

A BILL

entitled

EVIDENCE (AUDIO VISUAL LINK) ACT 2018

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WHEREAS it is necessary to facilitate the taking of evidence by the use of an audio visual link in court proceedings; to make a consequential amendment to the Evidence Act 1905 and to make a related amendment to section 70 of the Criminal Jurisdiction and Procedure Act 2015;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act may be cited as the Evidence (Audio Visual Link) Act 2018.

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Interpretation

2 In this Act—

“audio visual link” means facilities that enable audio visual communication whereby a party or a witness, while not present in the courtroom or other place where the proceeding is being held, is able to be seen and heard—

- (a) by a judicial officer and the jury (if there is one);
- (b) by a member of a special court;
- (c) by legal representatives acting in the proceeding;
- (d) by any person appointed by a judicial officer to assist the party or the witness; or
- (e) by parties to the proceedings;

“court” means the Court of Appeal, the Supreme Court or the Magistrates’ Court;

“judicial officer” means—

- (a) the Chief Justice;
- (b) a Puisne Judge;
- (c) an Assistant Justice;
- (d) a magistrate;
- (e) a Registrar of the Court of Appeal or the Supreme Court;

“party” means a party to a proceeding;

“proceeding” means any civil proceeding or criminal proceeding;

“witness” means a person who is obliged to give or has agreed to give a statement or evidence or both in any proceeding.

Application of the Act

3 This Act applies to any proceeding in or before a court in Bermuda.

Audio visual link

4 (1) A party or a witness may, if a judicial officer so directs, give evidence by the use of an audio visual link in any proceeding.

(2) A direction under subsection (1) may be given—

- (a) on an application by a party or a witness; or
- (b) of the judicial officer’s own initiative.

(3) The judicial officer shall direct that the evidence by audio visual link be given by the party or the witness from an appropriate place outside of the courtroom, either in Bermuda or elsewhere.

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(4) An application for a direction under subsection (2)(a) shall be made to the judicial officer as soon as practicable before the proceeding, or at any later time permitted by the judicial officer.

(5) A direction under subsection (1) may be made on the grounds provided in section 68C(3) of the Evidence Act 1905.

(6) A direction shall not be given under this section, unless the judicial officer is satisfied—

- (a) that it is in the interest of the efficient and effective administration of justice for the person concerned to give evidence in the proceeding by the use of an audio visual link; and
- (b) that an appropriate place is available for receiving evidence by the use of an audio visual link.

(7) In giving a direction under subsection (1), the judicial officer shall have regard to the nature of the proceeding and the need to ensure—

- (a) that there is a fair trial;
- (b) the comfort or views of the party or the witness, including the need to minimise stress on a party or a witness;
- (c) any other factor that is relevant to the just determination of the proceeding.

General criteria; use of audio visual links

5 (1) When giving a direction to allow the use of audio visual link for the appearance of a party or a witness in any proceeding, a judicial officer shall consider—

- (a) the nature and alleged circumstances to which the proceeding relates;
- (b) the age or maturity of the party or the witness;
- (c) any physical, intellectual, psychological or psychiatric impairment of the party or the witness;
- (d) any trauma suffered by the party or the witness;
- (e) the party's or witness's fear of intimidation;
- (f) the linguistic or cultural background or religious beliefs of the party or the witness;
- (g) the nature of the evidence that the party or the witness is expected to give;
- (h) the relationship of the party or the witness to any party to the proceeding;
- (i) the absence or likely absence of the party or witness from Bermuda;
- (j) the availability, quality and security of the technology to be used;
- (k) the potential impact of the use of technology on the effective maintenance of the rights of other parties to the proceeding, including—

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- (i) the ability to assess the credibility of the parties or the witnesses and the reliability of evidence presented to the court; and
- (ii) the level of contact with other parties or witnesses;
- (l) any other relevant matters, including the effective maintenance of the right of a party to a fair hearing.

(2) The availability, quality and security of technology in subsection (1)(i) shall be verified by the Registrar of the Supreme Court on the advice of the appropriate person qualified to advise on such quality and security.

Additional criteria; audio visual link in criminal proceedings

6 In addition to the criteria in section 5, when giving a direction to allow the use of an audio visual link in a criminal proceeding, a judicial officer shall consider—

- (a) the potential impact of the use of technology—
 - (i) on the effective maintenance of the right of the defendant to a fair trial; and
 - (ii) on his rights associated with the hearing;
- (b) the ability of the defendant—
 - (i) to comprehend the proceedings;
 - (ii) to participate effectively in the conduct of his defence;
 - (iii) to consult and instruct his counsel privately;
 - (iv) to access relevant evidence;
 - (v) to examine the witnesses for the prosecution;
- (c) the level of contact the defendant has with other witnesses; and
- (d) any adverse inference that may arise through the defendant or any witness appearing by means of an audio visual link, and whether that adverse inference may be mitigated.

Judicial officer may vary or revoke a direction

7 (1) A judicial officer may vary or revoke a direction given under section 4(1) if the criteria in section 5 or 6 no longer apply.

(2) A direction may be varied and revoked under subsection (1)—

- (a) on application by a party; or
- (b) of the judicial officer's own initiative.

(3) An application under subsection (2)(a) may only be made if there has been a material change in circumstances since the direction was given.

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Direction to jury

8 In a proceeding tried with a jury, the judicial officer may direct the jury as he thinks is necessary to ensure that the jury gives the same weight to evidence as if it had been given by the witness in the courtroom or other place where the proceeding is being held.

Determining place of hearing

9 The place of hearing of any proceeding in which one or more of the parties or witnesses appear by the use of audio visual link is the same as if none of the parties or witnesses in that proceeding were to appear by the use of audio visual link and is the place that the judicial officer determines as appropriate in the circumstances.

Attendance at hearing

10 A party or a witness, whether inside or outside Bermuda, who appears at a proceeding, or part of a proceeding, by the use of an audio visual link is regarded as being present at the place of hearing at the proceeding, or that part of the proceeding, for the duration of that use.

Failure of audio visual link

11 Where an audio visual link being used in accordance with this Act fails during the proceeding, the judicial officer may adjourn the proceeding or make such other orders as are appropriate as if the party or the witness giving the statement or evidence by the use of an audio visual link were present at the proceeding.

Documents and other exhibits when using audio visual link

12 A document may be put to or tendered by a party or a witness appearing at a proceeding by the use of an audio visual link, or another exhibit may be shown to or tendered by that party or witness—

- (a) by transmitting the document or other exhibit by secure electronic means;
- (b) by the use of audio visual link;
- (c) by any other means that the judicial officer thinks fit.

Relationship to other enactments

13 (1) The appearance of a party or a witness at a proceeding by the use of an audio visual link authorized by this Act fulfils the corresponding legal requirements in relation to his appearance in person at the proceeding under every enactment and rule of court, unless that other enactment or rule of court expressly provides otherwise.

(2) If an enactment or rule of court provides for the appearance of a party or a witness at a proceeding by the use of an audio visual link, then this Act shall be read subject to that enactment or rule of court.

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Judicial officer's powers

14 For the avoidance of doubt, a judicial officer presiding in a proceeding in which an audio visual link is used has the powers that he would have if the party or the witness appeared in person.

Rules

15 (1) The Chief Justice may, following consultation with the Senior Magistrate, the Director of Public Prosecutions, the Bar Council and such other persons as the Chief Justice may consider appropriate,—

- (a) make rules under section 540 of the Criminal Code Act 1907 governing the practice and procedure to be followed in the criminal jurisdiction (original, appellate or otherwise) of the Magistrates' Court and Supreme Court;
- (b) make rules under section 62 of the Supreme Court Act 1905 governing the practice and procedure to be followed in the civil jurisdiction (original, appellate or otherwise) of the Supreme Court.

with respect to the use of an audio visual link.

(2) The Senior Magistrate may, following the approval of the Chief Justice, make rules under section 21 of the Magistrates Act 1948 governing the practice and procedure to be followed in the civil jurisdiction of the Magistrates' Court with respect to the use of an audio visual link.

(3) The rules in subsections (1) and (2) may—

- (a) prescribe the procedure to be followed in respect of children and vulnerable and intimidated witnesses to appear by the use of an audio visual link;
- (b) prescribe the procedure to be followed, the type of equipment to be used and the arrangements to be made for a person to appear by the use of an audio visual link;
- (c) prescribe a method or technology of audio visual link which is suitable for use as an audio visual link under this Act;
- (d) prescribe the forms for the purposes of this section;
- (e) provide for any other matters contemplated by this section as necessary for its administration or necessary to give it effect.

Consequential amendment

16 The Evidence Act 1905 is amended—

- (a) in section 2, by inserting the following definition in its alphabetical place—

“give evidence” means to give evidence in a proceeding—

- (a) in the ordinary way, as described in section 68B;

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- (b) in an alternative way, as provided for in section 68E; or
 - (c) in any other way provided for under this Act or any other enactment;”;
- (b) by inserting the following after section 68—

“PART IVA WAYS OF GIVING EVIDENCE IN PROCEEDINGS

Interpretation of Part IVA

68A In this Part—

- (a) “court” means the Court of Appeal, the Supreme Court or the Magistrates’ Court;
- (b) “judicial officer” means—
 - (i) the Chief Justice;
 - (ii) a Puisne Judge;
 - (iii) an Assistant Justice;
 - (iv) a magistrate;
 - (v) a Registrar of the Court of Appeal or the Supreme Court; or
- (c) “party” means a party to a proceeding;
- (d) “witness” means a person who is obliged to give or has agreed to give a statement or evidence or both in any proceeding.

Ordinary way of giving evidence

68B (1) The ordinary way for a party or a witness to give evidence is—

- (a) in a criminal or civil proceeding, orally in a courtroom or place where the proceeding is being held, in the presence of—
 - (i) the judicial officer or, if there is a jury, the judicial officer and jury;
 - (ii) the parties to the proceedings and their counsel;
 - (iii) any member of the public who wants to be present, unless excluded by order of the judicial officer;
- (b) in a criminal proceeding, in an affidavit filed in the court or by reading a statement in a courtroom, if both the prosecution and the defendant consent to the giving of evidence in this form;
- (c) in a civil proceeding, in an affidavit filed in the court by reading a written statement in a courtroom or—

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- (i) if the rules of court permit or require the giving of evidence in this form; or
 - (ii) if both parties consent to the giving of evidence in this form.
- (2) An affidavit or written statement referred to in subsection (1)(b) or (c) may be given in evidence only—
- (a) if it is the affidavit or personal statement of the deponent or maker; and
 - (b) if it does not contain a statement that is otherwise inadmissible under this Act.

Directions about alternative ways of giving evidence

68C (1) In any proceeding, the judicial officer may, either on the application of a party or a witness, or on the judicial officer's own initiative, direct that a party or a witness is to give evidence-in-chief and be cross-examined in an alternative way as provided in section 68E.

(2) An application for a direction under subsection (1) must be made to the judicial officer as soon as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a party or witness is to give evidence in an alternative way may be made on the grounds of—

- (a) the nature and alleged circumstances to which the proceeding relates;
- (b) the age or maturity of the party or the witness;
- (c) any physical, intellectual, psychological or psychiatric impairment of the party or the witness;
- (d) any trauma suffered by the party or the witness;
- (e) the party's or witness's fear of intimidation;
- (f) the linguistic or cultural background or religious beliefs of the party or the witness;
- (g) the nature of the evidence that the party or the witness is expected to give;
- (h) the relationship of the party or the witness to any party to the proceeding;
- (i) the absence or likely absence of the party or witness from Bermuda;
- (j) the availability, quality and security of the technology to be used;
- (k) any other relevant matters, including the effective maintenance of the right of a party to a fair hearing.

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(4) The availability, quality and security of technology in subsection (3)(i) shall be verified by the Registrar of the Supreme Court on the advice of the appropriate person qualified to advise on such quality and security.

(5) In giving directions under subsection (1), the judicial officer shall have regard to the nature of the proceeding and the need to ensure—

- (a) that there is a fair trial;
- (b) the comfort or views of the party or the witness and—
 - (i) the need to minimise the stress on the party or the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
- (c) any other factor that is relevant to the just determination of the proceeding.

Chambers hearing before directions for alternative ways of giving evidence

68D If an application for directions is made under section 68C, before giving any directions about the way in which a party or a witness is to give evidence-in-chief and be cross-examined, the judicial officer—

- (a) shall give each party an opportunity to be heard in Chambers; and
- (b) may call for and receive a report from any person considered by the judicial officer to be qualified to advise on the effect on the party or the witness of giving evidence in the alternative way.

Alternative ways of giving evidence

68E (1) A judicial officer may direct, under section 68C, that the evidence of a party or a witness is to be given in an alternative way so that—

- (a) the party or the witness gives evidence—
 - (i) while in the courtroom but is unable to see or be seen by the defendant or witness; or
 - (ii) from an appropriate place outside the courtroom, either in Bermuda or elsewhere;
- (b) any appropriate practical and technical means may be used to enable the judicial officer, the jury (if any) and any counsel to see and hear the party or the witness giving evidence, in accordance with any rules made under section 75;
- (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the judicial officer directs otherwise.

(2) The judicial officer may admit evidence that is given substantially in accordance with the terms of a direction under section 68C, despite a failure to observe strictly all of those terms.”.

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Related amendment to Criminal Jurisdiction and Procedure Act 2015

17 The Criminal Jurisdiction and Procedure Act 2015 is amended in section 70(1) by deleting "shall" and substituting "may".

Transitional

18 Where any proceeding is commenced in a cause or matter before the day this Act comes into operation, and is continued on or after that day, the presiding judicial officer may give directions governing the use of an audio visual link for the continued proceeding.

Commencement

19 This Act comes into operation on such day as the Minister responsible for legal affairs may appoint by notice published in the Gazette.

EVIDENCE (AUDIO VISUAL LINK) BILL 2017

EXPLANATORY MEMORANDUM

This Bill seeks to facilitate the taking of evidence by the use of an audio visual link in court proceedings, to make a consequential amendment to the Evidence Act 1905 and to make a related amendment section 70 of the Criminal Jurisdiction and Procedure Act 2015.

Clause 1 provides the title of the Bill.

Clause 2 provides for the interpretation of terms used in the Bill.

Clause 3 provides the application of the Act.

Clause 4 sets out the process for the direction of a party or a witness to give evidence by audio visual link.

Clause 5 allows for the use of audio visual link in a proceeding on the application of any party or on the judicial officer's own motion where the judicial officer considers the criteria.

Clause 6 sets out criteria, in addition to the criteria in clause 5, that a judicial officer must consider in criminal proceedings.

Clause 7 provides that a judicial officer may rescind a direction to allow the use of an audio visual link in any proceeding.

Clause 8 provides the direction a judicial officer may give during a proceeding tried with a jury.

Clause 9 provides the place of hearing of a proceeding.

Clause 10 states that a party or a witness, whether inside or outside of Bermuda, who appears by the use of an audio visual link is regarded as being present at the place of hearing.

Clause 11 sets out what a judicial officer is able to do should there be a failure when using an audio visual link.

Clause 12 provides the ways a document can be put to or tendered to the court by a witness giving evidence by audio visual link.

Clause 13 provides the relationship to other enactments.

Clause 14 provides for the powers of a judicial officer presiding in a proceeding which uses an audio visual link.

Clause 15 provides that the Chief Justice, after consultation with the Senior Magistrate, the Director of Public Prosecutions, the Bar Council and such other persons as the Chief Justice so chooses, may make rules for the practice and procedure to be followed in both criminal and civil proceedings with respect to using an audio visual link.

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Clause 16 provides the consequential amendment to the Evidence Act 1905 by inserting Part IVA (ways of giving evidence).

Clause 17 provides a related amendment to section 70 of the Criminal Jurisdiction and Procedure Act 2015 to make the video conference appearance by a person while on remand discretionary rather than mandatory.

Clause 18 is the transitional provision.

Clause 19 provides the commencement of the Bill.