

New Zealand Law Society

Submission on Courts (Remote Participation) Bill

1. The Explanatory Note to the Courts (Remote Participation) Bill (p.2) states
This legislation is one of the first steps being taken in the reform of criminal procedure. ... Future legislation and operational reforms will modernise and simplify criminal procedure to improve timeframes and promote efficiency in the courts.
The Society supports measures that will improve criminal and civil procedure and the administration of the Courts in New Zealand and avoid unjustifiable expense and delay in having parties and witnesses brought to the Court.
2. The enactment of overarching legislation is preferable to piecemeal amendments to existing legislation. Overarching legislation also signals a cultural change and provides a clear legal basis for the use of audio-visual links (AVL).
3. However, a desire to achieve improvements in the efficient administration of civil and criminal trials and improvements in use of Court time must not override the fundamental requirement that justice not only be done but also be seen to be done.
4. In this respect, the statement in the Explanatory Note that
The Bill will ensure that as AVL facilities are installed in courts, they can be used to their full potential.
must be treated with caution. While it is desirable that AVL systems should be used to the fullest extent possible, they should be used only where appropriate. The Society disagrees with the suggestion that because AVL systems are installed, they should be used. AVL systems are useful but only to the extent that they improve judicial decision making and outcomes. A focus on achieving efficiencies should not override the need to ensure that proceedings are conducted in a fair and just way in which the rights of all parties are protected.

Use of criminal proceedings

Clause 8 Use of audio-visual links in criminal procedural matters

Clause 9 Use of audio-visual links in criminal substantive matters

5. The Society supports different standards or presumptions being applied to different stages in the criminal process. However, it does not consider that clauses 8 and 9 reflect the correct balance.

6. There are two broad reasons:
 - (a) The Society considers that AVL should not be allowed during deposition hearings and trials. The technology is not currently, nor will be in the foreseeable future, be capable of adequately protecting the rights of defendants. This may change in the future, but this change should not be forced through at this premature stage. The matter can be reviewed when all stakeholders have had a greater opportunity to experience the system and when there is full confidence in the system.
 - (b) The definition of “criminal procedural matter” as currently drafted might cause confusion as to whether or not a bail application is a procedural matter. Counsel are able to examine witnesses in bail applications, although this generally does not occur. Bail applications represent the first appearance of a defendant before the Court. In contrast to other pre-hearing proceedings, there are more often times where the defendant will need to speak with their counsel during these proceedings and family will want to be heard. There is potential for this to be abrogated if the defendant appears via AVL.

Recommendations

7. That there be a three stage progression:
 - (a) presumption in favour of the use of AVL in criminal procedural matters except bail applications, unless the judicial officer is satisfied on his or her own motion or on the objection of any party that the criteria would not be satisfied;
 - (b) allowing for the use of AVL in bail applications (i.e., those where evidence is being presented) on the application of any party or on the judicial officer’s own motion where the judicial officer considers that the criteria would be satisfied; and
 - (c) prohibiting the use of AVL for criminal substantive matters.

Use in civil proceedings

8. The Society supports the provision in clause 7 that the use of AVL in civil proceedings should be a matter that is in the first instance to be agreed between the parties. The criteria in clauses 5 and 6 that a judicial officer must apply in deciding whether AVL should be used provide adequate safeguards against the risk of exploitation or an imbalance of power between the parties.
9. The use of AVL in civil proceedings will largely be dictated by the level of confidence participants have in that system. Accordingly, the Society is of the view that there must be a

commitment to invest in the infrastructure needed in order for all stakeholders to have confidence in the underlying AVL infrastructure. Without such confidence this Bill will have little impact in achieving its objectives.

Clause 17 Regulations

10. Clause 17 provides for the making of regulations covering a number of matters. Matters that should be the subject of regulations include:
 - (a) As a practical matter, and in order to achieve the efficiency outcomes of AVL use, it should be made clear that, to the fullest extent practicable, where AVL is to be used the relevant participant appearing by AVL must have access to the full range of relevant documents.
 - (b) Safeguards to ensure that the participant appearing by AVL is, if giving evidence, giving his or her evidence without duress or encumbrance. The image conveyed to the Court will not incorporate the full environment in which the participant is in and the potential exists for serious abuse. Clause 17 should include a specific statement recording that safeguards are to be put in place.

Judicial Officer in the Proceeding

11. Clauses 7(2) and 9(1) refer to “*the judicial officer in the proceeding*” making a decision as to whether or not AVL is used. As a practical matter, it is preferable that decisions regarding a participation by AVL will be made before any hearing otherwise the benefits of AVL will not necessarily be realised.

Recommendation

12. That the words “*in the proceeding*” in clauses 7(2) and 9(1) be deleted.

Definitions

13. The definition of “*Judge*” in the Evidence Act 2006 (a Justice of the Peace, a community magistrate, and any tribunal) is different from the definition of “*Judge*” in the Bill (a Judge of any court) and “*Judicial Officer*” (a Judge, a Community Magistrate, or a Justice) does not appear in the Evidence Act 2006. While, when read together, these appear to be consistent, consideration should be given to the desirability of having consistent definitions to avoid any misinterpretations.

14. Similarly, the definition of “*court*” in the Evidence Act provides that “*court includes the Supreme Court, the Court of Appeal, the High Court and any District Court*” while the definition of “New Zealand court” in the Bill provides that New Zealand court means “(a) *the Supreme Court, the Court of Appeal, the High Court, or a District Court*”. Again, while these appear to be consistent, it is desirable to have consistent definitions to avoid any misinterpretation.

Recommendation

15. That the definition of
- Judge and Judicial Officer, and
 - all of the Courts
- be amended to be consistent across all Acts.

John Marshall QC
President
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