

## SUMMARY OF EMERGENCY LEGISLATIVE CHANGES

### A. BACKGROUND AND DISCLAIMER

1. This document seeks to identify the most significant changes to legislation in response to the Covid-19 pandemic relevant to criminal practice. It is, however, no substitute for reviewing the legislation directly.
2. The most prominent changes are now included in the *Criminal Procedure Act 1986* ('CPA') and Section 22C *Evidence (Audio and Audio Visual Links) Act 1998*:
  - [Chapter 7, Part 5 Response to the Covid-10 pandemic](#)
  - [Section 22C Evidence \(Audio and Audio Visual Links\) Act 1998](#)
3. [Section 367 CPA](#) sets an automatic repeal date six months after its introduction (25 March 2020) but this can be extended to twelve months by regulation. However, evidence taken under some of the new procedures will continue to be admissible after the date of the repeal e.g. pre-recorded witness evidence. An identical time limit applies to the arrangements available under [s22C\(1\) and \(9\) Evidence \(Audio and Audio Visual Links\) Act 1998](#).

### B. APPEARANCE OF ACCUSED PERSONS

4. [Section 22C Evidence \(Audio and Audio Visual Links\) Act 1998](#) and [r4A Evidence \(Audio and Audio Visual Links\) Regulation 2015](#).
5. The emergency provisions extend the circumstances in which an accused person may be directed to appear by Audio-Visual Link (AVL). [Section 22C\(1\)](#) states that the emergency provisions will prevail to the extent that there is any inconsistency with existing legislation or rules of the court.
6. For all bail proceedings it is presumed that the accused will appear by AVL unless otherwise directed ([s22C\(2\)](#)). Given [s22C\(1\)](#), this now includes the first appearance of the accused.<sup>1</sup>
7. [Section 22C\(3\)](#) states that the Court may direct the accused to appear by AVL for all "[physical appearance proceedings](#)". "[Physical appearance proceedings](#)" are defined in [s3 Evidence \(Audio and Audio Visual Links\) Act 1998](#) and include trial, 'hearing of charges', fitness inquiries and certain bail applications.
8. Read in isolation, [s22C\(3\)](#) suggests that the accused could be directed to appear by AVL for contested matters, including for trial in the District or Supreme Court.
9. However, [r4A Evidence \(Audio and Audio Visual Links\) Regulation 2015](#) specifically excludes the making of a direction under [s22C\(3\)](#) in relation to proceedings 'on indictment'. That means that the power of the Court to order an AVL appearance of

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<sup>1</sup> Prior to the emergency provisions (and subject to some exceptions in the regulations) the accused's first appearance would have usually attracted a presumption that they be in physical attendance – [s5BA\(1\) Evidence \(Audio and Audio Visual Links\) Act 1998](#)

an accused under [s22C\(3\)](#) appears to be largely limited to contested hearings in the Local Court.

10. For an order to be made for the accused to appear by AVL pursuant to [s22C\(3\)](#) the following preconditions must be met:

- a. The parties must be afforded an opportunity to be heard ([s22C\(5\)](#));
- b. The direction must be in the interests of justice ([s22C\(6\)](#));
- c. The direction cannot be inconsistent with the advice of the Chief Medical Officer of the Ministry of Health relating to Covid-19 ([s22C\(6\)](#));
- d. The Court must be satisfied that there is a reasonable opportunity for the accused to have private communication with their legal representative ([s22C\(7\)](#)).

11. It is observed that the all Courts have existing powers to order the attendance of the accused by AVL at all stages of a criminal proceedings, including proceedings on indictment. The power to order such appearances for 'physical appearance proceedings' (trial, fitness hearings and some bail applications) is contained in [s5BA Evidence \(Audio and Audio Visual Links\) Act 1998](#) but is subject to a significant number of preconditions and safeguards. The power to order AVL appearances in other criminal proceedings – including sentence – is contained in [s5BB Evidence \(Audio and Audio-Visual Links\) Act 1998](#).

### **C. APPEARANCE OF WITNESSES GENERALLY**

12. [Section 22C Evidence \(Audio and Audio Visual Links\) Act 1998](#).

13. The Court has been granted the power to direct any witness to appear by AVL. However, the parties must be afforded an opportunity to be heard on such an arrangement ([s22C\(4\) and \(5\)](#)).

### **D. APPEARANCE OF LEGAL REPRESENTATIVES**

14. [Section 22C Evidence \(Audio and Audio Visual Links\) Act 1998](#).

15. The Court has been granted the power to direct legal representatives to appear by AVL. However, the parties must be afforded an opportunity to be heard on such an arrangement ([s22C\(4\) and \(5\)](#)).

### **E. PLANNED PRE-RECORDING EVIDENCE FOR CRIMINAL TRIALS**

16. Sections 354 – 358 *Criminal Procedure Act 1986*.

17. The emergency provisions include powers for the evidence of a witness to be recorded. Such orders are only available for criminal trials in the District and Supreme Courts.

18. The Court can make orders for evidence to be taken in a recorded hearing in the absence of the jury only where, ([s356\(2\) Criminal Procedure Act 1986](#)):
  - a. an accused person has had legal advice on this matter;
  - b. the parties have been given a chance to make submissions;
  - c. all pre-trial disclosure and case management requirements under Division 3 of Part 3 of Chapter 3 have been complied with; and
  - d. it is satisfied that it is in the interests of justice.
19. The views and circumstances of the witnesses must be taken into account – [s356 Criminal Procedure Act 1986](#).
20. The pre-recording of evidence is only available for certain categories of witness (although additional categories can be created by regulation). They presently include:
  - a. Complainants in prescribed sexual offences;
  - b. Complainants for domestic violence offences within [s11 Crimes \(Domestic and Personal Violence\) Act 2007](#);
  - c. Complainants for a serious indictable offence that is an offence of violence
  - d. A complainant *or* witness whom the Court thinks is at greater risk of Covid-19.
21. Once evidence is recorded there are restrictions on access to copies of those recordings – [s357 Criminal Procedure Act 1986](#).
22. Significantly, a witness who has given evidence that has been recorded cannot be required to give further evidence without leave of the Court. To grant leave the Court must be satisfied that the issue requiring additional evidence was a matter that the questioner could not have reasonably known at the time of the recording or recalling the witness is in the interests of justice – [s358 Criminal Procedure Act 1986](#).
23. Evidence pre-recorded under these provisions will still be admissible in trial even when the emergency measures are repealed – [Schedule 2, Part 38, s111 Criminal Procedure Act 1986](#).

## **F. RECORDED EVIDENCE IN RE-TRIALS OR AFTER SUCCESSFUL APPEALS**

24. Section 359 – 364 *Criminal Procedure Act 1986*.
25. The legislation now permits recorded evidence of any witness (no longer limited to sexual assault complainants) to be admitted in re-trials or trials following appeal. This includes recordings made before the commencement of the new provision.

26. These provisions apply to all Courts.
27. The Court is given a wide discretion to decline such evidence under [s362\(5\) Criminal Procedure Act 1986](#) after considering:
- a. The completeness of the evidence and the opportunity for cross-examination;
  - b. The effect of editing any inadmissible evidence from the recording;
  - c. The availability of the witness to give further evidence (but note – leave is still required for a witness to be recalled);
  - d. The interests of justice;
  - e. Any other relevant matter.
28. Once evidence is recorded there are restrictions on access to copies of those recordings – [s363 Criminal Procedure Act 1986](#).
29. As with planned pre-recordings a witness in these circumstances cannot be required to give further evidence without leave of the Court. To grant leave the Court must be satisfied that the issue requiring additional evidence was a matter that the questioner could not have reasonably known at the time of the recording or the recalling of the witness is in the interests of justice – [s364 Criminal Procedure Act 1986](#).
30. Recordings under these provisions will still be admissible in trial even when the emergency measures are repealed – [Schedule 2, Part 38, s112 Criminal Procedure Act 1986](#).

## **G. JUDGE ALONE TRIALS**

31. [Section 365 Criminal Procedure Act 1986](#) allows a Court to make an order for a judge alone trial on its own motion. This means there no longer needs to be an application from the accused. It also overcomes the time limits for making an application for a judge alone trial.
32. However, the Court cannot make an order unless:
- a. The accused person consents and, if a joint trial, all accused consent;
  - b. If the prosecutor does not agree to a judge alone trial, the Court must be satisfied it is in the interests of justice;
  - c. The Court must be satisfied the accused person has received legal advice.
33. Otherwise, the legislation does not appear to have materially changed the test for ordering a trial by judge alone when the Crown does not consent. Of course, the

circumstances created by the Covid-19 pandemic and the desirability of avoiding delay in finalising trials would be a matter of importance to the interests of justice.

34. An accused person's consent to be tried by judge alone may be taken into account, as presently, pursuant to s22A *Crimes (Sentencing Procedure) Act 1990*. Arguably, greater weight ought to be afforded to that consent in the present circumstances.

## H. CHANGES TO OTHER ACTS

35. Other significant changes include:

- a. [\*Crimes \(Domestic and Personal Violence\) Act 2007\*](#) has been amended to allow provisional Apprehended Violence Orders to be in force for up to 6 months (rather than 28 days).
- b. [\*Crimes \(Administration of Sentences\) Act 1999\*](#) has been amended to allow release of certain inmates to parole on public health grounds.
- c. [\*Children \(Detention Centres\) Act 1987\*](#) and [\*Crimes \(Administration of Sentences\) Act 1999\*](#) have been amended to allow restrictions on visits.