

MITCHELL FRASER

**NOT REMOTELY FAIR: AN EXAMINATION OF
AUDIO-VISUAL LINKS IN CIVIL PROCEEDINGS**

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**Faculty of Law
Victoria University of Wellington
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Abstract

Audio-visual links (“AVL”) allow parties to appear remotely in court proceedings. The Courts (Remote Participation) Act 2010 (“CRPA”) is the enabling legislative scheme for AVL use in New Zealand. While the scheme strictly regulates AVL deployment in criminal matters, s 7 of the CRPA adopts an intentionally more permissive approach to civil proceedings. This paper addresses the concern that s 7 poses a unique risk to prisoners in civil litigation against the Department of Corrections (“Corrections”). There, Corrections bears the costs and risks of facilitating their counter-party’s presence in court. These burdens are markedly reduced when the litigant appears remotely from prison. Corrections accordingly has an unusual incentive to apply for an order compelling their counter-party to participate remotely. The New Zealand High Court has been divided on the permissibility of granting such an order. This paper contends compelling participants to appear via AVL in substantive civil proceedings is a breach of those affected participants’ natural justice rights guaranteed at common law and by s 27(1) of the New Zealand Bill of Rights Act 1990. This paper concludes that reform to the CRPA is necessary to fully address these rights concerns and protect all participants under the scheme, as intended.

Key words

Audio-visual links, Courts (Remote Participation) Act 2010, civil proceedings, natural justice, New Zealand Bill of Rights Act 1990.

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I Introduction

Litigants have appeared in court to stand trial for centuries. The right to do so is enshrined in both domestic and international human rights instruments.¹ It is a cornerstone of legal systems the world over, including New Zealand's. Traditional conceptions of having one's day in court have almost always necessitated parties' physical presence in the courtroom.² However, these conceptions are now changing. The digital age has seen the rise of various technologies which are slowly, but surely, permeating the judicial system.³ Audio-visual links ("AVL") are one such technological development.

AVL is video conferencing technology which allows parties to participate remotely in court proceedings.⁴ No longer must litigants (or many other participants for that matter) be in the same courtroom, building, city, or even country as the proceeding(s) to which they are party.

In New Zealand, the Courts (Remote Participation) Act 2010 ("CRPA") is the overarching legislative scheme governing AVL deployment. The CRPA was enacted to facilitate widespread AVL use, with a view to reducing costs while increasing courtroom efficiency and public safety.⁵ The CRPA has delivered exponential growth in the deployment of AVL, with a 50 per cent increase in its use for remand appearances in the two years preceding August 2017.⁶ AVL is now utilised in New Zealand legal proceedings of almost any nature — from criminal, to commercial, to family court matters — and for the appearance of

1 See generally, International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14; New Zealand Bill of Rights Act 1990, ss 25–27.

2 See *Connelly v R* 15 CRNZ 662, [1998] 3 NZLR 763 (HC).

3 Sian Elias, Chief Justice of New Zealand "Managing Criminal Justice" (address given at the Criminal Bar Association Conference, University of Auckland Business School, Auckland, 5 August 2017).

4 Courts (Remote Participation) Act 2010, s 3.

5 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 8.

6 Ministry of Justice "Increasing use of AVL in courts" (2 August 2017) <www.justice.govt.nz>.

almost any party to those proceedings — plaintiff, defendant, witness, judge, jury or counsel.⁷

However, little-to-no empirical research has been undertaken on AVL usage in New Zealand’s courts. Meanwhile, overseas studies cast serious doubt upon the New Zealand Judiciary’s assertion⁸ that remote court appearance is, in effect, no different to physical presence.⁹

One set of issues arising from AVL use in New Zealand are those posed by s 7 of the CRPA, the provision which concerns civil proceedings. The CRPA’s regulation of AVL in civil proceedings is intentionally less prescriptive — and indeed less proscriptive — than in criminal matters. This design recognises that interference with the inherent fair trial rights associated with criminal matters should be exercised with due caution.¹⁰ While participants in civil proceedings may not ordinarily be exposed to the same immediate threat of loss of liberty as in criminal matters, civil proceedings can nevertheless still grapple with fundamental rights and interests, and involve the provision of oral evidence. Judicial reviews, deportation hearings, and claims taken under the New Zealand Bill of Rights Act 1990 (“NZBORA”) are all examples of proceedings which are typically taken civilly, and which can affect participants’ life and liberty.¹¹ In other words, civil

7 Courts (Remote Participation) Act 2010, s 3.

8 See generally, *R v Wong* HC Auckland CRI-2005-004-15296, 17 May 2006 at [55]–[56]; *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC) at [14]; *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 95 (HC) at 109.

9 See generally, Emma Rowden “Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?” (2018) 14(2) *Law, Culture and the Humanities* 263; Emma Rowden and others *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (University of Western Sydney, Sydney, 2013).

10 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 7.

11 See discussion of the importance of judicial review in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 815; Elias J’s comments on the significance of deportation proceedings in *Ali v Deportation Review Tribunal* [1997] NZAR (HC) 208; Duffy J’s comments relating to public law civil claims in *Taylor v Manager of Auckland Prison* [2012] NZHC 1241 at [27]–[31].

proceedings can and do raise pressing fair trial concerns. Given those concerns, s 7(2)(b) of the CRPA is problematic.

This paper contends that s 7(2)(b) leaves the natural justice rights of participants in substantive civil proceedings vulnerable to abrogation. These natural justice rights are guaranteed both at common law and by NZBORA.¹² Section 7(2)(b) of the CRPA allows for the possibility of one party to a civil proceeding obtaining an order compelling their counter-party to appear via AVL against that counter-party's will. This issue presents itself in rather limited circumstances, since s 7(2)(b) will only be invoked to achieve such an end in litigation between prisoners and members of the Department of Corrections ("Corrections"), where Corrections bears the unusual cost of facilitating their counter-party's physical presence in court. However, this niche applicability alone raises serious concerns.

To date, authority on the permissibility of granting an order in the above circumstances has been divided. Two judgments of the High Court, both adjudicating interlocutory AVL applications made by Corrections, have accepted differing interpretations of s 7(2)(b), which has resulted in opposite outcomes in each matter. With this divergent authority, it is important to determine which of their Honours' readings, if either, is correct.

Part II of this paper begins by canvassing the CRPA's history and key provisions to provide a working overview of the scheme's operation and the intention behind that legislative blueprint. Part III goes on to examine the so-called "s 7(2)(b) statutory interpretation issue" in greater depth through consideration of the High Court authorities. Part IV then determines the better approach to interpreting s 7(2)(b) as it stands, by reference to: natural justice, NZBORA, and the principles of statutory interpretation. Finally, part V will advocate for the legislative reform necessary to address the foregoing rights concerns identified with s 7.

¹² Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1480.

II The Courts (Remote Participation) Act 2010

A History

The CRPA governs the use of AVL in all New Zealand judicial proceedings. The stated purpose of the Courts (Remote Participation) Bill was to allow for greater use of AVL in New Zealand courts.¹³

The Bill sought to amend the legislative environment of the time, which had fettered courts' ability to take advantage of new technologies, including AVL.¹⁴ Previous legislation had only allowed AVL to be used in a limited number of matters: witness appearances, applications for leave to appeal, and remand prisoners' attendance at Court of Appeal hearings.¹⁵ Those few instances aside, the Courts had interpreted enactments such as NZBORA, requiring defendants or witnesses to "be brought before a court" or "be present in court", as demanding physical presence in the courtroom.¹⁶

The Bill's Explanatory Note ("Explanatory Note") summarised the significant expenditure associated with facilitating participants' — but especially prisoners' — physical appearance in court, including: the costs of transporting inmates, housing them at court, and providing security; the expected growth in prisoners on remand, increasing demand for court appearances and associated prisoner transports; and the pressure on defence counsel from the increased numbers of participants entering the system.¹⁷ Calls were also made elsewhere for increased uptake in AVL usage, including by the Chief Ombudsman in his 2006 investigation of prison transportation following the tragic death of Liam Ashley.¹⁸

13 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 1.

14 At 4.

15 At 4.

16 See *Connelly v R*, above n 2.

17 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 4–5.

18 *Investigation by John Belgrave, Chief Ombudsman and Mel Smith, Ombudsman of the Department of Corrections in Relation to the Transport of Prisoners* (2006) at 25.

It is significant that the Explanatory Note additionally stressed the need for legislative intervention to legitimise the anticipated rise in AVL use, ensuring compliance with NZBORA and the common law insofar as they enforce minimum standards of procedure and the right to a fair trial.¹⁹ The Bill’s drafters accordingly set out to devise an “overarching piece of enabling legislation that [would apply] to [all] New Zealand law”.²⁰

B Key Provisions

The resultant CRPA adopted a so-called “modified presumption for the use of AVL”.²¹ The default position is that AVL may be used in any New Zealand court proceeding. However, permitting AVL use is more straightforward in certain contexts than others.²² The CRPA identifies three categories of proceeding, each with corresponding presumptions in favour of (or against) using AVL. Section 3, the interpretation section, defines these three categories as follows:

civil proceedings means any proceedings in a court, other than criminal proceedings

criminal procedural matter means any matter, in a criminal proceeding, in respect of which no evidence is to be called

criminal substantive matter means any matter, in a criminal proceeding, in respect of which evidence is to be called.

“Participant” is defined broadly in s 3 to include any person in the proceeding who is: a party, the defendant, counsel, witness, member of the jury, judicial officer or Registrar, or any other person directly involved in the proceeding whom the judicial officer or Registrar considers appropriate.

19 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 4.

20 At 8.

21 At 6.

22 At 6.

Having set out these definitions, s 5 provides the following criteria for the judicial officer or Registrar to consider when determining whether to allow AVL use in any context:

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and
 - (ii) the level of contact with other participants;
- (d) any other relevant matters.

Section 6 supplements this with additional criteria that a judicial officer or Registrar must consider whenever deciding whether to allow a participant's AVL use in any form of criminal proceeding. It provides that a judicial officer or Registrar must account for "the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing". Specifically, the judicial officer or Registrar must consider:

- (a) the ability of the defendant—
 - (i) to comprehend the proceedings; and
 - (ii) to participate effectively in the conduct of his or her defence; and
 - (iii) to consult and instruct counsel privately; and
 - (iv) to access relevant evidence; and
 - (v) to examine the witnesses for the prosecution; and
- (b) the level of contact the defendant has with other participants; and
- (c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.

At the Bill's first reading, the Attorney-General, the Hon Christopher Finlayson, explained that, read together, the ss 5 and 6 criteria were "designed to protect defendants' right to a

fair trial, and to ensure that the rights and interests of other participants, as well as the interests of the court itself, are taken into account”.²³

Sections 8 and 9 go on to create divergent presumptions in favour of/against using AVL in criminal procedural and criminal substantive matters, respectively. Section 8 provides that AVL *must* be used for the appearance of a participant in a criminal procedural matter if AVL is available and that participant is in custody, unless a judicial officer or Registrar finds that use would be “contrary to the interests of justice”. Additionally, AVL may be used in a sentencing matter for the appearance of a participant in custody. Section 8 directs the judicial officer or Registrar to always consider the ss 5 and 6 criteria.

Conversely, s 9 states that AVL *must not* be used for the appearance of a participant in any criminal substantive matter, unless a judicial officer allows its use in accordance with the ss 5 and 6 criteria, having also taken into account whether or not the parties consent. Subsection (2) expressly stipulates that AVL must not be deployed for the appearance of the defendant in a trial that determines their guilt, unless the defendant consents to that use.

The overall effect of ss 8 and 9 is to draw a distinction between the permissibility of AVL in relation to the two different kinds of criminal proceedings defined in s 3. However, the CRPA does not create a similar divide between procedural (interlocutory) and substantive civil matters. When determining whether or not to allow AVL in *any* civil proceeding, a judicial officer or Registrar is directed to s 7. This provision was intended to create a “less rigorous” test for allowing AVL use than that for criminal matters.²⁴ Section 7 reads:

- (1) AVL may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow for its use for the appearance of that participant.
- (2) A judicial officer or Registrar may make a determination under subsection (1)–
 - (a) on his or her own motion; or

23 (16 March 2010) 661 NZPD 9520.

24 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 7.

- (b) on the application of any participant in the proceeding.
- (3) A determination under subsection (1) must–
 - (a) be made in accordance with the criteria in section 5; and
 - (b) take into account whether or not the parties consent to the use of AVL for the appearance of the participant.

III The Trouble with Section 7

A The Section 7(2)(b) Interpretative Issue

Two factually similar cases of the High Court of New Zealand have accepted distinct interpretations of “participant” in the context of s 7(2)(b).

The first is a broad, unqualified reading, which will hereafter be referred to as the “wide meaning”. Justice Allan implicitly accepted this interpretation in *Taylor v Chief Executive of the Department of Corrections*.²⁵ The wide meaning allows any participant to apply for an order compelling themselves or any other participant(s) to appear in the proceeding(s) via AVL.

The second reading of s 7(2)(b), the “narrow meaning”, accords an implicitly qualified definition to “participant”. The narrow meaning allows a participant to apply for an order to appear remotely only in relation to their own participation in the proceeding(s). The narrow meaning was accepted by Duffy J in *Taylor v Manager of Auckland Prison*.²⁶

B Justice Allan’s Approach

This judgment concerned an interlocutory application made during litigation taken by Mr Taylor, a self-represented litigant and inmate at Auckland Prison, against Corrections.²⁷ From time to time, Mr Taylor had attended hearings for his claims in person, but most of

²⁵ *Taylor v Chief Executive of the Department of Corrections* [2011] NZHC 850 at [18].

²⁶ *Taylor v Manager of Auckland Prison*, above n 11, at [63]; see support for this approach in *R v NRS* [2015] NZHC 47 at [7] and *Taylor v Attorney-General* [2017] NZHC 2234 at [23].

²⁷ *Taylor v Chief Executive of the Department of Corrections*, above n 25, at [3].

his appearances had been remote.²⁸ Corrections, as respondent, applied for an order requesting all Mr Taylor’s future appearances be conducted via AVL, pursuant to ss 5 and 7 of the CRPA.²⁹ While Mr Taylor accepted he should partake in “routine hearings” remotely, he objected to the granting of a blanket order affecting all future hearings, including substantive ones.³⁰

Corrections’ application was predicated on Allan J accepting the wide meaning of s 7(2)(b). His Honour did, raising no concern that the respondent was applying to compel someone other than themselves to appear remotely.

Before granting the order, Allan J considered the s 5 criteria as mandated by s 7. His Honour found that the nature of the proceedings was such that AVL use would be appropriate. However, in future cases where oral evidence was to be called, his Honour held there *may* have been grounds to reconsider this finding.³¹ His Honour labelled the quality of the AVL facilities at Auckland Prison “satisfactory”.³² Turning to s 5(c), his Honour accepted that the only “other party” to the proceeding was Corrections, whose rights would be effectively maintained by the use of AVL (bearing in mind it was Corrections who sought the order in the first place).³³ His Honour, in accounting for “any other relevant matters” under s 5(d), mentioned the importance of safeguarding Mr Taylor’s entitlement to assess witness credibility and the reliability of evidence.³⁴ His Honour was nevertheless satisfied that Mr Taylor should appear in *all* proceedings thereafter via AVL, subject to his right to apply for an order to vary this in future.³⁵

The key takeaway from this case is indeed the wide meaning Allan J attributed to s 7(2)(b). While consistent with the plain text of the provision, the consequence of adopting this

28 At [2].

29 At [3]–[4].

30 At [12].

31 At [13].

32 At [14].

33 At [15].

34 At [16].

35 At [18].

unqualified reading is the ability of one party to apply for, and obtain, an order compelling their counter-party to appear remotely, potentially even in a substantive matter. Duffy J was not so convinced by this prospect.

C Justice Duffy's Approach

The relevant judgment of Duffy J arose in the context of another claim taken by Mr Taylor, this time against the manager of Auckland Prison. Mr Taylor challenged a rule instituted at the prison preventing inmates from smoking tobacco or any other substance, or having in their possession any tobacco or tobacco-related item on the prison's property.³⁶

The defendant prison manager sought an order compelling Mr Taylor, who was to represent himself at the substantive hearing, to participate in that proceeding via AVL.³⁷ Unlike Allan J, her Honour did not accept the wide meaning of s 7(2)(b).³⁸ Instead, Duffy J took this opportunity to engage in a sustained discussion of the issues she saw with the CRPA, and outline her preference for qualifying the text of s 7(2)(b).

Justice Duffy's judgment began with her Honour setting out the key provisions of the CRPA and considering its history, referring to the Explanatory Note (in a similar fashion to part II of this paper).³⁹ Having done so, her Honour concluded that the legislature's primary concerns regarding AVL use in courts were targeted at reconciling that use with the rights of persons accused of criminal offences to a fair trial.⁴⁰ In response, Duffy J highlighted that participants in civil proceedings are likewise guaranteed (including by s 27 of NZBORA) "certain procedural rights and obligations under a system that strives to give all persons a fair opportunity to be heard".⁴¹

36 *Taylor v Manager of Auckland Prison*, above n 11, at [1].

37 At [2].

38 At [75].

39 At [3]–[9] and [17]–[27].

40 At [26].

41 At [59].

Justice Duffy further stressed that civil proceedings — particularly when of a public law nature — will often engage fundamental rights and principles which are equal to those in criminal proceedings.⁴² Accepting the parity of the rights in play in (at least some) civil and criminal law matters, her Honour expressed concern that s 7 of the CRPA seemingly treats all civil matters as being akin to criminal procedural hearings.⁴³ Her Honour held that any interference with the procedures governing how persons participate in significant civil proceedings should be “approached with care”. This is particularly so if that interference is to be forced on participants against their will.⁴⁴

Later in her judgment, Duffy J also took issue with the quality of hearing that could be achieved if Mr Taylor appeared via AVL. Her Honour highlighted problems with background noise in Mr Taylor’s AVL suite during this interlocutory proceeding, and questioned Mr Taylor’s ability to present evidence to the Court remotely, as well as confer with counsel.⁴⁵ This, her Honour said, was at definite odds with Mr Taylor’s natural justice right to be heard.⁴⁶

Finally, Duffy J considered the interaction between ss 5 and 7 favoured adoption of the narrow meaning. Like Allan J, when directed to the s 5 criteria (specifically s 5(c)), Duffy J found the only “other party” to the proceeding to be the defendant prison manager, whose rights her Honour would be expressly required to consider. However, there would be no corresponding express requirement for consideration of Mr Taylor’s rights. Instead, this would be relegated to s 5(d), where the Court looks to “any other relevant matters”.⁴⁷ From this, her Honour drew two conclusions:⁴⁸

42 At [30].

43 At [39].

44 At [30].

45 At [57].

46 At [52].

47 At [42].

48 At [43].

This [is yet] another indication that the legislature may not have given thought to how this Act might impact on proceedings like the present. More importantly, it suggests to me that the language of s 5 is not so easily read in the way the defendant would have it.

Although Duffy J recognised the freedom of Parliament to pass legislation that overrides established rights and principles, her Honour held:⁴⁹

... [the CRPA] does not clearly spell out an intention to authorise the Court to compel any participant in a civil proceeding to appear via AVL when he or she wants to be physically present before the court ... [Section] 7 [goes] no further than to allow any participant, as defined in s 3, who wants to appear by AVL to apply to the Court for that outcome. This way of reading s 7 results in an interpretation that accords with established rights and principles...

Finally, her Honour addressed Allan J's decision. Having "considered carefully" his Honour's approach, Duffy J was prepared to forge a new path, stating that "[Allan J] did not direct his attention to the concerns that [had] weighed so heavily in [her] decision."⁵⁰

IV The Preferred Approach

A Overview and Methodology

Given the High Court authorities have proffered these two opposing interpretations of s 7(2)(b), it is necessary to determine which is the correct reading of the provision, if either. This section will make that determination by resolving two inquiries, in turn: first, whether (and to what extent) the wide meaning of s 7(2)(b) in fact infringes the affected participants' natural justice rights, guaranteed both at common law and by s 27(1) of NZBORA; and, secondly, whether the narrow meaning of s 7(2)(b) is properly open as an alternative. The fundamental, guiding principles of construction and statutory interpretation will be referenced throughout.

49 At [62].

50 At [75].

Section 27(1) of NZBORA forms part of the broader s 27 ‘right to justice’, and reads:

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.

Although not directly fashioned on any corresponding article of the International Covenant on Civil and Political Rights (“ICCPR”), the commentary on what is now s 27(1) did refer to art 14(1) of the ICCPR,⁵¹ which affords every person the right to “a fair and public hearing by a competent, independent and impartial tribunal established by law”.⁵² The commentary explained that s 27(1) was enacted to recognise the “pervasive nature” of public authorities’ powers, and the “central importance” of natural justice in ensuring those powers are exercised fairly.⁵³ Crucially, the commentary also provided that s 27(1) directly reflects the “basic principles of the common law”.⁵⁴

The early 18th century judges traced the origins of natural justice principles to the Bible.⁵⁵ The New Zealand Courts have likewise attributed to “natural justice” a “long-established meaning”;⁵⁶ one which considerably pre-dates the enactment of NZBORA. The Court of Appeal in *Drew* therefore said of s 27(1) of NZBORA: it does little more than affirm and strengthen the finding of a violation of the common law rights guaranteed therein.⁵⁷ Section 27(1) was envisaged as giving those rights an “enhanced status”.⁵⁸ Moreover, s 27(1) is not limited in scope to certain classes of rights, nor to the ICCPR; it is coexistent with the

51 Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 109.

52 International Convention on Civil and Political Rights, above n 1, art 14(1).

53 Palmer, above n 51, at 10.168.

54 At 10.168.

55 See *R v Chancellor etc of the University of Cambridge* (1723) 1 Stra 557 at 567.

56 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* (2008) NZCA 423, [2009] 2 NZLR 56 at [11] per Glazebrook J.

57 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [67] per Blanchard J.

58 Palmer, above n 51, at 10.171.

totality of pre-existing rights concerning natural justice.⁵⁹ It is, in effect, a gatekeeper of common law natural justice. Hence, when examining the alleged infringement the wide meaning of s 7(2)(b) poses to natural justice — and thereby s 27(1) of NZBORA — due regard must be had to the principles of the common law.

The methodology this paper adopts to analysing the inconsistency between s 7(2)(b) of the CRPA and the common law rights protected by s 27(1) of NZBORA departs from the leading Supreme Court approach to applying the operative provisions of NZBORA in *Hansen v R*.⁶⁰ The majority in *Hansen* relied on the Canadian test⁶¹ when deploying the operative provisions.⁶² However, their Honours declined to call this methodology prescriptive, stating that the sequence adopted in any given case must be applicable to the circumstances.⁶³

Questions of infringements on s 27(1) of NZBORA — or more specifically on the common law rights whose observance s 27(1) guarantees — are one such instance where modification of the *Hansen* sequence is required. This is not only because of the central role the principles of the common law play in the overall inquiry, but also the further observations made by the Court of Appeal in *Drew*, which disposed of any consideration of justifiable limitations in relation to natural justice rights. The Court held that when the principles of natural justice apply, “there is no room and no need for the operation of s 5 [of NZBORA]”.⁶⁴ On this point, Elias CJ noted in *Hansen*: “it seems to me to be nonsense to speak of a restricted right to fair trial ... because it would permit unfair trial ... Any

59 *Combined Beneficiaries Union*, above n 56, at [21] and [50].

60 See majority approach summarised in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J; this approach is also followed in the recent decision of the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59 at [101]–[144] per O’Regan and Ellen France JJ.

61 See Canadian approach in *R v Oakes* [1986] 1 SCR 104 at 69–29; summarised in *R v Chaulk* [1990] 3 SCR 1303 at 1335–1336.

62 *R v Hansen*, above n 60, at [42] per Elias CJ; [105] per Tipping J; and at [205] per McGrath J.

63 At [61] per Blanchard J.

64 *Drew*, above n 57, at [67] per Blanchard J.

restriction denies the right”.⁶⁵ As such, the following analysis will proceed using the simplified and abridged, two-stage approach laid down at the outset of this section.

B Natural Justice and the Wide Meaning

When defining “natural justice”, the Courts have reverted to the touchstones of: “fair play in action”,⁶⁶ “but fairness writ large and juridically”,⁶⁷ and the mechanism through which “minimum standards of fairness” are enforced.⁶⁸ Natural justice invokes “a duty lying on every one who decides anything” to “act in good faith and fairly listen to both sides”.⁶⁹ Natural justice principles are therefore engaged when a judicial officer or Registrar determines whether or not to allow a participant’s AVL use in a proceeding, by virtue of this being an adjudicative decision concerning the participants’ rights at trial.

The principles of natural justice essentially necessitate the provision of a fair hearing.⁷⁰ This notion encompasses two broad tenets: first, that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*); and, secondly, that the decision-maker be disinterested and unbiased (*nemo debet esse iudex in propria sua causa*).⁷¹ There is most notably tension between the use of AVL and the former of these rights.

Before considering the tension between those rights and the wide meaning of s 7(2)(b) though, it is necessary to briefly return to an observation made in part I of this paper. Rationally, a party will only rely on the wide meaning of s 7(2)(b) to compel their counterparty to appear via AVL in litigation between prisoners and Corrections, as in the *Taylor* cases. There, Corrections undertakes the unusual expense and risk of facilitating their

65 *R v Hansen*, above n 60, at [38].

66 *Wiseman v Borneman* [1971] AC 297, [1969] All ER 275 (HL) at 278 per Lord Morris of Borth-y-Gest.

67 *Furnell v Whangarei High Schools Board* [1973] AC 660, 2 NZLR 705 (PC) at 718 per Lord Morris of Borth-y-Gest.

68 *R v Secretary for State for the Home Department ex parte Pierson* [1998] AC 539, [1997] 3 All ER 577 (HL) at 607.

69 *Board of Education v Rice* [1911] AC 179 (HL) at 182 per Lord Loreburn LC.

70 Butler and Butler, above n 12, at 1484.

71 *Combined Beneficiaries Union*, above n 56, at [11] per Glazebrook J.

counter-party's physical presence in the courtroom. As previously canvassed, prisoners' physical court appearances are not only expensive, but come with associated public and courtroom safety concerns (including those with prison transport), as well as increased chance of prisoners escaping or accessing drugs.⁷² These burdens are lessened when the litigant prisoner appears remotely. Ordinary lay litigants do not bear the responsibility of such burdens. Corrections is therefore the only party with both a motive, and indeed justification, for wishing to invoke the wide meaning of s 7(2)(b).

This finding that the s 7(2)(b) interpretative issue is one which only affects prisoners is itself cause for considerable concern. The custodial relationship between Corrections and prisoners involves the exercise of considerable, coercive state power by Corrections — abuses of that power being of the very kind natural justice (and s 27(1) of NZBORA) was developed to safeguard against. As Lord Bingham of Cornhill observed in *R v Secretary of State for the Home Department, ex parte Daly*, any custodial order will inevitably curtail the confined person's enjoyment of the rights enjoyed by other citizens. However, his Lordship also emphatically noted:⁷³

... the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights.

Policies which interfere with or curtail prisoners' residual rights therefore ought to be subject to careful scrutiny. There must exist a strong rationale before adverse rights implications are drawn, or accepted, against prisoners. The wide meaning of s 7(2)(b) poses natural justice concerns against the prisoners it affects on a number of fronts.

72 Courts (Remote Participation) Bill 2009 (107-3) (explanatory note) at 4; see also Allan J's observations in *Taylor v Chief Executive of the Department of Corrections*, above n 25, at [7]–[8] and Duffy J's in *Taylor v Manager of Auckland Prison*, above n 11, at [70].

73 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 at [5].

There is first the impact on the affected participants' fundamental right to be heard. The Court of Appeal has held this right to include the principle of equality before the law: the presumption "that like should be treated alike".⁷⁴ In *Patel*, Baragwanath J said, "the rule of law requires that a person whose factual situation is indistinguishable from another should be given like treatment".⁷⁵ However, when participants are compelled to appear via AVL, when others in their position (and indeed, their counter-party) could be physically present before the Court, it calls into question whether the opposing parties are being heard on an equal footing. Justice Duffy contended,⁷⁶ and this author concurs, that if a party is compelled to appear via AVL while their counter-party is not, then in a quite literal sense the parties are not being heard in the same way.

The New Zealand Courts have tended to deny this difference between physical and remote court appearances. In *R v Wong*, Williams J accepted there was no distinction in principle between having a witness present in person in the witness box, and that same person being "effectively present" in the courtroom electronically. The Court observed that in today's day and age people commonly make judgements on matters of credibility from "nothing more than electronic images".⁷⁷ However, this judicial assertion is far from incontrovertible.

First, Williams J's comments in *Wong* pre-date the enactment of the CRPA. His Honour's finding of indistinguishability between remote and physical appearances seemingly contradicts the legislature's direct acknowledgement of these differences in s 5. The s 5 criteria contain an express requirement for the judicial officer or Registrar to consider the impact AVL has on the ability of the parties to "assess the credibility of witnesses and the reliability of evidence presented to the court". Meanwhile, s 6 requires consideration of any adverse implications that may arise from a participant appearing remotely. The CRPA

74 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 72.

75 *Patel v Chief Executive Department of Labour* [1997] 1 NZLR 102 (HC) at 111.

76 *Taylor v Manager of Auckland Prison*, above n 11, at [52].

77 *R v Wong*, above n 8, at [55]–[56].

therefore recognises some inherent distinction (and limitations) between the two forms of participation, countering Williams J's comments.

Moreover, one need look no further than Duffy J's judgment to see the first-hand, practical difficulties associated with AVL use. As Duffy J recounted, the background noise in Mr Taylor's AVL suite during the relevant proceedings was sufficiently loud for her Honour to request that Mr Taylor apply the mute button to curtail its broadcast into the courtroom. Her Honour explained that while this action removed the distraction she experienced, it did not do the same for Mr Taylor. Had Mr Taylor not been represented by counsel before Duffy J, or had this been a substantive hearing requiring greater participation on his part, it is difficult to see how this inaudibility could have been mitigated without delaying the proceeding. Conversely, had the same issue arisen while Mr Taylor were physically present in court, Duffy J was confident she could have resolved the issue for everyone.⁷⁸ Indeed, even Allan J was reserved in his assessment of the quality of Auckland Prison's AVL suite, calling it merely "satisfactory".⁷⁹

Justice Duffy also expressed frustration at Mr Taylor's inability to surrender documents to the Court from his remote location. This, her Honour said, was "not satisfactory".⁸⁰ Justice Duffy was prepared to go as far as to say that Mr Taylor, if compelled to appear via AVL in his later substantive hearing, would be at a real disadvantage when it came to looking at new material introduced by other parties, and in his ability to converse with his counsel.⁸¹ More broadly, this would speak to a denial of Mr Taylor's right to state his case.⁸²

In *Pomeroy v Police*, Wild J found that the appellant, Mr Pomeroy, who had a physical disability, had suffered a breach of his s 27(1)-guaranteed natural justice rights as a result

78 *Taylor v Manager of Auckland Prison*, above n 11, at [57].

79 *Taylor v Chief Executive of the Department of Corrections*, above n 25, at [14].

80 *Taylor v Manager of Auckland Prison*, above n 11, at [57].

81 At [55].

82 See generally, GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis Wellington, 2010) at 13.40–13.46.

of being unable to access the courtroom for trial.⁸³ Justice Wild considered that if a party cannot physically access the court, “there is a distinct risk that [they] will not receive justice”.⁸⁴ There, Wild J was addressing a complete curtailment of Mr Pomeroy’s ability to be present at trial. However, his Honour’s observations appear equally relevant and applicable to the situation where a remote participant is effectively denied access to the court due to their inability to adequately hear the proceeding or proffer evidence in the manner which they would otherwise be capable of were they physically present.

It is likely (and hopeful) that, with time, many of these more basic, operational concerns will become less acute as AVL technology increases in its capabilities, sophistication and reliability. However, in a more abstract sense, there are other reported, “fundamental disturbances to court interactions and rituals caused by videolinks”.⁸⁵

In 2015, Emma Rowden conducted an exploration of the Australian experience of justice in the age of remote court participation. Drawing on data gathered during a comprehensive, three-year study of AVL in Victoria and Western Australia,⁸⁶ Rowden analysed interviews with various “stakeholders”, including: judicial and technology officers, expert witnesses, and judges’ associates.⁸⁷ These interviews discussed the stakeholders’ experiences with AVL at trial.⁸⁸ Interviewees repeatedly raised with Rowden what they perceived to be an “unequivocal shift” in the nature of courtroom proceedings as a result of AVL use. The interviewees spoke of a “sense of loss” associated with remote participation. This loss was articulated in several distinct ways.⁸⁹ Some discussed a loss in the court’s capacity to achieve successful performances and rituals (although Rowden expressed some scepticism

83 *Pomeroy v Police* (1999) 5 HRNZ 405 (CA), [2000] NZAR 273 at 275.

84 At 275.

85 Rowden “Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?”, above n 9, at 272.

86 Rowden’s article draws on the empirical study *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceeding*, above n 9.

87 Rowden, above n 85, at 271.

88 At 271.

89 At 271.

towards this).⁹⁰ Others identified loss in terms of the “intractable” depersonalisation of the AVL participant.⁹¹ On a similar vein, some stakeholders quantified loss in a thermal sense, referencing the lack of “body heat” and “human warmth” resulting from the use of screens.⁹² For some, the perceived loss of “full sensory engagement, and the loss of potential, if not actual, body-to-body contact”, resulted in an overall “less humane experience” at trial.⁹³ One judicial officer lost what they described as a reminder of the “human condition” — the symbolism of all litigants convening in one place to reflect the gravity of the matter before the Court.⁹⁴ Some stakeholders spoke of loss in the court’s “atmosphere”.⁹⁵ And finally, others expressed their loss as flowing from the diminished efficacy of cross-examination or test evidence.⁹⁶

While Rowden’s research does not comment on the extent to which AVL participants themselves conceptualise their own resultant loss from AVL use (if any), her finding of loss — even if only felt by other key stakeholders to the trial, such as the judicial officer — is compelling. Indeed, one must assume that the ultimate loss is inevitably borne by the affected participant in the form of the adverse impacts on their quality of trial and right to be heard. In sum then, and in the words of Duffy J, it would be unwise to assume that participants who appear in court remotely do so “suffering no additional burdens”.⁹⁷

At this point, it is, however, necessary to reiterate that it is not this paper’s contention that AVL use be discontinued entirely. AVL has become sufficiently entrenched within New Zealand’s courts that any suggestion of winding back its deployment altogether would be implausible. Moreover, for procedural matters, which will typically be shorter and not involve the provision of oral evidence, the above burdens and natural justice concerns will be less adverse, or at least far more manageable, than those same issues in a substantive

90 At 272.

91 At 273.

92 At 273.

93 At 273.

94 At 273.

95 At 274.

96 At 274.

97 *Taylor v Manager of Auckland Prison*, above n 11, at [58].

context. As part II explained, that observation was the very basis on which the CRPA’s drafters distinguished between procedural and substantive criminal proceedings in the first place. The same natural justice concerns are also mitigated when it is the participant themselves who consents (in the context of s 7, by way of an application to the Court) to bear the deficiencies flowing from the use of AVL. As Duffy J noted:⁹⁸

... insofar as there are disadvantages to a participant appearing by AVL, it will be that participant who has sought this form of participation and, therefore, he or she will have accepted any attendant disadvantages.

However, where the wide meaning of s 7(2)(b) is accepted to allow one party to compel their counter-party to bear these detriments against their will, and in the context of a substantive hearing, this presents a very real risk of abrogation of the affected participants’ (prisoners’) natural justice rights. These already vulnerable participants would be placed at an even greater disadvantage vis-à-vis their counter-party, and as a result, their rights guaranteed at both common law and by s 27(1) of NZBORA infringed. This is a pill not easily swallowed.

Further, the long-standing common law “principle of legality”, helpfully summarised by the Supreme Court in *Cropp*, stipulates that courts should be hesitant to “impute to Parliament an intention to override established rights and principles where that is not clearly spelt out”.⁹⁹ The New Zealand Court of Appeal has said “clear words [will be] necessary before the court will read legislation as intending to remove rights protected by [NZBORA]”.¹⁰⁰ Similarly, Lord Hoffmann definitively held in *Simms* that, notwithstanding Parliament’s freedom to legislate contrary to fundamental principles of human rights:¹⁰¹

98 At [62].

99 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26] per Blanchard J.

100 *Attorney General (on behalf of Ministry of Health) v Spencer* [2015] NZCA 143 at [75] per Harrison J.

101 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, [1999] 3 All ER 400 (HL) at 412 per Lord Hoffmann.

... Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Accordingly, “participant” — recalling that this term was given a generalised definition in s 3 of the CRPA — should not, in the context of s 7(2)(b), be hastily read as abrogating participants’ such as Mr Taylor’s natural justice rights through the acceptance of the wide meaning.

Support for disposing of the wide meaning is also found by reference to the basic principles of statutory interpretation. Section 5 of the Interpretation Act 1999 provides: “the meaning of an enactment must be ascertained from its text and in the light of its purpose”.¹⁰²

As canvassed earlier, the wide meaning does accord to s 7(2)(b) a reading consistent with its ordinary text. And part II of this paper did identify that the stated purpose of the CRPA was to facilitate greater deployment of AVL in New Zealand’s Courts. However, part II also highlighted a dual purpose of the CRPA: to ensure compliance between the forecasted increase in AVL usage and the bodies of law — including that contained in NZBORA — which protect the affected participants’ natural justice and fair trial rights. Accordingly, an interpretation, like the wide meaning, when it results in a direct abrogation of those very rights, would seemingly subvert one of the underlying purposes of the CRPA.

Finally, the consequences of the interplay between ss 5 and 7 of the CRPA also support disposal of the wide meaning. Recall Duffy J drew this same inference in her judgment. Although s 7 may direct the judicial officer or Registrar to s 5 before determining whether to allow for AVL use, when the s 5 criteria are applied to the facts of the *Taylor* cases,

¹⁰² See also JF Burrows and RI Carter in *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 319.

absent is any express reference to Mr Taylor’s rights. Instead, these rights are (by default) relegated for consideration in “any other relevant matters” under s 5(d). If this were the correct operation of ss 5 and 7, then these provisions seemingly steer the judicial officer or Registrar *away* from focusing on the actual, affected participants’ rights in their discretionary, adjudicative exercise. Again, this seems remiss, particularly when contrasted with the plethora of mandatory considerations in relation to AVL deployment in criminal matters under s 6 of the CRPA. As above, this author contends that the CRPA’s blueprint ought to be taken as having been designed to more prominently feature affected participants’ like Mr Taylor’s natural justice rights in the AVL determination process than by a mere catch-all provision.

Notwithstanding this multitude of reasons which favour rejection of the wide meaning, the Courts are expressly prohibited from rendering a provision inoperative based on such rights concerns alone.¹⁰³ It is necessary to consider whether the narrow meaning of s 7(2)(b), which seemingly modifies the plain text of the statute, is a viable alternative before it can be accorded to the provision.

C The Narrow Meaning

As canvassed in part III, the narrow meaning of s 7(2)(b) requires reading an implicit qualification into the provision, such that a participant can only apply for an AVL order in relation to their own participation in the proceeding. Justice Duffy justified giving effect to such a qualified meaning based on its consistency with the above, rights-oriented principles of statutory interpretation and legality.¹⁰⁴

Supporting this view is the direction in s 6 of NZBORA that meanings which accord with the rights and freedoms guaranteed therein are to be preferred when they *can* be given. In *Hansen*, McGrath J said of s 6:¹⁰⁵

103 New Zealand Bill of Rights Act 1990, s 4.

104 *Taylor v Manager of Auckland Prison*, above n 11, at [63].

105 *R v Hansen*, above n 60, at [179] per McGrath J.

[It is] the primary statutory direction concerning the interpretation of the Bill of Rights Act. It requires the court to interpret other legislation consistently with protected rights and freedoms, wherever that legislation can be so interpreted.

However, the Supreme Court also reiterated that, notwithstanding s 6, any exercise in statutory interpretation is ultimately constrained by statutory text in light of purpose. Justice Blanchard summarised:¹⁰⁶

Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and purpose.

Further, their Honours at various times asserted the need for the alternative meaning to be: “tenable”¹⁰⁷; “reasonably or properly open”;¹⁰⁸ “intellectually defensible”;¹⁰⁹ “[bearable]”;¹¹⁰ and “follow a legitimate process of construction”.¹¹¹ In other words, “s 6 must not be used as a concealed legislative tool”.¹¹²

Justice Duffy’s exposition of the narrow meaning in *Taylor* purports to create a blanket prohibition on a party *ever* applying for an order compelling *any* party other than themselves to appear via AVL. There are two key practical difficulties flowing from adoption of such a narrow meaning. These suggest that, while well-intentioned, Duffy J’s proscriptive reading of s 7(2)(b) is perhaps not as easily attributable to the provision as her Honour asserted.

106 At [61] per Blanchard J.

107 At [5] per Elias CJ.

108 At [150] per Tipping J.

109 At [156] per Tipping J, referencing Lord Millett’s dissenting judgment in *Ghaidan v Mendoza* [2004] UKHL 30.

110 *R v Hansen*, above n 60, at [237] per McGrath J.

111 At [156] per Tipping J.

112 At [156] per Tipping J.

First, when read literally along the words of Duffy J, the narrow meaning would prevent parties from applying for any other participants, even those associated with their side of the litigation, such as witnesses, to appear remotely — those parties would have to apply directly for themselves, imposing additional burdens on them.

Secondly, and fatally, given s 7's holistic treatment of all civil proceedings, the narrow meaning would restrict Corrections from applying for an order compelling their incarcerated counter-party to appear remotely even for procedural civil matters. While Mr Taylor conceded before Allan J that he should appear via AVL for such hearings, other participants may not be so obliging. Therefore, unless the prisoner applied for an order for themselves to appear remotely from prison, this would result in that prisoner having to be physically present in court for any and all civil proceedings. Of course, a judicial officer or Registrar would still be empowered to make an AVL order on their own motion under s 7(2)(a), but what motivation they would have to unilaterally do so is unclear. While such a result would mitigate the natural justice concerns raised with s 7(2)(b) in relation to substantive civil proceedings, it would also require Corrections to bear the costs and risks associated with prisoners' physical presence in court for simple, procedural matters, whereas they are not required to do so in the equivalent class of criminal hearings. Essentially, this narrow meaning would reverse the status quo. Participants in procedural civil proceedings would be treated preferentially to their counterparts in criminal matters, at least in the sense of physical courtroom presence. And that is neither "intellectually defensible", nor what was intended under the CRPA.

D Outcome

The elephant in the room up until this point has indeed been the discretion that the judicial officer or Registrar possesses under s 7 to either grant or refuse an AVL application. Section 7 does not mandate that an application, if made, must be accepted; the judicial officer or Registrar ultimately makes that determination applying the s 5 criteria. Ideally then, the s 5 guidelines would provide appropriate safeguards for the affected participants' natural justice rights. However, as already canvassed, this is not the case. In fact, when the s 5 criteria are applied to factual matrices of cases like *Taylor*, they seemingly direct the

judicial officer or Registrar away from such considerations. The focus is expressly on the rights of the applicant, rather than the participant. The affected participants' rights are de-emphasised and given effect merely through the catch-all provision of s 5(d).

While undesirable, absent a “tenable” alternative approach to s 7(2)(b), then the fate of participants' such as Mr Taylor's natural justice rights may regrettably have to rest in this discretion under ss 5 and 7, even despite those provisions' current unsatisfactory state. This conclusion highlights the need for legislative reform to attain a more nuanced resolution to s 7's shortcomings than that which is open using blunt statutory interpretation.

V Legislative Reform

There are almost undoubtedly several means through which the necessary reform to the CRPA addressing the above concerns could be given effect. This paper will advocate for what it deems to be the simplest approach to achieving this end.

First, “proceeding” in s 3 of the CRPA should be re-drafted to delineate between interlocutory and substantive civil proceedings. These definitions could be easily drafted to be linguistically-consistent with the distinction the CRPA creates for criminal proceedings, as follows:

civil procedural matter means any proceeding in a court, other than a criminal proceeding, in respect of which no evidence is to be called

civil substantive matter means any proceeding in a court, other than a criminal proceeding, in respect of which evidence is to be called

Secondly, s 7 should also be re-drafted to create divergent presumptions for and against using AVL for the appearance of incarcerated individuals in procedural and substantive civil proceedings, respectively. The new s 7 would expressly provide that any participant could apply for an order to appear via AVL in a substantive civil proceeding, but only in

relation to their own appearance, or only on behalf of another participant where appropriate — for example, a witness on the applicant’s side of the litigation. This would bring s 7 into closer alignment with its ss 8 and 9 counterparts. Applying these modified ss 3 and 7 to the facts of the *Taylor* cases considered in part III would lead to the desired, rights-consistent outcomes this paper has advocated for.

Turning first to the matter before Allan J: the new s 7 would already provide a presumption that Mr Taylor should appear in all civil procedural matters via AVL from prison, without Corrections having to apply for, or his Honour having to grant, an order to that effect. However, the new s 7 would simultaneously protect Mr Taylor’s right to be present at any subsequent substantive civil matters (which Allan J suggested was a bona fide expectation), since the provision would, as a default, demand that physical presence. This would still be subject to Mr Taylor’s ability to apply for an order to the contrary, or if the judicial officer or Registrar were to deem the participants’ remote appearance necessary (under current s 7(a), perhaps due to considerations of courtroom safety).

The modified s 7 would also still result in an outcome consistent to that reached by Duffy J in her *Taylor* judgment. This is again because the new provision would provide, as a starting point, that Mr Taylor be present at the substantive hearing of his claim. The new s 7 would meanwhile avoid the negative consequences arising from a blanket adoption of Duffy J’s narrow meaning of current s 7(2)(b), which would seemingly eliminate the possibility of prisoner participants ever appearing via AVL in civil proceedings.

Applying the new provisions to ordinary civil proceedings — those not involving prisoners and Corrections — would result in little-to-no practical change. Any participant could still apply for an order for themselves, or another participant associated with their side of the case, to appear via AVL. The new provisions would merely safeguard against the abrogation of prisoners’ rights in the context of substantive civil litigation.

VI Conclusion

New Zealand has embraced the advent of AVL in its courts. The CRPA has led to rapid proliferation of the technology. Indeed, while AVL brings with it associated cost savings, enhanced efficiency and purportedly increased public and courtroom safety, even the CRPA contains express recognition of the rights concerns associated with its deployment in substantive proceedings. While the CRPA addresses these concerns comprehensively in relation to criminal matters, this paper's overall conclusion is that the legislature gave insufficient consideration to the CRPA's applicability in civil proceedings. Specifically, the CRPA leaves prisoners in civil litigation against Corrections at risk of having their fundamental natural justice rights violated by remote appearance ordered on the basis of an application made by their counter-party. This non-consensual remote participation exposes the affected participants to the patent disadvantages flowing from AVL use, which is plainly inconsistent with their right to natural justice, guaranteed at common law and by s 27(1) of NZBORA.

In recognising that such an outcome should not be tolerated, this paper endeavoured to find an approach to interpreting s 7(2)(b) as it stands which would strike the correct balance between all participants', including Corrections', interests. This was a fruitless exercise. Section 7 in its current form, and s 5 insofar as these provisions interact, is insufficient to ensure that judicial officers or Registrars adjudicating AVL applications will give appropriate weight to the affected participants' natural justice rights. Accordingly, this paper calls for the reform to the CRPA deemed necessary to address these concerns and ensure that AVL can be safely deployed in *all* manner of New Zealand court proceedings, as intended.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 7985 words.

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