Speech by

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AUDIO VISUAL AND AUDIO LINKS AMENDMENT BILL

Mrs LAVARCH (Kurwongbah—ALP) (3.42 p.m.): When I first started practising law in the mid-1980s, word processors were a new technology and fax machines were barely heard of. In the firm I worked for, we were still using electric typewriters and couriers for delivery of urgent letters and documents. In less than 10 years, fax machines became a vital means of delivery of letters and documents and computers sprung up in law offices all over the country. Today, lawyers readily access statutes and case law via the Internet and, on the whole, have embraced the latest in information technology as their day-to-day tools of trade. Yet the court system in which they work has been much slower to utilise new technologies. I fondly remember the Petrie Magistrates Court was still using manual typewriters long after electric typewriters were the vogue. In my view, this was most likely due to a combination of lack of financial resources by the Government of the day and a lack of enthusiasm to change old ways.

This Bill will go some way to introducing modern technology into our justice system—not just because these technologies are available and therefore should be used but because in so doing they will be able to streamline the administration of justice and increase the access to justice by lessening the cost. The 1994 report of the Access to Justice Advisory Committee, chaired by Ron Sackville, identified the need for a national approach on making justice simpler, cheaper and fairer. One of the steps recommended to achieve this outcome was changes to court practice and court procedure. Through the Standing Committee of Attorneys-General, this national approach to improving access to justice has been kept firmly on the agenda.

This Bill is an example of that national approach. It implements an agreement by SCAG to enact provisions for the taking of and the receiving of evidence and the making or receiving of submissions by video link or telephone within Australia. It also includes general provisions about the use of audio visual links and audio links inside or outside Queensland. The Bill also provides for the arraignment and sentencing using either link but only with the consent of all parties.

Before I address a couple of matters specific to the Bill, I do want to make some general comments in relation to information technology. It must be borne in mind that the rapid advances in information technology just in the last decade have confirmed that we as legislators will, at best, be playing catch up and, at worst, be overrun by these new means. I say "overrun" because cyberspace technology has created a worldwide community at our fingertips. The Internet knows no sovereign boundaries. As business and the general population embrace computer technology to conduct their day-to-day transactions, it begs the question: what is the role of Government in the age of the online and how do we effectively govern our community when we cannot really know what that community is any more? The other question that springs to mind is: how do our courts cope with the increasingly complex questions of who has jurisdiction over a particular matter and the increasing complexities of the matters themselves? I wonder how the judges cope and I wonder even deeper how juries cope with such complex and technical matters.

These very questions were raised recently by a parliamentary committee of the Victorian Government in its report Technology and the Law. As well as canvassing the here and now, this report delves into how we can keep up with new and emerging technologies such as artificial intelligence. The Victorian parliamentary committee saw this as such a critical issue that their first recommendation was to establish a Government entity to coordinate and implement a centralised approach to the introduction and development of new technologies on a whole-of-Government basis. Whilst we are not

dealing with matters of such magnitude in debating the provisions of this Bill, it is timely that we as a Parliament put our minds to these matters and be in a position to prepare for the future, or at least be able to respond as and when the need arises.

Returning to the provisions of this Bill, in my contribution today I want to address some of the concerns expressed in relation to the introduction of audio links and audiovisual links in respect of the assessment of the demeanour of a witness, or as put in the Technology in the Law report from the Victorian parliamentary committee—

> "One of the strongest arguments mounted against using video conferencing in all aspects of legal processes is that of examination and cross-examination of witnesses and the accused. It is argued that barristers and juries need to smell the fear of the witness."

Submissions to that inquiry by several legal experts maintained that the most constructive method of ensuring witnesses telling the truth is by placing them in the courtroom amongst the formal paraphernalia of justice rather than a remote location where they might be tempted to dismiss the importance of the situation.

The demeanour of the witness was a matter raised by the committee I have the honour of chairing, the Scrutiny of Legislation Committee. In response to the committee's inquiry, the Attorney-General referred the committee to two journal articles. I sought copies of these articles and took the time to read them. These articles assessed the veracity of judging a witness's demeanour by them actually being in court. Both writers concluded that there is no sound basis for assessing credibility from demeanour. In fact, the Attorney-General submitted that the assessment of credibility from demeanour is a myth.

These articles, if members are interested, are firstly one written by Marcus Stone entitled Instant Lie Detection? Demeanour and Credibility in Criminal Trials, which can be found at page 821 of the Criminal Law Reports of 1991. The other article was an earlier article by Loretta Re entitled Oral versus Written Evidence—the Myth of the Impressive Witness, which is in the Australian Law Journal, Volume 57, December 1983 at page 679. Both articles are quite enlightening.

The first point made is that most of the information we receive today is via the television or through other electronic means. Not seeing or hearing someone in person does not mean that we are unable to make assessments of that person. However, more importantly, it is contended that too much emphasis is put on demeanour by those practising in the criminal justice system. This could be to the detriment of the system itself.

Central to this point is that the courtroom is a very controlled forum, and advocates rarely allow witnesses to have total freedom of expression or to make voluntary statements. Generally, witnesses can only answer questions and, in this way, they may lose their personalities and spontaneity. The interrogation of witnesses is usually controlled and is designed to edit their testimony. The court is unfamiliar with the witness's normal manner and cannot compare it with the demeanour it observes. Psychological studies show that anxiety or relaxation, even if detected correctly, cannot be relied on to indicate veracity. Truthful witnesses may be anxious, and liars may be or be seen to be relaxed.

Loretta Re in her article quotes Lord Devlin, who cites the view of Mr Justice McKenna, which is probably worth repeating here today. Justice McKenna's comments refer to only the male gender, but I presume his comments apply to both sexes. He said—

> "I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges to discern from a witness's demeanour or the tone of his voice whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man whose statements are for that reason to be respected or is he taking his time to fabricate? Is the emphatic witness putting on an act to deceive me or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eye on the ground, perhaps from shyness or a natural timidity? For my part, I rely on these considerations as little as I can help."

The very question of a person's actions in answering questions or giving evidence in court was raised in a cultural context in the report entitled Multiculturalism and the Law by the Australian Law Reform Commission, No. 57 of 1992. In respect of the criminal justice system, the commission expressed a view that there is a cultural bias in assessments of witness demeanour. That report states—

> "Although there is no formal rules about the assessment of a witness's demeanour (non verbal communication) it is widely considered to be one of the indicators of his or her honesty and reliability. A person who has seen a witness giving evidence is supposed to be able to assess the witness's credibility more accurately than someone who has not. There are cultural variations in body language. The Commission has been told of concern that assessments are

made of the demeanour of Aboriginal and Ethnic Minority witnesses because their demeanour has been misunderstood. For example, eye contract considered appropriate amongst those of European origin, may be considered disrespectful or confrontational amongst many other cultural groups. Avoiding eye contact can be a non-verbal way of communicating recognition of an authority relationship. But this can be misinterpreted as inattention, evasiveness or even dishonesty. Displays of emotion may be taken to signify a lack of control and disunity. Smiling and laughing can be an expression of pleasure or an expression of anxiety. It is also associated with subordination. Readings of facial expression, eye contact and other non-verbal communication can be very unreliable. A review of psychological research conducted by the Commission for its evidence inquiry concluded that as little reliance as possible should be placed on demeanour. It is not a good indicator of the honesty of the witness or the value of his or her evidence."

In other words, the popular belief that we can assess a person's truthfulness by their body language is, in the Attorney-General's words, a myth. Marcus Stone in his article concludes that courts ought to be fully aware of the risk of an approach where demeanour is assessed in respect of truthfulness. He is of the view that, in the interests of sound judgment and justice, all criticisms of relying on demeanour should be assimilated into professional training and techniques of advocacy and judicial practice.

For the purposes of the introduction of technology as proposed by this Bill, we can say that the taking of evidence by means other than the witness being present in court will in no way undermine our justice system. It is in fact the reliance made already on the demeanour of the witness that is brought into question and there is a need for this to be addressed through the legal profession itself.

Victoria has had audiovisual and audio linking technology in operation since December 1997. From all accounts it has been a success for its justice system. The report Technology and the Law advises that this technology is used for remands, where prisoners can remain at jail and therefore eliminate or reduce transport costs, security risks and disruption to prisoners. This is already the case in Queensland and I understand that it has been operating successfully.

This technology is used in Victoria in pre-hearing conferences and interlocutory proceedings. The benefits found are that solicitors and their clients interact with the court from many locations and have access to the judiciary for early arraignments, directions hearings and other interlocutory steps on a daily basis without the judge, practitioners and litigants having to travel.

In relation to remote or protected witnesses, the Victorian report lists as a benefit the facility of being able to provide unlimited opportunities for expert witnesses and protected witnesses to be able to provide evidence quickly, securely and cost-effectively from many locations worldwide.

The report states that the provision of evidence by expert witnesses, which occurs mostly in medical and forensic science areas, is very costly. It has been found that this facility enables organisations such as police forensic science laboratories, as well as private practitioners, to increase their productivity by reducing travel time and that it is making it more affordable to use intrastate, interstate and overseas experts. Victoria's experience also encompasses remote appearances by counsel, including the Director of Public Prosecutions and the Victorian Legal Aid Public Defence Council.

This is a positive step forward for our courts. Coupled with the utilisation of information technology for court management, as well as the introduction of the remote recording and transcription system, access to justice should be speedier and thus less expensive. I commend the Attorney-General for bringing forward these welcome changes to our justice system and I commend the Bill to the House.
