

Courts (Remote Participation) Bill

Government Bill

As reported from the Justice and Electoral
Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Courts (Remote Participation) Bill and recommends by majority that it be passed with the amendments shown.

Introduction

The purpose of the bill is to enable more use of audio-visual links (AVL) in New Zealand courts. A number of pieces of legislation, including the New Zealand Bill of Rights Act 1990, require defendants and witnesses “to be brought before the courts” or “to be present in court”. The courts have interpreted these provisions to require a person to be physically present in the courtroom. This has limited the use of AVL to those cases where it has been specifically mandated by the law.

The bill sets out an overarching legislative framework for the use of AVL, and would apply to every enactment in New Zealand law. The significant features of the bill as introduced are as follows:

- It sets out the criteria to be used in considering whether AVL should be used.

- It provides for a presumption in favour of the use of AVL in criminal procedural matters.
- It provides for an expectation in favour of an accused appearing in person but it would allow any party to make an application for, or a judicial officer to determine in favour of, the use of AVL in criminal substantive matters.
- It would allow the use of AVL in civil matters with the parties' consent or, where there is disagreement between the parties, for a judicial officer to determine that AVL will be used.

Our commentary covers the major amendments we recommend and issues brought to our attention by submitters. Minor and technical amendments are not discussed.

Use of audio-visual links in civil proceedings

We recommend replacing clause 7 with new clause 7 to provide that, after considering whether the parties consent and the criteria in clause 5 for determining whether AVL should be used, a judicial officer or Registrar is allowed to determine that AVL should be used where the parties have consented to its use. As introduced, clause 7(1) merely says that AVL may be used in civil proceedings where all the parties consent to its use. We have two concerns about this provision. The first is that it would have implications for court administration, as clause 7(1) does not include a mechanism to ensure that the court is informed that the parties have agreed to the use of AVL. The second is that clause 7(1) does not require the parties to take into account wider considerations, such as the interests of other participants in the proceedings, before agreeing to the use of AVL.

We heard concern that clause 7 of the bill as introduced would not allow a child in Family Court proceedings to withhold consent to the use of AVL, as they are not participants in the proceedings. We do not recommend amending clause 7 to refer to particular types of proceedings, such as Family Court proceedings, as this would be inconsistent with the intent of the bill. The bill is intended to provide an overarching legislative framework to apply to all court proceedings. However, we consider that our proposed new clause 7 should alleviate submitters' concerns by requiring the judicial officer or Registrar, when determining whether AVL should be used, to have regard to the

criteria set out in clause 5 of the bill as introduced. Amongst other things, these criteria require the judicial officer or Registrar to consider the nature of the proceedings (for example, whether they are Family Court proceedings) and any other relevant matter (such as whether a lawyer representing a child or counsel appointed to assist the Family Court consents to the use of AVL). Our proposed new clause 7 would ensure that the views of the lawyer representing the child and counsel assisting the court could be taken into account in determining whether to use AVL.

Clause 7 of the bill as introduced would allow only judicial officers to be involved in determining whether AVL could be used in civil proceedings. Proposed new clause 7 would also allow Registrars to determine whether AVL could be used. This would recognise the role of Registrars in some civil proceedings. They have the power, for example, to examine witnesses, hear and determine applications to extend or shorten the time, adjourn hearings, and make orders on interlocutory applications.

As introduced, clause 7(2) refers to a judicial officer in civil proceedings deciding whether AVL may be used in those proceedings. For practical reasons we consider it preferable for any judicial officer or Registrar to be allowed to make a decision before the hearing about the use of AVL. A similar amendment is needed to clause 9(1), which relates to a decision to use AVL in a criminal substantive matter.

Use of audio-visual links in criminal procedural matters

Clause 8 of the bill as introduced sets out the situations in which AVL may be used for the appearance of a participant in a criminal procedural matter. We recommend replacing clause 8(1) with new clause 8(1) to require that the use of AVL be considered in criminal procedural matters if the necessary technology is available. We note that the intention of clause 8 was to create a presumption in favour of the use of AVL in criminal procedural matters. Our recommended amendment is aimed at preserving this objective by ensuring that AVL should be the first option considered for criminal procedural matters, unless the technology was not available. In practice our amendment would mean that where the technology was available, the judicial officer or Registrar would be required to consider, using the

criteria set out in clauses 5 and 6 and having regard to any objections by a party to the proceedings, whether any one or more participants in a criminal procedural matter should appear by AVL.

Use of AVL in substantive criminal proceedings

We heard significant arguments against the use of AVL in substantive criminal proceedings, on the basis that its use would be incompatible with international human rights instruments. In particular, concern was raised that in respect of criminal proceedings the bill does not comply with sections 23 and 25 of the New Zealand Bill of Rights Act 1990.¹

In the light of the concerns expressed, we investigated the use of AVL in court proceedings in overseas jurisdictions. Our findings can be summarised as follows.

Canada's Federal Criminal Code permits a defendant to appear by AVL "for any part of the trial other than a part in which evidence of a witness is taken" with the parties' consent.

In the United States, AVL is used in several state courts for remote first appearances and arraignment.

In Australia, AVL is used to some degree in all states, for particular kinds of proceedings. For example:

- In Queensland AVL may be used for arraignments and sentencing, with the parties' consent.
- In Victoria, the physical appearance of a defendant is not required, unless the court directs otherwise, for proceedings including bail, adjournment, subsequent remands in custody, status hearings, and committal proceedings. A defendant must appear physically before the court for the first appearance after arrest, inquiries into fitness to stand trial, committal hearings, trials, sentencing hearings, and hearings on appeals; however, if the parties consent and it is consistent with justice and reasonable practice, a court may direct videoconferencing in any of these proceedings.

¹ Section 23 outlines the rights of a person who has been detained or arrested under any enactment; section 25 outlines the minimum rights of a person charged with a criminal offence.

- In New South Wales defendants must, unless the court directs otherwise, appear by videoconference for a number of proceedings, including bail, interlocutory proceedings, adjournment, and arraignment. A defendant must appear physically before the court for the first appearance after arrest, inquiries into fitness to stand trial, committal hearings, and trials.

In the United Kingdom, Virtual Courts are being trialled in London and Kent. A Virtual Court hearing can occur where an accused is in custody and the matter relates to a preliminary or sentencing hearing. A recent amendment to the Crimes and Disorder Act 1998 removed the requirement for the accused to consent to a Virtual Court hearing. Our investigations indicate countries take a variety of different approaches in determining whether to allow the use of AVL for the appearance of an accused at trial or in substantive criminal proceedings. Furthermore we found in many of these jurisdictions the consent of the accused in substantive criminal proceedings is often, but not always, required.

Consistent with historical practice and notions of a court, an accused's right to participate in proceedings has commonly been equated with the need for them to be physically present at the proceeding. However, we were advised that an accused's physical presence alone does not safeguard their right to participate in a trial, but merely provides them with the opportunity to participate in the proceedings. We were advised that the use of AVL would not necessarily infringe on an accused person's right to a fair trial. With appropriate legislative mechanisms and minor modifications to courtroom behaviour (for example, requiring judges to actively check that defendants are following the proceedings), an accused's fair trial rights could be safeguarded if AVL were to be used.

The majority of the committee are satisfied that the bill provides legislative mechanisms that would protect the rights of the accused. The general and specific criteria set out in clauses 5, 6, and 9 are intended to ensure that rigorous consideration is given to whether, and to what extent, appearance by AVL would limit or enhance an accused's opportunity to participate in the proceedings. We further understand that the obligation under section 6 of the New Zealand Bill of Rights Act to give all enactments an interpretation consistent with the rights and freedoms contained in that Act would further protect the fair trial rights of the accused in any proceedings.

Interpretation

We recommend amending the definition of “participant” in clause 3 to include the Registrar presiding over the proceedings. The definition of “participant” in the bill as introduced did not include Registrars, which fails to recognise that a Registrar may preside over proceedings and therefore might appear by AVL.

Judicial officer or Registrar may make direction

We recommend inserting new clause 10A to require that the determination of a judicial officer or Registrar as to whether AVL should be used in particular proceedings may be recorded as a direction by the judicial officer or Registrar. This would provide for uniformity and consistency in the recording and managing of the courts’ decisions. A court direction would be recorded in the Case Management System and on the court file, authorising the court administration to act on the judicial officer’s or Registrar’s decision.

Amendment to the Evidence Act 2006

We recommend amending clause 18 to make it clear that nothing in the bill would affect the ability of any party to apply for evidence to be given in an alternative way under section 103 of the Evidence Act. As introduced, clause 18 is not sufficiently clear that, while the bill is intended to be the primary statute under which applications should be made for the use of AVL in the courtroom, the ability to apply for evidence to be given in an alternative way under the Evidence Act would not be overridden by the provisions in the bill. The purpose of clause 18 is to recognise that in some cases it might be more appropriate for parties to apply under the Evidence Act for evidence to be given in an alternative way, possibly in conjunction with the use of AVL.

New Zealand Labour view

Central to the right of an accused, who may be innocent, to a fair trial is his or her right to personally attend their own trial. This is a fundamental civil liberty. We agree that interlocutory or preliminary hearings on some occasions can be held by audio visual conference without causing prejudice to the accused. We do not accept there is

justification for allowing such a process to be imposed, without the consent of the accused, for a substantive hearing.

We did not receive any cogent evidence to show that this erosion of the right of the accused to be present at trial was necessary. There is no evidence of trials being frustrated by the current rule. The clearly predominant and longstanding practice in overseas jurisdictions like Canada, Australia, the United Kingdom and the United States reinforces our view that the accused ought to have the right to attend his or her own trial.

This legislation represents a serious incursion into the civil liberties and protection that all New Zealand citizens currently have to protect themselves against the actions of the State. The submissions from the New Zealand Law Society and the Human Rights Commission are correct and should not be ignored. We strongly disapprove of this aspect of the bill and on this basis will be opposing the bill as a whole.

Appendix

Committee process

The Courts (Remote Participation) Bill was referred to us on 23 March 2010. The closing date for submissions was 16 April 2010. We received and considered eight submissions from interested groups and individuals. We heard one submission.

We received advice from the Ministry of Justice.

Committee membership

Chester Borrows (Chairperson)

Jacinda Ardern

Kanwaljit Singh Bakshi

Simon Bridges

Dr Kennedy Graham

Hekia Parata

Hon David Parker

Lynne Pillay

Paul Quinn

Courts (Remote Participation) Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

text inserted unanimously

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~~text deleted unanimously~~

Hon Simon Power

Courts (Remote Participation) Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Courts (Remote Participation) Act **2009**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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Part 1

Preliminary provisions

3 Interpretation

In this Act, unless the context otherwise requires,—

audio-visual link, or **AVL**, in relation to a participant's appearance at any proceeding, means facilities that enable both audio and visual communication between participants, when some or all of them are not physically present at the place of hearing for all or part of the proceeding 10

civil proceedings means any proceedings in a court, other than criminal proceedings 15

Community Magistrate has the same meaning as in section 2(1) of the District Courts Act 1947

court means a New Zealand court

Court of Appeal means the Court of Appeal of New Zealand constituted under Part 2 of the Judicature Act 1908 20

criminal procedural matter means any matter, in a criminal proceeding, in respect of which no evidence is to be called

criminal substantive matter means any matter, in a criminal proceeding, in respect of which evidence is to be called 25

District Court includes—

- (a) a Family Court and a Youth Court; and
- (b) a District Court sitting in its admiralty jurisdiction

High Court includes the High Court sitting in its admiralty jurisdiction, or sitting as a permanent Prize Court under the jurisdiction conferred by section 8 of the Admiralty Act 1973

Judge means a Judge of any court

judicial officer means a Judge, a Community Magistrate, or a Justice 5

Justice has the same meaning as in section 2 of the Justices of the Peace Act 1957

Minister means the Minister of the Crown who, under the authority of a warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act 10

New Zealand court means—

- (a) the Supreme Court, the Court of Appeal, the High Court, or a District Court; or 15
- (b) any of the following specialist courts: the Court Martial of New Zealand established under section 8 of the Court Martial Act 2007, the Court Martial Appeal Court constituted by the Court Martial Appeals Act 1953, the Employment Court, the Environment Court, the Maori Appellate Court, and the Maori Land Court 20

participant, in relation to a proceeding, means a person who is, in that proceeding, any of the following:

- (a) a party:
- (b) the defendant: 25
- (c) counsel:
- (d) a witness:
- (e) a member of the jury:
- (f) a judicial officer who is presiding over the ~~proceedings~~ proceeding: 30
- (fa) a Registrar who is presiding over the proceeding:
- (g) any other person directly involved in the proceeding whom the judicial officer or Registrar considers appropriate

proceeding means any proceeding in a New Zealand court 35

Registrar includes a Deputy Registrar

Supreme Court has the same meaning as in section 4 of the Supreme Court Act 2003

witness means a person who gives evidence and is able to be cross-examined in a proceeding.

- 4 Act binds the Crown**
This Act binds the Crown.

Part 2

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Use of audio-visual links in proceedings

- 5 General criteria for allowing use of audio-visual links**
A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding: 10
- (a) the nature of the proceeding:
 - (b) the availability and quality of the technology that is to be used:
 - (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including— 15
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and 20
 - (ii) the level of contact with other participants:
 - (d) any other relevant matters.
- 6 Additional criteria for allowing use of audio-visual links in criminal proceedings**
A judicial officer or Registrar must also consider, when he or she is required to determine under this Act whether or not to allow the use of AVL for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing, and, in particular,— 25 30
- (a) the ability of the defendant—
 - (i) to comprehend the proceedings; and
 - (ii) to participate effectively in the conduct of his or her defence; and 35

- (iii) to consult and instruct counsel privately; and
- (iv) to access relevant evidence; and
- (v) to examine the witnesses for the prosecution; and
- (b) the level of contact the defendant has with other participants; and 5
- (c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.

7 Use of audio-visual links in civil proceedings 10

- (1) ~~AVL may be used in any civil proceeding for the appearance of any participant if all the parties to the proceeding consent to its use:~~
- (2) ~~AVL may also be used in a civil proceeding for the appearance of a participant without the consent of all the parties if the judicial officer in the proceeding determines, in accordance with the criteria in **section 5**, to allow its use for the appearance of that participant in the proceeding.~~ 15
- (3) ~~A determination under **subsection (2)** may be made by the judicial officer on his or her own motion or on the application of any participant in the proceeding.~~ 20
- (1) AVL may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow its use for the appearance of that participant. 25
- (2) A judicial officer or Registrar may make a determination under **subsection (1)**—
 - (a) on his or her own motion; or
 - (b) on the application of any participant in the proceeding.
- (3) A determination under **subsection (1)** must— 30
 - (a) be made in accordance with the criteria in **section 5**; and
 - (b) take into account whether or not the parties consent to the use of AVL for the appearance of the participant.

8 Use of audio-visual links in criminal procedural matters

~~(1) A judicial officer or Registrar may require any participant in a criminal procedural matter to use AVL for his or her appearance.~~

(1) Judicial officers and Registrars must determine whether to require any 1 or more of the participants in a criminal procedural matter to use AVL for his or her appearance, if AVL is available for that appearance. 5

(2) A judicial officer may determine not to allow the use of AVL for the appearance of a participant in a criminal procedural matter, despite a previous requirement under **subsection (1)** made by a Registrar or a judicial officer. 10

(3) A determination under **subsection (1) or (2)** may be made on the objection of any party to the proceeding or on the motion of the judicial officer. 15

(4) Any determination made under this section must be made in accordance with the criteria in **sections 5 and 6**.

9 Use of audio-visual links in criminal substantive matters

AVL must not be used in any criminal substantive matter for the appearance of a participant unless ~~the~~ a judicial officer ~~in~~ ~~the proceeding~~ determines to allow its use for the appearance of that participant in the proceeding— 20

(a) in accordance with the criteria in **sections 5 and 6**; and

(b) taking into account whether the parties to the proceeding consent to the use. 25

10 Judicial officer or Registrar may vary or revoke determination

(1) A judicial officer may at any time vary or revoke a determination to allow the use of AVL for the appearance of a participant if the judicial officer considers that any reason for the determination, with respect to the criteria in **section 5**, or **sections 5 and 6** (as the case may be), no longer applies. 30

(2) A Registrar may at any time vary or revoke his or her determination, or the determination of another Registrar, to allow the use of AVL for the appearance of a participant if the Registrar 35

considers that any reason for the determination, with respect to the criteria in **section 5**, or **sections 5 and 6**, as the case may be, no longer applies.

10A Judicial officer or Registrar may make direction

A judicial officer or Registrar who makes a determination under this Act in relation to the use of AVL for the appearance of a participant in a proceeding may make a direction in accordance with that determination. 5

11 Direction to jury

In a proceeding tried with a jury, the Judge may direct the jury that it must not draw any adverse inference against any party to the proceeding because of the use of AVL in the proceeding. 10

12 Determining place of hearing

The place of hearing of any proceeding in which 1 or more of the participants appears by the use of AVL is the same as if none of the participants in that proceeding were to appear by the use of AVL. 15

13 Attendance at hearing

- (1) A participant who appears at a proceeding, or part of a proceeding, by the use of AVL under this Act is regarded as being present in the place of hearing at the proceeding, or that part of the proceeding, for the duration of that use. 20
- (2) **Subsection (1)** applies whether or not the participant is in New Zealand.

14 Documents and other exhibits when person appears at proceeding by use of AVL 25

A document may be put to or by a person appearing at a proceeding by the use of AVL, or another exhibit may be shown to or by that person,—

- (a) by transmitting the document or other exhibit electronically; or 30
- (b) by use of AVL; or

- (c) by any other manner that the judicial officer or Registrar thinks fit.

15 Relationship with other enactments

- (1) The appearance by a participant at a proceeding by the use of AVL to the extent that is authorised by this Act fulfils the corresponding legal requirements in relation to his or her appearance in person at the proceeding under every enactment and rule of court, unless that other enactment or rule of court expressly provides otherwise. 5
- (2) If an enactment or rule of court provides for the appearance by a participant at a proceeding by the use of AVL or video link in a court proceeding, then this Act must be read subject to that enactment or rule of court. 10

16 AVL does not affect exercise of judicial officer's powers

To avoid doubt, a judicial officer or Registrar presiding in a proceeding in which AVL is used has all the powers that he or she would have if the participant appeared in person. 15

17 Regulations

- (1) The Governor-General may, on the recommendation of the Minister, by Order in Council, make regulations— 20
- (a) prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made where a person is to appear by the use of AVL;
- (b) prescribing any method or technology of AVL as one which is suitable for use as AVL under this Act: 25
- (c) prescribing forms for the purposes of this Act;
- (d) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
- (2) Before making a recommendation under **subsection (1)(b)**, the Minister— 30
- (a) must be satisfied that the method or technology is appropriate for use in proceedings; and
- (b) may consult with other Ministers as he or she considers appropriate. 35

Courts (Remote Participation) Bill

18 Amendment to Evidence Act 2006

- (1) This section amends the Evidence Act 2006.
(2) The following section is inserted after section 102:

**“102A Relationship of Courts (Remote Participation) Act 2009
to sections 103 to 106**

Evidence given by audio-visual link under the provisions of the Courts (Remote Participation) Act ~~2009~~ is not, for the purposes of sections 103 to 106, evidence given in an alternative way.

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**“102A Relationship of Courts (Remote Participation) Act 2009
to sections 103 to 106**

Nothing in the Courts (Remote Participation) Act 2009 affects or limits the ability of—

- “(a) a party to apply under section 103(1) for evidence to be given in an alternative way; or
“(b) a Judge to make directions under that subsection.”

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Legislative history

8 December 2009
23 March 2010

Introduction (Bill 107–1)
First reading and referral to Justice and Electoral Committee
