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## Audio Links and Audio Visual Links in Proceedings

### Purpose

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1. The purpose of this paper is to discuss the policy and legal issues associated with developing legislative provisions for the use of audio links (AL) and audio visual links (AVL) in judicial proceedings, both civil and criminal.

### Executive Summary

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2. The introduction of advanced technology, such as audio links (AL) and audio visual links (AVL) in court proceedings, means that the notion of being 'present' in court needs to be re-examined, to ensure that 'participation' via this new technology is consistent with the right to a fair trial.
3. This paper considers whether, and to what extent, 'appearance' by AVL limits or enhances the opportunity for participation as compared with physical presence.
4. AVL and AL are already regular tools for the purposes of timetabling and dealing with procedural matters. AVL is currently used in a limited range of civil proceedings (mostly circuit sittings of Associate Judges) and for taking evidence from witnesses in criminal proceedings. There are permanent installations of AVL equipment in only one conference room and eight courtrooms (out of 226 court and hearings rooms) at seven sites.
5. The Ministry's preliminary analysis is that, with respect to the majority of civil and criminal proceedings, legislative change would be required to allow for the use of AVL.
6. The preferred approach to such legislative change is to focus on principles that can be applied in the context of the circumstances of the particular proceedings, with a presumption that:
  - 6.1. the court can use AVL in any proceeding other than where evidence is being presented, unless a party satisfies the court that it would not be appropriate in a particular case (eg, the current technology does not allow the legislative principles to be met); and
  - 6.2. any party can apply for AVL to be used in a proceeding where evidence is to be presented, and the court will decide whether the use of AVL is appropriate in the particular case.
7. Legislative guidance / principles would assist a court to decide whether to allow or override the presumption regarding the use of AVL in any particular case. The determination and application of the principles would be on a case by case basis, depending on all of the circumstances, including the availability and quality of the

particular technology proposed to be used. This approach allows for gradual introduction and continued development as technology advances.

8. Legislative change would have to be accompanied by operational changes and modifications to courtroom behaviour to accommodate and support effective participation by those appearing via AVL. It will also require general acceptance by all those involved in proceedings (judiciary, counsel, parties, witnesses) of the notion that physical presence is not essential to effective participation. This culture change will require leadership, particularly from the judiciary, who may provide more detailed guidelines through the development (and continued review) of a relevant practice note.

#### *Potential Benefits*

9. The expanded use of AL and AVL by the courts in New Zealand has potential benefits across the justice sector, including reduction in costs (eg, transportation, facilities, security), improvements in safety and security, greater court efficiencies, increase in access to justice, improved quality of evidence and overall improvement in the administration of justice.
10. The use of AL and AVL in a wider range of court proceedings will benefit not only justice sector agencies but also other users of the courts, such as counsel, witnesses (particularly overseas witnesses), applicants for probate and parties in civil disputes.

#### *Open Justice*

11. The use of audio visual technology in criminal and civil proceedings has implications for the principle of open justice, particularly public access to proceedings and the traditional courtroom's role as the embodiment of the administration of justice. However, public access can be addressed and could in fact be improved through use of AVL (eg, internet access rather than travelling to court where there may not be sufficient space). With regard to the symbolism of the traditional court, the advent of alternatives such as alternative dispute resolution and restorative justice demonstrate how the mechanisms of justice must and do evolve in response to the changing needs of the public.

#### *Criminal Proceedings*

12. This paper focuses on the use of AVL (with some discussion of AL) primarily in criminal proceedings. This is an area in which the use of audio visual technology raises particular issues regarding consistency with the New Zealand Bill of Rights Act 1990 (NZBORA), especially the right to a fair hearing. It can be argued that the essential objectives of the right to a 'fair hearing' are impartiality, participation, and procedural protections.
13. Because current legislation reflects the historic practice and notions of a court, participation tends to be equated with physical presence. However, technological advances require us to re-examine our understanding of what it means to be 'present' in court and discuss the nature of the *participation* required by the right to a fair hearing. This allows us to consider whether and to what extent appearance by AVL limits or enhances the opportunity for effective participation as compared with the physical presence of the defendant (or other participants to the proceeding).
14. Consequently, this paper focuses on what principles a court should take into account when considering whether or not to employ AVL. The critical question would be

whether the use of audio visual technology is able to ensure the protection of NZBORA rights (particularly the right to a fair trial) in the particular circumstances of the particular case, taking into account (as far as it is relevant) such principles as:

- 14.1. the nature of the proceeding
- 14.2. the technology to be used
- 14.3. the potential impact of the use of the technology on the effective maintenance of the defendant's right to a fair trial, in particular the impact on
  - 14.3.1. the ability of the defendant to comprehend, and participate effectively, in the proceeding
  - 14.3.2. the ability of the defendant to privately consult and instruct counsel
  - 14.3.3. the ability of the defendant to access the relevant evidence
  - 14.3.4. the ability of the defendant to confront the prosecution witnesses
  - 14.3.5. the level of contact the defendant has with other participants (including the judge, jury and witnesses) in the proceeding
  - 14.3.6. any adverse impression that may be created by the defendant appearing by AVL and whether that can be mitigated against
- 14.4. the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including
  - 14.4.1. the ability to assess witnesses' credibility and the reliability of evidence presented to the court
  - 14.4.2. the level of contact with other participants (including the judge, jury and defendant) in the proceeding
- 14.5. whether both parties consent to the defendant appearing by AVL and
- 14.6. any other relevant matters.
15. These principles would be incorporated into legislation and applied universally across all parts of the criminal process, to ensure a defendant's NZBORA rights are protected.
16. The paper also examines the use of AVL to facilitate participation by witnesses, counsel/prosecution, the judge and the jury from a remote location.

#### *Civil Proceedings*

17. The use of audio visual technology in the civil jurisdiction does not raise issues under NZBORA to the same extent as in the criminal jurisdiction. The chief concern is to ensure compliance with the principles of *natural justice* under section 27 of NZBORA; that is, that proceedings are conducted in a manner that is fair to, and protects the rights of, all parties. It is expected that such issues can be largely addressed by requiring the parties' consent, with perhaps some additional safeguards around this consent to mitigate the risk of potential exploitation or power imbalance between parties.

## *Appeals*

18. Finally, the paper considers the use of AVL in appeals, which, for the most part, does not present the same issues as its use in trials. Oral arguments in appellate courts do not usually involve assessing credibility or analysing evidence, so the concerns raised about use of AVL for remote witnesses, etc do not arise. The critical consideration would be whether, and the extent to which, the use of audio visual technology is able to support and not interfere with the 'discussion' between counsel and judges about the major points of a case. The decision about whether to use AVL in an appeal will largely come down to the quality of the technology proposed to be used and the level of a judge's and counsels' comfort with using such technology.

## **The Problem**

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19. In many ways, today's courtrooms still reflect historic notions and practices, from a time when there were no telecommunications (or other technology), that enabled individuals to communicate effectively or actively with the court from a place outside the physical courtroom. Legislation has similarly developed to reflect the presumption of physical presence. For example, section 376 of the Crimes Act 1961 provides that "every accused shall be entitled to be present in Court during the whole of his trial" and "the Court may permit the accused to be out of Court . . .". As another example, section 316(5) of the Crimes Act, and sections 58, 59 and 60 of the Bail Act, require a person who has been arrested to be brought before a court/judge as soon as possible.
20. The Ministry has considered the extent to which use of AVL is possible within the current legislation framework, including in light of recent amendments to the Evidence Act 2006 and the Sentencing, Bail and Parole Acts. Preliminary analysis has identified some criminal and civil proceedings where no legislative change is required. However, with respect to the majority of criminal proceedings, legislative change would be required to achieve consistency with the New Zealand Bill of Rights Act 1990. Similarly with regard to civil proceedings, legislative change would be needed to facilitate the use of AVL in the majority of proceedings. See Appendix 1 and 2 for a summary of this analysis.

## **COSTS OF CURRENT ARRANGEMENTS**

21. Having all court participants physically present involves financial and other costs. For example, witnesses can be required to appear in their local court, or, depending on the nature of the case, in courts well outside their local area. This can be time consuming, as well as a source of considerable financial and emotional stress. There can be substantial variations between a court schedule and the day's course of events. For witnesses residing outside main centres (or even overseas), hearing delays and adjournments can escalate the costs of appearing in metropolitan courts, creating serious financial and logistical problems.
22. There are also the costs of transporting prisoners, housing them at court and providing security. Each year approximately 38,000 prisoners are escorted to and from court by Corrections and 132,000 by NZ Police. Much of the transport of inmates to court occurs with those in remand and inmates applying for bail. For example, an inmate in the summary jurisdiction will typically make on average three or four short appearances following an initial in-person appearance in court. The initial court appearance is normally in person; the next two or three appearances are often short matters prior to the substantive hearing, though appearances of a day, or more, in length are not

uncommon. The average unit cost to transport and escort a remand prisoner is currently \$138, expected to increase to \$221 by 2020/21.

23. The process of preparing and transporting a prisoner can typically consume a whole day and a large amount of resource. For a typical court appearance an inmate has to be:
- woken earlier than other prisoners
  - fed, showered, strip searched and provided with appropriate clothing for a court appearance
  - assembled in a particular area for transportation
  - transported to the court location (which may be far from the correctional facility), often with other inmates, regularly requiring segregation
  - appropriately accommodated at the courthouse in a holding cell
  - escorted to the dock
  - returned to the holding cell and detained until a warrant for return to the corrections facility has been prepared
  - transported to the corrections facility
  - received into a holding area and
  - taken to a cell.
24. In addition to the above process are the extensive time delays between steps.
25. The current transport process has a high degree of risk (attempted and actual escapes, arguments with other inmates, offences committed while in transit and at the court), costs (guards, vehicles, cells at court houses or at Police stations, food etc) and scheduling issues (court delays and/or matter changes are common). The transport of high risk/high security inmates increases these costs.
26. In addition, the delivery of Justice services generally is under sustained pressure from volume growth and issues with capacity. The longer-term trend in growth is rising strongly. For example, in the criminal justice area, projected growth is 3.5% per annum for people remanded in custody; and 6% per annum for charging events in 2008/09, with the rate of growth slowing from 2009/10 onwards. This will create a consequent flow-on in demand for court appearances and associated prisoner transports. For example, the forecast 3.5% increase in prisoners on remand highlights a possible 32% increase over the next 8 years to 2016. This translates to an estimated increase of 35,899 prisoner transports to be managed by Police and Corrections.
27. The rising numbers of people entering the system and inmate population places growing pressure on defence counsel. This manifests itself in an increasing workload (including time travelling to corrections facilities) and creates a flow-on effect where insufficient time for consultation and preparation with clients can lead to a court appearance requesting an adjournment – in effect increasing the load on the court without making new progress in the matter.
28. The rising inmate population also creates bottlenecks at courts where the number of holding cells can limit the number of short matters that can be heard in a day – due to the logistics of moving and segregating inmates.

## POTENTIAL BENEFITS OF AL AND AVL

29. Increased availability and use of AL and AVL by the courts in New Zealand could have potential benefits across the justice sector:

### 29.1. reduction in costs

Greater use of AL and AVL can reduce travel and related costs (eg, accommodation and waiting time) for defendants, witnesses (including scientific or other experts), judges and counsel. When a matter requires the attendance of expert witnesses in or from remote locations – particularly highly specialised experts, AVL may also facilitate the process of engaging the witness. In some instances, it may be the only practical or financially acceptable means by which they can appear. AVL could also contribute to a reduction in costs for transporting prisoners, along with the associated costs of housing them at court and security (particularly for high risk/high security inmates).

### 29.2. reduction in safety risks

AVL has the potential to enhance the security for the public, defendants, Police, Corrections and court staff. The tragic circumstances surrounding the death of remand prisoner Liam Ashley in August 2006, is one example of the risks associated with court appearances. The Ombudsmen's 2007 Report of its own-motion investigation into prisoner transport noted that the "increased use of audio/video technology could reduce the need for attendance of prisoners at court hearings."<sup>1</sup>

### 29.3. greater court efficiencies

Greater use of AL and AVL could enhance efficiency in the courts. For example, if Judges could spend less time travelling this should increase judicial capacity. Similarly NZ Police (prosecutors and officers), the Department of Corrections, counsel and witnesses could use more productively the time currently spent travelling to and from (and waiting in) courts and correctional facilities. This saved time could translate into thousands more person hours policing on the streets, duty in correctional facilities or providing legal advice to clients. The use of AVL can save travel by court reporters to a remote location (for example, between Christchurch and Greymouth). Hearings could be concluded more quickly as electronic evidence, or evidence that is currently difficult to display in the courtroom, could be displayed more easily and be considered more readily by the court.

### 29.4. increase in access to justice

Matters could be heard in provincial areas without the need to wait for a judge to travel on circuit. AVL could reduce the financial burden and inconvenience to parties of travelling to courts from remote areas. Access could also be improved for persons with disabilities and for those who may be able to attend only at significant expense and with difficulty. For defendants in custody, access to justice is improved by timelier and more efficient proceedings. There is also potential for improved quality of participation in proceedings, as the use of AVL

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<sup>1</sup> Investigation by John Belgrave, Chief Ombudsman and Mel Smith, Ombudsman of the Department of Corrections in relation to the Transport of Prisoners, 12 June 2007, p. 25.

is likely to generate operational changes to ensure defendants and other participants are not disadvantaged (eg, the judge periodically checking that the person appearing by AVL is following the proceeding).

29.5. improved quality of evidence

AVL technology may contribute to a higher quality of evidence. As discussed above, it may allow witnesses who would not have otherwise been able to attend the proceeding (eg, witnesses who are unable to travel as a result of a disability, experts in remote locations, etc), to provide evidence. AVL may also provide a better opportunity to observe more closely witness demeanour than if the witness were physically present. In future, AVL could result in a complete video record of proceedings and evidence, which would assist not only the hearing but also consideration of any matters on appeal.

29.6. overall improvement in the administration of justice, resulting from the above benefits.

30. The use of AL and AVL in a wider range of court proceedings can bring benefits across justice sector agencies as well as to other users of the courts, such as counsel, applicants for probate and parties in civil disputes.
31. A cross-justice agency implementation of videoconferencing in New South Wales, Australia, highlights the potential benefits. Over the first 5 years, it experienced a total savings of \$24.5 million<sup>2</sup> and the avoidance of 66,997 prisoner transports.<sup>3</sup> The experience in New South Wales was one of a gradual uptake, from 1,110 matters heard and 2,633 prisoner appearances by AVL in 2001/02 to 26,151 matters heard and 17,878 prisoner appearances in 2006/07.<sup>4</sup> The success of the initiative has been such that the initial 68 audio visual link facilities have been increased to 166 courts and justice agencies.<sup>5</sup>
32. In New Zealand, it is projected that over the ten year period post introduction, the level of benefits (costs avoided) through the adoption of AVL technology could be approximately \$70 million at a total present value of \$43 million. After incorporating the costs to implement AVL, the net present value ranges from \$3.9 million for a low growth scenario to \$29.3 million for high growth.

## Discussion

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### OPEN JUSTICE

33. In New Zealand, the principle of open justice for criminal proceedings is reflected in NZBORA section 25(a)'s right to a fair and *public* hearing;<sup>6</sup> in civil proceedings there is an established presumption at common law.<sup>7</sup> While the principle has several aspects,

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<sup>2</sup> Attorney General's Department of New South Wales, *Cross Justice Sector Agency Videoconferencing Project: Benefits Review* (draft final), 2008, p. 7.

<sup>3</sup> *Ibid*, p. 19.

<sup>4</sup> *Ibid*, pp. 6 and 19.

<sup>5</sup> *Ibid*, pp. 10-11.

<sup>6</sup> See also section 138 of the Criminal Justice Act 1985.

<sup>7</sup> The Law Commission has argued that NZBORA section 14, right to freedom of expression, can be interpreted as supporting aspects of the principle – see NZLC R 85, *Delivering Justice for All*, Wellington, Law Commission, 2004, p. 300.

the most basic element is that judicial proceedings must be conducted in an open court to which the public and the media have access.<sup>8</sup>

34. This long-standing principle is often expressed in the form attributed to Lord Chief Justice Hewart,

*It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*<sup>9</sup>

35. As the Law Commission notes, open justice is important for:

- maintaining public confidence in the administration of justice
- ensuring accountability of judges
- enhancing the accuracy of the process
- serves an educative function and
- contributes to the democratic process, because the actions of government and officials are subject to public scrutiny through court proceedings.<sup>10</sup>

## Issues

36. The use of audio visual technology in criminal and civil proceedings has implications for the principle of open justice.

### *Public access*

37. If one or more participants, including possibly the judge, are participating remotely, it raises the question of where the court is 'sitting' and therefore where the public and the media can go to see the court 'in action'.
38. As will be discussed later, where the court file and record are actually held determines the venue for proceedings, rather than the judge's physical location.<sup>11</sup> In the short-to-medium term at least, the court building holding the court file and record is likely to remain the location where the proceedings take place, with many of the participants still physically present, and the public and media able to go to view the proceedings.
39. In the longer term, the public and media are likely to have electronic access to view the proceeding as it takes place. However, there may be a concern about whether this is adequate to achieve open justice, particularly if not everyone has the means for easy and free electronic access.
40. One should first consider to what extent the public currently has access to proceedings. As one commentator, Fredic Lederer, discusses:

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<sup>8</sup> "The Principle of Open Justice: A Comparative Perspective", Address by the Honourable JJ Spigelman AC Chief Justice of New South Wales to the Media Law Resource Centre Conference, London, 20 September 2005, p. 3 (available at [www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman\\_200905](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman_200905)).

<sup>9</sup> "The Principle of Open Justice", p. 1 citing *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256 at 259.

<sup>10</sup> *Delivering Justice for All*, p. 300.

<sup>11</sup> *Serious Fraud Office v Anderson* [2000] DCR 435.

*the traditional right to view a trial has never required the government to enable the public to travel to the courthouse. Similarly, today's courthouses do not promise sufficient space for all interested attendees, first-come, first-served is usually the practice.*<sup>12</sup>

41. Lederer notes that, as a result, many trials are effectively private, and the television media (even with Court TV) have limited carrying capacity to improve this. The current easy and relatively inexpensive accessibility of the internet could actually enhance open justice – “They could make trials truly public if any member of the public who wished could ‘log in’ to a trial.”<sup>13</sup> If issues of public access did arise, they could also be addressed through such mechanisms as a ‘Court TV’ channel, similar to that for Parliament, or by providing places where the public could have free electronic access to the proceedings, such as court buildings, other government offices or public libraries.

#### *Courtroom as embodiment of justice*

42. With the move toward a ‘virtual courtroom’, a further consideration is the implications for the ‘theatre and ritual’ of the courtroom. As several commentators have discussed:

*Court buildings, it can be argued, embody the relationship between citizen and state, court processes give concrete form to abstract rights, and the interactions between people in the court environment displays justice in practice.*<sup>14</sup>

*Courthouses are accordingly regarded by the community as evidence of stability, self-assurance, even nationhood.*<sup>15</sup>

43. Lederer explains the possible impact of AVL : “Courtrooms, the center of courthouses, embody the administration of justice. . . . Virtual courtrooms and virtual trials threaten that sense of place and solemnity.”<sup>16</sup>
44. However, recent innovations such as alternative dispute resolution and restorative justice have demonstrated that a solemn, formal process in the courtroom is not the only way for the State to achieve its interest in open justice, respect for the rule of law and general societal acceptance of the judicial system. Indeed, the advent of these alternatives to traditional court may be viewed as demonstrating that historic traditions and practices have not always served the changing needs of the public.
45. Therefore, while expanded use of technology such as AVL must be carefully introduced, to take account of open justice issues,

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<sup>12</sup> Lederer, Fredric I. “The Road to the Virtual Courtroom? A Consideration of Today’s – and Tomorrow’s – High Tech Courtrooms”, presented 9 December 2002 at the International Society for the Reform of Criminal Law’s 16<sup>th</sup> International Conference on Technology and Its Effects on Criminal Responsibility, Security, and Criminal Justice, p. 28 (available at [www.isrcl.org/Papers/Lederer.pdf](http://www.isrcl.org/Papers/Lederer.pdf)).

<sup>13</sup> Ibid pp. 6, 30.

<sup>14</sup> Tait, David, “Remote and intimate justice: challenges and paradoxes for courts of the future”, presentation to the Australasian Law Reform Agencies Conference, Wellington, April 2004, p. 2 (available at [www.lawcom.govt.nz/UploadFiles/SpeechPaper/de306351-93e9-454f-a772.../Session%208A%20-%20Courthouse%20-%20Tait.pdf](http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/de306351-93e9-454f-a772.../Session%208A%20-%20Courthouse%20-%20Tait.pdf)).

<sup>15</sup> Justice Hugh Williams, High Court of New Zealand, “Remote and intimate justice: challenges for courts of the future”, presentation to the Australasian Law Reform Agencies Conference, Wellington, April 2004, p. 3 (available at [www.lawcom.govt.nz/UploadFiles/SpeechPaper/b44cba59-a134-45ad-a691.../Session%208A%20-%20Williams%20J%20comment.pdf](http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/b44cba59-a134-45ad-a691.../Session%208A%20-%20Williams%20J%20comment.pdf)).

<sup>16</sup> Lederer, Fredric I., “The Road to the Virtual Courtroom?”, p. 29.

*We ought not, however, to be overly-wedded to current courtroom assumptions. . . . Presumably, when adjudication uses the same methods employed in the day-to-day activities by most of the populace, those methods will not be viewed with suspicion. . . . given the rate of technological change, it may not be long before elements of the public find the lack of virtual courtrooms to be a visible sign of the law's innate and undesirable conservatism.*<sup>17</sup>

## **USE OF AVL IN CRIMINAL PROCEEDINGS**

46. Criminal proceedings (including fitness to plead hearings and habeus corpus hearings) is an area where the use of audio visual technology raises particular issues with the New Zealand Bill of Rights Act 1990 (NZBORA).
47. As discussed earlier, legislation currently reflects historic practices and notions of a court with all participants physically present. Therefore, a traditional analysis focuses on whether the use of AVL for certain types of criminal proceedings would be a justified limitation on the defendant's right to be physically present. In other words, traditionalists begin with the presumption that the use of AVL will impinge on a defendant's rights, and therefore its use can be justified in only a limited range of proceedings.
48. Such a presumption does not allow for consideration of, or even contemplate, the potential for AVL to enhance defendants' rights and access to justice, as well as improve the overall administration of justice. For example, as one expert on the use and impacts of courtroom technology, Fredic Lederer, notes, "In geographically remote areas, prisoners may actually have a hearing scheduled sooner and may get a more personal hearing via videoconferencing than they would if they appeared in person in front of the judge."<sup>18</sup>
49. Further, while quality/reliability concerns about AVL may have been valid in the past, significant gains have been made in audio visual technology, and further gains are likely in the future. As noted in New South Wales' review of its cross-justice agency implementation of videoconferencing, "The technology has matured considerably since the early implementations and is generally stable. One frequent user commented that the technology had made 'quantum leaps with every implementation'.<sup>19</sup> In fact, the technology has been taken to a level where it may actually enhance the quality of evidence given in a proceeding, and therefore provide overall increases in the protection of a defendant's rights and the administration of justice.
50. Therefore, instead of focussing on reasons for and against the use of AVL in specific proceedings, this paper will focus on what principles a court should take into account when considering whether or not to employ AVL. It is expected that these principles will be incorporated into legislation and applied universally across all parts of the criminal process, as a way of ensuring a defendant's rights under the NZBORA are protected.

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<sup>17</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", pp. 29 – 30.

<sup>18</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 15, note 76.

<sup>19</sup> *Cross Justice Sector Agency Videoconferencing Project: Benefits Review*, p. 38.

## AVL AND THE RIGHT TO A FAIR TRIAL

51. In discussing what principles to consider about whether or not to use AVL, the focus must be on the fundamental constitutional concept of the right to a 'fair trial', and what this means, not just for defendants but for all participants.
52. The importance of 'fairness' (or procedural fairness) cannot be overstated – it is key to maintaining public trust and confidence in the judicial process.<sup>20</sup> Recent social science research indicates that:
- 52.1. the general public, including litigants, care more about the fairness of the judicial process than the outcome; and
- 52.2. persons who perceive that they were treated more fairly during a proceeding are more likely to comply with an order resulting from the proceeding.<sup>21</sup>
53. However, defining what exactly is meant by the right to a 'fair' hearing provided for in section 25(a) can be difficult. As Butler and Butler note,
- First, it is not clear the extent to which the right to a "fair hearing" permits the Courts to go beyond the specific protections contained in ss 24 [Rights of persons charged] and 25 of BORA (and, indeed, ss 21 – 23 of BORA) to supply further rights not specifically enumerated in BORA. Secondly, like beauty, the fairness of a hearing is often in the eyes of the beholder.*<sup>22</sup>
54. Commentary on the *right to a fair hearing* tends to focus on the procedural protections.<sup>23</sup> As noted by all of the commentators, 'fairness' is something beyond specific procedural rights constituting 'minimum guarantees' of a fair trial.<sup>24</sup> However, the procedures are the criteria or proxy by which it is possible to evaluate the 'fairness' of a trial.
55. NZBORA section 25 sets out, for everyone who is charged with an offence, in relation to the determination of the charge, minimum standards of criminal procedure. The most relevant of these for the purposes of this discussion are:
- section 25(a) right to a fair and public hearing by an independent and impartial court
  - section 25(b) right to be tried without undue delay
  - section 25(e) right to be present at the trial and to present a defence

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<sup>20</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 29.

<sup>21</sup> Greacen John M., "Social Science Research on 'Procedural Justice': What are the Implications for Judges and Courts?", *The Judges' Journal*, Volume 47, Number 1, Winter 2008, p. 41 (available at [www.abanet.org/jd/publications/jjournal/2008winter/JJ\\_Winter08\\_full.pdf](http://www.abanet.org/jd/publications/jjournal/2008winter/JJ_Winter08_full.pdf)).

<sup>22</sup> Butler, Andrew and Butler, Petra, *The New Zealand Bill of Rights Act: A Commentary*, Wellington: LexisNexis NZ Limited, 2005, para. 23.14.1.

<sup>23</sup> See, eg, Paul Rishworth et al, *The New Zealand Bill of Rights*, South Melbourne: Oxford University Press, 2003, p. 664; Lawyers Committee for Human Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, March 2000 (available at [www.humanrightsfirst.com/pubs/descriptions/fair\\_trial.pdf](http://www.humanrightsfirst.com/pubs/descriptions/fair_trial.pdf)).

<sup>24</sup> *Ibid.* See also Butler and Butler, para. 23.14.3 "the guarantee of a 'fair hearing' in s 25(a) is a source of unenumerated rights that are additional to those conferred by ss 24 and 25 of BORA."

- section 25(f) right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution
  - section 25(h) right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.
56. Drawing on the above, these section 25 rights can be further reduced to their essential objectives:
- 56.1. impartiality  
(eg, independent and impartial court; right to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution)
- 56.2. effective participation  
(eg, right to be present at trial and present a defence; right to examine/confront witnesses and accusers)
- 56.3. procedural protections  
(eg, public hearing; right to be tried without undue delay; right to appeal).
57. The issues surrounding AVL are primarily concerned with ‘effective participation’, and, to a lesser extent, the ‘procedural protections’ intended to support it.
58. As noted above, current legislation reflects historic notions and limitations of a traditional court and therefore equates participation with physical presence. However, physical presence alone does not ensure participation (to say nothing of effective participation) – it merely provides the *opportunity* to participate. The real question is the nature of the participation involved in the right to a fair hearing.<sup>25</sup> This allows consideration of whether and to what extent appearance by AVL limits or enhances the opportunity for participation as compared with the physical presence of the defendant (or other participants to the proceeding).

## **PARTICIPATION OF A DEFENDANT BY AVL**

### **Current law**

#### *New Zealand*

59. Statutes use differing terminology as to what is required in respect of a defendant’s participation (eg, “must be brought before the court” and “must be present at court” etc). All are based on the presumption that physical presence equates to participation. As a result, the extent to which a defendant can participate by AVL is uncertain in New Zealand. In contrast, a number of overseas jurisdictions have enacted specific legislation to address this issue.

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<sup>25</sup> This is consistent with the approach taken in Canadian jurisprudence, where the emphasis is on participation in the trial process rather than physical presence in court. See The Committee on Videoconferencing, *Final Report*, Dublin: Irish Department of Justice, Equality and Law Reform, January 2005, para 2.12.1 (available at [www.justice.ie/en/JELR/Pages/Videoconferencing\\_report](http://www.justice.ie/en/JELR/Pages/Videoconferencing_report)).

## Overseas Jurisdictions

60. Audio visual technology is commonplace in many types of court proceedings in overseas jurisdictions (including the United Kingdom, Australia, Canada and the United States of America). The Australian jurisdictions are internationally recognised for the effective use of videoconferencing in legal processes, and have been particularly proactive in developing legislative criteria to complement the use of AVL in proceedings in a criminal context.<sup>26</sup> Australia's lead in this area stems from the vast geographic distances involved, which have motivated courts and the legislature to make more use of the technology.<sup>27</sup>

## Canada

61. Canada's Federal Criminal Code<sup>28</sup> permits a defendant's appearance by AVL "for any part of the trial other than a part in which the evidence of a witness is taken" with the consent of both parties.

## United States

62. AVL for remote first appearances and arraignment has become commonplace throughout the state courts, with at least 29 states using or authorising videoconferencing for various proceedings by the end of 2002.<sup>29</sup> At this same time, thirty-four U.S. District Courts were using AVL for prisoner civil rights pretrial proceedings.<sup>30</sup>
63. In addition to the obvious benefits (time saved in travel, easier scheduling, and fewer security risks associated with transporting and monitoring prisoners), the U.S. courts have also recognised the benefit for defendants of allowing appearances by AVL in pretrial proceedings. For example, U.S. District Court Judge Fred Biery described in a 1998 interview how in the past the Del Rio divisional courthouse in the Western District of Texas was regularly jammed with 50 to 60 defendants awaiting sentencing, while another 50 people would be awaiting arraignment. Because there was no full-time judge, defendants were being transported from all over the district for once-a-month proceedings at the court, which Judge Biery described as "very impersonal". Following introduction of the use of AVL for sentencings from the San Antonio court, the Western District is able to do between eight and 10 sentencings every Thursday morning from San Antonio. Judge Biery noted,

*We do them individually and we give them the attention I think they deserve. The majority of the defendants don't speak English, so we use a translator. I think with the videoconferencing the defendant has a better perspective on what is happening. With the cameras, it's like they are sitting six feet away. There is a one-on-one relationship that just wasn't possible before.*<sup>31</sup>

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<sup>26</sup> Parliament of Victoria Law Reform Committee, *Technology and the Law Report 52*, Melbourne: Government Printer, May 1999, p 181 (available at [www.parliament.vic.gov.au/LAWREFORM/inquiries/Technology%20and%20the%20Law/final%](http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Technology%20and%20the%20Law/final%20)).

<sup>27</sup> *Ibid.*

<sup>28</sup> R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12.

<sup>29</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 14.

<sup>30</sup> *Ibid.*, note 67.

<sup>31</sup> *Videoconferencing Links Federal Courts and Public*, The Third Branch 2, para. 10 (June 1998) (available at [www.uscourts.gov/ttb/jun98ttb/video.html](http://www.uscourts.gov/ttb/jun98ttb/video.html)).

## Australia

64. All of the Australian jurisdictions provide for appearance of the defendant by AVL to a greater or lesser extent. All focus on the particular kind of proceeding for which AVL may (or may not) be used, although the jurisdictions do not necessarily agree about which proceedings.
65. For example, Queensland permits appearance of the defendant by AVL or AL, with the consent of all the parties, only for arraignment and sentencing.<sup>32</sup> In Victoria,<sup>33</sup> physical appearance of a defendant in court is not required for a number of proceedings (unless the court directs otherwise), including bail, adjournment, subsequent remands in custody, arraignment (not on trial date), status hearing and committal proceedings. Physical appearance in court is required for the first appearance after arrest, inquiry into fitness to stand trial, committal hearing, trial, sentence hearing and appeal. However, the court may direct videoconferencing in any case, if all parties consent and it is consistent with justice and reasonably practicable, or the court is satisfied that exceptional circumstances exist.
66. New South Wales takes appearance by AVL a step further. Under the Evidence (Audio and Audio Visual Links) Act 1998, a requirement by or under any other Act that a defendant appear (or be brought or be present) before a court is taken to be satisfied if the defendant appears before the court by way of videoconference. In addition, defendants *must* (unless the court directs otherwise) appear by videoconference for a number of proceedings, including bail, interlocutory proceedings, adjournment and arraignment (not on trial date). Similar to Victoria, a defendant must appear physically before the court for the first appearance after arrest, a committal hearing, inquiry into fitness to stand trial, trial, sentencing hearing, and hearing on appeal arising out of trial or hearing. However, the court may still direct that the defendant appear by videoconference if it is satisfied that it is in the interest of the administration of justice, or both parties consent to the defendant appearing this way.
67. It is not clear why Victoria and New South Wales identify these 6 proceedings (first appearance after arrest, a committal hearing, inquiry into fitness to stand trial, trial, sentencing hearing, and hearing on appeal arising out of trial or hearing) as generally requiring the defendant's physical appearance. Victoria's Parliamentary debates on the legislation simply indicate these proceedings were considered more "substantial" or "serious" and matters more closely associated with trials.<sup>34</sup> Yet, in contrast, Queensland specifically allows for AVL appearances in one of the proceedings, sentencing (albeit with consent of both parties). Further, New South Wales has recently amended its legislation (not yet in force) which expand defendants' appearances by AVL to other proceedings, including sentencing. Arguably, the distinction between proceedings is arbitrary; eg, allowing a defendant to appear by AVL for a bail hearing but not for sentencing is difficult to rationalise, when in both cases the defendant's liberty is at stake, and in the case of a bail hearing, the defendant's guilt is yet to be established.

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<sup>32</sup> Queensland Audio Visual and Audio Links Amendment Act 1999.

<sup>33</sup> Evidence (Audio Visual and Audio Linking) Act 1997.

<sup>34</sup> Victorian Parliamentary Hansard, Second Reading, Legislative Assembly, 5 December 1996, p. 1722, and 20 March 1997, pp. 162, 166; Second Reading, Legislative Council, 2 April 1997, p. 80.

## Principles

68. There are a number of important principles that will impact on the ability of a defendant to appear/participate by AVL and their right to a fair trial.<sup>35</sup> As discussed above, while ‘fairness’ is something beyond specific procedural rights, the procedural elements that constitute ‘minimum guarantees’ of a fair trial are the criteria or proxy by which it is possible to evaluate the ‘fairness’ of a trial.

### *Right to be present at trial and present a defence*

69. Section 25(e) of the NZBORA and sections 354 and 376(1) of the Crimes Act 1961 guarantee the right of the defendant to be present at trial and to present a defence. This right can be broken down into a number of key elements:<sup>36</sup>

69.1. ensuring the defendant is capable of comprehending the proceedings and is able to participate effectively in the conduct of their defence;

69.2. ensuring the defendant is able to instruct and consult with counsel privately; and

69.3. ensuring the defendant has access to the relevant evidence.

70. The physical presence of the defendant at a proceeding is one way of satisfying these elements; equally the potential exists for audio visual technology to provide for such protections. Hence, if the appropriate mechanisms are put in place, along with some minor modifications to courtroom behaviour, a defendant appearing by AVL may satisfy the above elements, and for all intents and purposes, be considered ‘present’ at court.

71. For this to occur, the court will need to ensure that the defendant’s participation by AVL does not hinder their contact with the court and counsel throughout a proceeding, and that the defendant can at all times observe the proceedings and be observed by the other participants. In the United States decision of *Williams v State*,<sup>37</sup> the court permitted the sentencing of a defendant who was not physically present in the courtroom, but who could see and hear and be seen and heard through audio and video devices.

72. It is unclear whether the defendant’s lawyer should be at the same remote location with the defendant. If the defendant and counsel are at separate locations, there is a question of whether the defendant is receiving adequate legal representation or is disadvantaged by the inability to confer in person with counsel.<sup>38</sup> To confer with a client during a video conferencing session, counsel would potentially need to disrupt the proceedings and contact the client for subsequent private communication. Although some courts have telephone lines, these may be inconvenient in comparison to an “unobtrusive nudge” made possible through immediate communication.<sup>39</sup> However, often even a ‘physically present’ defendant will not necessarily be in close contact with his or her counsel during the proceeding. Any issues regarding communication with

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<sup>35</sup> NZBORA, s 25(a).

<sup>36</sup> Butler and Butler, p. 850; *R v Duval* [1995] 3 NZLR 202.

<sup>37</sup> 2d 1991 WL 65953.

<sup>38</sup> South African Law Reform Commission, Project 113 Report *The Use of Electronic Equipment in Court Proceedings (Postponement of Criminal Cases via Audiovisual Link)*, Pretoria: South African Law Reform Commission, July 2003, p. 29 (available at [www.doj.gov.za/salrc/reports/r\\_prj113\\_2003jul.pdf](http://www.doj.gov.za/salrc/reports/r_prj113_2003jul.pdf); also available at [www.saflii.org/za/other/zalc/report/2003/4/2003\\_4.rtf](http://www.saflii.org/za/other/zalc/report/2003/4/2003_4.rtf)).

<sup>39</sup> *Ibid.*

counsel should be able to be addressed through a combination of suitable technology (eg, providing facilities that allow for private communication during the hearing or during adjournments, such as in Victoria's legislation<sup>40</sup>) and procedure (eg, ensuring short adjournments at regular intervals during the proceeding).

73. The use of AVL also runs the risk that defendants will feel detached from the proceeding and consider that they have been excluded, and therefore treated unfairly.<sup>41</sup> Importantly, social science research has shown that defendants who perceive that they are treated fairly during a proceeding are far more likely to accept a guilty verdict.<sup>42</sup> Ensuring that audio visual capabilities allow for the defendant to meaningfully participate in the proceeding will be a crucial way of preventing such perceptions. Courtroom behaviour, including the judge actively taking steps to ensure this risk is addressed (eg, periodically checking that the defendant is following the proceeding), will also be important.

### *Confrontation*

74. Confrontation is a fundamental right of a defendant.<sup>43</sup> The right ensures the defendant (or their counsel) is given the opportunity to stand before a witness and examine their evidence through questioning.<sup>44</sup>
75. In *United States v Gigante*, the U.S. Court of Appeals for the Second Circuit quoted the U.S. Supreme Court's decision in *Maryland v. Craig*, when considering the comparable U.S. Constitutional right to confrontation: "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."<sup>45</sup>
76. As noted in a recent review of the use of AVL in New South Wales,

*There were particular concerns about the impact this technology would have on the ability to read body language and facial/emotional signals. This concern appears to be lessening over time as familiarity with videoconferencing increases and a body of evidence is beginning to develop that indicates there is no significant impact on outcome for most inmates.*<sup>46</sup>

77. If the defendant is appearing from a remote location, it will be essential for the audio visual technology to permit the defendant to effectively question and examine the witness, either themselves, or through their counsel.

### *Contact*

78. The physicality of the courtroom is a way of ensuring a level of contact between all the participants. For instance, in a courtroom the jury are frequently only several metres

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<sup>40</sup> Evidence (Audio Visual and Audio Linking) Act 1997, s42R(3).

<sup>41</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 24.

<sup>42</sup> Greacen John M., "Social Science Research on 'Procedural Justice', p. 41.

<sup>43</sup> *R v Accused* (1998) 16 CRNZ 149 and NZBORA, s 25(f).

<sup>44</sup> Killen, A., "Video-Link Evidence in Criminal Proceedings", *The New Zealand Law Journal*, August 2004, p. 313.

<sup>45</sup> 166. F.3d 75 (2d Cir. 1999), citing 497 U.S. 836 at 845 (1990), 110 S.Ct. 3157.

<sup>46</sup> Attorney General's Department of New South Wales, *Cross Justice Sector Agency Videoconferencing Project: Benefits Review* (draft final), 2008, p. 37.

away from the defendant about whom they are to render a verdict, making it very difficult for the jury to ignore the significance of their role and the impact the verdict may have on the defendant.

79. The fact that defendants appearing by AVL are not physically present may be seen as creating a distancing effect and therefore limiting any sense of empathy towards the defendant (ie, the 'dehumanization' or 'virtualization' of court proceedings).<sup>47</sup>
80. However, with increasing levels of audio visual technology capability, any argument that individuals are less empathetic towards a defendant appearing by way of AVL may be difficult to substantiate. Audio visual technology is now able to provide 'real time' footage and life size images of individuals, with significant technological advances being made (eg, hologram technology) that will allow participants to have a high level of contact throughout a proceeding. Some academic writing even suggests that the fact that the western population is a "visually oriented group", means that a person on a screen may be received more sympathetically than if they were actually in the courtroom.<sup>48</sup> Again, the judge can also actively take steps to ensure this risk is minimised.

#### *Adverse impressions from the use of AVL*

81. Argument exists that the use of AVL may create an adverse impression on jury members, with the jury inferring that the necessity of these measures arises because the defendant is guilty, or, for example, the defendant is violent.<sup>49</sup> Such adverse impressions may, of course, be overcome by issuing the appropriate warning to the jury.<sup>50</sup> This is already provided for under section 123 of the Evidence Act 2006, which requires the following direction to be given:
  - (a) *the law makes special provision for the manner in which evidence is to be given, or questions are to be asked, in certain circumstances; and*
  - (b) *the jury must not draw any adverse inference against the defendant because of that manner of giving evidence or questioning.*

#### *Summary of principles*

82. In terms of the impact of AVL on a defendant's right to a fair trial, it is essential to ensure:
  - 82.1. the defendant is capable of comprehending the proceedings and is able to participate effectively in the conduct of their defence;

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<sup>47</sup> Lederer, Fredric I. "The Road to the Virtual Courtroom?", pp. 24, 29. See also Parliament of Victoria Law Reform Committee, *Technology and the Law* Report 52, May 1999, p. 185.

<sup>48</sup> South African Law Reform Commission, Project 113 Report *The Use of Electronic Equipment in Court Proceedings*, p. 28; Lederer, Fredric I., "Modern Technology in the Courtroom: Possibilities and Implications" paper presented at the Fourth National Court Technology Conference National Center for State Courts Oct, 1994, p 2 (available at [www.ncsconline.org/WC/Publications/Summary/KIS\\_CtRoomCTCSum.htm](http://www.ncsconline.org/WC/Publications/Summary/KIS_CtRoomCTCSum.htm)).

<sup>49</sup> New South Wales Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101), Sydney: New South Wales Law Reform Commission, 2003, p. 95 (available at [www.lawlink.nsw.gov.au/lrc.nsf/pages/r101pdf](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r101pdf)).

<sup>50</sup> Ibid.

- 82.2. the defendant is able to instruct and consult with counsel privately;
- 82.3. the defendant has access to the relevant evidence;
- 82.4. the defendant is able to confront the prosecution witnesses;
- 82.5. there is sufficient involvement by the defendant in the proceeding, so that other participants maintain a sense of the defendant's presence and empathy with the defendant as a person (rather than an image); and
- 82.6. an adverse impression is not created by the defendant not appearing in person.

Q1. Are there any other considerations or principles associated with the impact on a defendant's right to a fair trial of the defendant participating by AVL?

## **PARTICIPATION OF A WITNESS BY AVL**

### **Current law**

#### *New Zealand*

- 83. The Evidence Act 2006 makes it clear that the "ordinary" way for a witness to give evidence is orally from within the courtroom in the presence of the Judge (and jury, if there is one), parties to the proceeding and their counsel, and members of the public (unless excluded by the order of the Judge).<sup>51</sup> Under sections 103 and 105 of the Evidence Act, a court may direct that a witness give their evidence "in an alternative way", such as from outside the courtroom by AVL. Again, the presumption is that physical presence equates to participation and that someone not being physically present impinges on participation.
- 84. Section 103 of the Evidence Act prescribes the grounds under which an order for an "alternative way" of giving evidence, such as by AVL, can be made. The grounds are fairly wide, including age or maturity of witness; physical, intellectual, psychological, or psychiatric impairment of witness; absence or likely absence of the witness from New Zealand; or any other ground likely to promote the purpose of the Act. While the Evidence Act provides the court with a discretion to allow for evidence to be given an alternative way, the discretion is clearly drafted with AVL is seen as an exception to the general rule, as opposed to a standard or widely accepted way of giving evidence. Notwithstanding the legislative discretion, the taking of witness evidence by AVL occurs regularly in the High Court (such as overseas witnesses in criminal proceedings).
- 85. Further, when a witness is located in Australia, a fairly broad approach is taken to use of AVL, with the witness able to give evidence in New Zealand by video link if it would be more convenient for the court.<sup>52</sup>

<sup>51</sup> Evidence Act, s 83; see also s 103.

<sup>52</sup> Evidence Act, s 168.

### Overseas jurisdictions

86. In the Australian jurisdictions, there is general acceptance of witness appearances by AVL. For example, in Victoria, a witness can give evidence by video link unless the court is satisfied that the technical requirements specified in the Act and court rules cannot be met.<sup>53</sup>
87. In the U.S., a much more conservative approach is taken to allowing witnesses to participate by AVL in criminal proceedings. As discussed earlier, it is considered to raise issues for the defendant's Constitutional right to confront witnesses. It is generally approached on a case-by-case basis and only allowed in very exceptional circumstances, such as a child victim's testimony in a sexual abuse case;<sup>54</sup> where the crime victims testifying were in another country;<sup>55</sup> or where a key witness in an organised crime case was in a witness protection programme and suffering from inoperable cancer.<sup>56</sup> In 2002 the U.S. Supreme Court (two Justices dissenting) chose not to forward to Congress a proposed amendment to the Federal Rules of Criminal Procedure that would have permitted the use of contemporaneous two-way video transmissions in criminal cases in exceptional circumstances and with appropriate safeguards, if the witness was unavailable.<sup>57</sup>

### Principles

88. Many of the issues regarding witnesses appearing by AVL are similar to those discussed in relation to the defendant, including confrontation, impact of evidence, and the potential for adverse impression.
89. However, AVL must also be considered in terms of its contribution to access to justice and the administration of justice. AVL may allow witnesses who may not have otherwise been able to attend the proceeding (eg, witnesses who are unable to travel as a result of a disability, etc), to provide evidence. Advances in audio visual technology have meant that there may be very little difference between a witness appearing physically in the courtroom, and a witness appearing by AVL. In some instances, AVL technology may also contribute to a higher quality of evidence, such as by providing a better opportunity to observe more closely witness demeanour than if the witness were physically present. In future, AVL could also result in a complete video record of proceedings and evidence, which could assist not only the hearing but also consideration of any matters on appeal. As a result, AVL could provide overall increases in the protection of a defendant's rights and better serve the interests of justice.
90. If technological capability can ensure that the appearance of a witness by AVL does not negatively impact upon the defendant's rights, and may in fact allow for improvements in the administration of justice, then there is no reason for restricting the use of AVL to a particular circumstances.

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<sup>53</sup> Victoria Evidence Act 1958, s 42E.

<sup>54</sup> *Maryland v Craig*, 497 U.S. 836 (1990).

<sup>55</sup> *Harrell v State*, 709 So. 2d 1364 (Fla. 1998); *cert. denied*, 67 U.S.L.W. 3237 (U.S. 1998).

<sup>56</sup> *United States v Gigante*, 166 F.3d 75 (2d Cir. 1999).

<sup>57</sup> Available at [www.supremecourtus.gov/orders/courtorders/frcr02p.pdf](http://www.supremecourtus.gov/orders/courtorders/frcr02p.pdf)

### *Confrontation*

91. As discussed above, confrontation is a fundamental right of a defendant, ensuring the defendant has the opportunity to examine and test the recollection of a witness. If the witness is appearing by AVL, it will be necessary to ensure that the technology permits the defendant or counsel to effectively question and examine the witness.

### *Ability to assess a witness' credibility and reliability of evidence*

92. Some commentators have expressed concern about the impact of AVL on the ability of the judge/jury to properly assess a witness' demeanour, reliability and credibility.<sup>58</sup>
93. Such concerns can be alleviated, if the technology employed will allow for the accurate assessment of a witness (eg, use of life-size video screens). As Lederer notes,

*From a pragmatic perspective, the technology itself is simple. The remote witness or participant appears in the courtroom on a display device, preferably life-size. A camera located with the display ensures that when a courtroom participant looks at the remote person, as when counsel question a remote witness, there is effective eye-to-eye contact. With today's technology, video and sound should be perfectly coordinated; only the most rapid movement may show some variance.*<sup>59</sup>

94. Audio visual technology may actually enhance the ability to assess the credibility of a witness and comprehension of the evidence, with reactions and demeanour of a witness being easier to gauge. The use of high quality images accompanied by digital transcripts, with the ability to replay testimony from different angles and enlarged images, may reveal a lot more about the credibility and honesty of a witness than can be deciphered when they are physically present.<sup>60</sup>

### *Ensuring a witness tells the truth*

95. Traditionally it has been considered that the most constructive method of ensuring witnesses tell the truth is by placing them in a courtroom amongst the formal paraphernalia of justice (ie, surroundings thought to convey the seriousness of the proceeding).<sup>61</sup> This notion is linked with the right of confrontation, in that it is thought that the pressures of a court setting (including the examination process and being required to stand face to face with the defendant) will be conducive to a witness telling the truth. Alternatively, it could be argued that the witness may feel less intimidated outside the courtroom and therefore more comfortable and responsive to the situation, thus facilitating the process of justice rather than hampering it.<sup>62</sup>
96. With advances in technology allowing for audio visual links, where the witness is answering questions in 'real time' and is visually aware of the court surroundings, the

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<sup>58</sup> New South Wales Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials*, p. 95.

<sup>59</sup> Lederer, Fredric I., *Courtroom Technology: A Status Report*, 2005 (available on the Center for Legal and Court Technology website <http://www.courtroom21.net/>).

<sup>60</sup> Widdison, R., "Electronic Law Practice: An Exercise in Legal Futurology" (1997) 60 *Modern Law Review* 143, p 161.

<sup>61</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 14 ; Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 185.

<sup>62</sup> South African Law Reform Commission, Project 113 Report *The Use of Electronic Equipment in Court Proceedings*, p. 29.

risk that a witness appearing by AVL will dismiss the importance of the situation (and therefore be more inclined to provide false evidence) would seem to be less likely. Research by the New Zealand Law Commission has indicated that there is “no empirical evidence” to support the view that witnesses are less likely to lie if confronted face to face by the accused nor to suggest that alternative modes of giving evidence detract from the rational determination of the facts or from procedural fairness.<sup>63</sup> However, research has only begun to be undertaken in this area and it remains empirically uncertain as to whether remote witnesses are more or less likely to tell the truth than witnesses who are physically present at court.<sup>64</sup>

#### *Impact of a witness’ evidence*

97. When witnesses appear by AVL, their absence in the courtroom may be viewed as having a distancing effect, removing any sense of humanity and reducing the impact of their testimony (ie, the “virtualization” or “dehumanization” of court proceedings).<sup>65</sup> However (as discussed above in regard to defendants), while past technology may not have been capable of ensuring a certain reality is brought to a witness appearing by AVL, technology is advancing to a level where a witness appearing by AVL may, for all intents and purposes, be considered “present” at court. Experiments conducted in the United States have revealed that jurors’ perception of remote witnesses is neither better or worse than in-court witnesses.<sup>66</sup>

#### *Adverse impressions from use of AVL*

98. As with the appearance of the defendant by AVL, argument exists that the use of AVL may create an adverse impression on jury members, with the jury inferring that the necessity of these measures arises because the witness has a justifiable fear of the accused, or that the witness may be less reliable. Such adverse impressions may, of course, be overcome by issuing the appropriate warning to the jury, as is already required under section 123 of the Evidence Act.

Q2. Are there any other considerations or principles associated with the impact on a defendant’s right to a fair trial of a witness participating by AVL?

## **PARTICIPATION OF A JUDGE BY AL OR AVL**

### **Current law**

#### *New Zealand*

99. With regard to District Court judges, as highlighted in *Serious Fraud Office v Anderson*,<sup>67</sup> the distinctive nature of each District Court (as opposed to the general jurisdiction of the High Court), prevents a judge that is sitting in a particular place from hearing and determining any proceeding filed in another court without proper transfer of

<sup>63</sup> Butler and Butler, para. 23.8.17, citing NZLC PP 26, *The Evidence of Children and Other Vulnerable Witnesses*, Wellington, Law Commission, 1996, p. 28.

<sup>64</sup> Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 186.

<sup>65</sup> “The Road to the Virtual Courtroom?”, pp. 24, 29. See also Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 185.

<sup>66</sup> Lederer, Fredric I., “The Road to the Virtual Courtroom?”, p. 14.

<sup>67</sup> [2000] DCR 435.

the proceedings. At first instance, this would appear to inhibit the appearance of judges by AL or AVL in the District Court.

100. However, it is not the judge's physical location that determines the venue for proceedings, but where the court file and record are actually held. A judge 'appearing' by AL or AVL, is for all effective purposes, sitting in the court at which the link is received and the court file and record is held. There is therefore nothing in current legislation that explicitly prevents a District Court judge from appearing at a proceeding by AL or AVL.<sup>68</sup>
101. As for High Court judges, recent amendments to the Judicature Act 1908 (sections 26I and 26IB) and the High Court Rules (Rules 72C and 72D) have provided for High Court judges and associate judges to appear by AVL in a limited set of proceedings of a civil nature. Arguably, because legislation has been amended to specifically provide for this, further legislation may be required for High Court judges to appear by AL or AVL in a broad range of criminal proceedings. However, given the lack of statutory guidance in this area, the High Court could conceivably use its inherent jurisdiction to allow for AL and AVL. Under its inherent jurisdiction, the High Court has power to control and regulate its process and proceedings, and may exercise its powers to ensure that it is not prohibited from using AL or AVL in situations that would benefit the administration of justice.

## Principles

102. The judge is essentially the "supervisor" of proceedings, controlling the way the case is conducted in accordance with the relevant law and practice. It is for the judge to oversee and maintain control over the court, consider the admissibility of evidence, control the distribution of information, and make determinations on the law.
103. Certainly past technology did not have the capability to allow a judge to appear by a remote link, while still permitting the judge to effectively control proceedings. However, advances in technology have meant that judges may now be able to appear by AVL, with technical equipment allowing the judge to view file information and all the relevant participants (eg, split-screen capability). There may also be some occasions where an AL (ie, teleconferencing) as opposed to an AVL would suffice (eg, hearings such as callovers which are largely procedural in nature).

Q3. Are there any other considerations or principles associated with the impact on a defendant's right to a fair trial of the judge participating by AVL?

## PARTICIPATION OF COUNSEL/PROSECUTION BY AL OR AVL

### Current law

#### *New Zealand*

104. There is nothing in the current law that appears to explicitly prevent defence counsel or the prosecution appearing by AVL.

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<sup>68</sup> Ibid.

## *Overseas Jurisdictions*

105. Canada's Federal Criminal Code expressly permits the prosecutor or defendant's counsel to appear "by any technological means satisfactory to the court that permits the court and all counsel to communicate simultaneously".<sup>69</sup>
106. Overseas evidence tends to show that counsel have been enthusiastic in making use of audio visual technology.<sup>70</sup>

## **Principles**

107. As discussed above, an important principle is that the defendant must be able to properly instruct and consult in private with their counsel. If defendant's counsel is appearing by AVL, then the defendant's ability to do this effectively may be restricted. Of course, the same concern does not apply to the prosecution. Further, technological advances may mean that counsel appearing by AVL are able to maintain contact with their client throughout a proceeding (eg, use of headphone devices etc). A situation where both the defendant and their counsel appear together by AVL can also be envisaged.
108. Sometimes in proceedings, counsel or the prosecution or both will need to meet with the Judge in private to discuss matters. Operationally, AVL does not raise a problem for the proceedings, because this is normally done by requesting an adjournment to meet with the Judge in chambers. The only issue will be providing suitable technology to allow for private communication between the Judge and both counsel.
109. It is also conceivable that on some occasions counsel or the prosecution could appear by AL. As discussed above, this is more likely to occur in hearings of a procedural as opposed to substantial nature (eg, callovers).

Q4. Are there any other considerations or principles associated with the impact on a defendant's right to a fair trial of the counsel or prosecutor participating by AVL?

## **PARTICIPATION OF A JURY BY AVL**

### **Current law**

#### *New Zealand*

110. Allowing a jury as a whole to appear by AVL is the focus of this discussion. It is not proposed that one or several members of a jury participate by AVL, separate from the rest of the jury. This would have implications for jury deliberations, because of its effect on the dynamics of the group and the constraints it would place on the ability to enter into discussions about a case (eg, during morning and afternoon adjournments). This 'group dynamic' and its importance for procedural fairness is already recognised in law (eg, jurors cannot be replaced after the trial starts).<sup>71</sup>

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<sup>69</sup> 2002, c. 13, s. 61.

<sup>70</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 17.

<sup>71</sup> Both section 22(1) of the Juries Act 1981, and new section 22A(1)b inserted by the Juries Amendment Act 2008, make clear that a juror cannot be replaced after the trial begins.

111. Facilitating the appearance of a jury as a whole would have to overcome some practical difficulties, such as the monitoring of a jury from a remote location and ensuring an officer of the court has charge of them. While the ability to have remote jury appearance could be valuable (eg, where concerns had been raised regarding jury intimidation), its use is not likely to be common.

### *Overseas Jurisdictions*

112. No information could be found about appearance of a jury by AVL in other jurisdictions.

### **Principles**

113. The role of the jury is often described as a finder of fact. That is, they make a determination on all the evidence provided during the course of a proceeding.
114. As the “trier of fact” the jury must possess the ability to examine all evidence that is before the court, and importantly be able to assess a witness’ demeanour, reliability and credibility. As discussed above, while previous technology may have hindered such an assessment, this may no longer be the case.

Q5. Are there any other considerations or principles associated with the impact on a defendant’s right to a fair trial of the jury participating by AVL?

### **Options**

#### **Option 1: Maintain the status quo**

115. Under this option AVL and AL would be used in criminal proceedings only as allowed for under current legislation.
116. As discussed earlier, legislation has not kept pace with technological changes and still reflects the historic notion of a physical court, with all the participants being physically present. Therefore, AVL could be used in only a very limited range of proceedings.
117. With regard to a defendant’s appearance, statutes use differing terminology as to what is expected (eg, “in person”; “brought before a court”; “in the presence of the examining court”). Currently, it is for the courts (through statutory interpretation) to determine in what proceedings a defendant can appear by AVL.
118. This approach creates significant uncertainty as to the possible uses of AVL and whether it is consistent with the underlying policy intent of particular legislation. It may result in the courts taking an overly cautious or conservative approach. With advances in audio visual technology offering considerable benefits to the justice system (both in terms of efficiency and the administration of justice), it is important to ensure that courts have sufficient guidance that will encourage and support the use of such technology.
119. In relation to witnesses, sections 103 and 105 of the Evidence Act provide the court with a discretion to allow for evidence to be given an alternative way. However, the discretion is worded in such a way (“ordinary way” versus “alternative way”) that the use of AVL may be seen as an exception to the general rule, as opposed to a standard way of giving evidence.

120. In relation to judges and lawyers, while the law may not explicitly prevent their appearing by AL or AVL, uncertainty exists as to whether specific legislation is required to allow for this. With such uncertainty, it is likely that the courts will be restrained in their approach, therefore restricting the potential use of AL or AVL.

### **Option 2: Specify when AVL can (and cannot) be used**

121. This option would involve specifying in what circumstances participants could appear using AVL.
122. One approach would be to focus primarily on the type of participant (defendant, witness, judge, counsel, jury) and specify when that participant could appear by AVL. New Zealand legislation already does this to some extent. The Evidence Act specifies when witnesses may give their evidence via AVL; the Judicature Act and High Court Rules High Court specify in what circumstances judges and associates judges may appear by AVL in a proceeding.
123. Another approach would be to focus primarily on the particular proceedings or types of proceedings in which participants could appear by AVL and / or the proceedings for which AVL generally should not be used.
124. Most jurisdictions that have legislated for AVL have adopted some combination of focus on both the type of participant and proceedings in their approach. Usually, they distinguish between the defendant's participation by AVL and the use of such technology for other participants.
125. For example, as discussed earlier, New South Wales and Victoria have identified certain proceedings that are considered to be more "substantial" and more closely associated with trials, for which there is a presumption that the defendant must be physically present rather than participating by AVL. In Canada, the Federal Criminal Code does not allow a defendant to appear by AVL for any part of the trial in which the evidence of a witness is taken. Other jurisdictions considering introducing AVL have focussed on more technical, clearly "non trial" proceedings; for example, South Africa is considering a bill to allow an accused person to participate by AVL for adjournment applications in all custody cases<sup>72</sup>, and Ireland is considering introducing AVL for defendants' participation in "pre-trial, pre-appeal applications, case management and other such applications."<sup>73</sup>
126. On its face distinguishing between the defendant and other participants could have some attraction. As discussed above, NZBORA issues arise primarily in relation to the defendant. However, the concerns regarding the defendant's right to a fair trial are not necessarily restricted to the *defendant's* participation by AVL; rather, they may arise if *any participant* in the proceedings appears using such technology, depending on the circumstances. For example, issues regarding the defendant's ability to effectively confront a witness would be similar, regardless of whether the defendant or the witness is appearing by AVL. Concerns about the defendant's ability to instruct and consult with counsel privately arise if the defendant or their counsel participates by AVL.
127. Similarly, there is some appeal in focussing on the specific kind of proceeding. On further reflection, however, such a distinction appears to be relatively arbitrary and

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<sup>72</sup> Republic of South Africa, Criminal Procedure Amendment Bill [B 42 – 2008].

<sup>73</sup> The Committee on Videoconferencing, *Final Report*, Dublin: Irish Department of Justice, Equality and Law Reform, January 2005, para 5.18 (available at [www.justice.ie/en/JELR/Pages/Videoconferencing\\_report](http://www.justice.ie/en/JELR/Pages/Videoconferencing_report)).

raises the question of why participation is more important in some criminal proceedings than in others. For example, the presumption that a defendant can appear by AVL for the purpose of a bail hearing but not for sentencing, is difficult to rationalise, when in both instances the defendant's liberty is at stake, and in the case of a bail hearing, the defendant's guilt is yet to be established. This arbitrariness is borne out by the fact that jurisdictions differ as to which proceedings are considered suitable for AVL or not (eg, Queensland permits AVL in sentencing while New South Wales and Victoria do not). The approach is also restrictive, because it is based on the limits of current technology; it does not allow for technological advances that may make AVL acceptable for use in a wider range of proceedings in future.

128. Specifying the particular types of proceedings in statute may simply be due to a desire to introduce slowly such a potentially significant change in court proceedings. For example, in New South Wales, the original Evidence (Audio and Audio Visual Links) Act 1998 only addressed use of AVL for the taking or receiving of evidence and submissions from or in other States participating in an Australian interstate scheme.<sup>74</sup> At that time, other legislation provided that a defendant could participate by AVL only in bail proceedings.<sup>75</sup> Over time, New South Wales has amended its legislation to gradually expand the use of AVL for defendants in specified proceedings beyond bail, for child defendants, and for other persons (whether or not parties to the proceeding). The most recent amendment in 2007 (not yet in force) further expands the AVL use for defendants, including for sentencing.<sup>76</sup> If specification does result from the desire for a gradual and controlled introduction of AVL, this could be addressed in other ways that avoid the need to amend the proceedings specified in the statute every time greater use of the technology is considered appropriate.

### **Option 3: General presumption AVL can be used**

129. A third option is to have a general presumption that AVL can be used in any proceeding.
130. This is the approach taken in Tasmania's Evidence (Audio and Audio Visual Links) Act 1999. That Act provides that a court may direct, on application or on its own motion, that any person, including a defendant, may appear before or give evidence to a court by audio visual or audio link.
131. The Tasmanian legislation is supported by court guidelines, which stress that "An overriding factor is that the use of video-conferencing in any particular case must be consistent with furthering the interests of justice."<sup>77</sup> The Guidelines set out the matters for which AVL can be used, ranging from remands to civil and criminal trials and sentencing, and the circumstances, such as where the defendant/accused is in custody, where persons in custody are required to appear before a Court as a witness, or where a witness is located intrastate, interstate, or overseas.<sup>78</sup> The Guidelines also address specific issues for particular kinds of participants. For example, in relation to appearance of an accused in custody by video link:

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<sup>74</sup> New South Wales Evidence (Audio and Audio Visual Links) Bill 1998, Explanatory Note.

<sup>75</sup> New South Wales Supreme Court Act 1970, Part 7A.

<sup>76</sup> Evidence (Audio and Audio Visual Links) Amendment Act 2007 No 75.

<sup>77</sup> Supreme Court of Tasmania, "Guidelines for the Conduct of Court Proceedings Between Courts and Remote Sites" (available at [www.supremecourt.tas.gov.au/about\\_us/courtroom\\_technology/video\\_conferencing\\_guidelines](http://www.supremecourt.tas.gov.au/about_us/courtroom_technology/video_conferencing_guidelines)), p. 1.

<sup>78</sup> Ibid.

*Accused persons in custody may appear in any proceedings either by consent, or at the direction of the Court. However, all remands of persons in custody will be conducted by video link unless otherwise ordered by the Court.*

*The Prison, Remand Centre, or Youth Detention Centre will liaise with the Court Video link Co-ordinator prior to the scheduled video link concerning the persons in custody who are to appear, including their order of appearance.*

*In matters where no order was made at the previous appearance for proceedings by video link on the return date, the Prison or Detention Centre will ensure that all parties (including Defence Counsel, Prosecution, Community Corrections Officers, Youth Justice officers, etc) consent to proceedings being conducted by video link, and advise the Court Video link Co-ordinator accordingly before booking the video link.*

### *Modified Presumption*

132. A variation of this option would be to have a 'modified' general presumption – that is, a presumption generally for AVL to be used but with a threshold for greater consideration before AVL is used in some situations.
133. New South Wales is one version of this approach. Its Evidence (Audio and Audio Visual Links) Act 1998 has a presumption that a defendant will participate by AVL in specified proceedings, while other listed proceedings that are considered more 'serious' have a presumption of physical appearance. However, as previously discussed, a threshold based on distinguishing between proceedings may not be the most appropriate approach. Another variation might be to distinguish between summary and indictable cases, but this would raise similar issues to distinguishing between proceedings.
134. The preferred approach is to focus on the *circumstances* of the particular proceedings – that is, the manner and extent of participation involved in the individual case. For example, in Canada, rather than specifying proceedings, the Federal Criminal Code's threshold for a defendant's appearance by AVL is "any part of the trial other than a part in which the evidence of a witness is taken".<sup>79</sup> This reflects the notion that the manner and extent of participation involved when evidence is being presented is likely to be substantively different from the participation involved in other situations.
135. Therefore, it is proposed that the presumption be:
  - 135.1. a participant (defendant, witnesses, counsel/prosecution, judges or jury) can participate using audio visual technology in any proceeding other than where evidence is being presented, unless a court is satisfied (on its own motion or because of a successful objection by either of the parties) that it would not be appropriate in a particular case (taking into account legislative guidance / principles); and

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<sup>79</sup> R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12.

135.2. in a proceeding where evidence is to be presented, any party can request AVL be used and the court would determine that motion, considering legislative guidance / principles.

- Q6. Should participation by AVL in criminal proceedings be allowed? If not, why not? If so, which option is preferred and why?
- Q7. Are there any other options for providing for participation by AVL in criminal proceedings?

*Principles-based*

136. Legislative principles that can be applied to all proceedings would be required to support the preferred approach. These principles would assist a court to make a determination about whether to allow or override the presumption regarding the use of AVL in any particular case.
137. The determination would be on a case by case basis, depending on all of the circumstances. The critical question would be whether the use of audio visual technology is able to ensure the protection of NZBORA rights (particularly the right to a fair trial) in the particular circumstances of the particular case, taking into account (as far as it is relevant) such principles as:
- 137.1. the nature of the proceeding
  - 137.2. the technology to be used (eg, availability, quality)
  - 137.3. the potential impact of the use of the technology on the effective maintenance of the defendant's right to a fair trial and rights associated with the proceeding, in particular the impact on
    - 137.3.1. the ability of the defendant to comprehend, and participate effectively in, the proceeding
    - 137.3.2. the ability of the defendant to privately consult and instruct counsel
    - 137.3.3. the ability of the defendant to access the relevant evidence
    - 137.3.4. the ability of the defendant to confront the prosecution witnesses
    - 137.3.5. the level of contact the defendant has with other participants (including the judge, jury and witnesses) in the proceeding
    - 137.3.6. any adverse impression that may be created by the defendant appearing by AVL and whether that can be mitigated against
  - 137.4. the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including
    - 137.4.1. the ability to assess witnesses' credibility and the reliability of evidence presented to the court

137.4.2. the level of contact with other participants (including the judge, jury and defendant) in the proceeding

137.5. whether both parties consent to the defendant appearing by AVL (ie, if both parties consent, that should be determinative; however, lack of consent may not necessarily be determinative) and

137.6. any other relevant matters (eg, cultural issues; costs of having the party appear in person versus remotely; safety and security issues; etc).

138. The weight given to each principle would depend on the particular circumstances of the case and the nature of the proceedings. Also, the extent to which these principles, in this detail, need to be in statute, delegated legislation or court guidance (eg, practice notes) would need to be considered.

Q8. Are considerations or principles an appropriate way to assist a court to make a determination about whether to allow or override the presumption regarding the use of AVL in any particular case?

Q9. Are these considerations sufficient when considering whether to allow a participant to appear using AVL?

#### *Appeal of judge's decision*

139. In providing for wider use of AVL, one issue that must be considered is the right to appeal a judge's exercise of the discretion, if both parties do not consent to the AVL appearance in question.

140. Section 379A of the Crimes Act 1961 provides for interlocutory appeal in relation to a limited range of specified criminal procedural matters. Appeal may be made to the Court of Appeal or the Supreme Court (but not both), with leave of the court appealed to, before the trial commences. The Crimes Act section 379AB provides for further appeal to the Supreme Court (with the leave of that court); however, section 13 of the Supreme Court Act 2003 states that leave to appeal will only be given if "it is necessary in the interests of justice", which is defined as:

140.1. the appeal involves a matter of general or public importance; or

140.2. a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or

140.3. the appeal involves a matter of general commercial significance.

141. If the procedural matter is not specified in section 379A, then the trial proceeds, but in appropriate cases the matter may be reviewed by way of appeal against conviction or as a reserved question of law.<sup>80</sup>

142. Interlocutory appeal is allowed for an order about the admissibility of evidence (section 344A of the Crimes Act), including an order raising an issue of admissibility of evidence

<sup>80</sup> *R v Accused* (CA 32/91) [1992] 1 NZLR 257 at 264 (Richardson, J).

made on an application under section 107 of the Evidence Act 2006 as to the mode by which a child complainant should give evidence.<sup>81</sup> However, it is not entirely clear whether, if there is no admissibility issue, an order as to mode of giving evidence is within section 344A; if not, then no appeal lies under section 379A.

143. Court of Appeal decisions indicate differing views. Some judgments are clear that there is “no general appellate jurisdiction under s 379A in relation to mode of evidence rulings which do not involve a discrete admissibility issue”<sup>82</sup> However, others are of the view that “a wide interpretation should be given to ‘admissibility’ and ‘admissible’ in section 344A to include the mode of evidence so as to provide for appeal under section 379A.”<sup>83</sup>
144. Justice Casey sums up the arguments in favour of allowing interlocutory appeal for mode of evidence decisions:

*On reflection . . . I think we took too narrow a view of “admissible” [when interpreting section 344A in R v Accused (CA 171/89)]. It appears in a section aimed at securing the just and expeditious disposal of criminal trials, and there are powerful reasons of convenience against reading it down to the narrow technical meaning it has in the law of evidence. Understood in its natural and ordinary sense, it would allow disputed questions like the present (which can be seen as fundamental to an accused's right to a fair trial) to be settled in advance on appeal, rather than await the outcome of the trial itself. An adverse ruling on appeal at that late stage could render it nugatory and require a new trial.*<sup>84</sup>

145. Justice Richardson, however, argues

*Section 25 of that Act is concerned with standards of criminal procedure and specifies primary rights of anyone who is charged with an offence. They include "(a) The right to a fair and public hearing by an independent and impartial court:" and "(f) The right to examine the witnesses for the prosecution". It is perhaps arguable that those rights may be more meaningful in practice if pretrial rulings in relation to procedural matters are susceptible to appeal. But s 25 itself only contemplates the right to appeal following conviction (para (h)). Further, in giving directions under s 23D of the Evidence Act [now section 103 of the Evidence Act 2006], the Judge has to have regard to the need to minimise stress on a complainant "while at the same time ensuring a fair trial for the accused." In that way the statute expresses the absolute value attached to the right to a fair trial. Finally to expand pretrial appeal rights as suggested would cause substantial and unreasonable delays in the determination of charges. If applied to procedural matters relating to the reception of evidence it would extend to the use of interpreters, the taking of oaths, recording of evidence and a host of matters ancillary to the mode of giving evidence. If further extended to all*

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<sup>81</sup> Adams on Criminal Law section CA379A.02, citing *R v Accused* (CA32/91) [1992] 1 NZLR 257; (1991) 7 CRNZ 230 (CA).

<sup>82</sup> *R v Lewis* 28/11/06, CA311/06 – but the opinion goes on to note that the only issue being appealed was the admissibility of the witnesses' previous video interview, not the judge's ruling that the witness could be examined and cross-examined via closed-circuit television. See also *R v Accused* at 265-6 (Richardson J dissenting), citing *R v Accused* (CA 171/89) (1989) 4 CRNZ 339.

<sup>83</sup> *R v Accused* (CA 32/91) [1992] 1 NZLR 257 at 261 (Cooke P, Cur adv vult).

<sup>84</sup> *R v Accused* (CA 32/91) [1992] 1 NZLR 257 at 268.

*procedural matters it would cast the net far wider. That would, I think, be contrary to the careful selection in s 379A of defined and limited circumstances in which pretrial rights of appeal should be available. I can see nothing in s 25 of the Bill of Rights Act to justify reading either s 344A or s 379A any differently than was done in R v Accused (CA 171/89).*<sup>85</sup>

146. Therefore, the question is whether there is something unique about AVL which necessitates an interlocutory appeal. It could be argued that the risk of a miscarriage of justice is such that the matter should be settled as soon as possible, rather than await the outcome of the trial itself. This would also avoid the costs (financial and stress for all participants) associated with later adverse ruling resulting in a new trial. Alternatively, it could be argued that AVL is no different from any other procedural matter. Further, an interlocutory appeal would only allow for speculation as to the potential impact of AVL for a fair hearing; in contrast, a later appeal would allow consideration of the actual impact and demonstrated harm (or not) of AVL in the particular case. Regardless of which view is favoured, it is clear that legislative guidance is required.

Q10. If parties do not consent to the AVL appearance in question, should there be a right to an interlocutory appeal of the judge's decision to allow AVL to be used? Or should it be reviewed by way of appeal against conviction or as a reserved question of law?

## USE OF AVL IN CIVIL JURISDICTION

### Current law

#### *New Zealand*

147. As discussed at the beginning of this paper, preliminary analysis indicates legislative change would be needed to allow use of AVL in the majority of civil proceedings considered.

#### *Overseas Jurisdictions*

148. Use of AVL by parties, witnesses, counsel and judges is common in many types of civil proceedings in overseas jurisdictions (including the United Kingdom, Australia, Canada and the United States of America).
149. Australian jurisdictions are particularly proactive in their use of videoconferencing in legal processes, largely driven by geography.<sup>86</sup> In Victoria, there is even at least one case of a substitute judge being brought in within an hour by videoconferencing, after the scheduled judge was forced from the bench by family necessity.<sup>87</sup>
150. The U.S. Federal Rules of Civil Procedure (Rule 43(a)) expressly provide for the use of AVL:

<sup>85</sup> *R v Accused* (CA 32/91) [1992] 1 NZLR 257 at 265-6.

<sup>86</sup> Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 181.

<sup>87</sup> Lederer, Fredric I., "The Road to the Virtual Courtroom?", p. 16, citing a report at the Australian Institute of Judicial Administration Conference, Melbourne, Australia, 23 March 1998.

*In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.*

151. A number of the state courts have also embraced AVL. In one particularly striking example, a New Jersey Superior Court judge granted a plaintiff's application to testify and observe the trial from his apartment via AVL over the Internet. The plaintiff, paralyzed from the neck down and breathing with the aid of a respirator, was too weak to travel from Chicago to New Jersey for his medical malpractice suit against several New Jersey doctors, and the cost and time involved in his travel would have been prohibitive. To allay the defence attorneys' fears that the plaintiff could be coached in his testimony, the judge appointed a retired judge to monitor the plaintiff in his apartment during the proceeding.<sup>88</sup>

## **Principles**

152. The use of audio visual technology in the civil jurisdiction does not raise issues under NZBORA to the same extent as the criminal jurisdiction. The chief concern is to ensure compliance with the principles of natural justice (section 27 NZBORA) – ie, that proceedings are conducted in a manner that is fair to, and protects the rights of, all parties.
153. As discussed above, research and experience in other jurisdictions indicates the use of AVL in civil cases does not have the negative impacts that had been anticipated and may in fact improve access to justice and fairness of the proceedings.

Q11. Are there any other considerations or principles associated with the right to natural justice for participants to appear by AVL in civil proceedings?

## **Options**

### **Option 1: Maintain the status quo**

154. Under this option AVL would continue to be used in only very limited range of civil proceedings, as permitted under current legislation. Given the low risk and the potential benefits associated with AVL use, this option is not supported.

### **Option 2: Allow AVL with parties' consent**

155. Such NZBORA issues as there may be with the use of audio visual technology in civil proceedings could be largely addressed by requiring the consent of all parties' to the proceedings. However, this option may not take sufficient account of the risk of potential exploitation or power imbalance between the parties. For example, one of the parties could refuse consent, imposing additional costs on the other parties in an effort to pressure them to settle.

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<sup>88</sup> Ibid.

### **Option 3: Allow AVL with parties' consent or if in interests of justice**

156. This option would provide some safeguards in addition to the consent of the parties, to mitigate the risk of potential exploitation or power imbalance between the parties. For example, the court could order the use of AVL even if both parties do not consent, if it is in the interests of administration of justice and does not impact on parties' rights.

Q12. Should participation by AVL in civil proceedings be allowed? If not, why not? If so, which option is preferred and why?

Q13. Are there any other options for providing for participation by AVL in civil proceedings?

## **USE OF AVL IN APPEALS**

### **Current law**

#### *New Zealand*

157. New Zealand law does not expressly address participation of judges or counsel by AVL at appeals. Nevertheless, AVL is used regularly used to hear applications for leave to appeal to the Court of Appeal and Supreme Court.

#### *Overseas Jurisdictions*

158. As discussed above, audio visual technology is common place in many types of court proceedings, including appeals, in overseas jurisdictions (including the United Kingdom, Australia, Canada and the United States of America), with Australian jurisdictions particularly effective in their use of videoconferencing in legal processes.<sup>89</sup>

### **Principles**

159. Use of AVL in appeals does not generally present the same issues as its use in trials. Oral arguments in appellate courts do not usually involve assessing credibility or analysing evidence, so the concerns raised about use of AVL for remote witnesses, etc do not arise.
160. However, AVL does raise other concerns for appeals. Appeals involve oral argument, providing the opportunity for counsel and judges to discuss the major points of a case in a limited amount of time. The argument focuses on particular points of law or questions of fact in the record, with judges able to ask probing questions.
161. Therefore, in the case of appeals, the critical consideration would be whether, and the extent to which, the use of audio visual technology is able to support and not interfere with this 'discussion'.
162. In 2006 the US Federal Judicial Center surveyed 14 appellate court judges on their use and opinions of videoconferencing technology. These appellate courts use AVL to conduct oral arguments, in addition to some other proceedings and for court business.

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<sup>89</sup> Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 181.

The *Report of a Survey of Videoconferencing in the Courts of Appeal* found, among other things:

- The quality of the technology involved is a critical factor and clearly shaped judges' evaluations of their experiences.
- The extent to which judges had experience with AVL was also a factor in their perceptions (eg, those with less AVL experience mentioned the decreased ability to make personal connections with other participants, while the more AVL-experienced did not raise this).
- Saved travel time and money were the primary benefit to conducting oral arguments via videoconferencing, along with increased scheduling flexibility for courts and counsel, increased access to the courts for disempowered litigants, and the more timely hearing of cases.<sup>90</sup>

163. Thus the decision about whether to use AVL in an appeal will largely come down to the quality of the technology and the level of the judge's and counsel's comfort with using such technology.

Q14. Are there any other considerations or principles associated with participants appearing by AVL in appeals?

## Options

### Option 1: Maintain the status quo

164. Under this option there would continue to be uncertainty about the extent to which AVL could be used in appeals. It could also result in an ad hoc and inconsistent use of AVL in appeals. This option is not supported.

### Option 2: Allow AVL if judge and counsel agree

165. As the primary issue is whether, and to what extent, the use of audio visual technology is able to support and not interfere with the 'discussion' between counsel and judges, it seems sensible to allow for AVL to be used if both judge and counsel are comfortable doing so.

Q15. Should participation by AVL in appeals be allowed? If not, why not? If so, which option is preferred and why?

Q16. Are there any other options for providing for participation by AVL in appeals?

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<sup>90</sup> Dunn, Meghan and Norwick, Rebecca, *Report of a Survey of Videoconferencing in the Court of Appeals*, Washington, DC: Federal Judicial Center, 2006. See also, "Advantages of Videoconferencing Grow with Use", *The Third Branch* (Newsletter of the Federal Courts) 38:8 (August 2006).

## **LEGISLATIVE APPROACHES**

166. A further issue to consider is how best to legislate to provide for use of AVL in proceedings. The Australian jurisdictions indicate two possible drafting approaches – amendments to existing legislation or stand-alone legislation.

### **Option 1: Amend existing legislation**

167. The range of statutes that use varying terminology concerning participants in proceedings could be amended to clarify whether they could appear by AVL (or other appropriate technology) and in what circumstances.

168. With regard to a defendant's appearance, this would involve a range of legislation, including the Bail Act, Sentencing Act, Habeus Corpus Act, Criminal Procedure (Mentally Impaired Persons Act), Summary Proceedings Act, Crimes Act etc.

169. In relation to witnesses, sections 103 and 105 of the Evidence Act already provide the court with a discretion to allow for evidence to be given an alternative way. However, these provisions may need to be reviewed, to expand the conditions in which AVL technology can be used for witnesses. Also, the provision may need to be re-drafted as currently the discretion is worded in such a way ("ordinary way" versus "alternative way") that the use of AVL may be seen as an exception to the general rule, as opposed to a standard way of giving evidence.

170. In relation to judges and lawyers, while the law may not explicitly prevent their appearing by AL or AVL, specific legislation may be required to remove any uncertainty as to whether the law allows for this.

171. This would be a substantial task, involving identification and review of all relevant statutes, regulations and rules. It would require consideration of the underlying policy intent of each provision and determining whether and to what extent AL and AVL might be consistent with that intent. This may be particularly difficult for wording that is largely historic and has not been substantially re-drafted for some time and the original intent may never have been clearly recorded. This kind of examination and consideration might be better left to judicial discretion, applying agreed principles to the particular circumstances of a case, as discussed previously. There is also a risk that some provisions may be overlooked. Also, as legislation is further amended over time, there is a risk of provisions becoming inconsistent or again falling behind technology.

172. Furthermore, it may be considered desirable to have all the statutory provisions related to the use of AVL in one overarching piece of legislation.

173. The approach of specific amendments to existing legislation has been taken by several overseas jurisdictions. For example, the Australian Capital Territory's Courts and Tribunals (Audio Visual and Audio Linking) Bill 1999 amended 14 different statutes; Victoria's Evidence (Audio Visual and Audio Linking) Act 1997 amended 5 key statutes, the major amendment being the inclusion of a new part to Victoria's Evidence Act 1958.

### **Option 2: Overarching statute to apply across New Zealand legislation**

174. One overarching statute could set out clear guidelines for the appropriate use of audio visual and audio technology in any proceedings, which would apply to every enactment that is part of the New Zealand law.

175. This is similar to the approach of New Zealand's Electronic Transactions Act 2002 (ETA), which reduced uncertainty about the legal effect of information in electronic form or communicated by electronic means by providing that paper-based legal requirements were met by using functionally equivalent electronic technology. The ETA applies to all New Zealand legislation, unless specifically exempted in the ETA.
176. This approach of a stand-alone statute was taken in Tasmania's Evidence (Audio and Audio Visual Links) Act 1999 and New South Wales's Evidence (Audio and Audio Visual Links) Act 1998.
177. Such an approach provides a clear legal basis for the use of AVL. It also provides a foundation for the required cultural change, moving away from the historic notion that physical presence is necessary for effective participation, to acceptance that AVL can achieve this just as well (and in some cases better).

## **Conclusion**

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178. New Zealand legislation reflects historic practice and notions of a court, including the assumption that participation equates to physical presence. Advances in technology have now made out-of-court appearances by AL and particularly AVL a real possibility, potentially revolutionising the traditional concept of a court. As a result, our understanding of what it means to be 'present' in court needs to be re-examined, and the discussion needs to move to the nature of participation required by the right to a fair hearing (criminal proceedings) and natural justice (civil proceedings).
179. Advances in audio and audio visual technology have meant that previous concerns about the use of such technology in courts are to some extent no longer warranted. Rather than impeding on a defendant's rights, this technology may in fact offer benefits in terms of the administration of justice. Many of the concerns regarding appearance of participants by AVL are either not supported by current research or could be addressed through a combination of technological and minor operational/behavioural adjustments (eg, regularly checking with the person appearing by AVL to ensure they can hear and understand the proceedings; providing short adjournments at regular intervals during the proceeding to allow defendant – counsel consultation when one of them is participating via AVL).
180. The use of audio visual technology in criminal and civil proceedings also has implications for the principle of open justice, particularly public access to proceedings and the traditional courtroom's role as the embodiment of the administration of justice. However, public access can be addressed and AVL could in fact improve it (eg, internet access rather than travelling to court where there may not be sufficient space). With regard to the symbolism of the traditional court, the advent of alternatives such as alternative dispute resolution and restorative justice demonstrate how the mechanisms of justice must and do evolve in response to the changing needs of the public.
181. While a number of jurisdictions have adopted the approach of specifying which proceedings should allow participation by AVL, the distinction often appears arbitrary, as well as continuing the inflexibility of reflecting current notions of 'participation' and the extent to which current technology can provide for it. It is considered that a more appropriate approach is to focus on principles that can be applied in the context of the nature of the proceedings, with a presumption that:

- 181.1. the court can use AVL in any proceeding other than where evidence is being presented, unless a party satisfies the court that it would not be appropriate in a particular case (eg, the current technology does not allow the legislative principles to be met); and
- 181.2. any party can apply for AVL to be used in a proceeding where evidence is to be presented, and the court will decide whether the use of AVL is appropriate in the particular case.
182. The determination and application of the proposed legislative principles would be on a case by case basis, depending on all of the circumstances, including the availability and quality of the particular technology proposed to be used. In considering the principles, the critical question would be whether the use of audio visual technology is able to ensure the protection of NZBORA rights (particularly the right to a fair trial and the right to natural justice) in the particular circumstances of the particular case.
183. This approach allows for gradual introduction and continued development as technology advances.
184. A review and rationalisation of current provisions for use of AVL in proceedings (eg, the Evidence Act 2006; Judicature Act 1908 and associated High Court Rules) will required as part of this approach, to remove redundant or conflicting provisions and to ensure a smooth interface with others.
185. Legislative change must be accompanied by operational changes and modifications to courtroom behaviour to accommodate and support effective participation by those appearing via AVL (eg, regularly checking with the person appearing by AVL to ensure they can hear and understand the proceedings; providing short adjournments at regular intervals during the proceeding to allow defendant – counsel consultation in private).
186. However, the most significant change required will be a cultural one. Providing a clear legal basis for the use of AVL (and in appropriate circumstances, AL) will not be sufficient to ensure its wider use and uptake. It will require general acceptance by all those involved in proceedings (judiciary, counsel, parties, witnesses) of the notion that physical presence is not necessary to ensure participation.
187. In particular, this will require leadership from the judiciary. As noted earlier, the judge is essentially the “supervisor” of proceedings, controlling the way the case is conducted in accordance with the relevant law and practice. It will therefore be up to judges to set the tone and send the appropriate signals about acceptance of AVL. This leadership could be partly achieved through practice notes and benchbooks, which could be amended as technology advances and as participants gain more experience with AVL. This would accommodate new operational practices accompanying the use of AVL to ensure effective participation. It would also mean any issues with the use or uptake of AVL could be responded to quickly.

## **COMMENTS**

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## **Appendix 1: Summary of Preliminary Analysis on Use of Video Link In Criminal and Summary Proceedings**

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### **DEFENDANTS IN CUSTODY APPEARING REMOTELY BY VIDEO LINK**

#### **No legislative change required**

- Bail and appeal hearings in the High Court and Court of Appeal, except:
  - where person requests that they be brought before District Court to apply for bail under section 30 of Bail Act and section 20(4C) of Summary Proceedings Act
  - in appeals to High Court in summary proceedings where convicted person in custody is entitled to be present under section 130 of Summary Proceedings Act
  - where evidence is to be given, the physical presence of an accused may be required by section 25(e) and (f) of the NZ Bill of Rights Act. In such cases, the accused's informed consent to appearing remotely should be obtained
- Callovers, except where evidence is to be given, for example under section 344A of the Crimes Act
- Modes of evidence hearings where the accused is legally represented
- Applications made under Crimes Act sections 345B and 345D where accused is represented by counsel
- Applications to extend orders made under section 38(2)(b) or (c) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 where the accused consents to the order and is represented by counsel
- Applications for home detention under section 80K(1) of the Sentencing Act
- Applications for leave to appeal to Court of Appeal and Supreme Court, except if evidence or findings of fact are required

#### **Legislative change required**

- First appearance after arrest, whether arrested under a warrant or otherwise (including under Bail Act)
- Pre-trial hearings
- Preliminary hearing of an indictable offence
- Arraignment
- Trial of an indictable offence
- Hearing of a summary offence
- Sentencing
- Where an accused pleads guilty prior to trial under section 321 of the Crimes Act
- Where defendant remanded in custody brought before a court under sections 46(3)(c) and 59 of the Summary Proceedings Act
- Eight day remands
- Defended extended supervision orders

- Judicial monitoring hearings
- Applications under Habeas Corpus Act

### OTHER COURT PARTICIPANTS APPEARING REMOTELY

Proceedings	Participant	Preliminary Analysis
Any of the classes of proceedings identified above	Interpreters appearing by video link, with all remaining participants physically at court	No legislative change required provided the video link can be used with fairness and in a way that does not compromise the defendant's access to justice.
Any of the classes of proceedings identified above	Defence counsel appearing by video link, with all remaining participants (including the accused) physically at court	Generally, legislative change is required because there is a significant risk that the scenario may result in inconsistencies with the NZ Bill of Rights Act.  Legislative change is <u>not</u> required for defence counsel to appear remotely where administrative or purely legal considerations are being discussed <u>and</u> defence counsel agree to appear remotely.
Proceedings under Part 2, Subpart 5 of the Criminal Procedure (Mentally Impaired Persons) Act 2003	Person detained under section 38 appearing by video link from hospital, with all remaining participants physically at court	Legislative change required to enable persons detained under section 38 to appear by video link. Use of video link is likely to raise fair trial concerns under section 25(a) of the NZ Bill of Rights Act.
Taking evidence under section 31 of the Summary Proceedings Act 1957	Defendant, informant or witness appearing by video link.	No legislative change is required for a defendant or informant (who does not intend giving evidence at the hearing) appearing by video link.  Legislative change <u>is</u> required for a witness to appear by video link.
Judicial Monitoring hearings under the Sentencing Act 2002	Offender at the District Court where the sentence was imposed and the Judge and other participants are in another District Court	Legislative change is required for a Judge to appear by video link.

## Appendix 2: Summary of Preliminary Analysis on Use of Video Link In Civil Proceedings

Proceedings	Participant	Legislative change required?
Judicial Settlement Conferences in the District Courts	A judge and party (or parties) assemble in the District Court where proceedings are filed, and another party appears remotely by video link from another Court	No
Judicial Settlement Conferences in the District Courts	Parties assemble in the Court where proceedings are filed, and the Judge appears remotely by video link from another Court	Yes
Judicial Settlement Conferences in the family jurisdiction	A judge and party (or parties) assemble in the Court where proceedings are filed, and another party appears remotely by video link from another Court	No
Judicial Settlement Conferences in the family jurisdiction	Parties assemble in the Court where proceedings are filed, and the Judge appears remotely by video link from another Court	Yes
Objections to a post mortem under section 34(3) of the Coroners Act 2003	Parties will be in the High Court where the objection is lodged. The Judge appears remotely from another High Court	Yes
Enforcement of unpaid fines under section 88 of the Summary Proceedings Act 1957	The Judge, Community Magistrate or Registrar will be in the District Court where the fines are lodged. Fines defaulter and counsel appear remotely	Yes
Enforcement of unpaid fines under section 88 of the Summary Proceedings Act 1957	The fines defaulter and counsel will be in the District Court where the fines are lodged. The Judge, Magistrate or Registrar will appear remotely from another District Court	Yes
Judge led mediation conferences under section 13 of the Family Proceedings Act 1980	One party would appear remotely from another court building	No
Applications for leave to appeal to the Court of Appeal and Supreme Court	One party would appear remotely from another court building	No, except when evidence or findings of fact are required.
Civil proceedings specified in Judicature Act section 261 over which High Court Associate Judge has jurisdiction and in High Court rule 72C (eg, proceedings related to liquidations under Companies Act)	High Court judges and associate judges can appear by AVL	No