

Review of the Courts (Remote Participation) Act 2010 Ministry of Justice Discussion Document

Submission from the National Collective of Independent Women's Refuges
(NCIWR)

Introduction

We would like to thank the Ministry of Justice for the opportunity to provide feedback on this Discussion Document.

The National Collective of Independent Women's Refuges (NCIWR) is a non-governmental organisation with 41 member agencies, that has delivered services to women, children, and whānau affected by family violence in Aotearoa for 50 years. We represent victims of family violence, specifically wāhine and tamariki, who are the primary groups subjected to and impacted by family violence.

Our feedback is informed by Women's Refuge-specific data, research, and evidence, by the decades of experience of our senior practitioners in supporting women and children who experience family violence, and by insights from other relevant research.

1. What are your views on including a purpose statement?

We support including a purpose statement if it includes supporting victim safety and wellbeing, as this should be recognised as a key part of the purpose of allowing and enabling remote participation.

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

We recommend adding a point regarding the importance of allowing and enabling remote participation in order to support victims' safety and wellbeing, which should always be centred in Justice system responses to violence. For example: "the purpose of an Act is to facilitate and promote increased use of remote participation in all court proceedings ...**to support victims and enhance their safety, including decreasing the risk that court proceedings will expose victims to physical and psychological violence, stress and retraumatisation.**"

Being physically present in the Court (both Family and Criminal) puts adult and child victim-survivors in danger. In Backbone's [Family Court survey of victim survivors](#), 243 of 419 women (58%) said they had been threatened, intimidated, or physically assaulted by their abuser while attending court and court-related appointments/fixtures or hearings.

As Crown Law acknowledges, in the Family Court for example "there may be close physical proximity between the parties, and parties and witnesses. This increases the stress on victims and witnesses."¹

Women not only have to appear in a courtroom with their abuser, some women reported being left alone in the court room with their abuser while lawyers meet with Judges in Chambers, and many often have to wait outside the courtroom in the same space as their abuser is waiting and/or the abuser's family and supporters are waiting. This can be for hours at a time, as multiple cases are listed at the same time (most Family Court hearings are listed as starting at 10am and parties are expected to arrive earlier (9am)). Even before entering the court room, victim-survivors can be made to feel unsafe when they see their abuser outside, walking into/out of, or inside the court building, particularly just outside of the court room.

For many victim-survivors, this can be physically and/or psychologically harmful. Some survey participants told us they were accosted by the abuser in the Family Court and threatened. Some women talked about hiding in the toilets at the Family Court to stay safe, others said they refused to attend the court fixtures as they were so scared of seeing the abuser. Such fear is warranted; a recent incident where a family lawyer was brutally assaulted in the court elevator illustrates the risk of physical danger at court².

In Backbone's 2023 consultation with victim-survivors to support the Ministry of Justice review of AVT, victim-survivors discussed being threatened during court hearings in both criminal and Family Court by the abuser who used subtle ways to instil fear (gestures, looks and objects); Women's Refuge has heard innumerable similar stories from clients. These threats are usually not obvious to others around the victim-survivor, but greatly impact her ability to participate in the proceedings.

We believe that most women victim-survivors would feel enormously safer – both physically and psychologically – to participate in court proceedings using AVL / remote participation.

Enabling more victim-survivors to have the option to give evidence remotely is a practical way to counter the danger posed by their participation in court processes. As such, it should be embedded and signalled in the Act's purpose.

¹ [Whiting, K. \(2024\) "Evidence \(Giving Evidence of Family Violence\) Amendment Bill - Consistency with the New Zealand Bill of Rights Act 1990" letter Ref ATT395/407 Dated 24 March 2024](#)

² Neal, T (13 June 2024) "Family Court lawyer Brintyn Smith on being brutally bashed in Whangārei courthouse" NZ Herald/RNZ

3. What are your views on including the Coroners Court within an Act? Do you have any other comments to make?

Yes, we do believe the Coroners Court should be included in this Act, as this is also relevant to our point about victim-survivors. When there is a family violence homicide or suicide, for example, and a victim is killed, there are often other victims such as the child or parent of the deceased, who is required to testify. While including the Discussion Document states that this could not make a material difference, it would mean, should victim safety and wellbeing be added to the purpose of the Act, that this purpose would apply to the Coroners Court as well.

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

We strongly support the Ministry's intention to "Carry through the presumption that victims can remotely observe criminal trials and sentencings", and would oppose any move to remove this right for victims.

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

As observers, victim-survivors should not be made visible to others in the courtroom and most particularly the abuser/defendant.

We appreciate that media and the public may wish to observe court proceedings remotely and suggest that observers, other than victims, must complete an application in order to do so. That way there will be a record of who used remote participation, and communication from the Registry can strongly enforce that recording is not allowed and applicants must sign a declaration to confirm they understand this and that a penalty will be imposed for not complying (see Question 12 below)

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

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

We agree that this should be clarified/ made clearer.

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

If, and only if, any victim-survivors of family violence and/or sexual violence agree and actively consent that the hearing should be fully remote. If and when victim-survivors do wish for the hearings to be fully remote, then these views should take precedence

over other considerations. In other words, victim-survivors should be fully informed of the options and what they mean, and if a fully-informed victim-survivor prefers a fully-remote hearing, then the hearing should be fully remote; if the victim-survivor prefers that the hearing not be fully remote, then it should not be fully remote.

Scenarios may include (but not be limited to) a victim-survivor who feels that her evidence will be put at a disadvantage if she testifies remotely while the other party is testifying in-person. This was raised as a concern during Backbone's victim-survivor consultation for the MoJ AV team.

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

That the victim-survivor's support people, Victim Advisor or court support worker (Kaiaraahi) are equally as able to participate remotely as requested by the victim-survivor.

And that the ability for observing victim-survivors to enter into a virtual/online break-out room with their support person, Victim Advisor or court support worker (Kaiaraahi) if they are overwhelmed or distressed by the proceedings. Currently, in criminal court proceedings, a supporter or Victim Advisor would be physically sitting with the victim and could walk with them to a safe and quiet place and be with them if they become overwhelmed and distressed. It is important to build a similar virtual function into remote participation if possible to avoid victims being overwhelmed and isolated, without direct contact with support.

10. Do you think separate rules for AVL [vs] AL (as is the case currently) are necessary? Please explain why.

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

12. What are your views on including an offence provision?

We support an offence provision for anyone who records the court proceedings including those who participate remotely. The risk posed by the illicit recording and sharing of court proceedings is far greater to victim-survivors - sometimes to the point of life and death - than the risk to defendants (the abuser in civil proceedings). Of greatest concern is the sharing of victims' evidence.

The danger of Family Court proceedings being recorded by remote participants is high, particularly for abusers who will take opportunities to use court proceedings as a vehicle for ongoing abuse following separation. That might include threatening to share recordings of a victim's evidence publicly or with children or other friends and family or whānau; sharing recordings on social media platforms, with a victim's family or friends or work colleagues, or with other organisations including Oranga Tamariki, ACC or IRD.

Anecdotally, we are aware that it can be incredibly difficult for women to obtain full transcripts of their hearings (especially Family Court), and judgements do not accurately or fully record the proceedings. Victim-survivors need to have an accurate record of their own court proceedings to enable their understanding of what was said and how it was responded to, given that the immediate high-stress, potential unsafe outcomes and often threatening nature of proceedings can make information difficult to absorb, particularly for traumatised people and to help them prepare for subsequent proceedings or appeal. Therefore, we strongly recommend that an offence provision is accompanied by an adequate court transcript service for participants.

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

All parties (Criminal Court and Family Court) must sign a safety statement prior to the hearing stating they understand they are not permitted to record the proceedings and that sharing any recording will be referred to the police for prosecution under either a new offence or contempt of court.

Even if it does not become an offence, any unauthorised recording (and sharing, if known) of court proceedings should be notified to the victim-survivor and to police, and a record of the action should be kept by the court. One of the reasons to do so is that the unauthorised recording could be evidence of behaviour that constitutes a stalking offence against the victim-survivor, under the anticipated introduction of legislation to criminalise stalking. Unauthorised recording of court proceedings could be evidence of one of several acts that will be required to evidence a crime of stalking in the anticipated legislation. In addition, recording and sharing proceedings can also be recorded as a breach of Protection Order and/or a form of litigation abuse if and when the new Strengthening Family Violence Victims in Court Act comes into force.

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

Yes

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

Because the potential for physical and psychological harm of in-person court participation is greatest for victim-survivors, and because the Family Court in particular is currently extremely unsafe for victim-survivors, we recommend that there be a process for victim-survivors to appeal a decision to turn down a request for remote participation where a decision on such an appeal would be made by a more senior judicial officer.

At the core of the poor Family Court response to family violence is a failure of professionals working in the court (including judicial officers) to take victim-survivors’

evidence of family violence into account or to take it seriously when it is taken into account. In [Backbone's Family Court survey](#), 245 out of 395 (62%) women said the Family Court accused them of exaggerating or distorting the violence and abuse, and 55% (219/395) said they were accused of lying about the violence and abuse, and 59% (233/395) said they were spoken of as being mentally unwell when this was not true (as a way of minimising or dismissing their evidence, rather than as a potential indicator of PTSD or other violence-related psychological distress).

16. Do you support revising the current criteria [to decide whether remote participation is appropriate]? Please explain why.

Yes, the current criteria should include a consideration of the views of victim-survivors (as self-identified, regardless of family or sexual violence fact finding hearings) specifically and with a priority on their views above those of other 'participants.'

17. If you support streamlining the criteria, do you prefer Option 1 or Option 2? Please explain why.

We do not support streamlining the criteria, as "The interests of justice" is too broad to establish shared expectations and to ensure prioritisation of the safety of victim-survivors, including children. In addition, the court has a duty of care under the Health and Safety Act to all court users.

We so support Option 2, and we agree with "the views of the participant" being included, as this includes victims as participants as per your explanation.

However, we believe "views of the victim" should **also** be specifically included as per our response to Q18.

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

Decision-makers should consider the views of the victim, specifically stated as "victim" rather than "participant". The reason these should be taken into account is to assist with enabling victim-survivor safety and wellbeing (i.e. the factors which we recommend are within the purpose of the Act).

This includes considering the views of the victim on the use of remote participation for everyone in their court proceedings, not just whether or not they wish to use remote participation themselves. For example, if they wish to read out their victim impact statement in person and have the offender in the room with them, this should be seriously taken into account by decision makers when they are deciding whether or not an offender can participate remotely.

It also includes the views of the victim regarding who sees them when they are using AVL and who they see, while giving evidence; different victim-survivors have different preferences regarding these decisions so **victim-survivor preference should not be assumed, but always actively sought on these questions.**

It is also important that the views of the victim-survivor (such as any reason for needing remote participation and where they will be giving evidence from) are **not** shared with the defendant or their legal counsel. All that defence need to know is that the victim-survivor will be giving evidence remotely, once the decision has been agreed by the court.

We recommend that a prohibition on disclosing the views of victim-survivors regarding remote participation, and their location and reasons for it, is also included in the Act.

19. Do you think detailed rules and expectations should remain in an Act? Please explain why.

We would prefer that the detailed rules and expectations remain in an Act rather than the other two options provided. The reasons for this are that options two and three do not provide for family and sexual violence input into the writing of the rules and rely solely on the judiciary, or the judiciary and lawyers. Without the input from family and sexual violence specialists, and preferably victim-survivors themselves, the rules may have unintended consequences.

In addition, as outlined above, the Family Court does not currently respond safely to victim-survivors, and therefore - for good reason - victim-survivors have little trust that the judiciary will write rules that will work for, and centre, safety and wellbeing for victim-survivors.

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

We strongly recommend victims **always have the option** of remote participation, but that remote participation is **never mandatory** for victims (apart from exceptional circumstances, e.g. a pandemic). Therefore we support increasing expectations on the courts to centre and prioritise victim-survivor decisions regarding remote participation, with the goal of supporting safety and wellbeing for victim-survivors by respecting and prioritising their preferences for remote participation.

We strongly disagree with the statement in the discussion document that: “Family and compulsory care proceedings, and coronial inquest hearings, are less evidently suited to remote participation [than are general civil proceedings and specialist courts]. This is because of the sensitive nature of the matters, complex legislative and procedural requirements, and the vulnerability of many of the participants.”

On the contrary, it is precisely because of the sensitive nature of the matters and the vulnerability of victim-survivors in the Family Court, for example, that remote participation is an important option for victim-survivors in these proceedings. Many women explained in their responses to Backbone's Audio-Visual Technology in courts survey (2023, for MoJ AV team) that participating remotely would enable them to be safer, and therefore provide better quality evidence and understand and participate in the proceedings more fully. The distress caused to victims by participation in court can be lessened by remote participation due to:

- being somewhere the abuser is not
- not seeing the abuser while they give evidence and therefore any gestures, looks or other threatening acts
- being in a familiar environment (such as their home or support worker's workplace)
- not having to plan as much for attending court in person (travel, car parking, childcare, and costs associated)

Victim-survivors are best placed to make the decision on whether or not remote participation is appropriate for them. Making choices about how they participate in proceedings can be empowering and help alleviate the trauma and impacts associated with the experiences of violence and abuse. Therefore, our strong preference is that decision-making sits with victim-survivors.

It's unclear how all these options 1-3 on pages 27 and 28 of the discussion document would interact with the decision-making criteria lists (the subject of questions 16-18). The options listed here are relatively significant changes which are likely to have unforeseen ramifications.

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

Overall, the benefits of remote participation outweigh the risks for most victim-survivors. Please see our response to Question 2 above for a fuller discussion of risks (physical and psychological) to victim-survivors when they are required to attend court in-person with the abuser.

Preferences of individual victims should be taken into account on a case by case basis. Taking away the choice to be in-person or remote can be disempowering to victims. We refer you to MoJ's AV team for Backbone's research into victim preference for remote participation. Many (but not all) victim-survivors see that remote participation has benefits such as safety and privacy and reduced distress from facing the abuser and giving their evidence in front of them. However, victim-survivors who prefer to give evidence in-person, and/or to face their abuser, should be able to do so, for their benefit and in the interests of justice. In terms of evidence giving, some victim-survivors thought it was beneficial to the quality of evidence to do so remotely, while others thought it was better for evidence quality to do so in person: some victim-survivors have told Backbone that in their experience remote participation has made it

harder for others in the court room to connect with their evidence which impacts on the level of credibility they are given.

In terms of risks to victim-survivors of remote participation, a key general issue is the frequency at which technology fails, and inequitable access to appropriate technology and secure wifi connections and a lack of technical support available when things don't work. These can be substantial issues, and need to be planned for, and addressed. As previously discussed in this submission, the risk of remote evidence being recorded by abusers is significant for victim-survivors but we believe there are ways the court can mitigate these risks as discussed earlier.

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

Our preference is that the Family Court is mandated to actively promote and provide the option of remote participation but that the default setting is: **whatever self-identified victim-survivors prefer on a case by case basis**. That is, victim-survivors are fully informed about their options, and that whether the court is fully remote or fully in-person or a mix is always guided by, and prioritises, informed victim-survivor preference. The courts should be prepared and resourced with the expectation that most victim-survivors will prefer to give evidence remotely themselves - but this should not be an assumption for individual cases.

25. If you support a legislative presumption in favour of remote participation for civil proceedings (Option 3), do you think it should apply to: a. Proceedings in the Family Court? b. Compulsory care proceedings? c. Coronial inquest hearings? d. Specialist courts? e. Only certain court matters or types of matter, and if so, how should these be defined (e.g. by 'event' type or by characteristic)?

Our discussion above and recommendation that remote participation should be determined by informed victim-survivor preference within any applicable court.

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

Informed victim-survivor views should be the priority guide for the decision as to whether or not a proceeding should be remote, partially remote or in-person.

The Evidence Act Amendment bill is currently at Select Committee and receiving submissions. It would be beneficial for the Ministry of Justice to review submissions on that Bill to help inform the priority for ensuring remote participation is made available to victim-survivors.

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?

Public accountability is an important aspect of sentencing. Will remote participation of offenders reduce that aspect of justice? It can be an important aid to recovery for victims to know their abuser has had a public appearance as an offender, and has experienced a public acknowledgement that their violence and abuse is unacceptable.

It may be safer for victim-survivors to attend sentencing in person if the perpetrator is attending remotely. It would be critical to ensure victims are given accurate and up to date information as to whether or not the perpetrator will be attending remotely so they can make the safest decision possible with regards to their own attendance at sentencing.

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

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

As explained in number 22., the court should be take seriously into account the views of the victim-survivor on whether defendants who are not in custody and lawyers should be allowed to attend criminal procedural matters remotely if requested.

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

We believe that the public and victim-survivors should always have the option of seeing as well as hearing offenders/defendants, as part of their accountability to the public and the victim-survivor. Therefore offender/defendant remote participation should be limited to AVL.

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?

We would like to emphasise the importance of victim-survivors being given the choice to participate remotely in family violence and sexual violence proceedings as outlined in sections 103, 105 and 106 of the Evidence Act. We would like to see the courts and police proactively offer and provide this opportunity to all eligible victim-survivors.

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

Our one concern is that there are likely some procedural matters that are more relevant to victim-survivors than others, such as when the victim impact statement is read, and that victim-survivors' input into remote participation (for themselves, the defendant and other participants) should be weighed more heavily in these matters.

35. Do you think categorising by 'significance' of the matter could address the problem? Please explain why.

36. If so, 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?