

12 December 2024

Courts System Policy
Ministry of Justice

By email: courtspolicy@justice.govt.nz

Review of the Courts (Remote Participation) Act 2010

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Ministry of Justice’s *Review of the Courts (Remote Participation) Act 2010* discussion document (**Discussion Document**).
- 1.2 This submission has been prepared with input from the Law Society’s Family Law Section, as well as various law reform committees.¹

2 General comments

Considerations which should inform the development of an Act

- 2.1 The Discussion Document identifies constitutional principles, public confidence, effectiveness, and efficiency as key considerations which should inform the development of the Remote Participation Act, and suggests these considerations would need to be balanced in order to identify the most appropriate option for reform.²
- 2.2 While efficiency may be a relevant consideration, it is not appropriate for efficiency concerns to justify a departure from constitutional principles. If constitutional principles were to be compromised for efficiency gains, the second principle – public confidence – would also be undermined.
- 2.3 The Ministry should consider whether greater operational effectiveness and efficiency could be achieved without compromising on constitutional principles and public confidence. Such an approach could lead to desirable changes which could help reduce the current backlog of cases in the courts, reduce churn, and minimise risks of erroneous decisions.

Efficiency gains

- 2.4 As the Discussion Document notes,³ remote participation can enhance access to justice and effective participation in hearings for some participants (for example, by reducing

¹ See the Law Society’s website for more information about the Family Law Section and law reform committees: <https://www.lawsociety.org.nz/branches-sections-and-groups/>.

² At pages 12-13.

³ At page 7.

costs), and hinder access to justice for others by impacting their ability to effectively participate in a court proceeding.

- 2.5 A new legislative framework should therefore recognise that some court proceedings involve or require significant interaction between the judges, lawyers and the parties to a proceeding, and any general efficiency gains from conducting a remote hearing (for example, by reducing travel and wait times) would be lost if such interactions were to occur remotely.
- 2.6 Efficiency gains in one aspect of the court proceeding should not lead to significant inefficiencies in other aspects of the proceeding. Decision-makers should therefore be required to assess the overall efficiency gains and losses throughout the course of the proceeding when determining whether it would be efficient to conduct a proceeding remotely.

Availability of technology

- 2.7 Remote participation can be efficient and cost-effective in circumstances where the necessary technology is reliable, up-to-date, and available to all participants. However, the technology that is currently available in most courts does not, in our view, effectively enable nor encourage remote participation. For example, some lawyers have observed it is not uncommon for technology to be unreliable because of poor or limited internet access (including because court participants have limited data or poor Wi-Fi connections), and outdated hardware and software (these issues are also discussed further at [7.4] below). This can result in poor outcomes, wasted court time, and unsatisfactory and unequal experiences for court users.
- 2.8 We agree with the Ministry that any legislative changes which enable or encourage greater use of remote participation will need to be supplemented by remote participation infrastructure (including appropriate technology as well as suitable facilities which enable court participants to access that technology).⁴ We are pleased to learn the Ministry is working with the judiciary and justice sector agencies to address remote participation infrastructure,⁵ and we encourage the Ministry to complete this work before the new Act comes into force.

3 *Proposal to include a purpose statement in the Act (questions 1 and 2)*

- 3.1 We do not see any issues with including a purpose statement which captures the points set out in page 14 of the Discussion Document. However, such a statement may not be required if those indicia are set out in other provisions of the new Act.⁶
- 3.2 The purpose statement could also be aligned with the objectives of the High Court Rules 2016, which are to 'secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application by proportionate means'.⁷

⁴ See page 4 of the Discussion Document.

⁵ Page 5 of the Discussion Document.

⁶ See Legislation Act 2019, s 10.

⁷ Rule 1.2. We acknowledge that rule 1.2 does not currently include a reference to proportionality. However, we note the Rules Committee is looking to replace current rule 1.2 with a new rule which includes a reference to proportionality; see the draft *High Court (Improved Access to Civil*

3.3 It could also be useful to include a statement that these desired results are not to be achieved at the expense of the rights any parties to legal proceedings currently enjoy. Without such a statement, there may be a risk of gradual erosion of rights affirmed in the New Zealand Bill of Rights Act 1990, as well as open justice principles.

4 Applying the new Act to the Coroners Court (question 3)

4.1 We support the application of the new Act to the Coroners Court, for the reasons given at page 15 of the Discussion Document. However, we acknowledge there are likely to be some dynamics which favour in-person hearings for some participants (particularly for family members of the deceased individual, who are having to participate in what is likely a difficult process for them to navigate). We also expect that some individuals would prefer to appear remotely while others appear in person. The new Act should therefore build in flexibility for matters to be heard in person in the Coroners Court where needed.

5 Remote observation (questions 4 and 5)

5.1 The Law Society understands the need for open justice, and acknowledges that access to justice demands that justice has to be seen to be done. We therefore support amendment to the statutory framework to clarify that ‘remote observers’ includes the media (but noting our comments at [5.7] and [5.8] below). In the absence of a clear statutory framework, there is real risk of inconsistency in practices across different courts, which will threaten equal justice. Further, there would be efficiency losses because of the need for counsel and judges to debate and settle on the process to be followed in each particular case.

5.2 The Law Society has some concerns with the general public being able to participate remotely. While the media could be expected to know (or be informed) about relevant rules and protocols (such as those which apply to the taking photos or videos of a proceeding), members of the public are unlikely to know which rules or protocols apply to a particular case. Where members of the public have the ability to remotely observe a case, it can also be difficult to know:

- (a) who is watching a proceeding;
- (b) whether those observers are photographing or recording the proceeding (noting a remote observer could easily take a screenshot or a recording without being detected, as compared to an individual seated in the public gallery of a courtroom, who would need to operate a camera or recording device in order to photograph or record an in-person proceeding, which could be more easily detected by the judge(s) or others in the courtroom), and
- (c) whether and how they may disseminate those photographs or recordings.

5.3 Therefore, it may be appropriate to exempt certain types of cases from remote observation by the public – for example:

Justice) Amendment Rules 20XX, available here: <https://www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/access-to-civil-justice-consultation/2024-fourth-and-final-consultation/>.

- (a) cases which canvass material which is prohibited from publication by statute (for example, information about victims of certain kinds of offending, and names of child witnesses);
 - (b) cases involving information that is the subject of a suppression order (for example, persons 'connected with' a defendant);
 - (c) Family Court matters which meet the criteria in section 11B(3) of the Family Court Act 1980; and
 - (d) matters in the Coroners Court, which typically involve the canvassing of sensitive information which may be unsuitable for public streaming, as well as information which may subsequently become the subject of a suppression order.
- 5.4 There may also be concerns where victims and the general public have access to a direct transmission of court events. If, for example, a witness gives inadmissible evidence which is objected to, and that objection is upheld, a live transmission of proceedings would make that inadmissible material more widely available. In such circumstances, it is possible that members of the general public and/or victims may believe the material held inadmissible should become publicly known. This issue could potentially be addressed with a provision for a delay prior to transmission, which would allow for any inadmissible evidence to be removed from the recording before it is made available to the public.
- 5.5 We also encourage the Ministry to assess the impact and operation of the Courts (Remote Participation) Amendment Act 2024 (which enabled victims to remotely observe criminal trials and sentencing hearings in certain circumstances) in order to determine whether it would be appropriate for the new Act to allow victims to remotely observe proceedings. The design of a new Act should also consider matters beyond the paradigm case of one defendant facing one charge of offending against a single victim. A limited scope could otherwise lead to a defective analysis and complexities being ignored.
- 5.6 A further issue the Ministry would need to consider is whether lawyers for a party to the proceeding (who is not actively participating in the proceeding) may be permitted to observe a live transmission of the proceedings.
- 5.7 Where remote participation is permitted for observers, there must be clear, explicit and enforceable rules as to publication of material derived from remote participation, as well as enforceable consequences for non-compliance (noting there are currently strict rules which allow judges to control whether individuals can film or photograph court proceedings in order to limit or forbid the reporting of certain court events). It is equally important to clarify what rules will apply to distribution of video coverage of a court event, and whether such rules will apply, for example, to a media representative who intends to make a documentary about the case at a later time, but does not intend to provide contemporaneous coverage.⁸

⁸ Noting the High Court has held that a person not employed by a media organisation, but is contracted to one, is nevertheless part of the 'media' – see: *van Beynen v Birchfield* [2023] NZHC 3072.

5.8 It is also important that the provision of remote observation should not unduly burden the courts. While Supreme Court hearings are currently livestreamed to the general public in order to promote open justice,⁹ it is unlikely the lower courts presently have the facilities to record and livestream proceedings in this way. The Ministry would need to take these resourcing and operational matters into account when designing a new statutory framework.

6 Remote participation by jury members (question 6)

6.1 Section 9 of the Courts (Remote Participation) Act 2010 (**current Act**) provides that audio-visual links (**AVL**) must not be used in a criminal substantive matter unless a judicial officer permits this after considering the statutory criteria and whether the parties consent. The Discussion Document notes that this means that individual jurors (as participants) could theoretically participate remotely in a trial.¹⁰

6.2 However, some practitioners have raised various concerns about permitting remote attendance for jury members – these include:

- (a) The difficulties with challenging of jurors during selection, in accordance with the Juries Act.¹¹ It is unclear how a defendant (or counsel to whom the challenge function has been delegated) could form an opinion about whether to challenge a potential juror who can only be seen via AVL, and, in the case of defendants, give instructions to challenge.
- (b) If jurors are not together, but hear evidence by AVL in separate locations, it will be highly challenging to prevent one or more jurors from undertaking private research and/or being influenced by others who are not part of the trial process. In such circumstances, it is also likely that jury confidentiality will not be preserved.
- (c) Jurors' assessment of veracity and credibility are likely to be hampered because it is unlikely AVL will always allow a clear simultaneous view of counsel (or the judge) asking questions of a witness, the witness' demeanour while the question is being asked, as well as the witness' demeanour and reaction to a defendant giving their testimony. AVL would not be appropriate if confrontation is to be part of the process of testing a prosecution or a defence case.
- (d) Jury deliberations could be disorderly and inefficient, and be dominated by whoever controls the technology for the deliberations. As a result, appeals on the basis of unfair procedures may increase, and applications for access to recordings will require expenditure of valuable judicial time scrutinising the recordings.
- (e) The suggestion in the Discussion Document that court staff could monitor jury discussions occurring by AVL¹² may alleviate, but not eliminate, risks of private research and of influence by others. This is because court staff are only able to monitor what happens on the AVL platform, and they would not be privy to what is happening outside the field of view of the individual's camera and microphone.

⁹ Available at: <https://www.courtsofnz.govt.nz/streaming/>.

¹⁰ At page 17.

¹¹ Sections 23 to 26.

¹² At page 17.

The fact that England and Wales have introduced such a provision does not, in our view, strongly support such a change.

- (f) Finally, the Discussion Document notes that some groups in society are ‘most at risk of not being digitally included’. This is followed by a statement that ‘all options set out in this discussion document depend on the participant having access to technology, the ability to use it, and appropriate facilities. Where this is not available, participants should remain able to attend court in person.’¹³ Given that structural inequalities in society means equal access to technology is unlikely to exist in practice, the logical reading of the proposal in the Discussion Document would be that juries using AVL would be less representative of society at large than is the current (already unsatisfactory) position.

6.3 However, it may be appropriate for there to be some flexibility to allow remote participation by jurors in exceptional circumstances where a trial begins in person, but cannot continue in person for some reason (for example, because a juror becomes unwell partway through a trial during a pandemic, which then prevents that juror from participating in person).

6.4 We also encourage the Ministry to consider any feedback on this point from the New Zealand Bar Association and the Criminal Bar Association.

7 Clarifying fully remote hearings

Clarifying through legislation that fully remote hearings are enabled (question 7)

7.1 The Law Society agrees that a clearer and better-defined statutory framework for fully remote hearings would be helpful (particularly for self-represented litigants).

Circumstances in which fully remote hearings should be used (question 8)

7.2 Fully remote hearings may be beneficial provided any increase in their use is not at the expense of fairness and the ability to uphold constitutional principles. The Law Society suggests a four-stage approach to determining whether it is appropriate to conduct a fully remote hearing:

- (a) The first consideration should be whether it is fair on the parties to hold a fully remote hearing. While potential unfairness in criminal cases may focus on the defendant’s position, the position of private prosecutors must also be considered (and we note this is not canvassed in the Discussion Document).
- (b) If there is sufficient equality of arms (i.e., where the technology to be used favours neither party, and both parties have counsel) the next question will be whether there are aspects of the matter which require the physical presence of the judge or other court participants. These could include, for example, where a hearing requires a witness to give evidence, involves cross-examination, or where it raises concerns about privacy or confidentiality, the safety of parties, or about the likelihood of a party being placed under duress, or being subject to external influences during the proceeding.

¹³ At page 11.

- (c) Next, consideration should be given to whether practical issues could arise if the hearing was to be fully remote, and whether remote participation could impact lawyers' ability to take instructions from their client in order to present their client's case.
- (d) If not, then the issue should be decided by asking which option offers the best chances of a speedy and accurate outcome. The onus should be on the person proposing a fully remote hearing to show not only that the first three criteria mentioned above are met, but also that there is a benefit from having a fully remote hearing which outweighs any disadvantage. In making this assessment, efficiency should not be given more weight than accuracy (although fully remote hearings may achieve both).

7.3 The criteria proposed in the Discussion Document for determining whether remote participation is appropriate for specific participants (discussed at [11.1] to [11.4] below, and, to some extent, overlap with the criteria we have suggested above)¹⁴ must also be considered.

7.4 Even where all of these criteria are met, there remain concerns that the technology currently available in New Zealand's courts and Corrections facilities may not always be able to support remote hearings. For example, members of the profession have observed:

- (a) There can be connectivity issues with AVL facilities between different courts, as well as the AVL facilities available to lawyers and other participants. Substandard technology can also make it difficult for the Court and/or counsel to communicate effectively, and audio delays may result in participants unintentionally talking over each other.
- (b) Even relatively simple tasks, such as the Family Court joining lawyers to court matters by telephone, are not always well-managed.
- (c) AVL links from prisons to the courts do not always offer reliable and clear connections, and those who are participating remotely from a prison can have trouble hearing and understanding what is going on. As a result, prisoners may feel 'removed' from the court process, and find it challenging to fully understand and participate in the court process.
- (d) Lawyers who represent individuals who are attending remotely from a prison may also find it difficult to quickly obtain instructions from their clients.
- (e) There may also be delays in setting up AVL for prisoners, which results in delays in having the matter heard, and undermines any efficiency gains from having a remote hearing.

These issues would first need to be addressed if the legislation is to enable fully (or partly) remote hearings. If technology is to be used to enable fully remote hearings, it should recreate (albeit remotely) a court appearance including the ability to for parties to communicate privately with counsel.

7.5 Fully remote hearings may nevertheless be appropriate for the following matters if the criteria in [7.2] and [7.3] above are met:

¹⁴ See pages 22 to 23 of the Discussion Document.

- (a) Fully procedural civil matters (which are currently conducted by teleconference in the High Court);
- (b) Submission-only hearings, which do not require witnesses to give evidence, or are limited to legal arguments;
- (c) Matters with issues which are limited in scope (for example, a matter which involves only one issue which must be decided, rather than a matter which requires consideration of several complex issues) , and where all parties have consented to a fully remote hearing; and
- (d) List court matters and jury trial callovers where the defendant's attendance has been excused.

Other matters which should be included in a fully remote framework (question 9)

7.6 A fully remote framework should:

- (a) include clear and simple rules about how a fully remote hearing would be conducted;
- (b) clarify who is a 'participant' for the purposes of a fully remote hearing, including whether it includes remote observers such as the media and members of the public (noting our concerns at [5.2] to [5.4] above about permitting members of the public to observe proceedings remotely);
- (c) identify any constraints on remote participation and the dissemination of information relating to the hearing;
- (d) provide a way to ascertain prior to the hearing that each participant has suitable hardware, software, and an appropriate internet connection necessary for remote participation (although these details need not be set out in primary legislation); and
- (e) allow for in-person or alternative means of participation in circumstances where some, but not all, participants are able to participate remotely.

8 Modes of technology

The use of audio-links and AVL (question 10)

- 8.1 Audio-links (**AL**) tends to be more user-friendly, as it does not require court participants to have video technology or an appropriate setting in order to participate in a hearing. However, it has some limitations: it can be difficult to know which individuals are on a call, who is speaking, and whether the speaker is in fact the person they are claiming to be. Therefore, AL is generally more appropriate for less complex matters involving fewer court participants.
- 8.2 AVL, on the other hand, can be more easily extended to multiple participants, and indicate who is speaking at any time without the participants needing to identify themselves each time they speak. AVL can also assist with gauging witnesses' reactions to particular questions, and picking up on non-verbal cues.
- 8.3 AL and AVL also pose different levels of risk of information being improperly recorded or disseminated to third parties. AVL enables individuals to capture court participants in

photos and videos (even when they are not speaking or actively participating in the proceeding), and carries a higher risk of privacy breaches. At the same time, AVL can help deter individuals from taking photos or recordings when their actions are visible to other participants. The Ministry would also need to consider the relative risks of interception of AL and AVL communications by third parties who are not who are not involved in the proceeding.

- 8.4 The Law Society therefore supports having separate rules and regimes for AL and AVL (although we acknowledge there would be some overlap between the two regimes). Such rules should be drafted using plain language in order to assist participants (including, for example, self-represented litigants) in understanding their obligations.

Who should determine the mode of participation (question 11)?

- 8.5 Practitioners are divided on the issue of who should be responsible for determining the appropriate mode of participation:

- (a) Some agree the decision-maker should be responsible for determining the appropriate mode of remote participation in each individual case.
- (b) Some support allowing the parties to determine the appropriate mode for themselves, provided there are rules and guidelines to assist the parties in reaching a decision about the mode of participation.

Some of these lawyers are of the view that there are risks associated with leaving decision-makers to determine the appropriate mode of participation. They believe the pressure on the courts to progress matters as quickly as possible may mean decision-makers will not always consider, particularly in the Family Court, what might be in the best interests of the parties and their whānau. The priority of timeliness is, in some cases, in conflict with other important considerations for court users. If there is to be any consideration of the various matters relevant to the mode of participation, it should require the input and involvement of all interested parties. If parties are able to determine the mode amongst themselves, this would then avoid the need for the courts to direct a hearing by either AL or AVL simply in order to progress the matter more quickly.

- (c) Others consider this should be a matter for Parliament (rather than decision-makers or other participants) because divergent and inconsistent practices may develop if the modes of participation were to be determined by decision-makers. These practitioners support the legislation prescribing the circumstances where the use of AL and AVL is desirable, along with the criteria which must be applied when a decision must be made. If these matters are to be prescribed in the legislation, it may be appropriate to specify that AVL (rather than AL) should be used for substantive submissions which meet the criteria in [7.2] above.

9 Obligations for remote participants and observers

Proposal to include an offence provision (question 12)

- 9.1 The Law Society agrees that any increase in remote participation will also increase the risk of unauthorised recordings of court proceedings.¹⁵ We therefore support having an offence of recording court proceedings without the permission of the presiding judicial officer. This offence provision could be inserted into the Contempt of Court Act 2019. For consistency, we would also support such an offence extending to unauthorised recordings in physical courtrooms.
- 9.2 The Ministry could also consider whether it would be more appropriate to have two separate offences: one offence of recording a hearing without permission, and a separate offence of distributing a recording without permission. If this approach is to be taken, the legislation would need to specify separate penalties for each offence.
- 9.3 Any offence provisions could also be supplemented by non-statutory guidance about behaviour or actions which would constitute an offence, in order to assist court participants and observers, including self-represented litigants and the general public (particularly if the new Act permits the general public to remotely observe hearings).
- 9.4 We also note that any offence provisions would need to be enforceable in practice in order to deter offending behaviour. Therefore, if offence provisions are to be introduced, the Ministry would also need to consider how the offending can be detected and proved in practice (i.e., how it could be established that a particular individual made or distributed a recording).
- 9.5 The Discussion Document also states ‘it is likely to be difficult to enforce penalties against international participants and observers’.¹⁶ While that may be true, it should not alone be a decisive factor against introducing or attempting to enforce any offence provisions.

Proposed penalties

- 9.6 We disagree with the comments in the Discussion Document which suggest this offence should carry a low maximum penalty.¹⁷ In our view, the maximum penalty should be set at a sufficiently high level in order to effectively deter offending behaviour.
- 9.7 We note, for comparison, that the Contempt of Court Act provides for a maximum penalty of six months’ imprisonment, or a fine not exceeding \$25,000 for individuals who are found guilty of unlawfully publishing material which jeopardises a fair trial.¹⁸ Any penalty for a new offence should, at the very least, be aligned with the penalties in that Act.
- 9.8 Alternatively, the Ministry could consider introducing escalating or staggered penalties, for example, by having escalating penalties for failing to remove recordings which have been published or distributed without permission within prescribed periods.

¹⁵ See page 20 of the Discussion Document.

¹⁶ At page 20.

¹⁷ At page 20.

¹⁸ Section 7(3).

Other ways to address the risks associated with unauthorised recordings (question 13)

- 9.9 We acknowledge it can be challenging to address the risk of unauthorised recordings. Anecdotal feedback from members of the profession suggests unauthorised recordings occur on a relatively regular basis with little or no consequence in both the family law and criminal law jurisdictions. The degree to which technology has moved ahead is so significant, and highlights the inability of the court system to keep pace with that technology.
- 9.10 While it is not possible to completely prevent parties from making or distributing unauthorised recordings of remote hearings, suitably high penalties, paired with clear and plain language guidance could help reduce and deter offending behaviour (as discussed above).
- 9.11 It could also be helpful to require participants and observers to agree or declare, prior to joining or viewing the proceeding, that they will not record or distribute information relating to the proceeding without permission from the court (similar to the current terms and conditions for viewing livestreamed Supreme Court proceedings). This could help prevent inadvertent breaches, and serve as a written record of participants and observers acknowledging that they understand their obligations.

10 Who should make remote participation decisions?

Including Family Court Associates in the definition of 'judicial officer' (question 14)

- 10.1 The Law Society supports the proposal to include Family Court Associates in the definition of 'judicial officer'.

Other changes to the scope of judicial officers' and Registrars' decision-making powers (question 15)

- 10.2 We accept that judicial officers and Registrars must continue to have the power to make remote participation decisions. However, issues may arise where, for example, a judge disagrees with a Registrar's decision to allow (or not allow) a remote hearing. Therefore it could be helpful for judicial officers to have the ability to review and revoke decisions made by Registrars if the judicial officer considers the Registrar erred in their assessment of whether or not a specific hearing meets the relevant criteria for remote participation.
- 10.3 Some practitioners have also suggested that it could be helpful to give judicial officers and Registrars more flexibility to allow remote participation for counsel (although we note our comments at [14.3] below).

11 Criteria for determining whether remote participation is appropriate (questions 16 to 18)

- 11.1 The Discussion Document proposes two options for streamlining the statutory criteria for determining whether to allow remote participation:¹⁹

¹⁹ At page 22.

- (a) Replacing the multiple lists of criteria with a single requirement that decisions be determined by ‘the interests of justice’ (**option 1**); and
 - (b) Streamlining and updating the criteria (including by consolidating the existing three sets of criteria, and adding new criteria (**option 2**).
- 11.2 The Law Society supports revising the criteria as proposed under option 2 for a number of reasons:
- (a) A clear and single set of criteria will assist both decision-makers and participants in determining whether remote participation is appropriate, and provide more certainty for participants on whether remote participation will be permitted. In contrast, option 1 (the ‘interests of justice’ test) could invite arguments both for and against remote participation, and create uncertainty around whether it is appropriate to allow remote participation.
 - (b) In the absence of a clear set of criteria, the courts will likely look to fill in the gaps, by developing appropriate criteria or tests over time. The law would be more accessible if these criteria are set out in a single statutory provision, rather than in case law, or spread across multiple statutes or provisions (as is currently the case).
 - (c) Explicitly setting out the relevant considerations would also help improve transparency and accountability around decision-making.
 - (d) The criteria set out in the Discussion Document also strike an appropriate balance between certainty (by providing a list of relevant considerations) and flexibility (by enabling decision-makers to consider ‘any other matter’).²⁰ This broad discretion will enable decision-makers to consider both local and global issues (including emergencies such as pandemics and weather events).
- 11.3 We also support the criteria set out in the Discussion Document.²¹ We do not consider it is necessary to specify additional considerations since decision-makers are able to consider ‘any other matter’ when deciding whether to allow remote participation.²²
- 11.4 If the Ministry nevertheless considers expanding the criteria, the following factors could also be relevant:
- (a) Whether remote participants (such as lay witnesses and self-represented litigants) understand what is expected of them during a remote appearance (i.e., that they would need to organise, for example, childcare, access to technology, a power source, and an appropriate setting for the full duration of the hearing).
 - (b) The ability to lead evidence and/or cross-examine witnesses, and put documents to witnesses (which can be time-consuming if both the witness and counsel are not confident with using the relevant technology).

²⁰ Pages 22 to 23 of the Discussion Document.

²¹ At pages 22 to 23.

²² Page 23 of the Discussion Document.

- (c) The ability to assess the credibility of witnesses and the reliability of evidence presented during the hearing.²³
 - (d) Whether remote participation is likely to affect the participant's safety (for example, in circumstances where a remote witness is seeking to give evidence against a party from their residence, and that party knows where the witness resides).
 - (e) Whether remote participation amplifies current perceptions that the court system operates in a way which accords greater rights to those who can afford to access a lawyer privately or are entitled to receive legal aid, than it does to persons who are accused of offences of some seriousness and who cannot afford a lawyer, and are left to represent themselves. Any increase on the perception of a two-standard system of justice must be avoided.
 - (f) The views of counsel (if their views are not included in the 'views of the participant' criterion proposed in the Discussion Document).²⁴
 - (g) Other cultural factors and practices which are relevant to an individual's participation in the proceeding (noting the criteria in the Discussion Document only refer to 'the extent to which remote participation may affect tikanga Māori in court proceedings').²⁵
 - (h) Whether the individual who wishes to participate remotely has breached any privacy or confidentiality requirements during previous steps in the proceeding (for example, by taking or distributing unauthorised recordings of the proceeding).
- 11.5 The new Act should also enable regular reviews of any relevant criteria so they can be updated and remain fit for purpose as technology develops, and participants become more comfortable and familiar with the concept of remote participation.

12 Where should detailed rules be set?

Including rules in primary legislation, Court Rules and Judicial Protocols (questions 19 and 20)

- 12.1 The Discussion Document proposes three options for setting out detailed rules about remote participation:²⁶
- (a) Setting out detailed expectations and requirements in primary legislation **(option 1)**;
 - (b) Providing a legislative basis for the use of remote participation, and for setting the policy direction through a purpose statement and decision-making criteria,

²³ We acknowledge points (a) and (b) are arguably covered by the criteria listed in the Discussion Document, however they warrant more emphasis, and could potentially be identified as individual criteria.

²⁴ At page 23.

²⁵ At page 23.

²⁶ At pages 24 to 26.

and placing detailed rules and expectations in Court Rules, rather than in primary legislation (**option 2**); and

- (c) Providing a legislative basis for the use of remote participation, and for setting the policy direction through a purpose statement and decision-making criteria, and leaving it to the Judiciary to develop and set detailed guidance and expectations through Judicial Protocols, if they wish (**option 3**).

12.2 The Law Society supports providing a legislative basis for the use of remote participation in primary legislation (a feature of all of the proposed options), as this will help ensure consistency across different jurisdictions and courts.

12.3 However, there are different views amongst members of the profession as to which option is most appropriate:

- (a) Some prefer option 1, as it enhances certainty and accessibility for participants (particularly those who are not legally represented), and because of concerns that judges may not necessarily be well-placed to understand the needs and wishes of defendants, witnesses, victims and the media.
- (b) Some prefer option 2, which would enable the various Court Rules to reflect the different considerations that would apply to criminal, civil and family proceedings. These lawyers have observed that Court Rules are more routinely referred to, and are easier to access than Judicial Protocols (which require a more active search, and run the risk of being overlooked).
- (c) Others prefer option 3 because Judicial Protocols are easier to amend than primary legislation or Court Rules, and can more easily be regularly reviewed and updated to ensure they remain fit for purpose. They can also be updated more quickly (and therefore provide more certainty to parties) during an emergency such as a pandemic or a weather event.
- (d) Some others prefer a mix of the three options, which provides a legislative basis for the use of remote participation in primary legislation, and then sets out the decision-making criteria, as well as detailed rules and expectations in Court Rules and Judicial Protocols (referred to in this submission as **option 4**). These lawyers have suggested:
 - (i) Court Rules could set out the relevant decision-making criteria for determining when remote participation can be used, and
 - (ii) Judicial Protocols (or a Practice Note) could explain how those Rules will operate in practice, for example, by clarifying: what information parties and counsel must provide to the Registry when requesting a remote appearance; the form in which that information must be provided; the timeframes for providing such information in the prescribed form; and information about timetabling and procedure.

This approach would enable each Court to consider its resourcing and technological capabilities, and advise participants of that particular Court's expectations around remote participation (within the framework prescribed in the new Act and Court Rules).

- 12.4 If option 4 is to be adopted, we also note the following in relation to proceedings in the Family Court:
- (a) The Family Court Rules could include provisions to ensure any remote participation technology that is to be used is fit for purpose in each courtroom. Presently, the High Court Rules 2016 and the District Court Rules 2014 set out the rules which apply to remote participation from Australia, as well as some of the practical considerations for ensuring appropriate technological arrangements are in place.²⁷ The Family Court Rules 2002 provide that these District Court Rules apply to Family Court proceedings.²⁸ The rules around the use of remote participation in the Family Court could therefore be modelled on these High Court and District Court provisions, and apply to *all* Family Court proceedings.
 - (b) However, the Family Court Rules would require further amendments to reflect that Family Court proceedings are distinct from general civil proceedings, and therefore require the consideration of additional criteria when determining whether to allow remote participation (for example, by minors). Having a bespoke set of rules for Family Court proceedings would recognise that some Family Court proceedings may also be unsuitable for remote participation, as discussed at [15.3] to [15.17] below.
 - (c) These Rules could also be amended to provide:
 - (i) A definition of ‘remote participation’ in the interpretation section of the Rules.²⁹ This definition could be regularly reviewed and updated with the evolution of technology and capability of the courts to utilise available technology.
 - (ii) An option for parties and their counsel to attend any conference remotely. Notwithstanding this, an element of judicial discretion is also needed given many of New Zealand’s courts are currently ill-equipped to deal with remote participation.
 - (d) Detailed guidance and expectations for the use of remote participation in the Family Court could be set out in a Judicial Protocol to ensure technical difficulties are avoided. We note the Protocol which currently applies to remote hearings in the Supreme Court, Court of Appeal and High Court, helpfully details what remote technology can be used, the process for participating in a test call, as well as expectations of counsel and participants.³⁰ A similar protocol could be adopted by the Family Court.
 - (e) Such a protocol could be more readily amended (as noted at [12.3(c)] above), and accommodate rapid developments in technology. In contrast, primary and secondary legislation can be more difficult and time-consuming to update, and may, over time, fall out-of-step with technological advances and capabilities.

²⁷ Rule 9.57 of the District Court Rules, and rule 9.67 of the High Court Rules.

²⁸ Rule 173E.

²⁹ Rule 8.

³⁰ *Protocol for Participation in Remote Hearings* (23 November 2023).

Other matters which need to be set out in primary legislation, Court Rules and Judicial Protocols (question 21)

12.5 If a decision is made to proceed with options 2 or 3, a new Act could also include cross references to any detailed guidance and expectations set out in any Court Rules, Judicial Protocols or Practice Notes (i.e., in addition to a purpose statement and criteria for determining whether remote participation is appropriate). This will help improve the clarity and accessibility of the new framework for remote participation.

12.6 We also note the following in relation to Family Court hearings:

- (a) If changes are made to the Family Court Rules to provide for a presumption of remote participation in pre-hearing matters (as suggested at [15.1] and [15.2] below), it may also be necessary to provide statutory criteria for determining when this presumption could be rebutted.
- (b) If such criteria are to be provided in primary legislation, it could be helpful to identify any specific characteristics of a proceeding which would make that proceeding unsuitable for remote participation, in order to ensure consistency across pre-hearing matters in the Family Court, and to avoid the overuse of judicial discretion to displace the presumption of remote participation.
- (c) We note rule 181(1) of the Family Court Rules presently enables judges to hold conferences by AL or AVL. This rule could be modified to provide for a presumption in favour of remote participation – it could state, for example (amendments underlined):
 - (1) To ensure proceedings are dealt with speedily, the court must do one of the following:
 - (a) Deal with an application or hold a conference by way of telephone conference link-up, at the expense of one or more parties; or
 - (b) If facilities are available, and subject to a direction as to costs, deal with an application or hold a conference by way of video conference link-up; or
 - (c) If parties express that they wish to attend a conference in person, deal with an application or hold a conference in person.

13 Making greater use of remote participation in civil proceedings (questions 22 and 23)

13.1 The Law Society supports increasing expectations on the courts to make greater use of remote participation in civil procedural matters which do not require the giving of evidence, or involves consideration of relatively non-contentious matters.

13.2 Increased use of remote participation could help:

- (a) Achieve the objectives in existing Court Rules to deal with matters expeditiously.³¹

³¹ See r 3(1)(a) of the Family Court Rules, r 1.3 of the District Court Rules, r 1.2 of the High Court Rules, r 5 of the Court of Appeal (Civil) Rules 2005, and r 5 of the Supreme Court Rules 2004.

- (b) Reduce the costs incurred by parties (including travel and legal costs and disbursements) as well as time spent on the matter (by reducing or removing the need to travel, and wait for matters to be called).
- (c) Improve safety for participants, particularly in Family Court proceedings, who are less likely to be exposed to risks of conflict and violence (although we note our comments at [11.4(d)] above).
- (d) Make hearings less distressing for certain participants (for example, victims of family violence who do not wish to be physically present in the courtroom or face their abuser in person).
- (e) Increase efficiency, as applications could be heard more quickly because more matters could be called in a list, and judges could deal with matters in chambers rather than having to fit those within a courtroom schedule.
- (f) Improve the overall accessibility of civil proceedings, particularly for participants with disabilities who may have difficulty attending hearings in person.

13.3 However, increased use of remote participation also has its disadvantages:

- (a) It can create an uneven playing field if one of the parties to a proceeding does not have the means to appear remotely: they may be required to attend court, while the other party can appear remotely. If one party cannot appear remotely, facing cross-examination in person may be more stressful for them compared to the experience of a more advantaged party who has the means to appear remotely (that is, if cross-examination is allowed to take place remotely).
- (b) Issues and failures with technology, and difficulties in accessing suitable facilities can impact effective advocacy by counsel, and potentially prejudice the parties to the proceeding.
- (c) Remote participation can also present practical difficulties for counsel, for example, with conferring and taking instructions from their clients, cross-examining witnesses, putting documents to witnesses, producing documents and exhibits, and assessing the credibility of witnesses.
- (d) It can be difficult for judges to assess credibility during cross examination when they cannot see the body language of a witness (noting there are greater risks with the use of AL over AVL, as judges cannot see the witness via AL).
- (e) It could cause delays in the proceeding (for example, where matters need to be rescheduled because of technology issues), and, over time, contribute to backlogs in the courts.
- (f) The increased use of remote hearings could also have a detrimental impact on participants who are not confident with using remote technology (including, for example, with accessing electronic bundles, exhibits and documents during the course of the hearing). Parties may also not feel 'heard' by the courts when they participate remotely.
- (g) Greater use of remote participation would also see parties receiving less support during the hearing (including from family and whānau of victims in Family Court matters, who may have otherwise attended in person to offer support).

- (h) It can make it difficult for other participants in the proceeding to know whether a witness is giving evidence in private, or whether there are other individuals present. This is particularly a risk when using AL rather than AVL as it becomes more difficult to address issues of interference or intimidation in giving evidence.
 - (i) As noted in [9.1] above, any increase in remote participation will also increase the risks of privacy and confidentiality breaches via unauthorised recordings of court proceedings as well as the unauthorised distribution of those recordings (including on social media, and to individuals who have no involvement in the proceeding).
 - (j) Increased use of remote participation could, over time, erode the ‘gravitas’ of the matter because of the absence of formal in-person hearings (for example, because of individuals remotely participating in inappropriate settings, or in inappropriate attire).
- 13.4 These issues arising from greater use of remote participation could lead to less confidence in the justice system, and decreased access to justice, over time. The advantages of increasing the use of remote participation in civil proceedings would therefore need to be carefully balanced against its disadvantages.
- 13.5 We also note the current requirements around remote attendance by AVL can be costly and unnecessarily onerous – for example, if a party wishes to use AVL in the Family Court for a hearing, they are required to ensure the other party also attends via an ‘AVL equivalent suite’, whether domestically or overseas. While these suites guarantee secure video connections to the technology in the appearing court, they incur a booking cost. Practitioners have noted the Family Court Registry would also schedule test calls with counsel to ensure the connection is secure and functional, which then incurs additional costs. As a result, the overall process becomes onerous and costly for parties and counsel. Such issues would need to be addressed if there is to be increased use of remote participation.
- 14 Options for encouraging more remote participation in civil proceedings (question 24)
- 14.1 The Discussion Document proposes three options for increasing the use of remote participation in civil proceedings:
- (a) Requiring decision-makers to actively consider whether a civil hearing should be held remotely (**option 1**);
 - (b) Introducing an entitlement for lawyers to participate remotely if requested (**option 2**); and
 - (c) Introducing a legislative presumption in favour of remote participation in some or all civil proceedings (**option 3**).
- 14.2 Practitioners expressed different views on this issue: some preferred option 1 on the basis that there needs to be a case-by-case analysis of whether it is appropriate to use remote participation. Others preferred option 3 in circumstances where the criteria discussed in [11.2] to [11.4] above are met. If option 3 is to be adopted, some practitioners indicated they would support AL being used in all civil procedural matters.

14.3 We did not receive any feedback in support of option 2, potentially because of concerns that reserving an entitlement to lawyers could lead to remote appearances by counsel in hearings where remote participation is not appropriate (for example, where it is likely to result in a lengthy trial, or where remote participation is prejudicial to one of the participants).

15 Applying a presumption in favour of remote participation to specific courts (question 25)

Proceedings in the Family Court generally

15.1 Some practitioners support a presumption in favour of AVL, which can be displaced, in all judicial conferences in the Family Court. If such a presumption existed, clients should have the option to elect to appear in person, by AVL, or by AL, but would be able to avoid extra costs of drafting and filing an application. Attendance by AVL at any hearing could be an issue that is addressed as a general schedule item, much like length of hearing time and the filing of submissions.

15.2 A presumption in favour of remote participation, alongside statutory criteria for displacing the presumption, would set expectations around the need for the courts to make necessary and appropriate technological arrangements. For example, in family violence proceedings, it may not be appropriate for the victim to appear in person, and to be seated directly in front of a screen on which the respondent is to appear by AVL. A presumption in favour of remote participation could encourage the Family Court to consider whether the placement of AVL screens is appropriate for that particular proceeding, and address such matters in a Judicial Protocol.

15.3 It should be possible to rebut this presumption as not all situations are likely to be suitable for AVL or AL. The judicial officer or Registrar should be able to, on their own initiative or by application of a party, determine that AVL or AL are not appropriate, and require the parties to attend in person. Some characteristics of conferences which cannot be appropriately conducted via remote participation should be identified, and could include, for example, conferences relating to matters where:

- (a) a party to a Family Court proceeding does not have the means to appear via remote participation;
- (b) a participant has not adhered to the rules of remote participation in a previous remote conference;
- (c) there is a vulnerable witness; or
- (d) a protection order is in place.

15.4 However, some practitioners have noted they do not support such a presumption because of concerns that parties may not be able to meaningfully engage in certain conferences (for example, in matters brought under the Mental Health (Compulsory Assessment and Treatment) Act 1992), and because of the practical reality that matters are often advanced outside the courtroom, while waiting for the matter to commence.

15.5 We have also set out below several Family Court matters which, in our view, are not suitable for a remote hearing, and should be heard in person unless all parties and the judicial officer or Registrar agree they can be held remotely:

Mental Health (Compulsory Assessment and Treatment) Act 1992 hearings

Section 83 appeals from Review Tribunal

- 15.6 The default for appeals brought under section 83 of this Act should be in person hearings, unless the parties consent, or the judge directs otherwise. It is often difficult to know who will attend these hearings in advance (for example, whānau or other support persons for the patient). It may also be difficult for the patient to have this support if the default position is for these hearings to be held remotely.

Applications for compulsory treatment orders where patient lives or is being treated in at a significant distance from court

- 15.7 The default mode of appearance for these hearings should be in person unless the patient consents to remote appearance, or the judge directs that is the case. Any remote appearance should only be directed where it is necessary and for the benefit of the patient.
- 15.8 At present, where there are community patients that live at a distance from the court, a health professional assists the patient to attend court, or the technology is taken to the patient, so a remote appearance is available.
- 15.9 If a patient is not in hospital, and is brought to a hearing by a health professional, the visit provides a useful opportunity for the health professional to check in on the patient. Furthermore, if a patient lives a significant distance away from a court (which is likely to be in a rural area), they may not have the technology to appear remotely, or if they do, the coverage of technology is likely to be of a lower quality or less reliable than in a town or city.

Section 16 reviews where patient lives or is being treated at a significant distance from court

- 15.10 The default mode of appearance for these hearings should also be in person, unless the patient makes a request for the review to take place remotely, and it is practicable to do so in the circumstances. This is because section 16 review hearings generally go against the patient's desire to be discharged, and conducting such hearings remotely may add to the patient's dissatisfaction with the review process, which would be undesirable from a therapeutic perspective. We also note our comments at [15.8] and [15.9] above about the impacts on patients who live at a significant distance from court.

Substance Addiction (Compulsory Assessment and Treatment) Act 2017 review hearings under sections 29(c) or 34(1), and interviews under section 75(3)

- 15.11 Hearings under these provisions involve individuals who have a severe substance addiction, and whose capacity to make decisions is severely impaired. It would be more appropriate to conduct hearings involving such individuals in person, as they may not be able to consent to, or make decisions about, procedural matters such as the mode of

appearance. The default should therefore be that these matters are heard in person unless a judge directs otherwise.

Hearings under the Property (Relationship) Act 1976

- 15.12 We do not consider remote appearances to be appropriate for spousal maintenance or relationship property matters.

The first rule 175 conference

- 15.13 Rule 175D(2) of the Family Court Rules 2002 sets out a broad range of matters on which the presiding officer can make directions and orders. If a matter is relatively straightforward, a joint consent memorandum is usually filed in advance of a rule 175 conference, and therefore, those matters could be heard remotely with the consent of all the parties.
- 15.14 However some practitioners have observed that in all other matters, it is often the case that if the first rule 175 conference is held remotely, a second rule 175 conference will be required, which will only add to the workload of the Family Court.

Submissions only interim or interlocutory hearings

- 15.15 Appearances for submissions on interim or interlocutory hearings (particularly those involving spousal maintenance and discovery) should be in person by default, unless the parties and the Judge agree the hearing could be conducted remotely. This is because:
- (a) Both lawyers and Judges in submissions only hearings require all documents relating to the matter, and there are often delays in getting these documents on to the court file. In such circumstances, when a matter is heard in person, counsel can provide hard copies to the Judge if it becomes apparent those documents have not made it on to the file. This would be difficult in a remote hearing.
 - (b) A similar problem may arise with bundles of documents (i.e., with one party getting the bundle to the other) when the matter is being heard remotely. If a person is appearing at a hearing remotely, consideration would need to be given to how they could access the bundle, who would be responsible for preparing the bundle, as well as the costs of facilitating remote access to the bundle.
 - (c) Submissions only hearings tend to be interactive (for example, with Judges interjecting while counsel present submissions, in order to seek the views of other counsel), and at times, contentious. It would be appropriate for hearings of this nature to be conducted in person by default.
 - (d) In-person attendances can help parties feel they are meaningfully participating in the Court process, and can assist with resolving matters at an earlier stage (particularly where the Judge chooses to test potential outcomes with the parties).
- 15.16 However, we note some of the concerns discussed at [15.15(a)] to [15.15(c)] above may be addressed once the necessary technology is upgraded, and Te Au Reka (the new digital case management system for the courts and tribunals) has been implemented in the Family Court.

Applications for departure orders under the Child Support Act 1991

15.17 Practitioners have observed that applications for departure orders tend to be defended in approximately 80% to 90% of all cases. Such applications typically involve conflicting evidence, so cross-examination is almost always required. In our view, these are not conducive to a remote appearance, and the default should be an in-person appearance in court, unless the parties and the Judge (or Family Court Associate, if they have jurisdiction) agree they can be held remotely.

16 Other ideas for increasing expectations around the use of remote participation in civil proceedings (question 26)

Case management in the District Court and High Court

16.1 Some practitioners have suggested that case management conferences in the District Court and High Court could be conducted by AL or AVL (noting case management in the High Court already occurs via AL, and no concerns have been raised about the use of AL in that context). If this approach is to be taken, it would also be helpful to have the flexibility to have an in-person conference where that is necessary or appropriate.

Remote participation in the Family Court

16.2 There is currently no protocol for remote participation in the Family Court. The Covid-19 lockdowns gave many judges and lawyers a test run of remote hearings, and, while some judges and lawyers have embraced technology, others have not.

16.3 Ideally, legislation, rules and a protocol should be implemented together so judges are required to hold remote hearings (or at least turn their mind to them), and there is consistent use of remote hearings throughout the country.

16.4 There are also inconsistencies across the Family Court Registries about whether counsel can appear by AVL for conferences. We suggest that all Family Court Registries should be given a questionnaire to complete about its use of remote participation. The results could be summarised and provided to the judiciary to generate more discussion and perhaps a greater implementation of AVL by more members of the judiciary.

17 Using remote participation in criminal proceedings

17.1 The Law Society supports the use of remote participation in criminal procedural matters, as discussed further at [17.11] to [17.13] below), as well as a higher threshold for remote participation in criminal substantive matters.

17.2 The use of remote participation in criminal substantive matters could be contrary to the interests of justice because it can reduce efficiency (for example, where it requires judges to adjourn a matter and clear the courtroom in order to enable defendants to receive advice from, and provide instructions to, their counsel).

17.3 As noted at [7.4] above, the remote participation technologies that are currently available in Corrections facilities may not be adequate or reliable, and do not always ensure meaningful participation by defendants.

17.4 Various concerns also arise where jury trials are conducted remotely, as discussed at [6.2] above.

- 17.5 Remote participation in criminal substantive proceedings also reduce the ability of judges to be alive to, and to manage, any safety and security issues which can arise during the course of the proceeding.
- 17.6 Any requirements or guidance about the use of remote participation in criminal substantive matters would need to involve careful consideration of these matters.

Clarifying that AVL may be used in a sentencing hearing where the participant is not in custody (questions 27 to 29)

- 17.7 The Discussion Document proposes to clarify that AVL *may* be used for the appearance of a participant in a sentencing hearing where the participant is not in custody (and this would cover defendants/offenders on bail and at large).³²
- 17.8 The Law Society has a number of concerns about this proposal:
- (a) A key aspect of a sentencing hearing is that the sentencing Judge should be satisfied the offender realises the gravity of the offence and the sentence. Frequently, the physical presence of the offender while the sentence is being pronounced adds to the denunciatory function of sentencing, and helps the offender understand the impacts of their offending (including on victims). Remote participation would not achieve these objectives.
 - (b) Remote appearances would also make it difficult for the Court to know whether the offender is actively listening and participating in the sentencing hearing.
 - (c) Some victims may also wish to speak to address the offender in person. They would not have the opportunity to do this where the offender participates remotely.
 - (d) The physical presence of the offender can also enhance the seriousness with which the Court views the offender's conduct, particularly where it only results in a discharge without conviction.
 - (e) It can be difficult to know whether other individuals who are not participating in the proceeding are present beyond the view of the AVL screen, and whether they are able to listen to the proceeding.
 - (f) Given the defendant is being sentenced for an offence, it is not unreasonable for any inconvenience to the offender in physically attending the sentencing hearing to be seen as a consequence of their offending.
- 17.9 For these reasons, the Law Society does not support the proposal in the Discussion Document. In our view, the new Act should require offenders to attend sentencing hearings in person if they are not in custody, unless:
- (a) The offender is in hospital, or the offender's physical health is likely to be jeopardised if the offender were to travel to the court to attend the sentencing hearing.

³² At page 30.

- (b) There are significant geographical barriers or other factors which prevent the offender from traveling to the court (for example, where a weather event or road closures prevent the offender from travelling).
- (c) The offender is a body corporate, which cannot be physically present at sentencing because they have no physical presence. In such proceedings, the imposition of a sentence typically takes place with the presence of counsel or another individual representing the corporation. It may be appropriate for these participants to appear remotely, as the concerns noted at [17.8] above do not apply to bodies corporate.
- (d) The offender is being sentenced for a category 1 offence punishable with a maximum penalty of a fine only, and for infringement offences where the infringement is commenced by filing a charging document under the Criminal Procedure Act 2011.

17.10 We also note these concerns do not necessitate the offender's counsel participating in the sentencing hearing in person. We do not have any concerns with a legislative change to clarify that remote participation may be appropriate for counsel (provided the general criteria proposed in the Discussion Document are met).³³

Enabling greater use of remote participation in criminal procedural matters (questions 30 to 33)

17.11 The Discussion Document proposes to allow defendants who are not in custody and lawyers to attend criminal procedural matters remotely on request.³⁴ The Law Society generally supports a provision which entitles defendants who are not in custody to participate remotely in criminal procedural matters. However, there may be concerns where:

- (a) The defendant requires legal aid, or legal assistance with bail matters during the first call.
- (b) The defendant needs to enter a plea during the second call.
- (c) The lawyer does not know in advance whether the defendant will turn up for the hearing (noting hearings are sometimes the only opportunity for counsel to have contact with the defendant).
- (d) As noted in the Discussion Document,³⁵ such an entitlement:
 - (i) fundamentally changes the way the courts run and how list courts work; or
 - (ii) creates additional pressure on the courts, due to increased time required to schedule, set up, and support remote participation.

17.12 We therefore support judicial officers and Registrars having the ability to depart from this entitlement after considering statutory criteria.³⁶

³³ At pages 22 to 23.

³⁴ At page 31.

³⁵ At page 31.

³⁶ As noted in page 31 of the Discussion Document.

17.13 We also support the proposal to entitle lawyers to attend criminal procedural matters remotely on request.

Is the criminal 'procedural' and 'substantive' matters distinction fit for purpose (questions 34 to 37)?

17.14 The Discussion Document suggests the distinction between 'procedural' and 'substantive' matters, based on whether the matter involves evidence, may not be fit for purpose because some 'procedural' matters do not involve evidence but may still be considered significant, and because sentencing hearings do not fall neatly within existing definitions.³⁷

17.15 In our view, the problem does not lie with the distinction to be drawn between substance and procedure, but the inelasticity of the current definitions. These definitions make a binary distinction between criminal matters by considering whether or not 'evidence is to be called'.³⁸ It does not take into account hearings at which evidence may be called,³⁹ but where it is not known until the hearing, or close to it, whether or not the option of calling evidence will be exercised. Sentencing hearings are one such example (which would explain why sentencing hearings do not fit neatly within the current definitions).

17.16 We also note that a decision as to whether to change the venue of a trial typically proceeds without evidence, but the court may admit evidence relevant to matters such as local prejudice or the ability to secure accommodation for defendants remanded in custody. Such matters also do not fit neatly within the current definitions.

17.17 The current definitions also fail to consider that both procedural and substantive matters can involve practical and human factors which would favour in-person attendance.

17.18 The Law Society therefore supports the proposal in the Discussion Document to redefine which criminal matters may be suitable for remote participation.⁴⁰ The Ministry could consider either:

- (a) Revising the definition of the 'criminal procedural matter' to mean 'any matter where evidence could be called but neither party has given notice within a prescribed time of an intention to call such evidence'; or
- (b) Clarifying that any matter which requires the defendant to attend in-person is a 'criminal substantive matter', and any matter which does not require in-person attendance by the defendant is a 'criminal procedural matter'.

17.19 However, we acknowledge, in relation to [17.18(b)] above, that whether or not a defendant is required to attend a hearing in person will also vary from court to court (for example, depending on the availability of remote participation technology in a particular court). Therefore, if this approach is to be adopted, it may be appropriate to include this definition in a Judicial Protocol (rather than in primary legislation or Court Rules).

³⁷ At page 32.

³⁸ Section 3.

³⁹ Noting either party may choose to do so as of right, or if leave is given.

⁴⁰ At pages 32 to 33.

18 Next steps

18.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz), if you have any questions, or wish to discuss this feedback further.

Nāku noa, nā

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive, flowing style.

David Campbell
Vice-President