

Courts (Remote Participation) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

4 April 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Courts (Remote Participation) Amendment Bill (**Bill**).
- 1.2 This omnibus Bill is part of the Government's 100-day plan to "restore law and order" by enabling more virtual participation in court proceedings. The Law Society supports measures which are aimed at reducing the overwhelming backlog of cases within the District Court, and agrees that, when used appropriately, greater use of virtual participation in court proceedings can contribute to improved court performance and greater access to justice.
- 1.3 This submission focusses on some practical issues which may arise from the use of audio and audio-visual links in court proceedings, particularly around a greater use of audio-links (**AL**) in civil proceedings.
- 1.4 This submission has been prepared with input from the Law Society's Civil Litigations and Tribunals Committee, Access to Justice Committee, Criminal Law Committee, and Family Law Section.¹
- 1.5 The Law Society wishes to be heard.

2 General Comments

- 2.1 As noted in the Explanatory Note to the Bill, and the Departmental Disclosure Statement (**DDS**), there is a significant backlog of cases in the District Courts, particularly in the civil jurisdiction. Greater use of technology to address these considerations is necessary to ensure access to justice remains practicably available – a matter of constitutional significance.
- 2.2 It is not currently clear how often the restricted availability of AL as opposed to audio-visual link (**AVL**), adversely impacts on the prompt resolution of proceedings. The use of telephone conferences for preliminary hearings in the civil jurisdiction – the greatest area in which virtual participation is useful in promoting the efficient and timely resolution of court proceedings – is already commonplace. This may mean that any increased use of AL does not, in itself, significantly reduce the backlog in the civil (including family) jurisdiction, which is contradictory to the underlying objectives of the Bill. However, so long as the proposed amendments give appropriate weight to any countervailing considerations in any given case, promoting the general availability of AL is a positive initiative.

3 Family and Civil Proceedings - clause 5

General Comments

- 3.1 Virtual participation in court proceedings via AL or AVL can reduce travel time and costs for participants. Members of the profession noted this is particularly an issue in the Tāmaki Makaurau region (and other widespread geographical areas such as Te Tai Tokerau) where it can take longer than an hour to travel across the region to attend court

¹ More information on the Law Society's law reform committees and sections can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>

- in person for what might be a 10-minute appearance. Increasing the use of virtual participation in court proceedings will also reduce travel costs for Legal Aid Services.
- 3.2 The new section 7A, similar in nature to its predecessor, enables the use of AL instead of AVL for participation in civil proceedings, if certain conditions are met. Additional criteria (including in relation to the potential impact of the use of AL on the ability of the parties to comprehend and effectively take part in the proceedings) must be taken into account in deciding whether AL is used.
- 3.3 We note the court retains its discretion to either allow or not allow remote participation through the general criteria that must be considered in section 5 of the Courts (Remote Participation) Act 2010 (**Act**). Such a discretion is both important and appropriate to guard against litigation abuse, protect vulnerable parties and to also address any security or privacy concerns that may exist.
- 3.4 While a key objective of the Bill is to increase access to justice, those who come from a lower socio-economic background may not have access to the technology to enable virtual participation in court proceedings. There may also be some cultural concerns in terms of participants not being present in a room for a court event. This is particularly so when greater whānau involvement is encouraged in family court proceedings. However, in our view the overriding discretion retained by the court via section 5 of the Act, should address such factors.
- 3.5 In the Law Society's view, remote participation by AL in the Family Court would rarely be appropriate in a final hearing or any hearing where people will be giving evidence or being cross examined. However, it would be appropriate for use in events such as judicial or directions conferences and will allow for efficiencies such as those discussed above.
- 3.6 It is also important that the most up-to-date technology is available in all regions across the motū, not just in the main centers. Currently, AL technology in some regions is less than ideal with echoing and feedback a common occurrence.
- 3.7 AL practices also need to be consistent across the motū. For example, in Whanganui, parties and other court participants phone in (rather than the Registrar connecting participants in). If a matter is running behind it is not uncommon to have others join a previous teleconference with no joining sound available to make participants aware another party has joined. In contrast, the court rings participants in Dunedin and then joins the relevant parties together. In our view, the latter is preferable.

Personal Status Proceedings

- 3.8 Proposed section 7A(3) of the Bill sets out relevant statutes under which certain hearings may not be conducted via AL. Section 74 of the Protection of Personal and Property Rights Act 1988 (**PPPPRA**) under which judges can excuse the attendance of the subject person,² is similar in its purpose and structure to section 121 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, section 19 of the Mental Health

² Members of the Law Society's Family Law Section note that subject persons are regularly excused from attending in person under this provision.

(Compulsory Assessment and Treatment) Act 1992, and section 76 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017.

- 3.9 It is not clear from the Bill's supporting materials whether, in drafting proposed section 7A(3), a conscious choice was made to only refer to these provisions and not to also refer to section 74 of the PPPRA, or whether this was an oversight. Members of the Law Society's Family Law Section note it is commonplace for subject persons to be excused from attending a hearing in person because they lack the capacity to understand the nature and purpose of the proceedings, or their attendance is likely to cause the person serious mental, emotional or physical harm.
- 3.10 However, given the similarity to the statutes currently included in proposed section 7A(3), and the lack of information in the Bill's supporting materials as to why section 7A(3) was limited to those statutes, the Select Committee may wish to consider whether the Bill should also refer to section 74 of the PPPRA.

Risk of interference with witnesses

- 3.11 The Law Society draws the Select Committee's attention to the possible risk of interference with witnesses which may render the use of AL undesirable in a civil proceeding.³
- 3.12 In 2021, during a case in Michigan in conducted by way of AVL⁴, the prosecutor observed that the defendant was in the same building as the complainant while the complainant was giving evidence. This enabled the Court and authorities to respond promptly to avoid the course of justice being perverted. If the witness/complainant had been participating via AL, rather than AVL, it is unlikely the risk of interference with the complainant and their evidence would have been so promptly identified and addressed. While that case related to a criminal prosecution, the issues equally apply to the civil jurisdiction.
- 3.13 The Michigan case is a particularly clear example of the risk of interference with witnesses associated with the use of remote participation. There are other circumstances in which witnesses may be subject to interference, including intimidation, in giving evidence. It is inherent in the use of remote participation that these risks are less able to be mitigated than when a witness is giving evidence in the courtroom, or from another courtroom or controlled facility.
- 3.14 There are other ways in which remotely giving evidence may be subject to factors that interfere with the effective administration of justice. The presence of other persons in the place from which a witness is giving evidence may influence, even if unintentionally, the witness' evidence. Witnesses may also - quite possibly inadvertently - have with them copies of documents, or access to devices or other sources of information, to which they refer while giving evidence in a way that would not occur in court. That would reduce the

³ While directed at the use of AL in civil proceedings, the comments in paragraphs [3.13] to [3.19] may equally apply to criminal proceedings.

⁴ This case was a criminal prosecution (alleged assault) held on March 2 via zoom in the St. Joseph County 3B District Court. The proceedings were streamed live online at the time through Judge Jeffrey Middleton's official judicial video channel but have since been removed.

extent to which the witness' evidence was their recollection at the time of trial, or based solely on the contents of their brief of evidence.

- 3.15 Though not necessarily fatal to the fair conduct of proceedings, these do depart from the basis on which evidence is meant to be given in Aotearoa New Zealand. Guidelines issued for the giving of evidence remotely since the Covid-19 epidemic, recognise these considerations.⁵
- 3.16 In each case, the use of AL as opposed to AVL reduces the ability of the Court - as would have been the case in the Michigan example above - to identify and prevent these issues from arising.
- 3.17 More broadly, the use of AL as opposed to AVL may impact on the assessment of witness' credibility in other respects. In cases in which, for example, deceit is in issue, the ability of the plaintiff to put their case may be adversely impacted by witnesses not being visible to the tribunal of fact while giving evidence.
- 3.18 Proposed section 7A(2)(b) requires consideration of these types of factors to the extent they may "impact [...] on the ability of the parties to the proceeding" to receive a fair hearing according to law. These considerations are also pertinent to assessing what "the interests of justice" require, as the overall touchstone set out in proposed section 7A(2)(c).
- 3.19 Nonetheless, we invite the Select Committee to consider whether it may be appropriate for an additional paragraph to be inserted into section 7A(2) that expressly requires consideration to be given to "the potential impact of the use of AL on the ability of the Court to assess the credibility, reliability, or veracity of witnesses; and the extent to which a witness or other participant is able to freely and fearlessly give truthful evidence in the proceeding" (or similar). At the least, it may be desirable for the new section 7A(2) to refer not only to the impact on parties and participants of the factors listed in s 7A(2)(b), but also "the impact on the proceeding", which will extend to impacts on the Court and the fact-finding process.

4 Criminal proceedings - clauses 6 and 7

Clause 6 (new section 8A)

- 4.1 Proposed new section 8A is substantially similar to the temporary provisions inserted as part of the Covid-19 response. However, section 8A is silent as to when the decision to use AL instead of AVL is to be taken, and how defendants' wishes are to be determined. This may create practical difficulties in giving effect to section 8A.
- 4.2 For example, a defendant may change their mind about attending a procedural hearing shortly in advance of that hearing (i.e., if a case previously set down for trial changes to one where guilty pleas will be entered which would require the attendance of the defendant before the Court). This is not necessarily a result of a defendant's impulse, but rather reflects the lifecycle of criminal proceedings. While counsel could of course file a memorandum advising the Court that the defendant now wishes to attend, if those discussions do not produce a result until shortly before the hearing (which is not

⁵ See for example the Waitangi Tribunal Guidelines for appearing via Audio-Visual link: <https://www.waitangitribunal.govt.nz/assets/2019-03-21-AVL-Guideline.pdf>

uncommon), there is a real chance of no AVL facilities being available at the relevant prison at the correct time. This may require an adjournment, potentially causing further delay.

- 4.3 At present, this issue does not arise as provision is made for the availability of AVL at the subsequent hearing at the time the next event is set down.
- 4.4 However, any practical issues that may arise could be mitigated by clarifying, in section 8A, that the decision as to whether AL is to be used, is to be taken at the time the parties are required to file any documents required to be filed for that criminal procedural hearing. Further information could then be provided by defence counsel indicating the defendant's intentions about appearing, and the suitability of the use of AL. This would place the Judge in the best position to decide whether to use AL or not.

Clause 7(new section 9A)

- 4.5 It may be similarly useful for the proposed new section 9A to be amended to make clearer the time by which a victim is required to give notice of their wish to use the relevant technology. While the same practical considerations (outlined above) do not arise, making express the time by which notice is to be given would allow all court participants to have fair warning of the remote presence of the victim.
- 4.6 Having a prescribed timeframe may also usefully clarify victims' understanding and expectations of their rights; helping to avoid them being told they have left it too late to give notice. Since the allocation of matters to courtrooms will depend, in part, on whether AVL or AL facilities are required, it is possible that matters may be allocated to inappropriate courtrooms for remote participation by victims. While scheduling decisions are able to be changed and may not be made until shortly before a hearing, this may cause frustration on the victims' part. The Select Committee may wish to consider whether greater clarity in proposed section 9A is necessary to avoid these issues.
- 4.7 Separately, the Select Committee may wish to consider inserting a definition of "support person" into section 4 of the principal Act to state that "support person" has the same meaning in the principal Act as in the Victims' Rights Act 2002. While that is likely to be the interpretation that would be placed on the phrase if introduced into the Courts (Remote Participation) Act 2010, doing so will ensure that only persons who are support persons within the meaning of the Victims' Rights Act 2002 will be authorised to remotely observe proceedings together with victims. This will avoid scope for argument as to whether Parliament intended to allow a wider category of support persons to observe proceedings remotely with victims than in respect of other court processes (those governed exclusively by the Victims' Rights Act 2002).

5 Treaty of Waitangi Considerations

- 5.1 The Law Society notes there is, as acknowledged in the DDS,⁶ a possibility that allowing the use of AL in proceedings "may affect the ability to bring te ao Māori practices and processes into the courtroom". Earlier research also showed that Māori were more likely to experience digital exclusion than the wider population. While the DDS states that

⁶ Departmental Disclosure Statement, at [3.2].

greater use of AL in court instead of AVL technology will to some extent mitigate these inequities, they nevertheless are likely to still exist.

- 5.2 The DDS identifies this concern as particularly engaged in the criminal context, but similar concerns also arise in civil proceedings. The definitions of court and civil proceedings in section 3 of the Act include proceedings in Te Kooti Whenua Māori and Māori Appellate Court. There is also the possibility for matters concerning Te Tiriti o Waitangi and tikanga Māori to arise across the "core" civil jurisdiction - such as in judicial review matters - and the Environment Court's jurisdiction.
- 5.3 In such cases, as articulated by the Law Commission in its *He Poutama* study paper,⁷ there is a case to be made for the conduct of proceedings (within existing procedural law) to be conducted in a manner that is consistent with tikanga. It may be inconsistent with tikanga Māori for AL to be used, for example, as that would not be consistent with the notion that disputes should be resolved kanohi ki te kanohi (face to face).⁸
- 5.4 It may therefore be appropriate for proposed section 7A(2) to include a paragraph expressly directing the Court to consider whether the proceeding engages an issue related to Te Tiriti o Waitangi or tikanga Māori such that the use of AL is not in the interests of justice.
- 5.5 Although consideration of this point is arguably captured by proposed section 7A(2)(b) and 7A(2)(c), and also by sections 5(a) and 5(c) of the Act (to which section 7A(2) directs the Court), the Select Committee may wish to consider whether the Bill should expressly direct the Court to give consideration to these matters in each case.
- 5.6 The Law Society recommends further consultation with the Crown's Treaty of Waitangi partner (which has not been done, according to the DDS) before the Bill is enacted is appropriate. Given the use of urgency for this legislative process, in default of an opportunity for fuller consultation with the Crown's Treaty of Waitangi partner, it may be that input could also be sought from the Ministry of Māori Development by the Select Committee regarding these issues.



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⁷ Law Commission, *He Poutama* NZLC SP24, September 2023.

⁸ This is also consistent with the common law/constitutional traditions around the public nature of court proceedings as noted in the Departmental Disclosure Statement and Crown Law's advice under the New Zealand Bill of Rights Act 1990.