LORD CHIEF JUSTICE OF THE KINGDOM OF TONGA

PRACTICE DIRECTION No. 2 of 2021

REMOTE APPEARANCES IN COURT PROCEEDINGS

1 PURPOSE

1.1 The purpose of this Practice Direction is to formalise procedures for the use of audio and/or video technology to facilitate remote appearances by counsel, parties and/or witnesses in court proceedings in Tonga.

2 COMMENCEMENT

2.1 This Practice Direction takes effect on and from 1 November 2021.

3 APPLICATION

This Practice Direction applies to remote appearances:

3.1 by any person associated with any court proceedings in Tonga, whether they be a Judge or Magistrate, a party, a legal representative of a party, a witness or a vulnerable person required to give evidence before the court, and regardless of whether the person is situated overseas or within any part of Tonga;

3.2 by telephone and by video internet conferencing facilities (hereinafter referred to collectively as 'audio visual link' or 'AVL'); and

3.3 in the Court of Appeal, Supreme Court, Land Court and Magistrates Courts.

4 LEGISLATIVE BACKGROUND

4.1 Section 5 of the *Supreme Court Act* confers on the Supreme Court all the powers of the High Court of Justice in England and Wales and, subject to any other applicable law to the contrary, all powers that the court considers necessary or desirable to ensure that all reasonably obtainable evidence is available to the

court.

4.2 As the *Supreme Court Rules* do not currently provide procedures for appearances in court proceedings by AVL, Order 2 permits adoption of the English Civil Procedure Rules. Where there is no appropriate provision there, the procedure to be followed shall be that prescribed by the Judge, guided by the UK rules.

4.3 Rule 32.3 of the UK *Civil Procedure Rules* provides that the court may allow a witness to give evidence through video link or other means.

4.4 Tonga does not yet have its own criminal procedure rules. In England, rule 18 of the *Criminal Procedure Rules* 2020, in conjunction with s 32 of the *Criminal Justice Act* 1988, provides for a "live link direction".

4.5 Clause 11 of the Tongan Constitution provides, relevantly, that at a person's trial on indictment, the witnesses against him/her shall be brought 'face to face' with him, except according to law. The use of AVL technology for remote appearances by witnesses in such cases, pursuant to s 5 of the *Supreme Court Act*, provides a legal exception. In any event, the purpose of clause 11 will still be achieved by AVL appearances.

5 DISCRETION OF THE COURT

5.1 The decision to permit video link appearances lies within the courts' inherent procedural power and the discretion of the judge or magistrate conducting the relevant case.

5.2 In exercising the discretion:

(a) the court will be guided by the facts and circumstances of the individual case in which permission is sought; and

(b) the overriding consideration is the best interests for the administration of justice, including ensuring justice is done between the parties.

5.3 Relevant factors include:

(a) the cost and time of parties, counsel or witnesses having to otherwise travel from overseas to Tonga or from the outer islands to Tongatapu;

(b) whether those imposts are proportionate to what is at stake in the proceeding;

(c) whether the person is practically able to travel to Tonga or whether such travel may be impacted by government or other restrictions;

(d) the likelihood and extent of delays to the proceedings if the person does not

appear by AVL;

(e) the availability and quality of AVL facilities, including internet connectivity, both at the place from which the person is proposed to appear and at the relevant court;

(f) whether the person is able to appear from a court room or other government facility (which is not mandatory, but may be preferable, if available);

(g) the importance of the evidence expected to be given to the determination of the real issues in the proceeding;

(h) the extent to which the evidence is expected to be contentious;

(i) whether issues of credit are likely to weigh in the assessment of the evidence;

(j) whether the use of AVL may adversely impact effective cross examination;

(k) maintaining the integrity of the evidence; and

(l) whether, and if so, the extent to which, the opposing party may, or is likely to, be otherwise prejudiced by allowing evidence to be given by AVL.

6 APPLICATIONS FOR APPEARANCE BY VIDEO LINK

By consent

6.1 In the first instance, any party requiring a person to appear by AVL must seek the consent of all other parties to the proceeding.

6.2 If all other parties consent to, or do not oppose, the proposed appearance by AVL, then the party requiring the remote appearance is to provide the Registrar of the relevant court, by letter or email, no later than 14 days prior to the expected date of appearance, a request for appearance by AVL.

6.3 The request for appearance by AVL is to include the following:

(a) details of the name, location and contact details (address, telephone number, email address) of the person proposed to appear by AVL;

(b) the reason/s for the application;

(c) the person's location during the proposed appearance;

(d) the date and time or period (in Tonga time) for the proposed remote appearance; and

(e) confirmation that the person has, or will have, suitable audio or video link facilities at their location including access to, and use of, Zoom or Microsoft Teams software (or such other video conferencing software as may be

directed by the court); and

(f) written evidence of the consent (or no opposition) by all other parties to the proceeding.

6.4 The Registrar will then make the necessary arrangements for the audio or video conference to take place at the designated time and advise the party requesting the appearance and the person to appear of the required details for the audio or video conference to occur.

Where a request is opposed

6.5 Where any other party opposes, or does not consent, to the proposed appearance by AVL, an application for appearance by AVL by the requesting party is to be filed at the earliest opportunity or raised during a directions hearing in advance of the hearing at which the person is required to appear.

6.6 Save for cases of genuine urgency or circumstances which were not reasonably foreseeable, or as otherwise ordered, applications for appearance by AVL must be filed and served no later than 14 days prior to the expected date of appearance.

6.7 An application for appearance by AVL must include:

(a) the name, location and contact details (address, telephone number, email address) of the person proposed to appear by AVL;

(b) the reason/s for the application;

(c) the person's location during the proposed appearance;

(d) the date and time or period (in Tonga time) for the proposed remote appearance; and

(e) confirmation that the person has or will have suitable audio or video link facilities at their location including access to, and use of, Zoom or Microsoft Teams software (or such other video conferencing software as may be directed by the court).

6.8 Any party wishing to object to the application must, within 7 days of receipt of the application, file and serve a notice of opposition stating the grounds of opposition.

6.9 Upon receipt of the notice of opposition, the Registrar of the relevant court shall inform the judicial officer hearing the case, and the matter shall be called on at the Court's earliest convenience.

6.10 Upon hearing from the parties, the judicial officer shall determine the application in accordance with section 5 above.

7 DIRECTIONS UPON AN ORDER FOR APPEARANCE BY VIDEO LINK

Upon making an order for appearance by a party or witness by video link, the Court will give directions which may include any of the following:

7.1 Each party is to ensure that their respective AVL witness has adequate audio and/or video equipment with appropriate software and a reliable internet connection with sufficient bandwidth to enable video communications to operate without undue interruptions or delays.

7.2 Subject to any other order, the AVL conferencing sessions for each witness will be conducted using either 'Zoom' or 'Microsoft Teams' software applications.

7.3 Subject to 5.3(f) above, every AVL witness is to be alone in the room in which they give their evidence and out of earshot of any other person who may be associated with the case (save for any technical support person who is not a witness in the case), for the duration of their evidence.

7.4 Where an AVL witness elects to take an oath at the commencement of their evidence, he or she is to have a copy of the Bible upon which to take their oath.

7.5 The evidence of any other witness given prior to the commencement of any AVL witness is not to be communicated in any way to the witness before he or she commences his or her evidence.

7.6 The parties are to confer in relation to any documents which are to be put to an AVL witness, and, if agreed, copies of such documents are to be provided to the witness (by email, if available) prior to commencement of that witness's evidence.

7.7 If either party does not consent to a document being provided to an AVL witness prior to the commencement of that witness's evidence, then, subject to any objections as to admissibility, to be heard and determined prior to or at the commencement of the trial, the document shall be shown to the AVL witness during their evidence by email or through screen sharing features available within the software used.

7.8 The parties are to confer and endeavour to agree in relation to the day and time during the hearing when each AVL witness is to be called so that arrangements with that witness/es can be put in place in advance and to avoid any unnecessary delays during the course of the hearing.

7.9 The parties are to liaise with the relevant Registrar to arrange test calls with their respective AVL witness/es prior to the scheduled time/s for each witness's appearance.

7.10 Each party is responsible for ensuring the above directions are followed in respect of their respective AVL witness at all times up to the conclusion of each

such witness' evidence.

8 PROCEDURE DURING VIDEO LINK APPEARANCES

During the course of any AVL appearance, the judicial officer conducting the case may observe any of the following directions.

8.1 At the outset of the AVL session, the judge should assess the quality of the link by asking the person appearing remotely whether he/she is able to hear and see the judge clearly.

8.2 The judicial officer may then state on the record:

(a) that the parties have consented to, or that orders have been made for, the appearance of the specified person/s by AVL;

(b) that all rules of evidence and procedure shall apply during the remote appearance;

(c) whether there are any disability or accessibility needs;

(d) whether there is a need for an interpreter or not; and

(e) generally, how the AVL session will proceed.

8.3 The judicial officer may then instruct the person appearing:

(a) that if, at any time, he/she is not able to see or hear what is happening in court, he/she is to immediately inform the judicial officer (if possible);

(b) to keep within view of the video camera and refrain from turning away from the camera;

(c) not to use a virtual background to ensure that there is no one prompting the person or otherwise interfering in the proceedings.

(d) to wait until requested to speak;

(e) when speaking, to do so slowly and to not interrupt others when they are speaking;

(f) that they are not to record the session;

(g) to confirm that they have a bible with them if they wish to swear an oath or whether they wish to make an affirmation; and

(h) that if the internet drops out, to remain in the same place and turn on his/her mobile phone, on which he/she will be contacted; alternatively, provide a phone number the person can call to contact the court.

8.4 Any party or witness appearing remotely must not have access to any other electronic devices whilst giving their evidence. Communications with any other

party concerning the case, directly, or by any electronic medium including, but not limited to, telephone, email, text or social media during their evidence, or thereafter during the life of the case, is prohibited and may constitute a separate criminal offence.

8.5 An oath or affirmation may then be administered in the usual fashion.

8.6 The judicial officer may warn the witness that, notwithstanding their evidence is being given remotely, it is still an offence to commit perjury or contempt of court.

8.7 The judicial officer may ask the person appearing to confirm, on oath:

(a) their location;

(b) that they are, and will remain, alone in that location (save for any technical support);

(c) that they have not had access to the hearing before giving evidence;

(d) that they do not and will not have access to any other electronic devices or other means of communication with any other person (without permission of the court) whilst giving their evidence; and

(e) what, if any, documents they have before them which are relevant to the case, either in hard copy or electronic form on the computer or device by which they are appearing.

9 VIDEO LINK APPEARANCES FOR VULNERABLE WITNESSES

9.1 Safeguarding accessibility and fairness for vulnerable groups is essential for creating an inclusive justice system which operates remotely.

9.2 Vulnerable persons include:

(a) complainants in criminal proceedings;

(b) those who have a physical disability which may affect their ability to give evidence in court;

(c) those who experience mental illness;

(d) elderly;

(e) children;

(f) those who identify as belonging to minority or marginalised groups.

9.3 In some cases, it may be appropriate for a vulnerable witness to give evidence from a location remote from the witness box in the court room such as a room within the court precinct with AVL facilities.

9.4 Directions for the giving of that evidence are in the discretion of the court. Special

care is to be taken where the witness has expressed concerns of not wishing to to see the defendant in criminal proceedings, while at the same time, the defendant (if not legally represented) or his/her counsel ought be permitted to see the witness.

9.5 In such cases, the court may arrange for an officer of the court to:

(a) be present in the vulnerable witness room;

(b) ensure the computer is operating and connected (via the court's Wi-Fi or internet);

(c) access the video conferencing application;

(d) demonstrate to the witness how the process will work;

(e) mute the computer in the vulnerable witness room and, until directed by the court, ensure that the witness cannot hear the courtroom and vice versa;

(f) show documents on the document viewer to see if this can be clearly seen in the vulnerable witness room; and

(g) when ready, instruct the witness to join the proceeding.

9.6 The judicial officer may allow a support person to be present with the witness while giving evidence.

SUPREME COURT TONGA

Michael Whitten QC
Lord Chief Justice of the Kingdom of Tonga

14 October 2021