link or audio visual link, as nearly as practicable in the same way as if the person were to give evidence in the courtroom or other place where the NSW court is sitting, or
 - (b) at the direction of, or on behalf of, the court at the place where the person is giving the evidence by a person authorised by the court.
- (2) A person giving evidence by audio link or audio visual link under Part 1A or 1B from a foreign country is not required to give the evidence on oath or affirmation if:
- (a) the law in force in that country:
 - (i) does not permit the person to give evidence on oath or affirmation for the purposes of the proceeding, or
 - (ii) would make it inconvenient for the person to give evidence on oath or affirmation for the purposes of the proceeding, and
 - (b) the NSW court is satisfied that it is appropriate for the evidence to be given otherwise than on oath or affirmation.
- (3) If evidence is given otherwise than on oath or affirmation, the NSW court is to give the evidence such weight as it thinks fit in the circumstances.
- (4) Subsections (2) and (3) apply despite anything to the contrary in the [Evidence Act 1995](#) or any other law of this State.

Part 2 Use of interstate audio links or audio visual links with a participating State in proceedings in or before NSW courts

6 Application of Part

This Part applies to any proceeding (including a criminal proceeding) in or before a NSW court.

7 NSW courts may take evidence and submissions from outside State

- (1) A NSW court may, on the application of a party to a proceeding before the court, direct that evidence be taken, or submissions made, by audio link or audio visual link, from a participating State.
- (2) The court must not make such a direction if:
 - (a) the necessary facilities are unavailable or cannot reasonably be made available, or

- (b) the court is satisfied that evidence or submissions can more conveniently be given or made in this State, or
 - (c) the court is satisfied by a party opposing the making of the direction that the direction would be unfair to the party.
- (3) The court may exercise in the participating State, in connection with taking evidence or receiving submissions by audio link or audio visual link, any of its powers that the court is permitted, under the law of the participating State, to exercise in the participating State.

8-10 (Renumbered as sections 20A-20C)

11 Counsel entitled to practise

- (1) A person who is entitled to practise as a legal practitioner in a participating State is entitled to practise as a barrister, solicitor or both:
- (a) in relation to the examination in chief, cross-examination or re-examination of a witness in the participating State whose evidence is being given by audio link or audio visual link in a proceeding before a NSW court, and
 - (b) in relation to the making of submissions by audio link or audio visual link from the participating State in a proceeding before a NSW court.
- (2) Nothing in this section limits Part 3B of the [Legal Profession Act 1987](#).

Part 3 Use of interstate audio links or audio visual links with NSW in proceedings in participating States

12 Application of Part

This Part applies to any proceeding (including a criminal proceeding) in or before a recognised court.

13 Recognised courts may take evidence or receive submissions from persons in New South Wales

A recognised court may, for the purposes of a proceeding before it, take evidence or receive submissions, by audio link or audio visual link, from a person in New South Wales.

14 Powers of recognised courts

- (1) The recognised court may, for the purposes of the proceeding, exercise in New South Wales, in connection with taking evidence or receiving submissions by audio link or audio visual link, any of its powers except its powers:
- (a) to punish for contempt, and

(b) to enforce or execute its judgments or process.

- (2) The laws of the participating State (including rules of court) that apply to the proceeding in that State also apply, by force of this subsection, to the practice and procedure of the recognised court in taking evidence or receiving submissions by audio link or audio visual link from a person in New South Wales.
- (3) For the purposes of the recognised court exercising its powers, the place in New South Wales where evidence is given or submissions are made is taken to be part of the court.

15 Orders made by recognised court

Without limiting section 14, the recognised court may, by order:

- (a) direct that the proceeding, or a part of the proceeding, be conducted in private, or
- (b) require a person to leave a place in New South Wales where the giving of evidence or the making of submissions is taking place or is going to take place, or
- (c) prohibit or restrict the publication of evidence given in the proceeding or of the name of a party to, or a witness in, the proceeding.

16 Enforcement of order

- (1) An order of a recognised court under section 14 or 15 must be complied with.
- (2) Subject to any applicable rule of court, the order may be enforced by the Supreme Court as if the order were an order of the Supreme Court.
- (3) Without limiting subsection (2), a person who contravenes the order:
 - (a) is taken to be in contempt of the Supreme Court, and
 - (b) is punishable accordingly,unless the person establishes that the contravention should be excused.

17 Privileges, protection and immunity of participants in proceedings in courts of participating States

- (1) A judge or other person presiding at or otherwise taking part in the proceeding of a recognised court has, in connection with evidence being taken or submissions being received by audio link or audio visual link from a person in New South Wales, the same privileges, protection and immunity as a judge of the Supreme Court.
- (2) A person appearing as a legal practitioner in the proceeding of a recognised court has, in connection with evidence being taken or submissions being received by audio link or audio visual link from a person in New South Wales, the same protection and

immunity as a legal practitioner has in appearing for a party in a proceeding before the Supreme Court.

- (3) A person appearing as a witness in a proceeding of a recognised court by audio link or audio visual link from New South Wales has the same protection as a witness in a proceeding in the Supreme Court.

18 Recognised court may administer oath in the State

- (1) A recognised court may, for the purpose of obtaining in the proceeding, by audio link or audio visual link, the testimony of a person in New South Wales, administer an oath or affirmation in accordance with the practice and procedure of the recognised court.
- (2) Evidence given by a person on oath or affirmation so administered is, for the purposes of the law of New South Wales, testimony given on oath in a judicial proceeding.

Note—

Chapter 4 of Part 7 of the *Crimes Act 1900* contains offences relating to perjury and giving of false testimony in judicial proceedings.

19 Assistance to recognised court

An officer of a NSW court may, at the request of a recognised court:

- (a) attend at the place in the State where evidence is to be or is being taken, or submissions are to be or are being made, in a proceeding of the recognised court, and
- (b) take such action as the recognised court directs to facilitate the proceeding, and
- (c) assist with the administering by the recognised court of an oath or affirmation.

20 Contempt of recognised courts

A person must not, while evidence is being given or a submission is being made in New South Wales, by audio link or audio visual link, in a proceeding in a recognised court:

- (a) assault in the State any of the following:
- (i) a person appearing in the proceeding as a legal practitioner,
 - (ii) a witness in the proceeding,
 - (iii) an officer of a NSW court giving assistance under section 19, or
- (b) threaten, intimidate or wilfully insult any of the following:
- (i) a judge or other person presiding at or otherwise taking part in the proceeding,
 - (ii) a Master, Registrar, Deputy Registrar or other officer of that court who is taking part in or assisting in the proceeding,

- (iii) a person appearing in the proceeding as a legal practitioner,
 - (iv) a witness in the proceeding,
 - (v) a juror in the proceeding, or
- (c) wilfully interrupt or obstruct the proceeding, or
- (d) wilfully and without lawful excuse disobey an order or direction of the court.

Maximum penalty: Imprisonment for 3 months.

Part 4 Miscellaneous

20A Giving evidence or making submissions by audio visual link

Evidence must not be given, and a submission must not be made, by audio visual link under this Act unless the courtroom or other place where a NSW court is sitting, and the place where the evidence would be given or the submission would be made, are equipped with audio visual link facilities that enable:

- (a) persons who are at the courtroom or other place to see and hear the person giving the evidence or making the submission, and
- (b) persons who are at the place where the evidence is given or the submission is made to see and hear persons at the courtroom or other place.

20B Giving evidence or making submissions by audio link

Evidence must not be given, and a submission must not be made, by audio link under this Act unless the courtroom or other place where a NSW court is sitting, and the place where the evidence would be given or the submission would be made, are equipped with audio link facilities that enable:

- (a) persons who are at the courtroom or other place to hear the person giving the evidence or making the submission, and
- (b) persons who are at the place where the evidence is given or the submission is made to hear persons at the courtroom or other place.

20C Expenses

If a NSW court directs evidence to be taken, or submissions to be made, by audio link or audio visual link from a person under this Act, the court may make such orders as it considers just for payment of expenses incurred in connection with taking the evidence or making the submissions or providing the audio link or audio visual link.

20D Failure of audio link or audio visual link

If an audio link or audio visual link being used in accordance with this Act for the purposes

of a proceeding before a NSW court fails during the proceeding, the court may adjourn the proceeding or make such other orders as are appropriate in the circumstances as if a person present at the place at which the audio link or audio visual link facilities are located were in the presence of the court.

20E Putting documents to a remote person

If in the course of examination of a person by audio link or audio visual link it is necessary to put a document to the person, the NSW court may permit the document to be put to the person:

- (a) if the document is at the courtroom or other place where the court is sitting, by transmitting by any means a copy of it to the place where the person is giving evidence or making a submission and the copy so transmitted being then put to the person, or
- (b) if the document is at the place where the person is giving evidence or making a submission, by putting it to the person and then transmitting by any means a copy of it to the courtroom or other place.

20F Directions

A NSW court may at any time vary or revoke a direction given by it under this Act in a proceeding, either on its own motion or on application by a party to the proceeding.

21 Proceedings for offences

Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court.

22 Regulations and rules of court

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a maximum penalty not exceeding 5 penalty units.
- (3) Rules of court may (subject to the regulations) make provision for or with respect to the taking of evidence, or making of submissions, by audio link or audio visual link under this Act.
- (4) Without limiting subsections (1) and (3), provision may be made for or with respect to the circumstances in which taking of evidence, or making of submissions, by audio link or audio visual link under this Act may be terminated or interrupted.
- (5) Without limiting subsections (1) and (3), provision may be made with respect to

factors to be taken into account by a court in determining whether an accused child detainee should appear before the court by audio visual link.

22A Savings, transitional and other provisions

Schedule 1 has effect.

23 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Savings, transitional and other provisions

(Section 22A)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

the *Evidence (Audio and Audio Visual Links) Amendment Act 2001*
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.