



22 February 2024

Attorney-General

**Courts (Remote Participation) Amendment Bill (PCO 25940/1.7) – Consistency with the  
New Zealand Bill of Rights Act 1990**

**Our Ref: ATT395/405**

1. We have reviewed the Courts (Remote Participation) Amendment Bill (version 1.7) (**attached**) for consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**).
2. We conclude that although the use of audio-visual links (**AVL**) and audio-links (**AL**) for court proceedings must be reconciled with fair trial and related rights affirmed by the Bill of Rights Act, the safeguards provided by the Bill ensure it is not inconsistent with the Bill of Rights Act.
3. We understand a further draft of the Bill may be prepared before introduction. We do not expect that draft to alter the conclusions we have reached but will provide you with further advice if we consider that to be the case.

**The Bill**

4. The Bill seeks to improve court performance and increase remote participation in court proceedings by:
  - 4.1 allowing the use of AL for remote court proceedings;
  - 4.2 enabling victims to remotely observe criminal trials and sentencing where appropriate; and
  - 4.3 clarifying that provisions requiring criminal proceedings to be open to the public or media do not affect the ability of a court to conduct a hearing remotely or virtually.

**Amendments to Courts (Remote Participation) Act 2010**

***Allowing the use of AL for remote court proceedings***

5. Clauses 5 and 6 of the Bill reinstate and modify ss 7A and 8A of the Courts (Remote Participation) Act 2010, which were automatically repealed when the Epidemic Preparedness (COVID-19) Notice 2020 expired. These sections enable the use of

AL, instead of AVL, for participation in civil proceedings and criminal procedure matters respectively.

6. In respect of civil proceedings, s 7A enables a judicial officer or Registrar to determine that AL be used instead of AVL under s 7 if they:
  - 6.1 consider the criteria in s 5 in determining whether the use of AL is appropriate in the circumstances;
  - 6.2 consider additional criteria relating to the potential impact of the use of AL on the ability of the parties to comprehend and effectively take part in the proceedings; and
  - 6.3 determine that the use of AL would not be contrary to the interests of justice.
7. In respect of criminal procedural matters, s 8A enables a judicial officer or Registrar to determine that AL be used instead of AVL under s 8, in proceedings in which the defendant does not attend, if they:
  - 7.1 consider the criteria in ss 5 and 6 in determining whether the use of AL is appropriate in the circumstances; and
  - 7.2 determines that the use of AL would not be contrary to the interests of justice.

***Enabling victims to remotely observe criminal trials and sentencing***

8. Clause 7 of the Bill inserts a new s 9A into the Courts (Remote Participation) Act.
9. Section 9A provides that, unless a judicial officer or a Registrar determines that it is contrary to the interests of justice, a victim of an offence and any support person of the victim are entitled to observe all or part of the trial and sentencing using AVL or AL provided certain criteria are met. Those criteria include whether the trial and sentencing that is to be observed are open to the public and whether the victim and any support person would otherwise be entitled to be present.

**Amendment to the Criminal Procedure Act 2011**

10. Clauses 10 and 11 repeal cl 1 of sch 1AB of the Criminal Procedure Act 2011 (CPA) (which was a temporary provision inserted by the COVID-19 Response (Courts Safety) Legislation Act 2022) and replicate its text in the new s 198A.
11. The new s 198A (like cl 1 of sch 1AB) provides that nothing in ss 196 to 198 of the CPA (provisions requiring criminal proceedings to be open to the public or media) limits or affects the ability of a court to conduct a hearing wholly or partly by AVL or AL and to require some or all members of the media or public who wish to observe the hearing to attend by AVL or AL.

## Analysis

12. The amendments proposed by the Bill extend or clarify the circumstances in which participants and observers in court proceedings (including defendants, victims, counsel, parties and media) may attend using AVL or AL.
13. The right to be present before the courts, which is usually interpreted to entail physical presence,<sup>1</sup> is considered a fundamental safeguard against unfairness or other error in court proceedings.<sup>2</sup>
14. In respect of criminal proceedings, the right is reflected in the specific protections of the rights to be brought before a court following arrest, to instruct counsel, to a fair and public trial, to be present at trial and to examine witnesses on an equal basis to the prosecution under ss 23(3), 24(c), 25(a), 25(e) and 25(f) of the Bill of Rights Act. In civil proceedings, the right to be present arises as an incident of natural justice, as affirmed by s 27(1) of the Bill of Rights Act. This includes the opportunity to be heard on the making of a decision.<sup>3</sup>

### **Sections 7A and 8A of the Courts (Remote Participation) Act 2010 and s 198A of the CPA**

15. The amendments to the Courts (Remote Participation) Act to enable AL to be used in court proceedings (instead of AVL)<sup>4</sup> and the amendment to the CPA<sup>5</sup> are substantially similar to previous temporary provisions inserted into the respective Acts as part of the COVID-19 response. Crown Law advised that these amendments were not inconsistent with any of the rights and freedoms affirmed by the Bill of Rights Act.<sup>6</sup>
16. As we advised then, the decision to allow an appearance by AVL or AL is not necessarily inconsistent with these rights if it does not give rise to unfairness.<sup>7</sup> Whether it will be unfair will depend on the circumstance of each case. It is not possible to define all those factors which should have a bearing on a particular decision, but an important matter will often be the ability to assess the credibility of witnesses and so to effectively challenge those witnesses through cross-examination if they are not physically present in court. In this, and in other respects, appearances by AL may have greater impact on the rights of parties than AVL. This means a decision on whether to allow AL rather than AVL must be carefully considered.
17. The amendments provide the court with the power to determine that participants may appear by AL. However, the discretion provided in respect of criminal

<sup>1</sup> See *Connelly v R* [1998] 3 NZLR 763 (HC).

<sup>2</sup> See *Jones v R* [2003] 1 AC 1 at [8].

<sup>3</sup> *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 (CA) at [11] per Glazebrook and Hammond JJ.

<sup>4</sup> Sections 7A and 8A.

<sup>5</sup> Section 198A.

<sup>6</sup> Advice to Attorney-General on COVID-19 Response (Further Management Measures) Legislation Bill (PCO 22874/4.0) – Consistency with New Zealand Bill of Rights Act 1990 dated 30 April 2020 at 27; and Advice to the Attorney-General on COVID-19 Response (Courts Safety) Legislation Bill [PCO 24480/6.0] – Consistency with the New Zealand Bill of Rights Act 1990 dated 1 March 2022 at 22.

<sup>7</sup> *Accused v Attorney-General* (1997) 15 CRNZ 148 at 153-154.

proceedings is not available for substantive or sentencing hearings, nor for procedural hearings where the defendant is present. It thereby confines the power to those criminal hearings where there is least potential for injustice arising from appearances by AL.

18. In respect of both civil and criminal matters, there are statutory safeguards that will apply to ensure that the discretion is exercised fairly:<sup>8</sup>
  - 18.1 The requirement to consider the criteria in s 5, including the “potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding”.<sup>9</sup>
  - 18.2 In respect of criminal proceedings, the requirement in s 6 to consider “the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial” as well as the other criteria in s 6.<sup>10</sup>
  - 18.3 In respect of civil proceedings, the requirement in s 7(3)(b) to consider whether the parties consent.<sup>11</sup>
  - 18.4 The overarching requirement to determine that the use of AL is not contrary to the interests of justice.<sup>12</sup>
19. Our previous advice was that these safeguards sufficiently overcame any concerns about remote participation arising under the Bill of Rights Act. These safeguards are mirrored in the provisions in the new Bill.
20. The new s 7A also inserts additional safeguards in respect of civil proceedings: the requirement in s 7A(1)(b) on decision-makers to consider the potential impact of the use of AL on the ability of the parties to comprehend and participate in the proceedings, consult and instruct counsel, access evidence and examine witnesses.
21. It follows, in our opinion, that these amendments are not inconsistent with the rights and freedoms affirmed by the Bill of Rights Act.

***Section 9A of the Courts (Remote Participation) Act 2010***

22. Section 9A of Bill is a new amendment to the Courts (Remote Participation) Act that enable victims and any support persons of the victim to observe all or part of a trial and sentencing by AVL or AL.<sup>13</sup>

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<sup>8</sup> See Courts (Remote Participation) Act 2010, SS 5 – 9.

<sup>9</sup> Section 5(c).

<sup>10</sup> Further, s 9 provides AVL must not be used in any criminal substantive matters unless a judicial officer determines to allow its use.

<sup>11</sup> This consideration is in relation to AVL, but the use of AL in s 7A requires that the decision-maker must first be satisfied that they would have determined under s 7 that AVL be used.

<sup>12</sup> Sections 7A(1)(c) and 8A(c).

<sup>13</sup> Sections 9A and 9B.

23. A victim's ability to observe a trial or sentencing using AVL or AL is an entitlement that may be traced back to the general obligation to have a public hearing of criminal charges.<sup>14</sup> This entitlement, however, does not apply if a judicial officer or Registrar considers that it would be contrary to the interests of justice. In making this determination, a judicial officer or Registrar must take into account the criteria specified in ss 5 and 6 (as set out above).
24. The provision builds in safeguards and discretion into the entitlement. It does not affect a defendant's ability to examine witnesses, as they do not permit victims – who are also witnesses – to give evidence remotely. The Bill also enables the courts to impose conditions to protect the integrity of the court process by, for example, requiring victims to comply with court requirement such as not sharing access links or recording proceedings.<sup>15</sup>
25. We therefore consider that these amendments to the Courts (Remote Participation) Act are not inconsistent with the rights and freedoms that are affirmed by the Bill of Rights Act.

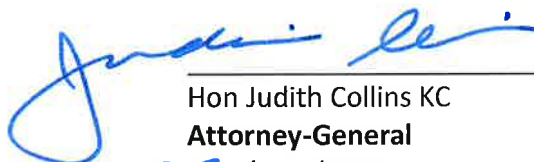
#### Review of this advice

26. In accordance with Crown Law's policies, this advice has been peer reviewed by Debra Harris, Crown Counsel.



Peter Gunn  
Crown Counsel

~~Noted / Approved / Not Approved~~



Hon Judith Collins KC  
Attorney-General

Encl.

27 / 2 / 2024

<sup>14</sup> See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.12].

<sup>15</sup> Courts (Remote Participation) Amendment Bill, Explanatory note.