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Audio Links and Audio Visual Links in Proceedings

Purpose

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

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

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.⁶³ 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.⁶⁴

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).⁶⁵ 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.⁶⁶

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*,⁶⁷ 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

⁶³ 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.

⁶⁴ Parliament of Victoria Law Reform Committee, *Technology and the Law*, p. 186.

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

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

⁶⁷ [2000] DCR 435.