

## Ensuring technology serves the interests of justice

The Chief District Court Judge, Judge Jan-Marie Doogue, looks at the growing trend toward remote participation in the courts and explores what may be at stake if it is embraced without question.

There is a certain allure about the promise of technology.

New technology has undoubted potential to ease workloads in environments under intense pressure, to advance both efficiency and productivity, and to keep us safer.

But this is a cautionary tale.

There is no question that in the District Court, where the overwhelming majority of justice is administered in New Zealand, a trend to remote participation in proceedings through technological advances such as audio visual links (AVL) between the courtroom and prison is saving time, reducing unnecessary travel and improving court security.

Some initiatives in remote participation have been judicially led; designed to help spread keenly sought judicial resource around high-volume demand that is beyond our control.

There is a place for technological advances. It is hard to imagine a modern court trying to perform its work without an eye on the future and a willingness to make the most of



innovations designed to better serve people relying on the timely delivery of justice.

However, for all those working in criminal justice, it is important to resist any head-long rush toward new technology simply on the basis that it allows us to go faster and at less cost, when so much else is at stake.

For the judiciary and the legal profession alike, efficiency, speed and convenience are not, on their own, good measures of integrity in the justice system. United States District Court Judge Joseph Goodwin reminds us that: “[The judicial system] must carefully segregate those inefficiencies that are mere products of time and place – which we would be foolish to retain – from those that are deliberately built into our system to spare a free people the convenience of the guillotine.”

In other words, the influence of technology needs to be moderated, in order to preserve and protect existing standards of criminal justice, including the rights of defendants and victims.

Where such standards cannot be assured, the technology ought not to be used, and this is acknowledged by ss 5, 6 and 10 of the Courts (Remote Participation) Act 2010 which

paved the way for more use of AVL.

As judicial officers and officers of the court, the principle of access to justice is a measurable standard we all share a duty to uphold.

I have become increasingly concerned about the issue of access to justice that initiatives around remote participation raise, and believe we may not have been sufficiently cognisant of a wider debate.

More vigilance is required to ensure the initiatives do not equate to diminished participation for any of those affected by a proceeding in our courts.

Access to justice, for defendants at least, implies the ability to obtain legal advice, information and representation, the ability to participate in and comprehend legal proceedings, and to communicate with counsel during legal procedures.

However, these rights, along with being treated with dignity, take on an entirely different complexion when during a hearing defendants are not in the same room as the judge, their counsel, accusers or victims.

As the use of remote participation increases, and before it becomes so ingrained in our courts that it becomes a de facto default setting, it is important to take stock and consider whether in all circumstances it is genuinely serving justice - or serving the bottom line.

For our part, I believe the time has come for District Court judges to pause and examine our responsibilities to apply the law in a way that preserves this access to justice.

## **Impact of AVL**

The most obvious example of remote participation in the courts is AVL.

Reliance on AVL has grown markedly since it was first introduced in the District Court at Auckland in 2004.



Remote appearances are now features of our everyday work.

The most recent amendment to the Courts (Remote Participation) Act 2010, which came into force in March, introduced a presumption in favour of its use in criminal proceedings. In the lead-up to a trial, it is now presumed defendants will appear mostly by AVL.

Also, under s 8(2) of the Act, AVL may be permitted for sentencing defendants held in custody, provided the judge determines it is not contrary to the interests of justice.

Not surprisingly, over the past two years, AVL links for remand appearances grew by more than half, to number more than 18,000 in the year to June 2017. Recently, the appearance rate has risen to nearly 2000 a month.

AVL appearances are becoming the norm in some areas, notably in Rotorua where police have established a hub for beaming defendants from police cells into the region's courtrooms.

In some overseas jurisdictions, reliance on AVL has become business as usual. In New South Wales, two-thirds of criminal court appearances and all parole hearings are now conducted by AVL.

However, we all need to remember that remote participation is not automatic, and should not be regarded as such.

Participants are free to challenge whether the use of AVL is contrary to the interests of justice.

Individual judges have discretion to require a prisoner is physically brought before the court.

It would be a mistake to assume that defendants prefer remote participation, despite the current orthodoxy in New Zealand. The most up-to-date international research is that we cannot take that as applying to all defendants.

There is a growing body of research and evidence to suggest there are profound adverse consequences for the connection between our courts and our communities.

I accept that there are legislative policy decisions that have been made, and it is constitutionally inappropriate for judges to challenge those, and nor would I want to. However, I have taken steps to ensure judges are informed of factors pertinent to the proper exercise of individual judicial discretion to protect both procedural and substantive fairness.

For example, whilst there is clear evidence that some defendants prefer remote participation because of adverse consequences of appearing in person, such as prison privileges being withdrawn, some defendants do not prefer it because of the diminished quality of their relationship with their lawyer and in how they experience their in-court participation.

## **Fairness and accountability**

Procedural fairness may become threatened in a number of ways, including by defendants being discouraged from expressing themselves as they otherwise might have done had they appeared in person, or by removal from the physical courtroom reducing their sense of respect and trust, diminishing procedural fairness.

Research shows the use of AVL may constrict a defendant's ability to participate in proceedings – there may be issues with trying to attract counsel's attention for example.

Remote participation also has consequences for applying tikanga in the courtroom and in a judge's ability to provide opportunities for transformative experiences in court.

Not least, there are implications for victims of crime, and for holding offenders to account.

Although victims are said to benefit from being spared having to physically confront defendants in court, latest research says it will not always be the case that victims prefer this.

In its submission to the Courts (Remote Participation) Bill the Human Rights Commission emphasised the potential impact on victims' rights, stressing the "long-standing principle

of criminal justice” that victims have the right to confront the defendant in court and observe the exercise of justice.

Sparing a defendant the emotional discomfort of being confronted by the presence of their victim runs counter to three purposes of sentencing in the Sentencing Act 2002. The effect on the delivery of a victim impact statement within the provisions of the Victims’ Rights Act 2002 is also a consideration that may count against the use of AVL at sentencing.

These issues all contribute to a snapshot of a growing amount of evidence and research which I believe we should all be aware of so as to make informed decisions when considering whether a participant should appear by remote participation or not.

For judges, I want to further explore procedural steps that will address the risk to the defendant’s “voice” and their feeling of being respected and their trust in the process itself.

We already have a protocol designed to safe guard against any diminished experience from remote appearance and I have recently reminded all District Court judges that it must be used uniformly.

We must all acknowledge there is a place for a technology that promises to be such a valuable tool for running a modern court. In this regard, AVL is a way of the future, but it is not the only way.

I expect District Court judges to consider carefully its effects, to be more selective about when its use is appropriate, and to adapt its application and design to ensure there is no degradation of justice.

I hope all court professionals will give this more thought and work constructively to guard against unintended consequences of remote participation.