



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: CLC/DHrg:1487250

30 April 2018

The Hon. Mark Speakman SC MP  
Attorney General  
GPO Box 5341  
Sydney NSW 2001

By email: [anita.chen-hatton@justice.nsw.gov.au](mailto:anita.chen-hatton@justice.nsw.gov.au)

Dear Attorney General,

*Mark*

**Expanding Audio Visual Links (AVL) – Proposals to amend the Evidence (Audio and Audio Visual Links) Act 1998 (the Act)**

Thank you for your letter in relation to the proposals to expand the use of AVL for court proceedings under consideration by the Department of Justice.

We note with disappointment your support for the use of AVL for first appearance bail proceedings and your decision to amend the Evidence (Audio and Audio Visual Links) Regulation 2015 to implement these changes.

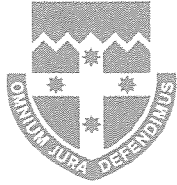
As detailed in our earlier submission (attached), the use of AVL facilities for first appearance bail proceedings will raise practical challenges for both clients and practitioners. We are also concerned that the changes will erode the underlying principle of procedural fairness and the right to participate effectively in legal proceedings, which is particularly important when a person's liberty is at stake. In person first appearance bail proceedings provide additional benefits and safeguards for vulnerable defendants (children, Aboriginal and Torres Strait Islanders and people with a cognitive impairment), which will now be lost.

We consider that these significant changes should have been made via amendment to the Act, rather than by Regulation, to allow for appropriate Parliamentary scrutiny.

Yours sincerely,

*Doug Humphreys*

Doug Humphreys OAM  
**President**



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OF NEW SOUTH WALES

Our ref: Crim:GUeh1176866

6 July 2016

Ms Caterina Kim  
Policy Officer  
Courts Strategy  
Justice Strategy and Policy  
NSW Department of Justice  
GPO Box 31  
SYDNEY NSW 2000

By email: [caterina.kim@justice.nsw.gov.au](mailto:caterina.kim@justice.nsw.gov.au)

Dear Ms Kim,

**Proposal to amend the *Evidence (Audio and Audio Visual Links) Act 1998* to create a presumption for first appearance bail proceedings via AVL**

Thank you for your email enclosing a proposal to amend the *Evidence (Audio and Audio Visual Links) Act 1998* ("the Act") to create a presumption for accused detainees to appear by audio visual link ("AVL") in first appearance bail proceedings.

The Law Society sees considerable benefit in the use of AVL technology, which can reduce the need for persons in custody to spend lengthy periods of time travelling long distances to and from Court for brief appearances. This can have logistical and cost savings benefits.

However, the use of AVL facilities for first appearance bail proceedings can also raise practical challenges for both clients and practitioners. To assist in highlighting these issues, practitioners have provided examples of the difficulties faced when utilising AVL facilities as follows:

1. Practitioners often find it challenging to identify clients with mental health and cognitive impairment issues where they are meeting for the first time via AVL. This means vulnerable individuals may not obtain appropriate advice to assist them in navigating the criminal justice system, and may also contribute to the overrepresentation of mentally ill and cognitively impaired people held in custody;
2. Justice Health may also have difficulty making an effective assessment of a client to establish whether they have mental health issues. This could result in individuals being kept in custody, when they should be receiving treatment in hospital;
3. Similarly, the Magistrates Early Referral Into Treatment ("MERIT") team may have difficulty making an effective assessment regarding eligibility for a community based or residential based drug or alcohol treatment;

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OF AUSTRALIA  
CONSTITUENT BODY

4. Vulnerable clients may not have the capacity to provide appropriate instructions via AVL and the quality of the instructions may be diminished in comparison with instructions taken in person;
5. Rapport and relationships can be difficult to build and the client may feel somewhat distant and less able to engage in the process. Building trust is essential to proper representation and access to justice, and this is more difficult to achieve via AVL. Incidences of non-responsive behaviour and a refusal to participate in conferences may increase where AVL is the only available medium;
6. Effective access to justice for Aboriginal and Torres Strait Islander clients may be reduced. It is not uncommon for Aboriginal people to experience a mistrust of agencies or authorities, particularly where they do not have direct personal access to the process;
7. Effective communication with Aboriginal people can also be impacted by the impersonal nature of AVL. It is not uncommon for Aboriginal people to communicate with limited eye contact and with an increased use of silence or breaks in language. These issues are amplified over a video screen (see the Judicial Commission of NSW's Equality Before the Law Benchbook, Chapter 2; particularly 2.3.3.3-4)<sup>1</sup>;
8. Practitioners can face difficulties observing (and on occasion recording) injuries reported by a client, which may for example have an impact on the ability to substantiate an argument of self-defence. It is important that observations of injuries sustained are undertaken at the first bail appearance due to the need for contemporaneous notes to be taken. Where injuries are minor, it may be the only opportunity to take a record of the injury, prior to the injury healing or changing in appearance;
9. Practitioners often find it difficult to show clients photographs via AVL. Showing this type of evidence to a client can be particularly important when advising as to plea. Where an early guilty plea discount may be available, the timing of such instructions is crucial;
10. Obtaining written instructions for a plea of guilty can prove to be challenging via AVL. Practitioners also find it difficult to obtain written authorities for assisting the client to secure accommodation or other services, which can affect the Court's decision to grant bail;
11. Additionally, risks relating to a potential loss of legal professional privilege involved in faxing legal documents to and from the police station may be heightened by this proposal. Any expansion of the use of AVL further limits contact between practitioners and clients and provides a greater risk that legal professional privilege may be compromised by those handling documents that are placed before the client for the purpose of providing legal advice;
12. Practitioners already experience difficulties in obtaining instructions from clients during an AVL hearing. For privacy reasons, once an indication is given that instructions must be taken, the matter would need to be stood down, a connection with the video link re-connected outside the courtroom, instructions taken and then both the client and practitioner would need to wait for any interim matter(s) to conclude before the matter was returned. This can cause significant delays;

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<sup>1</sup>Judicial Commission of NSW, Equality Before the Law Benchbook, 'Section 2 Aboriginal People' 2.3.3.3-4 <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html>>.

13. It may be difficult to ensure that clients understand and acknowledge their bail conditions. Custody staff will not be in a position to explain bail conditions to a client, which may in turn result in an increase in breaches; and
14. Overall technical difficulties with AVL (where sound or vision are affected, or even where the technology does not work at all) can mean the hearing cannot take place and/or is delayed. This has a particularly detrimental effect on vulnerable people (especially those with intellectual disabilities) who may not have the capacity to understand why a hearing is being postponed.

The Law Society refers the Department to a 2011 study by the Law and Justice Foundation 'Legal assistance by video conferencing: what is known?'<sup>2</sup> This study notes that virtually no evaluation of the use of AVL as an effective form of communication has been undertaken, particularly for those disadvantaged client groups who constitute a considerable proportion of the prison population.

The Law Society acknowledges the aim of the reforms and the potential cost saving benefits that can arise as a result of the proposal. However, the Law Society is concerned about the proposal to expand the use of AVL, prior to sufficient resources being invested to ensure the technology is reliable and further consideration of the resulting impact on vulnerable defendants. The Law Society would welcome further research on these issues, with particular emphasis on the experience of vulnerable clients with complex needs.

The Law Society would be happy to facilitate further consultation with practitioners regarding the impact of such reforms on vulnerable clients.

Should you have any questions regarding this letter I would be grateful if you could direct them to Elaine Heaney (Senior Policy Advisor to the Criminal Law Committee) by email at [elaine.heaney@lawsociety.com.au](mailto:elaine.heaney@lawsociety.com.au) or on 02 9926 0310.

Yours sincerely,



Gary Ulman  
**President**

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<sup>2</sup>Law and Justice Foundation, 'Legal assistance by video conferencing: what is known?' 2011  
<<http://www.lawfoundation.net.au/ljf/app/&id=B0A936D88AF64726CA25796600008A3A>>.