

## **The practical implications of the expansion of Audio Visual Links (AVL)**

The Chief Magistrate's Practice Note 5/2007

### ***What it means***

On Monday 3 September 2007 the Chief magistrate's practice note No. 5 of 2007 will come into effect. It represents major changes to the way in which accused in custody will communicate with the court and their legal representation. This marks a significant expansion of AVL appearances.

In essence it will mean that the accused prisoner will not to physically be taken to court except for hearing or sentence purposes unless the court is satisfied that it is "in the interest of justice" for the prisoner to appear. There is currently no additional information available as to what this expression will mean in this context and it is expected that the individual discretion of the presiding magistrate will determine how the exception is to operate. The Practice note also applies to all children's court, child detainees.

AVL appearances in a Weekend Bail Pilot for Juveniles held in Acmena and Riverina Juvenile Detention Centres began a couple of months ago. For first appearance bail applications, these children are beamed into Parramatta Court and receive representation from the Legal Aid NSW specialist Children's Legal Service. Evaluation is ongoing but the results are not currently available. Anecdotal evidence indicates that more children have been getting bail and 'it is popular with the children'. However, before the pilot, in at least one location (namely children detained at Acmena), bail would have been determined for these children without the benefit of any legal representation, unless the Aboriginal Legal Service appeared.

The practice note super cedes the process that was being trialled and evaluated in this area.

In the current expansion not all local courts currently have access to the required technology so matters will be transferred to courts with AVL links for all appearances other than hearing and sentence. Courts with AVL have been described as "hub courts" and the courts where the charges originate "feeder" or "original" courts. Annexed is the schedule of hub and feeder court supplied by the chief magistrate. All Circuit Courts will feed into the Hub Court.

There will be significant changes to the way which practitioners secure and administer a grant of legal aid, obtain instructions and communicate with their clients. While the law society, ALS, Legal Aid NSW and the Bar Association have been in close consultation, the way which practitioners will deal with the changes is by no means settled. Each of these bodies has concerns about the quality of communication with prisoners and the overall impact on the funding of legal services. The Department of Corrective services will save significant amounts of money.

### ***Communicating with clients***

To accommodate the changes in practice Corrective Services are promising to expand the telephone access from prisoners to legal practitioners and access via AVL suites currently accessible by Legal Aid NSW, the Public Defenders Chambers, and some Aboriginal Legal Aid Offices. Discussions are also progressing regarding expanding AVL via broad band.

At the moment the position regarding access to clients and security of instructions other in circumstances of face to face conferencing is as follows.

1. Telephone conferencing.
  - a) Legal representatives to prisoners at courts

For the pre and post – AVL court appearance, dedicated lawyer phones at courts and the phones already installed on Bar tables (for use in court), Corrective Services insists are not monitored. To improve access and security to these phones wireless

receivers are to be made available to practitioners at all AVL courts and more phones are to be made available.

b) Prisoner call to legal representatives

These calls are monitored "to ensure that they are genuine legal calls" and monitoring is discontinued once that is established. The difficulty is of course to identify when this occurs and the safest view is to consider that these calls are not secure.

2. Video conferencing

Corrective Services insists that the current video lawyer interviews (via the isdn connection) such as those currently installed at legal aid and the public defenders, are visually monitored by corrective services by watching the prisoner in the room ('so they don't destroy the equipment'), NOT at the lawyers end. They also insist there is no audio monitoring, but there is a wealth of anecdotal evidence supporting a healthy cynicism of the security of these conferences and the undertakings as they stand.

The Department of Corrective Services are in the process of drafting protocols for the use of AVL conferencing - these will not be resolved before the introduction of the practice note. They are expected to provide greater comfort regarding the security issues described above.

3. Expansion of AVL conferencing

The expansion promises to set up a mechanism to permit any legal practitioner with a 'broadband connection' and a 'web cam' to access the AVL interview suites, once a series of online documents are completed and security aspects considered. It is anticipated that further information regarding the scheme will be available in weeks to come.

Currently the cost of the service provider (to provide the link between the broadband connection and the isdn connection) is prohibitively expensive, but if this is resolved the security aspects will then be investigated.

**Legal Aid**

Legal Aid NSW has identified the practice measures annexed and it would appear that in summary, the practitioner who originally "picks up the matter" and identifies a plea of not guilty from the "feeder" court should apply for a grant of aid and liaise with the "hub" court duty solicitor, acting as agent for the solicitor with the grant of aid. Pleas of guilty will be dealt with by the relevant duty solicitor on the day.

If a plea is indicated at the "hub" court and the matter can be finalised by AVL then the hub court duty solicitor will retain the matter otherwise pleas of not guilty and sentences will be adjourned back to the "feeder court" to be finalised. (Details annexed)

What is immediately apparent is that there will be a significant challenge presented by maintaining the confidence of clients in the lack of continuity of representation between "hub" and "feeder" court duty lists. In the majority of these appearances instructions will be obtained by telephone unless AVL conferencing can be accessed.

It was initially thought that prisoners would remain in the regional area at a centre accessible to the country practitioner however it will be more likely that to access a goal 'video suite' the prisoner is most likely to be taken to a major remand centre many hundreds of kilometres away from the area where the offence originated and their 'feeder court' (or for that matter the 'hub' court) duty solicitor practices.

The funding of the Solicitor/solicitor instructions to act as agent or discuss detail of transferred matters, and the funding for additional 'face to face' conferencing that will be essential to maintain confidence does not appear to be resolved. Legal Aid NSW has indicated that existing fee scales and approval processes will continue under this initiative. Face to face conferencing is still seen as essential particularly when documents, photographs, audio and video evidence are the subject of instructions. Funding for additional conferences for the

intellectually disadvantaged and communicating with persons unable to use, or distrusting of technology will have to be sought on a 'case by case' basis from legal aid.

### ***Time management for practitioners***

The Court appearances from the various Custodial AVL suites will be scheduled at each court, access to these schedules has been sought to minimise waiting time for practitioners, however the courts administration will not meet this request at this time. It seems they are unsure how the greater demand for the AVL suites from the goals by the more numerous courts will operate. The court administration expects that practitioners will "just have to be there", or magistrates will deal with prisoners unrepresented.

### ***Prisoners interests***

Whilst AVL appearances have been in operation now for some time there has been no evaluation of the current scheme particularly from the perspective of prisoners and confidence in the impact of technology on Justice generally. It appears the changes are motivated by cost and security initiatives. The observation and purported rationale for the expansion 'that prisoners prefer not to travel' or that it is not in their interests to come to court, appear to be secondary considerations, in view of the speed and process of the implementation.

The success of current AVL practices has been based upon a solicitor client relationship being established in some form by face to face contact and confidence in AVL appearances is built upon that relationship.

Whilst there is no doubt there are significant benefits to these appearances in some of the more 'mechanical' appearances great concern has been expressed by the Bar Association, Legal Aid NSW, the Law Society and Aboriginal Legal Aid services that the blanket use of the technology in the new practice directive has the potential to alienate the accused from the court, inhibit the relationships between legal practitioner and client, and generally reduce the quality of service to clients.

It should be further noted that it will be more difficult to achieve the aims of the Criminal Case Conferencing initiative with more limited access to clients in custody.

### ***Country practitioners***

The issues highlighted above with continuity of representation between the "hub" and "feeder" court Duty schemes will particularly impact in country areas where the distances between "hub" and "feeder" courts are more significant and distance to goals more extreme. There is great concern that funding issues for travel are likely to be so significant for Legal Aid NSW, that very limited face to face contact to obtain instructions will be affordable.

The Bar Association will participate and monitor the working party reporting on the Chief Magistrate's directives and undertakes to further pursue these issues. We will also notifying the court of problems that its members are experiencing in the operation of the practice note. We invite comment from members.

*Sue Kluss*

**PRACTICE NOTE 5 of 2007**

**Procedures to be adopted for persons in custody at Courts/Circuits with NO Audio Visual Link facilities**

This Practice Note relates to accused persons who are in custody - refused bail or unable to meet bail set on first appearance before a magistrate and subsequent appearances at Court pending final hearing or sentence.

This Practice Note applies in all Children's Courts where the accused person is a child detainee unless the Court otherwise directs<sup>1</sup>.

This Practice Note does not apply if the original court is satisfied that it is in the interests of justice for the accused to appear personally before the court.<sup>2</sup>

The aim of the Practice Note is to ameliorate the necessity of persons in custody being taken long distances to and from court for brief interlocutory appearances before the court.

The procedures outlined are also intended to ensure the utilisation of Audio Visual Link (AVL) technology is conducted in the most efficient manner.

This Practice Note will take effect on and from 3 September, 2007.

**1. Courts without AVL Facilities**

Presiding magistrates at Local Courts (original courts), either on the same circuit or on circuits surrounding courts with AVL facilities, will adjourn all matters (other than matters for hearing or sentence) where accused persons are in custody, to the nearest or appropriate allocated Court with AVL facilities.

**2. Local Courts with AVL Facilities**

2.1 Presiding Magistrates at Local Courts with AVL facilities will manage all matters involving persons in custody from surrounding courts including:

- ? Hearing of bail applications
- ? Making of brief orders
- ? Making of further brief orders
- ? Listing matters for hearing or sentence at the original Court
- ? Adjournments pending the resolution of representations

2.2 When a matter from a surrounding Court is ready to be listed for hearing or sentence, it will be necessary for the parties through the registrar at the Court with the AVL facility to ascertain a suitable date for the adjournment of the matter to the original Court for hearing or sentence.

2.3 This Practice Note does not affect arrangements currently in place for Centralised Committals nor the courts at which committal proceedings are dealt with.

G.L. Henson  
CHIEF MAGISTRATE

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<sup>1</sup> Section 5BBA(1)(3) Evidence (Audio and Audio Visual Links) Act, 1998 No 105

<sup>2</sup> Section 5BA (4) Evidence (Audio and Audio Visual Links) Act 1998 No 105

**Annexure to Local Court NSW Practice Note 5 of 2007**

<b>Regional Local Courts with AVL Facilities</b>		<b>Metropolitan Courts with AVL Facilities</b>	
<b>AVL Sites</b>	<b>Surrounding Circuits</b>	<b>AVL Sites</b>	<b>Surrounding Courts</b>
Albury		Bankstown	Fairfield Sutherland
Bathurst	Lithgow	Blacktown	Windsor
Armidale		Burwood	
Bourke		Central	Newtown Balmain North Sydney Manly Waverley
Broken Hill		Liverpool	
Campbelltown	Camden	Mount Druitt	
Coffs Harbour		Parramatta	Hornsby Parramatta Ryde Katoomba
Dubbo	Parkes Narromine Walgett	Penrith	
Gosford		Sutherland (Aug 2007)	Kogarah
Goulburn	Queanbeyan MossVale	<b>NEW INSTALLATIONS</b>	
Grafton	Ballina	<b>Surrounding Courts/Circuits</b>	
Griffith		<b>Nowra (Oct 2007)</b>	<b>Bateman's Bay</b>
Lismore	Tweed Heads	<b>Wyong (Sep 2007)</b>	Toronto
Moree		<b>Tweed Heads (This Financial year)</b>	
Newcastle	Maitland Raymond Terrace Toronto ( <i>until Wyong installed</i> )	<b>Bateman's Bay (This Financial year)</b>	
Orange		<b>Maitland (This Financial year)</b>	
Port Macquarie	Taree	<b>Ballina (This Financial year)</b>	
Tamworth	Gunnedah	Fairfield	
Wagga Wagga	Cootamundra	Cootamundra	
Walgett		Moss Vale	
Wentworth		Katoomba	
Wollongong	<b>Nowra (Until Installation)</b> <b>Bateman's Bay</b>	Raymond Terrace	

Woy Woy	Wyong	Toronto
		Hornsby
		Taree
		Camden
		Queanbeyan

## **1. Plea Entered At Feeder Court**

Where a Duty Solicitor appears for a client in custody at a feeder court and the matter cannot be finalised on the first appearance or on the next return date either by way of sentence or hearing, the Court will adjourn the matter to a Hub Court for management of the matter until it can be finalised at either the Hub Court as a sentence matter with the consent of the client and the court; or by listing for sentence or hearing back at the Feeder Court.

### **A. Plea of Guilty**

1. The rostered duty solicitor at the Feeder Court should attempt to finalise the plea on the first appearance or satisfy the court that the plea can be finalised on the next return date.
2. If the matter does need to be adjourned for mention, it will be adjourned to the Hub Court to be dealt with by AVL unless the Court is satisfied that it is in the interests of justice for the accused to appear personally before the Court.
3. If adjourned to a Hub Court the rostered duty solicitor at the Hub Court (either private practitioner or legal aid solicitor in those locations where the court is serviced by Legal Aid NSW) will take instructions from the client in custody via telephone prior to commencement of the court sittings and either:
  - i. confirm and finalise the plea using AVL if the client and the court consents, or
  - ii. if consent is not given, adjourn the matter to the Feeder Court where the plea will be finalised by the duty solicitor rostered at the Feeder Court on the return date.

### **B. Plea of Not Guilty**

If the rostered duty solicitor at the Feeder Court is able to enter a plea of not guilty on the first appearance but the matter needs to be adjourned to a Hub Court for case management:

1. The rostered duty solicitor at the Feeder Court should:
  - i. ask for brief orders to be made on the first appearance
  - ii. apply for a legal aid case grant and retain management of the matter
  - iii. be served with the brief of evidence
  - iv. obtain instructions from the client (by AVL, telephone, webcam, gaol visit, etc)
  - v. instruct as agent the duty solicitors (either private or legal aid as appropriate) rostered at the Hub Court for each reply/mention date
  - vi. where using a Legal Aid solicitor as agent, send a copy of the duty application to the relevant Legal Aid office
2. When the matter is ready to be given a hearing date, the rostered duty solicitor or Legal Aid solicitor at the Hub Court will adjourn the matter to the Feeder Court for hearing on a date suitable to the solicitor with the case grant.

## **2. Plea entered at Hub Court**

Where **no** plea is entered/indicated at the Feeder Court, the matter will be adjourned to the Hub Court to be managed by AVL unless the Court is satisfied that it is in the interests of justice for the accused to appear personally before the Court.

### **A. Plea of Guilty**

The rostered duty solicitor (private or Legal Aid solicitor at locations serviced by a Legal Aid office) at the Hub Court will take instructions from the client in custody via telephone prior to commencement of the court sittings and will either:

- i. enter and finalise the plea using AVL if the client and court consents, or
- ii. if consent is not given, adjourn the matter for sentence to the Feeder Court where the plea will be finalised by the duty solicitor rostered at the Feeder Court on the return date.

### **B. Plea of Not Guilty**

1. The rostered duty solicitor at the Hub Court who enters the plea of not guilty should:
  - i. ask for brief orders to be made
  - ii. advise the Grants Division that a plea of not guilty has been entered/indicated and send the Grants Division a legal di application ( a copy of the duty application will be accepted).
2. The Grants Division will allocate a case grant to a solicitor at the Feeder Court.
3. The solicitor with the case grant at the Feeder Court should:
  - iii. obtain a copy of the brief of evidence
  - iv. obtain instructions from the client (by AVL, webcam etc)
  - v. instruct as agent the duty solicitors (either private or legal aid as appropriate) rostered at the Hub Court for each reply/mention date

4. At the Hub Court the rostered duty solicitor will adjourn the matter to the Feeder Court for hearing on a date suitable to the solicitor with the case grant.