

Review of Courts (Remote Participation) Act 2010

Overview

The Ministry of Justice is undertaking a first principles review of the Courts (Remote Participation) Act 2010 and is now seeking public feedback on options for change.

The Act provides a framework for determining when court users can attend remotely by audio-visual or audio links instead of in-person.

The Act is unclear in places, and it has not kept up with evolving court practices and attitudes to remote technology. It also has not been substantially reviewed since it became law 14 years ago.

Feedback is sought on options for change related to three areas: what a remote participation Act should apply to; how decisions about participating remotely should be made; and when remote participation should be used.

The key objective is to achieve a modern, fit-for-purpose regime that increases remote participation, supports access to justice and promotes efficiency in courts in a way that is consistent with the interests of justice.

The last day for submissions and completed online surveys is **Friday 6 December**.

Why your views matter

The options in the discussion document are preliminary only.

If change goes ahead, it may affect both civil and criminal court users such as complainants and victims, defendants, claimants, jurors and lawyers, and the judges and other judicial officers, and registrars, who make decisions about allowing remote participation.

Feedback will be used to inform the development of final policy proposals, which will be considered by the Government. If the Government decided to progress any change to the Act, a Bill will be developed and introduced into the House.

To give feedback,

read the discussion document <<https://www.justice.govt.nz/assets/Documents/Publications/Discussion-Documents/Review-of-the-Courts-Remote-Participation-Act-2010.pdf>> **first before you start the public online survey on this page. The discussion document contains important contextual information and a glossary of key terms used.** The survey questions follow questions described in Part 1,2 and 3 of the discussion document.

OR:

make a written submission separately:

by email to courtspolicy@justice.govt.nz

by post to:

Courts System Policy

Ministry of Justice – National Office

DX SX10088

Wellington

This **accessibility format document** <<https://www.justice.govt.nz/assets/Documents/Publications/Remote-participation-in-courts-discussion-document-plain-language-summary.pdf>> may assist some people with their navigation of the discussion document. This [PDF copy of the online] survey can be printed, if helpful.

Once the Government has made decisions the Ministry will publish a summary of feedback on our website. The summary will not include information that could identify individuals.

Official Information Act (OIA) requests and your submission

Your feedback is subject to the Official Information Act 1982 (OIA). If your feedback is within scope of an OIA request for information, the Ministry is required to release the information unless one of the withholding grounds of the OIA apply. The Ministry can withhold personal details under the OIA, including your name and address. If you do not want any information in your feedback to be released, please let us know and explain why. For example, some information may be commercially sensitive or personal. The Ministry will take your views into account when responding to such requests.

Your rights under the Privacy Act

The Privacy Act 2020 governs how the Ministry collects and uses the personal information about you and your submission. You have the right to access and correct personal information.

Introductory text

There are 37 questions. These align with the questions asked in the three parts of the discussion document:

Part 1: What a remote participation Act should apply to. (Questions 1-13)

Part 2: How remote participation decisions should be made. (Questions 14 - 18)

Part 3: When remote participation should be used. (Questions 19-37)

Use the table of contents below to navigate the questions.

You can answer all the questions or only the questions of particular interest to you.

Purpose of a remote participation Act (Q1,2)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act does not include a purpose statement or objectives. In 2010, the Act was developed to provide a legal basis for the use of remote participation and enable increased use. At that time, remote technology use was limited and there were concerns around its consistency with the New Zealand Bill of Rights Act 1990.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified an opportunity to clarify the purpose of an Act, and ensure it reflects contemporary views about remote participation use in courts.

The way in which courts work, and decisions are made about use of technology, has changed significantly since 2010. When used appropriately, it is now recognised as a tool to facilitate access to justice and a potential contributor to court efficiency.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Add a purpose statement. This could clarify that the purpose of an Act is to facilitate and promote increased use of remote participation in court proceedings to:

enhance access to justice;

support the just, effective, efficient, and timely resolution of court proceedings; and

comply with open justice principles.

A purpose statement could modernise and future-proof an Act, provide clarity and direction to users of that Act (supporting the rule of law), and align with the objective of enabling increased remote participation.

1 What are your views on including a purpose statement?

2 What else, if anything, should be included in the purpose statement?

Which courts an Act should apply to (Q3)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act applies generally to all courts. Separate legislation applies to tribunals. The Act defines courts to include the Supreme Court, the Court of Appeal, the High Court and the District Court. It also includes the following specialist courts: the Employment Court, the Environment Court, the Māori Appellate Court, and the Māori Land Court. The Act also applies to the Court Martial and Court Martial Appeal Court.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

There is an opportunity to consolidate requirements for remote participation use in the coronial jurisdiction. The current Act does not include coroners as a court. Instead, coroners rely on section 102A of the Coroners Act 2006, which states that the Courts (Remote Participation) Act 2010 applies to coroners as if it were a civil court. We are not aware that this is causing problems. However, there is an opportunity to reduce cross-referencing and circularity, and align the coroners with the other specialist courts under an Act.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Add the Coroners Court to the defined list of courts to which an Act applies. Section 102A of the Coroners Act could then be repealed.

We do not expect this change will make a material difference to remote participation use in the coronial jurisdiction. An Act will continue to apply to coroners as if it were a civil court. However, bringing coroners within an Act could create a simpler, more coherent regime and increase clarity for users. It would also recognise coroners' role as judicial officers.

3 What are your views on including the Coroners Court within an Act?

Do you have any other comments to make?

Who should be able to participate remotely (Q4,5)

Overview

The Act defines “participants” widely to include: a party, defendant, counsel, witness, member of the jury, judicial officer, Registrar, and any other person directly involved in the proceeding whom the decision-maker considers appropriate.

We have identified three potential issues relating to participants.

For each issue, click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Issue 1: Remote observation

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Courts (Remote Participation) Amendment Act 2024 enacted a presumption that victims may remotely observe criminal trials and sentencing hearings where appropriate. This comes into force in March 2025. This presumption will support victims and enable them to avoid the stress and potential retraumatisation they may experience when physically attending court.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified a potential unintended consequence of introducing a victims' remote observation 'presumption' under the Act. It may create doubts about whether the Act covers other observers, such as the media and public.

Courts already permit the media and public to observe some hearings remotely. A lack of clarity about the Act's application to these observers, and the interplay with the courts' inherent and implied powers, could create unnecessary confusion and raise questions about existing court practice.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Carry through the presumption that victims can remotely observe criminal trials and sentencings, and clarify that the Act covers remote observers, including victims, the media, and public. This could involve formalising a remote observation framework in an Act. The framework could apply to all observers, all hearings, and appropriate courts. Decision-makers would need to consider statutory criteria before determining appropriate use.

A new framework would maintain existing restrictions on public and media court attendance. For example, many Family Court cases are closed to the public. We would also need to consider implications that may arise if people are observing from outside of New Zealand.

Creating a clear framework to facilitate remote observation would formalise what already occurs in practice. It would also support the principle of open justice and could help to improve public understanding of the courts and strengthen the connection between the courts and communities.

Any increase in remote observation use would increase the risks of unauthorised recordings of court hearings. A significant increase in remote observation use would also have a big impact on court registries in managing observation. It would require substantial investment in remote participation infrastructure.

4 Do you think it is necessary to clarify that legislation governing remote participation covers remote observers, including victims, the media and the public?

Please select only one item

- Yes
- No
- Unsure

5 If we formalise a remote observation framework in an Act, what else, if anything, should be included in the framework?

Who should be able to participate remotely (Q6)

Issue 2 : Remote participation by jury members

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act states that audio-visual links (AVL) must not be used for the appearance of a participant in a criminal substantive matter unless a judicial officer permits this (after considering the statutory criteria and whether parties consent).

This means that individual jurors (as participants) could theoretically participate remotely in a trial.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified potential risks associated with remote jurors. If one or more jurors participated remotely from outside the courtroom, it may be difficult to control juror interference. Similarly, jurors may not engage in the same way as they would together in a group. These situations could raise fair trial concerns.

We do not have any evidence that the current settings are creating any problems, as in practice jurors do not participate remotely. Despite this, we want to test whether there is a need to tighten settings if it is ever considered that jurors should be able to participate remotely (e.g., in a pandemic).

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Clarify that jurors may only participate remotely together as a group, in exceptional circumstances. This would allow jurors to hear evidence together, decide a verdict together, and deliberate only with one another. Court staff could monitor them and ensure that there is no juror interference. England and Wales introduced a similar provision as a safeguard, for use in exceptional circumstances, such as during a pandemic.

6 What are your views on clarifying that members of the jury may only participate remotely together as a group?

Who should be able to participate remotely (Q7-9)

Issue 3: Clarifying fully remote hearings

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act sets out different levels of expectations over the use of remote participation for individual participants in civil and criminal proceedings. Current rules are framed around both the type of participant and the type of matter (whether civil, criminal procedural, or criminal substantive).

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified an opportunity to clarify the position regarding fully remote hearings (a hearing where everyone participates remotely instead of in the courtroom). Fully remote courts have potential for efficiency gains, such as freeing up courtrooms for other hearings and reducing travel for judicial officers and lawyers.

While the current Act does not prevent fully remote hearings from occurring, this is only clear when piecing together individual rules for each participant and matter. We are not aware that this is causing problems. However, there is an opportunity to provide a clearer and more user-friendly legislative framework for fully remote hearings.

Shortcode: factbank

Factbank Title: Option we are are considering

Factbank Content:

Clarify that fully remote hearings are enabled, provided the relevant statutory criteria are met.

Including an explicit reference to fully remote hearings could increase clarity for users and future proof the legislative framework. Fully remote hearings depend on appropriate technology being available for all court participants. Providing a legislative framework for fully remote hearings will support use if and when the necessary technology becomes available.

If the use of fully remote hearings increases, it will be important to consider the principle of open justice. It may be necessary to permit members of the media and public to remotely observe fully remote hearings.

7 What are your views on clarifying through legislation that fully remote hearings are enabled?

8 In what circumstances, if any, do you think fully remote hearings should be used?

9 What else, if anything, should be in a fully remote hearing framework?

What modes of technology should be used (Q10,11)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

Following the enactment of the Courts (Remote Participation) Amendment Act 2024, the Act authorises remote participation by both audio-visual link (AVL) and audio link (AL).

The Act prescribes the circumstances where each 'mode' of technology (AVL or AL) can be used. The threshold for using AL is higher than for AVL. For example, the Act authorises use of AL only in criminal proceedings that defendants do not attend, and in appropriate civil proceedings (including in the Family Court). This recognises that AL imposes constraints on a person's ability to participate effectively in a hearing.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified potential issues with prescribing separate rules for AVL and AL technology. This approach may create layers of complexity for court users, making an Act difficult to apply. It also provides less flexibility and discretion for decision-makers to determine the appropriate form of technology in the individual case. For example, it may restrict their ability to permit use of technology appropriate to the communication needs of visually-impaired or deaf users.

We want to test these assumptions to determine whether a change in settings is necessary.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

No separate rules for AVL and AL. Instead, decision-makers would be responsible for determining the appropriate 'mode' of remote participation in the individual case. They would be guided by statutory criteria and what is in the interests of justice.

This option could remove layers of complexity, making an Act easier to apply. It could also provide more flexibility for decision-makers to determine the appropriate type of technology in the individual case.

However, removing separate rules from primary legislation would - unless provided for in Court Rules or Judicial Protocols - provide less certainty for court users about the circumstances when each type of technology may be used. It does not emphasise the constraints that AL places on participants' ability to participate effectively in proceedings to the same extent as the current Act.

10 Do you think separate rules for AVL and AL (as is the case currently) are necessary?

Please select only one item

- Yes
- No
- Unsure

Please explain why

11 If decision-makers were responsible for determining the appropriate 'mode' of participation, what would be the benefits and risks of this approach?

Obligations for remote participants and observers (Q12,13)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act authorises decision-makers to give directions to remote participants, who must comply. Directions could include, for instance, prohibiting the recording of court proceedings. Failure to comply is a breach of a court order, which can be prosecuted under the Contempt of Court Act 2019.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified a potential risk associated with increasing the use of remote participation and observation. Any increase in use will also increase the risk of unauthorised recordings of court proceedings.

Instances of covert recordings of court proceedings sometimes occur, and advances in phone and recording technology can make instances more difficult to detect. Once taken, recordings can be posted online or shared with others. This could have adverse impacts on fair trial rights, safety, willingness of witnesses to give evidence, and public trust in the justice system.

While the Contempt of Court Act 2019 applies to remote participants, and the current Act authorises directions, the Act does not itself set out express obligations for people participating remotely or include an offence for failing to comply with these obligations.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Introduce a statutory prohibition on recording court proceedings without permission of the presiding judicial officer. It would be a criminal offence to do so. The maximum penalty for the offence would likely be low.

This would apply to remote participants and remote observers. If this option progresses, we would explore an equivalent offence applying to the physical courtroom.

Introducing an offence could enable recordings to be taken down from online platforms more easily. It could also deter people from taking recordings in the first place. However, it is likely to be difficult to enforce penalties against international participants and observers.

12 What are your views on including an offence provision?

13 Are there different ways to address the risks associated with unauthorised recordings of court proceedings?

Who should make remote participation decisions (Q14,15)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

Under the Act, judicial officers (judges, community magistrates and judicial Justices of the Peace) and Registrars can make decisions. Judicial officers have wider powers than Registrars. Judicial officers can make all decisions while Registrars can only make decisions in civil proceedings (including family) and criminal procedural matters.

In practice, we understand that Registrars make decisions on the high volume of applications from counsel seeking to remotely appear in criminal lists. Judicial officers decide all other criminal and all civil applications.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified a gap in the definition of "judicial officer". The current definition does not include Family Court Associates (a new type of judicial officer). Family Court Associates have the powers of Registrars under the Family Court Act 1980 and can, therefore, already make remote participation decisions. There is a need to update the Act to reflect this change.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Ensure Family Court Associates are included in the definition of "judicial officer".

We are not currently considering other adjustments to decision-making powers. However, we note that Registrars' powers are wider than in some other international jurisdictions. We are interested in your views on this, particularly whether it is causing any issues in practice.

14 Do you agree with ensuring that the definition of "judicial officers" includes Family Court Associates?

Please select only one item

- Yes
- No
- Unsure

15 Do you think any other changes should be made to the scope of judicial officers' and Registrars' decision-making powers?

What decision-makers need to consider (Q16-18)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act requires decision-makers to consider statutory criteria when determining whether remote participation use is appropriate and in the interests of justice.

Judicial officers and Registrars must consider a general set of criteria in all cases (section 5), additional criteria in criminal cases (section 6), and a third set of criteria relating to AL in civil proceedings (section 7A).

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified an opportunity to streamline the current criteria and remove duplication, while ensuring decisions continue to be determined by what is in the interests of justice. We recognise that the current decision-making process is complex as it requires consideration of multiple sets of criteria. We are interested in views on whether this is causing problems in practice and whether this aligns with the operational reality of decision-making in courts.

Shortcode: factbank

Factbank Title: Options we are considering

Factbank Content:

Option 1: Replace multiple lists of criteria with a single requirement that decisions be determined by 'the interests of justice'.

This option is simpler and less prescriptive than the current decision-making framework. It would not list or prioritise any factors, giving individual decision-makers considerable discretion. "The interests of justice" is not defined but is a well-known and established legal concept.

This option would not expressly refer to relevant considerations or participant rights. However, decision-makers would still need to consider all relevant factors and make decisions consistent with rights under the New Zealand Bill of Rights Act 1990 and an Act's purpose.

Option 2: Streamline and update the criteria that decision-makers must consider.

This approach would streamline the existing criteria from three sets to one.

It would also update and add new criteria. The proposed new criteria recognise that increased use of remote participation will have implications for court participants, open justice, tikanga Māori and court resourcing.

Possible criteria include:

The nature of the proceeding (this reflects the current criteria).

The availability and quality of technology to be used (this reflects the current criteria).

The potential impact of the use of remote participation technology on the effective maintenance of rights of parties to the proceeding, including the right of a defendant to a fair trial (this condenses current section 5(c) and section 6 into a single criterion).

The ability to participate effectively in the proceeding, including enabling participants to be seen and/or heard and understood (this recognises that remote participation may support effective participation for some, but not all court participants).

The views of the participant (this enhances the 'participant's voice' in the decision-making process and supports informed decisions about remote participation use. This may enable victims to have a voice when they are participants in proceedings).

The extent to which remote participation may affect tikanga Māori in court proceedings (this recognises that in some circumstances, it may be appropriate to enable or prohibit remote participation to better support tikanga Māori in court proceedings).

The potential time- and cost-saving efficiencies that may result from the participant appearing remotely (this enables convenience and efficiency factors to form part of decisions).

Complies with open justice (this recognises the need to consider open justice implications when making decisions).

Whether the necessary court resources are available to facilitate remote participation (this acknowledges that facilitating remote participation and observation requires sufficient court staff and resourcing).

Any other matter (this reflects current criteria).

This list is more streamlined than the current Act, but provides more legislative guidance about relevant considerations than Option 1.

16 Do you support revising the current criteria?

Please select only one item

- Yes
- No
- Unsure

Please explain why

17 If you support streamlining the criteria, do you prefer Option 1 or Option 2?

Please select only one item

- Option 1: Replace multiple lists of criteria with a single requirement that decisions be determined by “the interests of justice”.
- Option 2: Streamline and update the criteria that decision-makers must consider.

Please explain why

18 Are there other factors you think decision-makers should consider that we have missed?

Preliminary question: Where should detailed rules be set?(Q19-21)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

This section asks a key policy and design question: where should detailed rules and expectations about remote participation use be set? This includes consideration of whether rules should remain in primary legislation (an Act) or whether they could be set in Court Rules or Judicial Protocols.

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act sets out when remote participation may, must, or must not be used. For some matters and participants, there is an initial presumption that audio-visual links (AVL) will or will not be used, and for others it is more open-ended.

Judicial officers or Registrars make decisions in individual cases but must apply a general set of statutory criteria to all decisions. A second set of additional criteria applies to criminal proceedings and a third set to audio links (AL) in civil proceedings.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

The Ministry has heard some concerns that the current Act is unnecessarily prescriptive and complicated. Setting presumptions and criteria for different matters and participants can create unnecessary complexity and make the current Act difficult to apply.

We are aware that a range of factors may require a matter to take place remotely or in-person in the courtroom. It may be difficult to provide for all situations in primary legislation.

There is an opportunity to consider where the detailed rules should be set. Options include retaining them in an Act or setting them in Court Rules or in Judicial Protocols.

Shortcode: factbank

Factbank Title: Options we are considering

Factbank Content:

We want to test our understanding of the impacts, benefits, and risks associated with progressing each of the options below. All models would need to preserve rights under the New Zealand Bill of Rights Act 1990, open justice principles, and core constitutional principles of judicial independence and the separation of powers.

Option 1: Retain detailed expectations and requirements in primary legislation (an Act)

This option is the same as the current model. However, adjustments could be made to resolve known issues and ambiguities, and to strengthen expectations for use of remote participation. Retaining detailed expectations in an Act and making targeted changes to the current rules could modernise the regime, provide increased clarity and certainty for users, and support increased use.

This option would retain judicial discretion. However, prescribing when remote participation should be used in an Act would provide less flexibility. This could constrain the judiciary's ability to make decisions in the interests of justice. Amending primary legislation is time- and resource-intensive so this option may be less "future-proofed" than the other options, meaning it is less adaptable over time to changes in practice or technology.

Option 2: Place detailed rules and expectations in Court Rules rather than an Act

Under this option, an Act would provide a legislative basis for remote participation use, and set the policy direction solely through a purpose statement and decision-making criteria. It would not set out detailed expectations about remote participation use .

Instead, an Act could include an empowering provision signalling an intention that Court Rules be developed. Court Rules are formal and binding rules about the practice and procedure of the courts. Most Court Rules are developed through a formal Rules Committee process. The Rules Committee membership includes members of the judiciary, members of the executive branch of government, and representatives from the legal profession. Court Rules are therefore developed jointly by the judiciary and the executive.

This option would recognise the judiciary's constitutional responsibilities in relation to conducting the business of the courts. The judiciary would play a greater role in determining the appropriate circumstances, or types of court matters that are suitable for remote participation use.

Similar to primary legislation, setting detail in Court Rules provides clarity for users and supports consistency across courts. Court Rules are generally easier to amend than primary legislation, but not as easy as Judicial Protocols.

Option 3: Leave it to the Judiciary to develop and set detailed guidance and expectations through Judicial Protocols, if they wish

Like Option 2, an Act would provide a legislative basis for remote participation use and set the policy direction solely through a purpose statement and decision-making criteria. The judiciary may establish protocols about the use of remote participation.

Judicial Protocols are not legislation. They are issued by Heads of Bench in accordance with their inherent powers. The Government has no formal role in the development of protocols, but the judiciary may consult on drafts.

Like the other options, protocols would assist with consistent decision-making across the courts, and provide clarity to court users. Protocols can be kept under review by the judiciary and are quicker to amend than primary legislation or Court Rules. For example, they were used extensively during the COVID-19 pandemic to vary the usual operation of the courts.

19 Do you think detailed rules and expectations should remain in an Act?

Please select only one item

- Yes
- No
- Unsure

Please explain why

20 If you do not think detailed rules should be in an Act, do you think detailed rules on when to use remote participation should be ...

Please select only one item

- established through Court Rules.
- left to the judiciary to issue guidance through Judicial Protocols.
- Unsure

21 If detailed rules are set in court rules or Judicial Protocols, would a purpose statement in legislation and statutory criteria provide sufficient policy direction to court participants and decision makers?

Please select only one item

- Yes
- No
- Unsure

Would anything else be needed?

When should remote participation be used in civil proceedings (Q22-26)

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

If detailed rules and expectations remain in an Act, the following options could be progressed:

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act governs use of remote participation in civil proceedings in any New Zealand court. Civil proceedings are defined as any proceedings other than criminal proceedings. This captures general civil proceedings, family proceedings, compulsory care proceedings, and cases in the specialist courts.

The Act simply allows for remote participation in civil proceedings (i.e. audio visual link (AVL) and audio link (AL) technology *may* be used). There are no presumptions in favour or against use. A judicial officer or Registrar must consider the impacts of remote technology use on the rights and interests of participants in the proceedings and take into account whether or not the parties consent to the use of AVL for the participant.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

There is an opportunity to strengthen expectations for more use of remote participation in civil proceedings.

Many civil proceedings are likely to be suitable for remote hearings because of the subject matter and nature of the evidence. Civil proceedings do not involve New Zealand Bill of Rights Act fair trial considerations in the same way as criminal proceedings, nor are they dependent on AVL infrastructure across the justice sector.

Most suited to remote participation might be general civil proceedings (e.g. cases involving disputes between neighbours or over business contracts or debts) and cases in the specialist courts, which all currently make use of remote technology. Family and compulsory care proceedings, and coronial inquest hearings, are less evidently suited to remote participation. This is because of the sensitive nature of the matters, complex legislative and procedural requirements, and the vulnerability of many of the participants.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

We have identified three options for adjusting policy settings ranging from small to significant changes. All options would increase expectations for use compared to current settings, but each has a different focus. The options are standalone, but Options 1 and 2 could be progressed together.

Option 1: Require decision-makers to actively consider whether a civil hearing should be held remotely

This would be more directive than the current state. Judges or Registrars would have to actively consider, case by case, whether a hearing should be held remotely or in-person. This preserves judicial independence, but signals that when remote participation could be appropriately used in civil proceedings, it should be. This option would add an extra step for courts to take in advance of all civil hearings, which would impact court resourcing and timeliness. These impacts may, however, be offset by efficiencies gained through more remote hearings.

Option 2: Introduce an entitlement for lawyers to participate remotely if requested

An entitlement would provide that if a remote appearance is requested by a lawyer, this must be approved by the court unless it is determined that doing so would be contrary to the interests of justice. Approval would depend on the necessary technology being available. This option would increase certainty and convenience for lawyers, many of whom spend significant time travelling for in-person appearances at short procedural civil hearings.

An entitlement could apply to all lawyers and all civil appearances or be limited to a subset. For example, it could apply only to lawyers who are far away from the registry hearing the case, or only to certain types of appearances. Other participants could also appear remotely if the judicial officer or Registrar determines it appropriate but would not be entitled to do so. Unless all participants joined the hearing remotely, hearings would still involve some participants in a courtroom.

Option 3: Introduce a legislative presumption in favour of remote participation in some or all civil proceedings

A presumption could be applied to all civil proceedings or to a subset. Another option could be a presumption applied to particular types of civil hearings. For example, ones that are 'procedural' or 'short' or 'non-contentious'.

A presumption would function like a 'default' setting, signalling that most (or certain) civil hearings should be undertaken remotely. The presumption could set an expectation that the hearing will be 'fully remote', meaning all participants should join remotely.

Judicial officers and Registrars would be able to depart from the presumption in favour of holding an in-person hearing, but the bar would be high. They would need to determine that remote participation would be contrary to the interests of justice. Key considerations would be whether appropriate technology is available to the court and all participants, and whether the rights of the parties would be maintained.

Where supported by the appropriate technology and facilities, this option should result in much greater use of remote participation in civil proceedings. It could save time and money for participants and enable more efficient use of court resources, including by freeing up court rooms if all participants appear remotely.

Such a presumption would represent a major shift from current practice and could change the nature of many civil proceedings. Full implementation would rely on both the courts and participants having good technological capacity and capability, appropriate facilities, and court resources to support the hearings. Investment would be needed to realise the full benefits over time.

22 Do you support increasing expectations on the courts to make greater use of remote participation in civil proceedings?

Please select only one item

- Yes
- No
- Unsure

23 What benefits and risks to court users would there be if more civil hearings occurred remotely?

24 Which of the options above for encouraging more remote participation in civil proceedings do you prefer?

Please select only one item

- Option 1: Require decision-makers to actively consider whether a civil hearing should be held remotely
- Option 2: Introduce an entitlement for lawyers to participate remotely if requested
- Option 3: Introduce a legislative presumption in favour of remote participation in some or all civil proceedings
- None of the options described

Please explain why

25 If you support a legislative presumption in favour of remote participation for civil proceedings (option 3), do you think it should apply to:

Please select all that apply

- Proceedings in the Family Court
- Compulsory care proceedings
- Coronial inquest hearings
- Specialist courts
- Only to certain court matters or types of matters
- None of the above/unsure

If you think it should apply only to certain court matters or types of matter, how should these be defined (e.g., by 'event' type or by characteristic)?

26 Do you have any different ideas for increasing expectations on the court to hold more remote hearings in civil proceedings?

When should remote participation be used in criminal proceedings (Q27-29)

If detailed rules and expectations remain in an Act, the following options could be progressed:

Overview

The current law

The Act governs use of remote participation in criminal proceedings. This includes the general courts, as well as the Court Martial.

The Act distinguishes between 'criminal procedural matters' and 'criminal substantive matters' and sets out different levels of expectations for its use. The Act defines criminal procedural matters as matters that do not involve evidence, which could include first and second appearances, case review hearings, and pre-trial call-overs. Criminal substantive matters are matters that involve evidence, such as the trial.

Under the Act, there is a greater expectation that remote participation will be used in criminal procedural matters over substantive matters.

Problem or opportunity

We have identified opportunities to adjust existing rules to improve clarity and/or increase use in criminal proceedings. We discuss three options. The first two assume the existing presumption in favour of use in criminal procedural matters and higher thresholds for use in substantive matters will be carried over. These options can be progressed separately or together. The third would be progressed as a standalone option.

Click on the drop downs to read about the current law, the problem or opportunity and option(s) for change.

Issue 1: Lack of clarity about use of AVL in sentencing matters where the participant is not in custody

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act expressly permits use of audio visual links (AVL) in sentencing matters if the participant (i.e. the defendant) is in custody, provided technology is available and a judicial officer determines that use of AVL is not contrary to the interests of justice (section 8(2)).

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

There is a lack of clarity about how the Act applies to the use of AVL in sentencing hearings where the participant is not in custody. The Act does not expressly address this issue and a range of statutory interpretations can be made.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Clarify that AVL *may* be used for the appearance of a participant in a sentencing hearing where the participant is not in custody. This would cover defendants/offenders on bail and at large. It would also enable defence lawyers and prosecutors to appear remotely at sentencing.

Judicial officers would need to consider statutory criteria before determining whether AVL use is appropriate in the particular case. When determining whether it is in the interests of justice to sentence a defendant/offender remotely, they may consider the seriousness of the offending and the need for public accountability, as well as the interests of the victim (who may wish to read their victim impact statement to the court with the defendant present). The defendant would also require access to appropriate technology.

Creating a clear legislative basis for use will increase clarity for court users, support consistency across courts, and may create benefits for participants. Benefits may include greater convenience and a reduction in costs and travel time.

However, there are significant practical difficulties and risks associated with sentencing defendants/offenders remotely. The following factors would need to be worked through:

ensuring there is a robust system in place for serving the sentencing order on the defendant. In-person service requirements are currently satisfied by providing a copy of the sentencing order at the court registry counter following sentencing. We want to explore the viability of adopting alternative approaches, such as transferring the service responsibility to lawyers or adopting electronic service methods.

developing processes for assessing the chance of custodial sentences (imprisonment or home detention) being imposed. We consider that use of AVL for the defendant/offender's attendance would not likely be appropriate in these circumstances due to the severity of the sentence and risk that defendant/offenders may attempt to avoid being taken into custody.

27 What are your views on clarifying that AVL may be used in a sentencing hearing where the participant is not in custody?

28 What benefits and risks would there be for court users if more AVL is used in sentencing matters?

29 How might we address the practical difficulties associated with sentencing defendants/offenders remotely?

When should remote participation be used in criminal proceedings (Q30-33)

Issue 2: Enabling greater use of remote participation in criminal procedural matters

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

Under the Act, participants may participate in criminal procedural matters by audio-visual link (AVL) if a judicial officer or Registrar is satisfied the statutory criteria are met (section 8(1A)). This covers defendants who are not in custody and lawyers. As noted above, criminal procedural matters could include first and second appearances, case review hearings and pre-trial call-overs.

Audio links (AL) may be used instead of AVL in a criminal procedural matter if the judicial officer or Registrar determines that use is appropriate and not contrary to the interests of justice, and the defendant is not required to or does not wish to attend the hearing (section 8A).

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have identified an opportunity to strengthen expectations that participants (defendants who are not in custody and lawyers) may remotely attend criminal procedural matters if they wish to, and if the appropriate technology and facilities are available.

Many criminal procedural hearings are relatively short and straightforward. We have heard from some legal professional groups and the New Zealand Police that enabling lawyers, including Police prosecutors, to more frequently appear remotely at such hearings could create efficiencies while still satisfying the interests of justice.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Entitle participants (defendants who are not in custody and lawyers) to attend criminal procedural matters remotely on request.

Judicial officers and/or Registrars could depart from this entitlement after considering statutory criteria. It would be important to consider its appropriateness for defendants, especially those with age, disability, mental health, language, or comprehension barriers. Defendants also currently need to physically attend court if they need to sign a bail variation.

Where the appropriate technology and facilities are available, introducing this entitlement could provide greater convenience to participants, such as reduced travel and time savings for lawyers needing to work across courts and geographical areas.

However, depending on the volume of requests, this option could fundamentally change the way the courts run (e.g. list courts could look different). There are risks this option could create additional pressure on the courts, due to increased time required to schedule, set up, and support remote participation.

30 Do you support entitling court participants (defendants who are not in custody and lawyers) to attend criminal procedural matters remotely on request?

Please select only one item

- Yes
 No
 Unsure

Please explain why

31 Do you think such an entitlement should allow participants to request participation by AL or should it be limited to AVL?

Please select only one item

- Entitlement for participants to request participation by audio-link and audio-visual link
- Entitlement for participants to request participation by audio-visual link only
- Unsure

Please explain why

32 What benefits and risks would there be for court users if this entitlement was introduced?

33 Do you have any different ideas for increasing use of remote participation in criminal procedural matters?

When should remote participation be used in criminal proceedings (Q34-37)

Issue 3: The criminal 'procedural' and 'substantive' matters distinction may not be fit-for-purpose

Shortcode: factbank

Factbank Title: Current law

Factbank Content:

The Act distinguishes between criminal procedural matters (matters with no evidence) and substantive matters (matters involving evidence) and sets different expectations for use.

Shortcode: factbank

Factbank Title: Problem or opportunity

Factbank Content:

We have received feedback that the distinction between 'procedural' and 'substantive' matters, based on whether the matter involves evidence, may not be fit for purpose.

Some 'procedural matters' do not involve evidence but may still be considered significant (e.g. because they determine the pathway of a case). For example, the current Act requires audio-visual links (AVL) to be used for first appearances where a participant is in custody unless contrary to the interests of justice. A view could be taken, however, that first appearance is not a 'procedural matter' as it is the first opportunity for the courts to engage with a defendant. The New Zealand Bill of Rights Act 1990 right for people who have been arrested to be brought 'before' a court as soon as possible is also relevant in this context.

In addition, sentencing may not fall neatly within existing definitions.

Shortcode: factbank

Factbank Title: Option we are considering

Factbank Content:

Redefining which criminal matters are suitable for remote participation. We want to test whether the current distinction is sufficiently problematic that a new approach is needed, and if so, what that approach should be.

We have considered a range of potential alternative approaches to redefining which criminal matters are suitable for remote participation use. These include refining the definitions of 'procedural' and 'substantive', categorising by the type of event or matter (such as first appearance), the complexity of the matter, and the significance of the matter.

We consider categorising by the significance of the matter is most worthy of exploring further. This is because the alternatives are likely to be very difficult to define or identify. Categorisation by type of event or matter may also be too prescriptive for primary legislation and difficult to keep up to date.

Under an approach based on 'significance', there would be an initial presumption in favour of in-person attendance for significant events and remote attendance for non-significant events. Significance could be linked to whether the matter determines the pathway of the case and next steps, and/or progresses the case from one stage to another. Significant matters could include entry of plea and the trial.

There is a risk that this approach could create a different type of ambiguity or lack of clarity for court users.

34 Do you agree there is a problem with how the current Act defines criminal procedural matters and criminal substantive matters?

Please select only one item

- Yes
- No
- Unsure

Please explain why

35 Do you think categorising by “significance” of the matter could address the problem?

Please select only one item

- Yes
- No
- Unsure

Please explain why

36 If you answered 'yes', what are your views on linking significance to whether the matter determines the pathway of the case or progresses it from one stage to another?

37 Do you have any alternative ideas for defining and/or grouping criminal matters?

Please tell us your name or organisation

Providing this information is optional.

38 What is your name?

Name

39 What is your email address?

Email

40 What is your organisation?

Organisation

OIA Consent

Your feedback is subject to the Official Information Act (1982). If your feedback is within scope of an OIA request for information, the Ministry is required to release the information unless one of the withholding grounds of the OIA apply. The Ministry can withhold personal details under the OIA, including your name and address. If you do not want any information in your feedback to be released, please indicate this clearly and explain why. For example, some information may be commercially sensitive or personal. The Ministry will take your views into account when responding to OIA requests.

41 If you do not want information in your feedback to be released, please state this clearly and explain why

General comments

42 Do you have any other comments or feedback?

Please attach a copy of any documents you wish to include to this printout.

If you would like to upload a document in support of your submission, you may do so here.