# Accused in custody to appear in Magistrates’ Court by video link

## Background to the changes

Over recent years there has been an increase in the number of accused people being held on remand for criminal proceedings, resulting in more people having to be transported to court for their hearings. This increased demand for prisoner transport has led to situations where accused have not been brought to court and their cases have been unable to proceed.

## New legislative requirements

The *Justice Legislation (Evidence and other Acts) Amendment Act 2016* (Vic) (‘the amending Act’) was passed by Parliament on 13 June 2016. It amends Division 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958* (‘the Act’) which relate to use of audio visual links. These amendments commence on 12 September 2016.

A new section 42JA of the Act establishes a presumption that an adult accused being held in custody who is required to appear before the Magistrates’ court is required to appear by audio visual link (AVL).

The prosecution or defence can also ask the court to make a direction overriding the presumption about the accused’s appearance, or the court can do so without the parties applying for a direction.

## Presumption that accused in custody appear by audio video link

Under s. 42JA(1) a person who is in custody is required to appear in the Magistrates’ Court by AVL for all hearings unless the matter is listed for a hearing outlined in s. 42JA(2) and (3) or the Magistrate makes a direction under s. 42L.

## Exceptions to appearance by audio visual link

### Proceedings specified under s. 42JA(2)

Section 42JA(2) of the Act specifies that an accused will be brought to court for:

* an enquiry into fitness to plead
* a contested summary hearing
* a committal hearing
* the accused’s first court appearance after being remanded and they do not consent to appearing by AVL (s. 42JA(3))

unless the court makes a direction under s. 42M(1) of the Act that the accused appear at the hearing by AVL.

### Court direction under s. 42L

The court can direct under s. 42L that an accused be brought to court if:

* their physical appearance is required in the interests of justice, or
* it is not reasonably practical for the accused to appear by AVL.

When deciding if the interests of justice require the accused to be physically present, the court must consider if the accused is physically required to be present for them to understand the proceedings or communicate with and give instructions to their lawyer, (see s. 42L(1A) of the Act). For example, an accused who has an acquired brain injury or cognitive impairment might find it difficult to engage with their lawyer or follow the proceedings if they are not in court.

### Applying for a direction for physical appearance

Under s. 42L the defence or prosecution can apply for a direction that the accused be brought to court.

[Practice Direction 11 of 2016](http://www.magistratescourt.vic.gov.au/practice-direction-11-2016) commences on 12 September 2016 and sets out the procedure for applying for a direction that an accused person in custody appear physically before the court.

## New Practice Direction 11 of 2016

The application must be made using new ‘[Form 45 – Notice of application for direction that accused appear physically before court](http://www.magistratescourt.vic.gov.au/forms/form-45-application-physical-appearance)’. The application must be filed at the venue where the proceeding is listed.

The application can be made up to three days before the hearing, or later if there is a good reason, and must be served on the other party. The court will decide the application based on the written submissions filed by the parties, without an oral hearing. Even if the parties do not apply, the court can direct an accused to be brought to court.

If the application is granted the Court will arrange a gaol order to compel the physical appearance of the accused before the Court.

Where the accused is on summons but is being held in custody on another matter, the parties must notify the court that the accused is in custody so that an AVL can be arranged. An application under s.42L must be made if the accused’s physical attendance is required.

## Applying for a direction for appearance by audio visual link

Under s. 42M the defence or prosecution can apply for a direction that the accused appear via AVL. The application must be made using [‘Form 46 - Application for appearance by audio-visual link’](http://www.magistratescourt.vic.gov.au/forms/form-46-application-appearance-audio-visual-link).

The application can be made up to 14 days before the hearing. The application must set out the reasons for seeking the direction. The application must be filed at the venue where the proceeding is listed and must be served on the other party. The application will be heard and determined in open court.

If the parties do not agree that the accused should appear by audio visual link, the court will only make the direction if there are exceptional circumstances. The court can also make a direction where the parties have not applied, if there are exceptional circumstances for the AVL.

## More information

The Magistrates’ Court website has information to assist practitioners with the new procedures: <http://www.magistratescourt.vic.gov.au/jurisdictions/practice-and-procedure/avl-information>.