

Appearances by audio visual link and audio link during COVID-19

The below table provides an overview of audio visual link (AVL) and audio link use for parties appearing before Victorian courts while Part IX of the *Evidence (Miscellaneous Provisions) Act 1958 (EMPA)* is in operation.¹ This table is not intended to provide an exhaustive list of every requirement for AVL and audio link appearances and should be read in conjunction with the relevant legislation and court rules.²

	Appearance by AVL (physical appearance not required)	When a court can direct physical appearance instead of AVL	Physical appearance required	When a court can direct AVL instead of physical appearance	When a court can direct appearance by audio link
An adult accused: <ul style="list-style-type: none"> in custody appearing before the Magistrates' Court 	<p>Unless a court directs otherwise, an adult accused in custody must appear by AVL in the Magistrates' Court.³</p> <p>This includes proceedings related to:</p> <ul style="list-style-type: none"> a sentencing or plea hearing⁴ a hearing of the charge if the accused is pleading not guilty⁵ a committal hearing⁶ a first appearance before the Magistrates' Court.⁷ 	<p>On its own motion or on a parties' application,⁸ a court may direct an accused to appear physically when physical appearance would not otherwise be required if satisfied that:</p> <ul style="list-style-type: none"> physical appearance is required in the interests of justice; or it is not reasonably practicable for the accused to appear before the court by AVL.⁹ <p>When considering making this direction, the court must consider:</p> <ul style="list-style-type: none"> the impact of requiring physical appearance by the accused on the court's case management generally; and any risk to public health by requiring a physical appearance by the accused.¹⁰ <p>In determining whether the making of a direction is in the interests of justice, the court must consider whether the direction is required to enable the accused:</p> <ul style="list-style-type: none"> to comprehend the proceedings; or to communicate with the accused's legal representative and give instructions, or express wishes, to that representative.¹¹ 	<p>None in practice.¹²</p>	<p>A court may direct that an accused appear by AVL when physical appearance would otherwise be required if satisfied AVL is:</p> <ul style="list-style-type: none"> consistent with the interests of justice; and reasonably practicable in the circumstances.¹³ <p>A court may also make this direction on its own motion if satisfied that 'exceptional circumstances' exist.¹⁴ 'Exceptional circumstances' includes a state of emergency declared under section 198 of the <i>Public Health and Wellbeing Act 2008</i> or a state of disaster declared under section 23 of the <i>Emergency Management Act 1986</i>, in an area where an accused is required to appear before a court or required to transit through in order to appear before a court.¹⁵</p> <p>A victim may address a court to oppose this direction in person or, if directed, by AVL or audio link.¹⁶</p>	<p>A court may direct that an accused who is required or directed to appear by AVL in the Magistrates' Court¹⁷ may appear by audio link if it is satisfied that:</p> <ul style="list-style-type: none"> it is not reasonably practicable to use an AVL in the circumstances; and the appearance of the accused by audio link is consistent with the interests of justice; and that the technical requirements specified¹⁸ are met or can be reasonably met.¹⁹ <p>In determining whether an appearance of the accused by audio link is consistent with the interests of justice, the court must consider:</p> <ul style="list-style-type: none"> the effect of such an appearance on the accused's ability to comprehend proceedings; and whether the accused is self-represented; and whether the accused consents to appearing by audio link in the circumstances.²⁰

¹ Part IX was introduced by the *COVID 19 Omnibus (Emergency Measures) Act 2020* on 25 April 2020 and will sunset six months after commencement. When Part IX is repealed, AVL and audio link use will continue to operate under Part IIA of the EMPA.

² Note that section 600P of the *Children, Youth and Families Act 2005* clarifies that Parts IIA and IX of the EMPA also apply where a person is required to be brought before, produced before, or present before a court under the *Children, Youth and Families Act 2005*, or a similar expression in that Act is used.

³ EMPA s 42JA(1).

⁴ EMPA s 174(1).

⁵ EMPA s 174(2).

⁶ EMPA s 174(2).

⁷ EMPA s 174 (3) and (4).

⁸ EMPA 42L(7).

⁹ EMPA s 42L(1); EMPA s 176.

¹⁰ EMPA s 177.

¹¹ EMPA s 42L(1A).

¹² Section 42JA(2) of the EMPA provides that an accused must attend physically on an inquiry as to their fitness to plead, but the Magistrates' Court does not conduct these hearings.

¹³ EMPA s 42M(1).

¹⁴ EMPA s 42M(7).

¹⁵ EMPA s 169.

¹⁶ EMPA s 178.

¹⁷ EMPA s 181(1), s 181(2), s 181(4).

¹⁸ EMPA s 182. The specified technical requirements include that the court point and the remote point are equipped with facilities that enable all appropriate persons at the court point to hear the accused and all appropriate persons at the remote point to hear all appropriate persons at the court point; the remote point and the court point are equipped with facilities that enable private communication to take place between the accused and a legal practitioner; any requirements prescribed by the rules of the court; and any requirements imposed by the presiding judge or magistrate.

¹⁹ EMPA s 181(5).

²⁰ EMPA s 181(6).

	Appearance by AVL (physical appearance not required)	When a court can direct physical appearance instead of AVL	Physical appearance required	When a court can direct AVL instead of physical appearance	When a court can direct appearance by audio link
An adult accused <ul style="list-style-type: none"> • in custody • appearing before a court other than the Magistrates' Court 	<p>An accused is not required to appear physically before the court but may appear before it by AVL:</p> <ul style="list-style-type: none"> • in a bail proceeding²¹ • having been previously remanded in custody, in a subsequent proceeding with respect to his or her remand in custody²² • on an application for the adjournment of a proceeding²³ • on the trial²⁴ (including the arraignment of the accused)²⁵ • on a sentencing hearing²⁶ • on an appeal arising out of that trial or hearing.²⁷ 	<p>On its own motion²⁸ or on a parties' application, a court may direct that an accused appear physically before it in a proceeding in which physical appearance would not otherwise be required if it is satisfied that:</p> <ul style="list-style-type: none"> • a physical appearance is required in the interests of justice; or • it is not reasonably practicable for the accused to appear before the court by AVL.²⁹ <p>When considering making this direction, the court must consider:</p> <ul style="list-style-type: none"> • the impact of requiring a physical appearance by the accused on the court's case management generally; and • any risk to public health by requiring a physical appearance by the accused.³⁰ <p>In determining whether the making of a direction is in the interests of justice, the court must consider whether the direction is required to enable the accused:</p> <ul style="list-style-type: none"> • to comprehend the proceedings; or • to communicate with the accused's legal representative and give instructions, or express wishes, to that representative.³¹ 	<p>An adult accused must appear physically on an inquiry into his or her fitness to stand trial, unless the court directs that they may attend by AVL,³² or the court excuses them from attending on another basis.</p>	<p>A court may direct that an accused appear by AVL when physical appearance would otherwise be required if satisfied AVL is:</p> <ul style="list-style-type: none"> • consistent with the interests of justice; and • reasonably practicable in the circumstances.³³ <p>A court may also make this direction on its own motion if satisfied that 'exceptional circumstances' exist.³⁴ 'Exceptional circumstances' includes a state of emergency declared under section 198 of the <i>Public Health and Wellbeing Act 2008</i> or a state of disaster declared under section 23 of the <i>Emergency Management Act 1986</i>, in an area where an accused is required to appear before a court or required to transit through in order to appear before a court.³⁵</p> <p>A victim may address a court to oppose this direction in person or, if directed, by AVL or audio link.³⁶</p>	<p>A court may direct that an accused who is required or directed to appear by AVL before a court other than the Magistrates' Court³⁷ may appear by audio link if it is satisfied that:</p> <ul style="list-style-type: none"> • it is not reasonably practicable to use an AVL in the circumstances; and • the appearance of the accused by audio link is consistent with the interests of justice; and • the technical requirements specified³⁸ are met or can be reasonably met.³⁹ <p>In determining whether an appearance of the accused by audio link is consistent with the interests of justice, the court must consider:</p> <ul style="list-style-type: none"> • the effect of such an appearance on the accused's ability to comprehend proceedings; and • whether the accused is self-represented; and • whether the accused consents to appearing by audio link in the circumstances.⁴⁰

²¹ EMPA s 42K(1)(a).

²² EMPA s 42K(1)(b).

²³ EMPA s 42K(1)(d).

²⁴ EMPA s 175.

²⁵ EMPA s 42K(1)(e).

²⁶ EMPA s 175.

²⁷ EMPA s 175.

²⁸ EMPA s 42L(7).

²⁹ EMPA s 42L(1); EMPA s 176.

³⁰ EMPA s 177.

³¹ EMPA s 42L(1A).

³² EMPA s 42K(2). However, a court may excuse an accused for attending for other reasons.

³³ EMPA s 42M(1).

³⁴ EMPA s 42M(7).

³⁵ EMPA s 169.

³⁶ EMPA s 42M(8) and s 178.

³⁷ EMPA s 181(3).

³⁸ EMPA s 182. The specified technical requirements include that the court point and the remote point are equipped with facilities that enable all appropriate persons at the court point to hear the accused and all appropriate persons at the remote point to hear all appropriate persons at the court point; the remote point and the court point are equipped with facilities that enable private communication to take place between the accused and a legal practitioner; any requirements prescribed by the rules of the court; and any requirements imposed by the presiding judge or magistrate.

³⁹ EMPA s 181(5).

⁴⁰ EMPA s 181(6).

	Appearance by AVL (physical appearance not required)	When a court can direct physical appearance instead of AVL	Physical appearance required	When a court can direct AVL instead of physical appearance	When a court can direct appearance by audio link
An adult accused who is not in custody, appearing before any court, in a proceeding other than those referred to above	<p>On its own motion or on a parties' application, a court may direct that the accused may appear before the court by AVL if it is satisfied that appearance by AVL is in the interests of justice.⁴¹</p> <p>This direction is subject to the rules of the court.⁴²</p>	N/A	N/A	N/A	<p>A court may direct that an accused who is directed to appear by AVL before a court⁴³ may appear by audio link if it is satisfied that:</p> <ul style="list-style-type: none"> it is not reasonably practicable to use an AVL in the circumstances; and the appearance of the accused by audio link is consistent with the interests of justice; and the technical requirements specified⁴⁴ are met or can be reasonably met.⁴⁵ <p>In determining whether an appearance of the accused by audio link is consistent with the interests of justice, the court must consider:</p> <ul style="list-style-type: none"> the effect of such an appearance on the accused's ability to comprehend proceedings; and whether the accused is self-represented; and whether the accused consents to appearing by audio link in the circumstances.⁴⁶
Person other than the accused	<p>On its own motion or on a parties' application, a court may direct that any person other than the accused may appear before the court by AVL or audio link to give evidence or make submissions from any place within or outside Australia.⁴⁷</p> <p>This direction is subject to the rules of the court.⁴⁸</p> <p>The court may make practice directions, statements or notes relating to the exercise by the court of its discretion in relation to making a direction for a person other than the accused to appear by AVL.⁴⁹</p>	N/A	N/A	N/A	<p>On its own motion or on a parties' application, a court may direct that any person other than the accused may appear before the court by AVL or audio link to give evidence or make submissions from any place within or outside Australia.⁵⁰</p> <p>The power to make this direction is subject to the rules of the court.⁵¹</p> <p>The court may make practice directions, statements or notes relating to the exercise by the court of its discretion in relation to making a direction for a person other than the accused to appear by audio link.⁵²</p>

⁴¹ EMPA s 42MA.

⁴² EMPA s 42MA.

⁴³ EMPA s 181(4).

⁴⁴ EMPA s 182. The specified technical requirements include that the court point and the remote point are equipped with facilities that enable all appropriate persons at the court point to hear the accused and all appropriate persons at the remote point to hear all appropriate persons at the court point; the remote point and the court point are equipped with facilities that enable private communication to take place between the accused and a legal practitioner; any requirements prescribed by the rules of the court; and any requirements imposed by the presiding judge or magistrate.

⁴⁵ EMPA s 181(5).

⁴⁶ EMPA s 181(6).

⁴⁷ EMPA s 42E(1).

⁴⁸ An application for an AVL direction must be filed at least 14 days before the person is due to give evidence: EMPA s 42E.

⁴⁹ EMPA s 170.

⁵⁰ EMPA s 42E(1).

⁵¹ An application for an AVL direction must be filed at least 14 days before the person is due to give evidence: EMPA s 42E.

⁵² EMPA s 170.

	Appearance by AVL (physical appearance not required)	When a court can direct physical appearance instead of AVL	Physical appearance required	When a court can direct AVL instead of physical appearance	When a court can direct appearance by audio link
An accused who is <ul style="list-style-type: none"> a child required to appear before the court in a criminal proceeding 	N/A	N/A	A child accused who is required to attend the Children's Court in a criminal proceeding must physically attend the hearing unless the court makes an order to the contrary. ⁵³	<p>A court may direct a child accused to attend by AVL if it is satisfied on the application of a party,⁵⁴ that attendance by AVL is:</p> <ul style="list-style-type: none"> consistent with the interests of justice; and reasonably practicable in the circumstances.⁵⁵ <p>In determining whether the making of a direction is in the interests of justice, the court must take into consideration the effect of the direction on the child's ability:</p> <ul style="list-style-type: none"> to comprehend the proceeding; and to communicate with his or her legal representative and give instructions, or express wishes, to that representative.⁵⁶ <p>A court may also make a direction, on its own motion, that a child accused appear by AVL in a proceeding to which a direction relates, if the court is satisfied that that 'exceptional circumstances' exist.⁵⁷ 'Exceptional circumstances' includes a state of emergency declared under section 198 of the <i>Public Health and Wellbeing Act 2008</i> or a state of disaster declared under section 23 of the <i>Emergency Management Act 1986</i>, in an area where an accused is required to appear before a court or required to transit through in order to appear before a court.⁵⁸</p> <p>A victim may address a court to oppose this direction in person or, if directed, by AVL or audio link.⁵⁹</p> <p>The court may also direct, on its own motion, that a child accused appear by AVL if it is satisfied the direction is:</p> <ul style="list-style-type: none"> necessary for the purposes of the court's case management generally; and consistent with the interests of justice; and reasonably practicable in the circumstances.⁶⁰ 	<p>A court may direct that a child accused who is directed to appear by AVL before a court⁶¹ may appear by audio link if it is satisfied:</p> <ul style="list-style-type: none"> that it is not reasonably practicable to use an AVL in the circumstances; and that the appearance of the accused by audio link is consistent with the interests of justice; and that the technical requirements specified⁶² are met or can be reasonably met.⁶³ <p>In determining whether an appearance of the accused by audio link is consistent with the interests of justice, the court must consider:</p> <ul style="list-style-type: none"> the effect of such an appearance on the accused's ability to comprehend proceedings; and whether the accused is self-represented; and whether the accused consents to appearing by audio link in the circumstances.⁶⁴

⁵³ EMPA s 42O and s 179.

⁵⁴ The accused or the prosecution may apply for an AVL direction by filing a notice in court and stating the grounds for that direction at least 14 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason. A copy of the notice and grounds must also be served on the other party (EMPA s 42P).

⁵⁵ EMPA s 42P(1).

⁵⁶ EMPA s 42P(8).

⁵⁷ EMPA s 42P(7).

⁵⁸ EMPA s 42P(9) and s 169.

⁵⁹ EMPA s 178.

⁶⁰ EMPA s 180.

⁶¹ EMPA s 181(4).

⁶² EMPA s 182. The specified technical requirements include that the court point and the remote point are equipped with facilities that enable all appropriate persons at the court point to hear the accused and all appropriate persons at the remote point to hear all appropriate persons at the court point; the remote point and the court point are equipped with facilities that enable private communication to take place between the accused and a legal practitioner; any requirements prescribed by the rules of the court; and any requirements imposed by the presiding judge or magistrate.

⁶³ EMPA s 181(5).

⁶⁴ EMPA s 181(6).

	Appearance by AVL (physical appearance not required)	When a court can direct physical appearance instead of AVL	Physical appearance required	When a court can direct AVL instead of physical appearance	When a court can direct appearance by audio link
<p>A child who is</p> <ul style="list-style-type: none"> • subject to an application under the Family Division of the <i>Children, Youth and Families Act 2005</i>; or • an appeal under section 328 of the <i>Children, Youth and Families Act 2005</i> 	N/A	N/A	<p>A child who is the subject of a proceeding in an application under the Family Division of the Children's Court under the <i>Children, Youth and Families Act 2005</i> or an appeal under section 328 or 329 of the <i>Children, Youth and Families Act 2005</i> is required to appear physically before a court unless the court makes an order to the contrary.⁶⁵</p>	<p>The court must not direct a child to attend by AVL unless it is satisfied on the application of a party, that attendance by AVL is:</p> <ul style="list-style-type: none"> • in the best interests of the child; and • is consistent with the interests of justice.⁶⁶ <p>In determining whether the making of a direction is in the best interests of the child, the court:</p> <ul style="list-style-type: none"> • may have regard to the appropriateness of the direction in terms of the security and protection of the child; and • may consider whether physical appearance before the court would cause the child to suffer emotional distress to an unacceptable level; and • must consider any wishes expressed by the child.⁶⁷ <p>In determining whether the making of a direction is in the interests of justice, the court must take into consideration the effect of the direction on the child's ability:</p> <ul style="list-style-type: none"> • to comprehend the proceeding; and • to communicate with his or her legal representative and give instructions, or express wishes, to that representative.⁶⁸ 	<p>A court must not make a direction for a child who is the subject of a proceeding in an application under the Family Division of the <i>Children, Youth and Families Act 2005</i> or an appeal under section 328 or 329 of the <i>Children, Youth and Families Act 2005</i>, to appear before the court by audio link unless it is satisfied that exceptional circumstances exist.⁶⁹</p> <p>'Exceptional circumstances' includes a state of emergency declared under section 198 of the <i>Public Health and Wellbeing Act 2008</i> or a state of disaster declared under section 23 of the <i>Emergency Management Act 1986</i>, in an area where an accused is required to appear before a court or required to transit through in order to appear before a court.⁷⁰</p>

⁶⁵ EMPA s 42F(1) and (2).

⁶⁶ EMPA s 42F(3).

⁶⁷ EMPA s 42F(4).

⁶⁸ EMPA s 42E(5).

⁶⁹ EMPA s 172.

⁷⁰ EMPA s 169.