

20 September 2024

Cate Brett
Director, Office of the Chief Justice

By email: Tracy.Bryant@courts.govt.nz

Feedback on documents relating to the use of remote participation in courts

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the following documents which relate to the use of remote participation in the courts:

- a. Draft Guidance on the Objectives and Principles relevant to the use of remote participation in the courts (**draft Guidance**);
- b. Draft protocol on the use of remote participation in the High Court civil jurisdiction (**High Court Protocol**);
- c. Draft protocol on the use of remote participation in the District Court civil jurisdiction (**District Court Protocol**); and
- d. Draft protocol on the use of remote participation in the Family Court (**Family Court Protocol**).

1.2 The Law Society generally supports the stated aims of using remote technology with appropriate safeguards. The effective use of remote technology has the potential to achieve these aims and significantly improve the experience of all court users. The introduction of the protocols should also aid the goals of ensuring the use of remote technology will become more consistent and predictable across the country's courts depending, of course, on the resources available in each court.

1.3 This submission has been prepared with input from the Law Society's Family Law Section, and various law reform committees.¹ In making this submission, we note the Law Society has previously submitted on the Courts (Remote Participation) Amendment Bill,² and on the draft High Court (Improved Access to Civil Justice) Amendment Rules,³ both of which touch on the role of remote participation. We do not repeat those submissions here, but note the Law Society is keen to remain involved in any judiciary-

¹ Access to Justice Committee, Civil Litigation & Tribunals Committee, Courthouse Committee, and Criminal Law Committee.

² A copy of that submission is available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Courts-Remote-Participation-Amendment-Bill.pdf>.

³ That submission is available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Rules-Committee-HC-Improving-A2J-Amendment.pdf>.

led changes to court processes as a consequence of the wider review of the Courts (Remote Participation) Act 2010 (CRPA).

2 General observations

Opportunities and challenges in different jurisdictions

- 2.1 While the opportunities and challenges of using remote participation technology vary between jurisdictions, there appear to be greater challenges in the criminal jurisdiction than in the civil jurisdiction (for example, in the criminal jurisdiction, there remains a need for more Audio-Visual Link (AVL) facilities and booths in prisons). The benefits of remote participation cannot be fully realised without further investment in these technologies and facilities.

Impacts of remote participation on smaller regional courts

- 2.2 Some practitioners have expressed concerns that the increased use of remote participation could ultimately result in the closure of smaller regional courts. Such closures – if they do occur – would be a retrograde step, and contrary to the principles of Te Ao Mārama. Closures could also create significant barriers to access to justice in those regions. It is therefore important to ensure courts remain open to hear matters in person where appropriate.

Impacts on the opportunities available to junior litigators

- 2.3 Some members of the profession noted one unintended consequence of the increased use of remote participation; a reduction in the opportunities available to junior litigators to develop courtroom etiquette and advocacy skills.
- 2.4 They consider the ability to send junior counsel down to the court to observe other counsel on a regular basis, and to obtain relatively 'low-risk' directions independently, has been lost with the increased use of remote participation (noting those experiences cannot be replicated outside of the courtroom).

Availability of legal aid

- 2.5 Where a Protocol identifies remote participation as the default mode of appearance, but there is good reason in a particular case for the matter to proceed in person, it is important to ensure there are no additional barriers to securing legal aid funding for such in person attendance at court (and we acknowledge the Legal Services Commissioner has confirmed this will be the case).

Control over hearings

- 2.6 Finally, we note that control over what happens over the course of a remote hearing is an issue which will require more thought in future. Permitting participation or observation using digital technology inevitably risks misuse – for example, someone who has turned off their screen and microphone may still be recording the livestream (and potentially publishing it on social media or otherwise disseminating it). This is a particular risk in sensitive matters in the Family Court and other jurisdictions. The development of both rules and technology to address these risks should be a priority.

3 Feedback on the draft Guidance

3.1 The Law Society supports the approach of setting out the objectives and principles of remote participation, and agrees with the way they have been formulated. We only make the following additional points:

- (a) The objective of deploying digital technology to promote the rule of law, and to meet the needs of all different groups of people involved in the court system, is laudable. As is the recognition that the administration of justice is first and foremost a human process which can, however, be supported by the appropriate use of technology.
- (b) The 13 core principles identified in the Digital Strategy for Courts and Tribunals are comprehensive and provide a sound base for remote participation in the courts.⁴ The acknowledgment that experience confirms there is often an inherent benefit in hearings being held in person, and that in-person hearings enhance engagement in and understanding of court proceedings,⁵ provide an appropriate starting point from which the protocols are developed.
- (c) There is also no doubt that remote participation can, on many occasions, improve timeliness and be of significant benefit to participants in terms of cost saving and convenience. However, we note technology can at times be unreliable, of varying quality, and involve delays. As a result, technology can sometimes have the undesirable effect of requiring more time to complete a matter remotely than it would have taken in person.
- (d) Equality of arms is also an important consideration. The technology available to one party to a proceeding should not put them at an advantage or disadvantage to the other party. This should be considered by the judicial officer when considering whether the default position should be displaced. It is important there is not only a 'level playing field' but there is also no perception that one participant has an advantage over another.

4 General feedback on the Protocols

- 4.1 The Law Society supports giving judicial officers the discretion to depart from the Protocols. This provides appropriate judicial oversight and ensures that justice will be done, and be seen to be done, in each individual case. For this reason the Law Society considers that maintaining judicial oversight and flexibility in the way contemplated by the draft Guidance and the Protocols is important.
- 4.2 The challenges of using remote participation tend to be acute where the hearing has the potential to have a substantive effect on the outcome, and where evidence is being given remotely. The Law Society therefore supports the general policy in the Protocols of requiring substantive matters to be dealt with in-person, and refers to its comments on the risks involved in remote evidence in its submission on the Courts (Remote Participation) Amendment Bill.

⁴ Chief Justice of New Zealand *Digital Strategy for Courts and Tribunals* (March 2023) at pages 20-21.

⁵ Page 3 of the draft Guidance.

- 4.3 The Law Society also supports the proposed approach of setting default modes of appearance, and providing examples of circumstances when it might be appropriate to depart from the default approach, which provides clarity.
- 4.4 The drafters may also wish to address the following additional matters in the Protocols:
- (a) How participants can have input into the judicial officer's decision in appropriate cases. For example, provision could be made for the filing of written submissions by counsel or the parties themselves (if unrepresented) prior to the judicial officer making a decision as to how a hearing is to proceed.
 - (b) Guidance about what may and may not be considered adequate reasons for seeking leave to appear by AVL, where that is not the default mode of appearance. In the absence of such guidance, different courts have adopted a wide variety of approaches, and it would be helpful to have clarity and consistency across all courts.
 - (c) Any other relevant criteria the judicial officer should consider when making a decision. While the 'interests of justice' is the appropriate test, the criteria to be considered in reaching that determination should also be clear so the decision-making process is transparent and can be easily understood by all participants. Listing the criteria will also assist the parties if there is an opportunity to make submissions on the matter prior to the decision being made (as discussed at (a) above). These criteria could be based on, or cross-reference, the objectives and principles in the draft Guidance.

5 Feedback relating to the High Court and District Court Protocols

- 5.1 The High Court and District Court Protocols generally strike a good balance between:
- (a) Increasing the use of remote participation to improve access to justice and generate efficiency gains, without derogating from the quality of justice delivered to the community; and
 - (b) Kanohi ki te kanohi, and remote participation.
- 5.2 Each hearing type appears to have been carefully considered, and the proposed default positions appear to be appropriate.

6 Feedback relating to the Family Court Protocol

- 6.1 We invite the drafters to consider the following feedback from members of the Law Society's Family Law Section, regarding the Family Court Protocol:

The application of other relevant legislation

- 6.2 The High Court and District Court Protocols set out other legislation and rules which are relevant to determining the appropriate modes of certain hearings in those courts.
- 6.3 It would be helpful to include similar guidance in the Family Court Protocol, which identifies any other legislation relevant to determining whether a hearing in the Family Court should proceed remotely or in person. This could include, for example, applicable sections of the CRPA, as well as the Trans-Tasman Proceedings Act 2010 (TTPA).

- 6.4 In providing this feedback, we note the TTPA precludes the application of the CRPA to certain proceedings,⁶ and requires parties to seek leave to appear remotely in certain circumstances.⁷ The Trans-Tasman Proceedings Regulations and Rules 2013 prescribe further requirements relating to applications for leave to appear remotely. We invite the drafters to consider what impacts these provisions may have on hearings which are to be conducted remotely by default under the Family Court Protocol.

Reference to 'parties'

- 6.5 The reference to 'parties' in the heading on page 1 of the Family Court Protocol should be replaced with 'participants'. This term would capture the parties, their lawyers, any court-appointed counsel and others (such as social workers, whānau and family) who participate in Family Court proceedings.

Default mode of appearance

- 6.6 The draft protocol for remote participation in Family Court proceedings (Family Court protocol) identifies hearings where the default mode of appearance for parties is to be via AVL. In our view, the default mode of appearance for some of those hearings should be in person, as discussed further below.

Mental Health (Compulsory Assessment and Treatment) Act hearings

Section 34C – extension of community treatment orders

- 6.7 Section 34C of the Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for the hearing of an application to extend community treatment orders via AVL if the patient consents to the use of AVL. Although remote attendance is already provided for in this legislation, we do not object to the inclusion of these hearings in the Family Court Protocol.

Section 83 – appeals from Mental Health Review Tribunal

- 6.8 Practitioners have noted it is often difficult to know in advance whether a patient's whānau or other support persons intend to attend a Mental Health Review Tribunal hearing. It may be difficult for the patient to receive support from these individuals if the default position is to conduct these hearings via AVL.
- 6.9 The default mode of appearance for such hearings should be in person, unless the parties consent to appearance by AVL, or the Judge directs otherwise. In making this suggestion, we also refer to our comments at [6.10 – 6.12] below.

Applications for compulsory treatment orders where the patient lives or is being treated at a significant distance from court

- 6.10 The default mode of appearance for these hearings should also be in person, unless the patient consents to the appearance being by AVL, or the Judge directs that to be the case. Any AVL appearance should only be directed where it is necessary and for the benefit of the patient.

⁶ See sections 36, 80, and Schedule 2.

⁷ See section 38.

6.11 At present, where community patients live at a distance from the court, a health professional assists the patient to attend an in person hearing at the court, or takes technology to the patient in order to facilitate a remote appearance. If a patient is not in hospital, and is brought to a hearing by a health professional, the visit provides a useful opportunity for the health professional to check in on the patient. Furthermore, if a patient lives a significant distance away from a court (which is likely to be in a rural area), they may not have the technology to appear remotely, or if they do, the coverage of technology is likely to be of a lower quality or less reliable than in a town or city.

Section 16 reviews where the patient lives or is being treated at a significant distance from court

6.12 The default mode of appearance for these hearings should also be in person, unless the patient makes a request for the review to take place remotely, and it is practicable to do so in the circumstances. This is because section 16 review hearings generally go against the patient's desire to be discharged, and conducting such hearings remotely may add to the patient's dissatisfaction with the review process, which would be undesirable from a therapeutic perspective.

Substance Addiction (Compulsory Assessment and Treatment) Act review hearings under sections 29(c) and 34(1), and interviews conducted under section 75(3)

6.13 As currently drafted, it is unclear whether the 'AVL only' qualification applies to hearings under sections 29(c) and 34(1), as well as to interviews conducted under section 75(3) of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (**SACATA**), or whether it only applies to interviews conducted under section 75(3).

6.14 In any case, we believe the default should be that the matter is to be heard in person, unless a Judge directs otherwise. Hearings under the SACATA involve individuals who have a severe substance addiction, and whose capacity to make decisions is severely impaired.⁸ It would be more appropriate to conduct hearings involving such individuals in person, as they may not be able to consent to, or make decisions about, procedural matters such as the mode of appearance.

Hearings under the Property (Relationships) Act 1976, Family Protection Act 1955, and Family Proceedings Act 1980

6.15 While it may be appropriate to hear separation and dissolution orders remotely, we do not agree remote hearings are appropriate for spousal maintenance or relationship property matters.

The first rule 175 conference

6.16 Rule 175D(2) of the Family Court Rules 2002 sets out a broad range of matters on which the presiding officer can make directions and orders. If a matter is relatively straightforward, a joint consent memorandum is usually filed in advance of a rule 175 conference, and therefore, those matters could be heard remotely with the consent of all the parties.

⁸ SACATA, s 3.

6.17 However some practitioners have observed that in all other matters, it is often the case that if the first rule 175 conference is held remotely, a second rule 175 conference will be required, which will only add to the workload of the Family Court.

Submissions only interim or interlocutory hearings

- 6.18 Appearances for submissions only interim or interlocutory hearings (particularly those involving spousal maintenance and discovery) should be in person by default, unless the parties and the Judge agree the hearing could be conducted remotely. This is because:
- (a) Technology may only work intermittently, and audio delays may result in participants unintentionally talking over each other.
 - (b) Both lawyers and Judges in submissions only hearings require all documents relating to the matter, and there are often delays in getting these documents on to the court file. In such circumstances, when a matter is heard in person, counsel can provide hard copies to the Judge if it becomes apparent those documents have not made it on to the file. This would be difficult in a remote hearing.
 - (c) A similar problem may occur with bundles of documents (i.e., with one party getting the bundle to the other) when the matter is being heard remotely. If a person is appearing at a hearing remotely, consideration would need to be given to how they could access the bundle, who would be responsible for preparing the bundle, as well as the costs of facilitating remote access to the bundle.
 - (d) Submissions only hearings tend to be interactive (for example, with Judges interjecting while counsel present submissions, in order to seek the views of other counsel), and at times, contentious. It would be appropriate for hearings of this nature to be conducted in person by default.
 - (e) In-person attendances can help parties feel they are meaningfully participating in the Court process, and can assist with resolving matters at an earlier stage (particularly where the Judge chooses to test potential outcomes with the parties).

Applications for departure orders under the Child Support Act 1991

- 6.19 Practitioners have observed that applications for departure orders tend to be defended in approximately 80% to 90% of all cases. Such applications typically involve conflicting evidence, so cross examination is almost always required. In our view, these are not conducive to a remote appearance, and the default should be an in-person appearance in court, unless the parties and the Judge (or Family Court Associate, if they have jurisdiction) agree they can be held remotely.
- 6.20 This paragraph should therefore refer to *undefended* applications for departure orders (although we acknowledge it may be difficult to predict whether or not a party intends to defend an application, particularly where they do not indicate any intention to defend the application, but attend the hearing in person on the day to do so).

Hearings conducted under the Family Court Protocol for the Adoption by New Zealand-Based Intended Parents of Children Born by Surrogacy Overseas

- 6.21 There is no reason why these final hearings cannot be held remotely. However, these hearings tend to be important and celebratory ceremonies attended and enjoyed by the parents, their lawyers, and the judiciary. The Protocol should therefore give parties the option to attend such hearings in person even if the other party to the proceeding intends to attend by AVL (for example, because they are overseas).
- 6.22 Any remote hearings conducted under the Family Court Protocol should also take into account the other requirements prescribed in the Family Court Protocol for the Adoption by New Zealand-Based Intended Parents of Children Born by Surrogacy Overseas.

Hearings where a party or witness is overseas or lives a reasonable distance from the court

- 6.23 This default would apply to every Hague Convention matter in New Zealand. These are short and complex hearings if defended, with time pressures arising from the statutory timeframes in the Convention. It is reasonably common for such hearings to have cross-examination, and so these would typically require counsel appearing in person in court. In providing this feedback, we also refer to our comments at [6.18(c)] above regarding bundles.

Matters which do not involve parties

- 6.24 We note the following matters do not generally involve the parties to a case:
- (a) **Without notice applications on the National eDuty platform:** these applications are dealt with remotely by a Judge who is scheduled to be on e-duty on a particular day, and parties do not appear in these matters.
 - (b) **All chambers work on eBox platform:** this is generally referred to as 'box-work' and, as such, no parties are involved as this work is carried out by a Judge or a Family Court Associate in chambers.

However, we also note consent orders and directions (referred to in paragraph 2(e) of the Family Court Protocol) may not always be confined to chambers work, and may involve parties (for example, where parties seek consent orders in the settlement of matters brought under the Property (Relationships) Act 1976). For the avoidance of doubt, we support using remote participation as the default mode of participation in hearings relating to consent orders and directions.

- (c) **Dissolution on the papers:** these are conducted almost solely by the registry (as the Family Court Protocol notes), with no appearances by the parties.

7 Next steps

- 7.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz), if you have any questions, or wish to discuss this feedback further.

Nāku noa, nā

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive, slightly slanted style.

David Campbell
Vice-President