
Video Links in Youth Justice Proceedings: When Rights and Convenience Collide

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The use of audio-visual links in courtrooms is a cost-effective alternative to face-to-face court appearances. Appearance by video link is becoming increasingly common around the world, yet there have been few evaluations of the use of audio-visual links in courtrooms. Particular issues arise with respect to the use of audio-visual links where the accused person is a child – indeed it is often concluded that “virtual courts” are not appropriate for vulnerable defendants, including children and young people. Despite this, in many Australian States and Territories audio-visual links are used extensively in youth justice proceedings. This article considers the findings of a 2016 scoping study in which a focus group was conducted with eight lawyers in Brisbane who represent children and young people who have received criminal charges. Consistent with the existing literature, participants expressed serious misgivings regarding the use of audio-visual links in youth justice proceedings. They doubted that their young clients could follow the proceedings when they appeared by video link, and felt that their capacity to provide adequate support to their clients, both legal and emotional, was compromised. The trend towards “people-less” courts appears to be inevitable. This article considers what best practice in this area might look like, and how the use of technology in the courtroom can be regulated to protect children’s access to justice rights.

INTRODUCTION

The legal profession and the courts are under increasing pressure to become “virtualised”.¹ At the same time as justice system budgets continue to rise, the community has a “growing expectation that services will be delivered digitally”.² The use of audio-visual links in courtrooms, therefore, presents itself as a cost-effective alternative to the current reliance on face-to-face court appearances.

An audio-visual link – also referred to as “video link”, “videoconferencing” or “AVL”³ – allows individuals to remotely communicate and participate in court proceedings through audio-visual technology using monitors, microphones, cameras and computers.⁴ Where an accused person is in custody, audio-visual links enable them to remain at the prison (or detention centre in the case of young people), saving the cost and inconvenience associated with travelling to the courthouse for their appearance. Where the

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¹ See particularly FI Lederer, “The Road to the Virtual Courtroom? A Consideration of Today’s and Tomorrow’s High-Technology Courtrooms” (1999) 50 *South Carolina Law Review* 799; Thomson Reuters, “The Future of Courts: A Whitepaper” (2015) 8.

² L Tickle, “Online Justice: Why Courts Should Explore Emerging Digital Possibilities”, *The Guardian*, 16 January 2017.

³ Note that these terms are used interchangeably in this article. This is because the terminology used varies between jurisdictions, as well as between the various pieces of legislation, individual researchers and commentators, and the study’s participants.

⁴ See, eg ET Bellone, “Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom” (2013) 8 *Journal of International Commercial Law and Technology* 24, 26.



accused person is on bail, audio-visual links enable them to participate in proceedings remotely at an alternative location, such as a police station.

The use of audio-visual links in courtrooms is becoming increasingly common around the world,⁵ yet there have been few evaluations of their use in this context.⁶ Indeed, few courts keep records regarding their use of video links, so little is known about what kinds of matters it tends to be used in and what problems tend to be encountered.⁷

Despite the increased availability and accessibility of the technology, and the popularity of FaceTime and other video conferencing software and apps in the community generally, the uptake of video link technology in Australian courtrooms has been slow.⁸ Indeed, the use of audio-visual links in court proceedings has been met with some opposition, particularly from advocates.⁹ This is particularly so in respect of vulnerable clients, including those with impaired capacity as well as children and young people.¹⁰

In 2016 a focus group was conducted with eight lawyers in Brisbane who represent children and young people who have received criminal charges. Consistent with the existing literature, the participants expressed serious misgivings regarding the use of audio-visual links in youth justice proceedings. Importantly, they doubted that their young clients could follow the proceedings when they appeared by video link, and felt that their capacity to provide adequate support to their clients, both legal and emotional, was compromised.

This article discusses how the virtualisation of children's courts presents a conflict between convenience and the rights of the child that is difficult to resolve. Since the trend towards "people-less" courts appears to be inevitable,¹¹ it is important to consider what best practice might look like, and how the use of technology in the courtroom can be regulated to protect vulnerable defendants' access to justice rights, particularly in jurisdictions like Queensland where no guidelines are in place.

EVALUATIONS AND COMMENTARY ON APPEARING BY VIDEO LINK

Audio-visual links between courtrooms and places of detention are used extensively in the UK, the US and many other common law and European jurisdictions, and have been for some time.¹² With criminal caseloads rising, courts around the world have looked to technology to increase efficiency and reduce costs.¹³ In some jurisdictions courts are moving towards a completely paperless system, and the trend

⁵ Tickle, n 2.

⁶ J Donoghue, "The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice" (2017) 80(6) *Modern Law Review* 995, 996, 997.

⁷ E Rowden, A Wallace and J Goodman-Delahunty, "Sentencing by Videolink: Up in the Air?" (2010) 34(6) *Crim LJ* 363, 364.

⁸ S Forell, M Laufer and E Digiusto, "Legal Assistance by Video Conferencing: What is Known?" (2011) 15 *Justice Issues* 1, 9.

⁹ J Plotnikoff and R Woolfson, "Evaluation of Video Link Pilot Project at Manchester Crown Court: Final Report" (2000) 3.

¹⁰ J Ward, "Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts': Is Due Process Being Undermined?" (2015) 55 *British Journal of Criminology* 341, 350, 354; Donoghue, n 6, 1005.

¹¹ Thomson Reuters, n 1, 8.

¹² In the US, the use of video and teleconferencing for court appearances commenced in 1995, and in 2001 the Federal Judicial Conference approved the use of videoconferencing for arraignments and initial appearances with the defendant's consent: M Treadway Johnson and EC Wiggins, "Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research" (2006) 28 *Law and Policy* 211, 213–214. In the UK, the provision of children's evidence by television-link or video recording was made mandatory in 1999: L Mulcahy, "The Unbearable Lightness of Being? Shifts Towards the Virtual Trial" (2008) 35(4) *Journal of Law and Society* 464, 468. Accused persons have been appearing in court via videolink from prisons and other locations such as police stations, regardless of whether they consent or not, since 2009 in the UK: Ward, n 10, 350. See further H Brooke, "The Legal and Policy Implications of Courtroom Technology" (2004) 12 *William and Mary Bill of Rights Journal* 699. For some European examples, see I Giuffrida, "Legal, Practical and Ethical Implications of the Use of Technology in European Courtrooms" (2004) 12 *William and Mary Bill of Rights Journal* 745. Regarding developments in Italy, see R Mohr and F Contini, "Reassembling the Legal: The Wonders of Modern Science in Court-related Proceedings" (2011) 20 *Griffith Law Review* 994.

¹³ Bellone, n 4, 25. As to innovations in courtroom design, see ME Heintz, "The Digital Divide and Courtroom Technology: Can David Keep Up With Goliath?" (2002) 54(3) *Federal Communications Law Journal* 567.

towards “virtualisation” has led to the closing of courts and the creation of centralised justice “hubs”.¹⁴ In Australia uptake of such technology has been slower, although it is now gaining momentum.¹⁵ The roll-out of the National Broadband Network has led to increased interest in the use of video link technology across numerous fields.¹⁶ The benefits for those living in regional and remote areas – in the form of improved access to information, advice and assistance – are particularly important in an Australian context.¹⁷

The most common justification for the use of video links in courtrooms is, of course, the significant cost savings that come from “decluttering” the courts and reducing the number of prisoners that need to be transported from places of detention to the courts.¹⁸ Cost savings and efficiency dividends are also the most common measures of success of courtroom innovations.¹⁹ Having said this, there are significant costs associated with initial set-up, and the use of such technology attracts ongoing costs due to the need for technical support personnel to be present at both ends as well as a support person at the prison or client end.²⁰

Despite their ubiquity, there have been few evaluations of the use of video links in court proceedings, and there is a surprising lack of empirical research on point.²¹ Having said this, the evaluations that have been conducted have made similar findings to one another, regardless of any jurisdictional differences.

Most evaluations have accepted the inevitability of the trend towards “virtualisation” and have favoured the continued use of audio-visual links for court appearances.²² The evaluation of a video link pilot at the Manchester Crown Court in the UK concluded that “hearings can be conducted effectively” via this medium if “suitable safeguards are in place”.²³ For example, all parties, particularly clerks who operate the cameras, must receive adequate training;²⁴ the courtroom must be set-up appropriately so that the camera can always point at the person speaking; and judges must monitor defendants, ensuring they can see and hear the proceedings throughout.²⁵

¹⁴ Donoghue, n 6, 1001; K Gallagher, “Modernisation of Justice Through Technology and Innovation: A Speech on Modernising the Justice System” (Speech delivered for HM Courts and Tribunals Service, 20 July 2016); Thomson Reuters, n 1, 8; Tickle, n 2. Note that in the UK the use of video link in courts is only one aspect of the digitisation of their judicial system. Others include online plea functionality, the launch of eJudiciary (a cloud-based information system of judges and magistrates) and digital case management: see Gallagher, n 14; Rowden, Wallace and Goodman-Delahunty, n 7, 364; Ward, n 10.

¹⁵ Forell, Laufer and Digiusto, n 8, 1, 6, 7–8; C McKay, “Video Links from Prison: Court ‘Appearance’ Within Carceral Space” (2015) *Law, Culture and the Humanities* 1, 3.

¹⁶ Rowden, Wallace and Goodman-Delahunty, n 7, 364; Bellone, n 4, 26.

¹⁷ Forell, Laufer and Digiusto, n 8, 1, 6, 7–8.

¹⁸ J Hatzistergos, “The Virtues of Audiovisual Links in the Courtroom” (2008) 46 *Law Society Journal* 57, 59; Bellone, n 4, 26; Treadway Johnson and Wiggins, n 12, 212; H Brooke, “The Legal and Policy Implications of Courtroom Technology: The Emerging English Experience” (2004) 12 *William and Mary Bill of Rights Journal* 699, 711; McKay, n 15, 3; S Kluss, “Virtual Justice: The Problems With Audiovisual Appearances in Criminal Courts” (2008) 46(4) *Law Society Journal: The Official Journal of the Law Society of New South Wales* 48, 51; Forell, Laufer and Digiusto, n 8, 6; Plotnikoff and Woolfson, n 9, 38; Mulcahy, n 12, 470–471. See also *Black v Pastouna* [2005] EWCA Civ 1389, [14] (Brooke LJ). Note, however, Kluss’ concern that prisoners are still travelling for their appearance, just to a “hub” rather than the court (at 3). Also, it was noted in the Manchester Crown Court pilot that savings are only achieved if the reduction in transfers is significant enough to cancel whole buses: “Buses come from the prison to the court each day in any case” (Plotnikoff and Woolfson, n 9, 38).

¹⁹ Donoghue, n 6, 999, 1003; Ward, n 10, 344.

²⁰ Forell, Laufer and Digiusto, n 8, 6.

²¹ This was the conclusion of Forell, Laufer and Digiusto after they conducted a systematic review of the literature in 2011: see Forell, Laufer and Digiusto, n 8, 5. As to the US, see Treadway Johnson and Wiggins, n 12, 212. As to the UK, see Ward, n 10, 354.

²² Plotnikoff and Woolfson, n 9, 48; Forell, Laufer and Digiusto, n 8, 9; Rowden, Wallace and Goodman-Delahunty, n 7, 373–374; Treadway Johnson and Wiggins, n 12, 219.

²³ Plotnikoff and Woolfson, n 9, 3.

²⁴ Inadequate training of court staff to use the technology is a common complaint in evaluations and reviews: see Bellone, n 4, 37; Rowden, Wallace and Goodman-Delahunty, n 7, 13; Plotnikoff and Woolfson, n 9, 47.

²⁵ Plotnikoff and Woolfson, n 9, 3, 6.

Having said this, concerns are often raised regarding the sound and picture quality, and the reliability of the technology. Respondents in evaluations commonly report frequent dropping out of both the picture and sound.²⁶ Interference is also a problem. McKay interviewed 31 prisoners in New South Wales correctional centres who had appeared in court at least once by video link from the prison.²⁷ She found that, due to inadequate sound-proofing, some of the noise from the prison was audible at the court end, which made some prisoners anxious about the way they were perceived by the judge.²⁸ Donoghue argues that poor quality video or audio may impact negatively on judges' assessments of defendants' demeanour.²⁹ Certainly, if technical problems are persistent, the benefits of video links are lost;³⁰ however, in a pilot undertaken at the Manchester Crown Court in England, the technical problems reported were considered easily fixed, and were said to diminish over time as the technology improved and its users' skills increased.³¹ Notably, in this study defendants reported fewer concerns with sound and picture quality than judges and advocates.³²

There are important advantages for defendants appearing by video link – indeed most of the evaluations that have been conducted have reported high levels of satisfaction with video link appearances amongst defendants.³³ Prisoners report that they would rather avoid the trip to the courthouse, particularly the early mornings and the strip searches.³⁴ In her New South Wales research, McKay found that, although some prisoners found it harder to comprehend what was going on in the courtroom and one reported feeling “isolated”, most prisoners felt more comfortable appearing by video link because it was less intimidating and easier to focus on what was being said.³⁵ Bellone, writing about the use of videoconferencing in US courtrooms, suggests that a video link appearance may actually be more dignified for accused persons, as they do not have to enter court with a corrections officer, possibly in handcuffs.³⁶ The Manchester evaluation made similar findings: while some defendants reported feeling “excluded” and “the least most important person there”, the vast majority reported that they understood the proceedings and preferred appearing via video link to appearing in person.³⁷

Of course, defendants' preference for video link appearances over physical appearances does not necessarily mean this is in their best interests, and defence lawyers have been amongst the most vocal critics of video link appearances.³⁸ In the US, many commentators have argued that appearance by

²⁶ Forell, Laufer and Digiusto, n 8, 7; Plotnikoff and Woolfson, n 9, 4, 16–17; McKay, n 15, 19; Rowden, Wallace and Goodman-Delahunty, n 7, 275.

²⁷ McKay, n 15.

²⁸ McKay, n 15, 19. Bellone notes that any amount of background noise or interference reduces a person's capacity to process information and a breakdown of communication can result: Bellone, n 4, 34–35.

²⁹ Donoghue, n 6, 1007, 1009–1010.

³⁰ Forell, Laufer and Digiusto, n 8, 7; Bellone, n 4, 30. Donoghue reports that although proceedings may be stayed in cases where there has been a complete failure of the technology, cases frequently proceed where the link is only considered to be of “poor quality”: Donoghue, n 6, 1006.

³¹ Plotnikoff and Woolfson, n 9, 4, 16–17. Bellone agrees: Bellone, n 4, 46.

³² Plotnikoff and Woolfson, n 9, 17–18. The researchers' own impressions were that the sound quality was “adequate but not perfect” (at 18).

³³ McKay reports that “all” of her prisoner respondents said they would rather appear by video link than in person: McKay, n 15, 3. See also Hatzistergos, n 18, citing the Parramatta youth bail pilot evaluation (this evaluation report has not been made publicly available).

³⁴ Plotnikoff and Woolfson, n 9, 6; Kluss, n 18, 51; Hatzistergos, n 18, 57; McKay, n 15, 3; Rowden, Wallace and Goodman-Delahunty, n 7, 374; Brooke, n 18, 711.

³⁵ McKay, n 15, 9–10, 12.

³⁶ Bellone, n 4, 26. See also Mulcahy, n 12, 466, where she notes participation in a trial can be “degrading and inhibiting” and even traumatic.

³⁷ Plotnikoff and Woolfson, n 9, 29–30, 34.

³⁸ Donoghue, n 6, 1005; Plotnikoff and Woolfson, n 9, 34–35; Forell, Laufer and Digiusto, n 8, 9; Rowden, Wallace and Goodman-Delahunty, n 7, 365; Treadway Johnson and Wiggins, n 12, 219.

video link represents a breach of accused persons' fundamental rights to due process, representation by counsel and confrontation of witnesses.³⁹ In the common law context, Mulcahy has noted that the importance of fixed trials dates back to the Magna Carta,⁴⁰ and concerns have consistently been raised by advocates and prosecutors in Australia and the UK that procedural fairness, participation and access to justice are compromised by the use of video link appearances in court.⁴¹

Overwhelmingly, legal commentators have reported video links to be "impersonal" and not suitable for establishing rapport.⁴² They say that video links "alienate the accused prisoner from the court and inhibit the relationships between legal practitioner and client".⁴³ Lawyer respondents in the Manchester evaluation also believed that the use of video links "hampered" discussions with defendants regarding the plea,⁴⁴ and compromised their right to be present at proceedings concerning them.⁴⁵ Donoghue raises concerns that the use of video links may increase the number of guilty pleas, and that defendants may make admissions they would not have made had their lawyer been present with them.⁴⁶ Notably, some of McKay's New South Wales respondents felt that they were not "represented right" when appearing by video link because they were not able to communicate effectively with their lawyer.⁴⁷

Further, in the Manchester evaluation, advocates, prosecutors and judges were concerned that defendants could not hear what was being said, and could not follow what was happening in the courtroom during video linked proceedings.⁴⁸ This concern is particularly important considering the vulnerability of most accused persons.⁴⁹ Indeed, Ward notes that assessing capacity, and a client's medical or therapeutic needs, is more difficult over video link.⁵⁰ Concerns have also been raised that some clients may become anxious and not present as well when appearing via video link. For example, Forell, Laufer and Digiusto claim that some clients may be "shy about the technology".⁵¹ Similarly, judges in the Manchester pilot reported that the technology can have a "freezing effect" on defendants,⁵² and Bellone in the US has said

³⁹ See generally P Raburn Remfry, "Due Process Concerns in Video Production of Defendants" (1994) 23 *Stetson Law Review* 805; E Fortuna Cimino, Z Makar and N Novak, "Charm City Televised and Dehumanised: How CCTV Bail Reviews Violate Due Process" (2014) 44(2) *University of Baltimore Law Forum* 57. Treadway Johnson and Wiggins, n 12; Bellone, n 4. Note, however, that the European Court of Human Rights has held that the right to confrontation does not require physical presence: see Mulcahy, n 12, 472.

⁴⁰ Mulcahy, n 12, 474. Mulcahy goes on to note that courts have historically been built in centralised places, and have been designed to physically invoke a sense of authority: "Court buildings need to be seen to be there and seen to be public, authoritative and important in society, whether an individual has reason to use them or not" (at 477-478).

⁴¹ Donoghue, n 6, 998, 1024; Plotnikoff and Woolfson, n 9, 34; Kluss, n 18, 50; Ward, n 10, 351.

⁴² Plotnikoff and Woolfson, n 9, 19, 21. See also Bellone, n 4, 28; Treadway Johnson and Wiggins, n 12, 216-217.

⁴³ Kluss, n 18, 50. See also Bellone, n 4, 29; AB Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant" (2004) 78 *Tulane Law Review* 1089, 1129.

⁴⁴ Plotnikoff and Woolfson, n 9, 19-20. Although, the Manchester evaluation pointed out that there was not much difference in the proportion of guilty pleas during the pilot (at 20).

⁴⁵ Plotnikoff and Woolfson, n 9, 36, 40. Bellone notes that in the US defendants have a constitutional right to be physically present at "important" proceedings including sentencing. The US Supreme Court has held that a defendant's physical presence is necessary both for the dignity of the defendant and the public's perception of justice: Bellone, n 4, 27, 42-43.

⁴⁶ Donoghue, n 6, 1016; Ward, n 10, 352, 353. Of course, the availability of online guilty pleas in addition to the use of video links increases this risk in the UK. As Cimino, Makar and Novak state, at the very least the courtroom is "extended" to "untrained personnel": Cimino, Makar and Novak, n 39, 84.

⁴⁷ McKay, n 15, 18. See also Bellone, n 4, 27.

⁴⁸ Plotnikoff and Woolfson, n 9, 28-30, 36-37.

⁴⁹ Donoghue, n 6, 1005. See also Rowden, Wallace and Goodman-Delahunty, n 7, 376.

⁵⁰ Ward, n 10, 354.

⁵¹ Forell, Laufer and Digiusto, n 8, 7. Similarly, Poulin suggests that defendants may feel that all eyes are staring at them and feel uncomfortable as a result: Poulin, n 43, 1138.

⁵² Plotnikoff and Woolfson, n 9, 20.

that some defendants act “like zombies” when they appear via video link.⁵³ Donoghue notes that face-to-face contact with their lawyer on the day of the appearance can reduce defendants’ anxiety, particularly where incarceration may result.⁵⁴

An important shortcoming of the use of audio-visual links for court appearances is that accused persons are not able to converse privately with their lawyers during proceedings.⁵⁵ As Cimino, Makar and Novak note, one role of a lawyer is to provide advice to their clients on how they can “present themselves favourably” to the court – without physical proximity, this is not possible.⁵⁶ In New South Wales, telephones have been installed on bar tables to allow for instant communication between lawyers and clients in order to address this concern.⁵⁷ In the Manchester pilot, defendants were able to raise their hand during proceedings to indicate a desire to consult with their lawyer.⁵⁸ Lawyers would then move out of the courtroom into a video link booth to converse privately with their client.⁵⁹ Yet, lawyers doubt the confidentiality of these communications, and studies have indicated that defendants rarely avail themselves of these options.⁶⁰

An alternative is for lawyers to appear via video link alongside their clients. In the US, it is not uncommon for lawyers to be located at the prison with their client rather than in the courtroom.⁶¹ Appearing remotely alongside their client allows for these questions, conversations and reminders to occur, as well as enabling the lawyers to provide emotional support.⁶² However, this is generally presented as an imperfect alternative – lawyers report that, if they do not attend court, they sacrifice a clearer sense of how the defendant’s case is being received by the magistrate or judge and any opportunity to speak informally with the prosecutor regarding the charges.⁶³

Another concern raised by lawyers is that their clients may not appreciate the seriousness of proceedings when they are conducted over video link because it feels informal and unrealistic.⁶⁴ The behavioural cues that exist in the courtroom – the way the judge and lawyers interact, their body language and the power dynamics between each player – may be lost when a defendant is only observing on a screen.⁶⁵ As McKay explains: “Focused vision, such as presented by a video link screen, makes us mere spectators, distanced, detached and isolated, and devoid of empathy.”⁶⁶ This has consequences both for

⁵³ Bellone, n 4, 37

⁵⁴ Donoghue, n 6, 1010. Poulin also notes the support offered by standing alongside of, and standing up with, a client: Poulin, n 43, 1130.

⁵⁵ Plotnikoff and Woolfson, n 9, 5; Bellone, n 4, 26; Poulin, n 43, 1126–1127; Cimino, Makar and Novak, n 39, 82.

⁵⁶ Cimino, Makar and Novak, n 39, 86.

⁵⁷ Kluss, n 18, 50. This is often the case in the US also, although Bellone and Poulin note that non-verbal cues are lost through this medium so it is not an adequate substitute: Bellone, n 4, 38–39; Poulin, n 43, 1129–1130.

⁵⁸ Plotnikoff and Woolfson, n 9, 12.

⁵⁹ Bellone notes that in some US courts, lawyers converse with their clients in the courtroom and all others are required to leave. He concludes this is “cumbersome and impractical”: Bellone, n 4, 39.

⁶⁰ Plotnikoff and Woolfson, n 9, 22; Kluss, n 18, 50; Treadway Johnson and Wiggins, n 12, 217; Poulin, n 43, 1129–1130, 1141; Cimino, Makar and Novak, n 39, 85. In the Manchester evaluation, only six of the 64 defendants spoke to their lawyer during the hearing: Plotnikoff and Woolfson, n 9, 20.

⁶¹ Poulin, n 43, 1130–1131. Bellone notes that in some jurisdictions this is mandated: Bellone, n 4, 36.

⁶² Rowden, Wallace and Goodman-Delahunty, n 7, 365.

⁶³ EC Wiggins, “What We Know and What We Need to Know About the Effects of Courtroom Technology” (2004) 12 *William and Mary Bill of Rights Journal* 731, 737; Rowden, Wallace and Goodman-Delahunty, n 7, 365; Poulin, n 43, 1131–1133. Poulin notes this can also consume defence resources which are often in short supply: Poulin, n 43, 1133.

⁶⁴ Rowden, Wallace and Goodman-Delahunty, n 7, 376–377. See also Plotnikoff and Woolfson, n 9, 29, 36–37; Bellone, n 4, 37. Mulcahy notes that traditionally “the laity have been marginalised in courtroom design”, and that “some actors have privileged and others are disempowered”: Mulcahy, n 12, 481.

⁶⁵ Rowden, Wallace and Goodman-Delahunty, n 7, 377; Bellone, n 4, 30; Treadway Johnson and Wiggins, n 12, 215; Cimino, Makar and Novak, n 39, 71.

⁶⁶ McKay, n 15, 15.

the defendant and the other court players. For the defendant, the experience may seem “surreal” and “alienating” because they are not “immersed in their own legal proceedings”.⁶⁷ The hearing may “lose its potency” for them as a result.⁶⁸ This can negatively impact on defendants’ behaviour and thus the impression they make to the court⁶⁹ – for example, it has been found that a lack of eye contact may make an accused person appear distrustful or less likeable.⁷⁰

More broadly, Kluss argues that appearance by video link may dehumanise the prisoner, and that this may be associated with harsher penalties.⁷¹ Cimino, Makar and Novak argue that this is because a judge may be less likely to consider a person’s life circumstances or the impact of incarceration upon them and their loved ones.⁷² McKay also raises the “presumptive guilt” that may arise from seeing a prisoner in a prison uniform; this she says, coupled with their “screen-based appearance”, constructs an “image of criminality and ‘otherness’” and each defendant may be “perceived as a generic, screen-based prisoner, indistinguishable from the last”.

Rowden, Wallace and Goodman-Delahunty describe how camera shots can be used to make a defendant feel less detached from their own proceedings.⁷³ In their evaluation, a respondent described how helpful it was when a judge panned around the courtroom at the start of proceedings, introducing each person present in the courtroom, and allowing the defendant to see who was in the gallery, including their family members.⁷⁴ Notably, the greatest loss reported by the defendants in the Manchester pilot was not being able to see family and friends at court or benefit from the support they could have provided.⁷⁵

Young People and Video Link for Court Appearances

Particular issues arise with respect to the use of audio-visual links in court appearances where the accused person is a child. It is often concluded that “virtual courts” are not appropriate for vulnerable defendants, including children and young people.⁷⁶ However, research in other fields has found that young people generally adapt well to the use of videoconferencing for the delivery of services that they cannot receive in person due to illness or distance, including counselling, medical and educational services.⁷⁷ For children with medical conditions and disabilities that render them housebound, video links to the classroom reduce social isolation and help them “feel normal”.⁷⁸ One study found that young

⁶⁷ McKay, n 15, 16. See also Mulcahy, n 12, 465.

⁶⁸ Mulcahy, n 12, 466. Indeed, Mulcahy and Poulin suggest this may make it easier for defendants to lie: Mulcahy, n 12, 484; Poulin, n 43, 1125.

⁶⁹ Rowden, Wallace and Goodman-Delahunty, n 7, 377. See also Plotnikoff and Woolfson, n 9, 29–30, 35–37; Bellone, n 4, 28; Poulin, n 43, 1134.

⁷⁰ Bellone, n 4, 31; Poulin, n 43, 1108, 1111, 1122; Cimino, Makar and Novak, n 39, 72.

⁷¹ Kluss, n 18, 51.

⁷² Cimino, Makar and Novak, n 39, 73.

⁷³ Rowden, Wallace and Goodman-Delahunty, n 7, 383.

⁷⁴ Rowden, Wallace and Goodman-Delahunty, n 7, 376.

⁷⁵ Plotnikoff and Woolfson, n 9, 34. One of McKay’s interviewees also raised this issue, noting that on their screen view of the courtroom they could not see their children: McKay, n 15, 11. See also Poulin, n 43, 1141.

⁷⁶ And also people with mental illness: see Rowden, Wallace and Goodman-Delahunty, n 7, 365; J Price and H Sapci, “Telecourt: The Use of Videoconferencing for Involuntary Commitment Hearings in Academic Health Centres” (2007) 58(1) *Psychiatric Services* 17.

⁷⁷ D Savin et al, “Telepsychiatry for Treating Rural American Indian Youth” (2006) 45(4) *Journal of the American Academy of Child and Adolescent Psychiatry* 484; K Awori, F Vetere and W Smith, “Sessions with Grandma: Fostering Indigenous Knowledge Through Video Mediated Communication” in *Proceedings of the First American Conference on Computer Interaction* (2016); R Beeman and C Henderson, “Video-Conferencing Technology Brings a Homebound Middle Grades Student to the Classroom” (2012) 43 *Middle School Journal* 26; P Riley, “Video-conferenced Music Teaching: Challenges and Progress” (2009) 11(3) *Music Education Research* 365; M Harris, K Freeman and D Duke, “Seeing is Believing: Using Skype to Improve Diabetes Outcomes in Youth” (2015) 38(8) *Diabetes Care* 1427.

⁷⁸ Beeman and Henderson, n 77, 26.

people managed their diabetes more effectively when they received therapy via video link, and that face-to-face therapy was no more effective.⁷⁹ Further, children who have been separated from a parent as a result of divorce, military deployment or child protection intervention often use Skype technology to maintain contact with their absent parent.⁸⁰

Indeed, children in detention sometimes utilise video link technology in similar ways. For example, videoconferencing facilities have been used effectively to deliver educational services to incarcerated young people, using a distance education model of learning.⁸¹ Consistent with this, McKay reports that amongst her respondents in New South Wales correctional centres the younger people (those aged 20–29) were more “familiar” and “confident” with video link technology.⁸²

However, research has also found that children and young people are less likely to feel comfortable using videoconferencing technology in situations where they are being asked to disclose personal information. For example, the delivery of mental health services via video link has been trialled in detention centres, with mixed success. In one study, the young people reported that they had confidence in the psychiatrists’ recommendations, and overall satisfaction with the service was high; however, they were concerned about their privacy.⁸³ This made it difficult for psychiatrists to obtain an accurate history and interfered with the building of trust and rapport.⁸⁴

Extensive research has been conducted on the use of audio-visual links for the delivery of children’s evidence, such as where a child has been the victim of or has witnessed a crime, or in family law proceedings.⁸⁵ The benefits of providing remote testimony are well documented: children report less stress and anxiety, cry less and are less likely to report fear than children who give evidence in person.⁸⁶

However, one study in the US found that child witnesses who testified via CCTV were considered less believable than those who testified in person, even when their testimony was, in fact, more accurate.⁸⁷ The authors in that study concluded that “the direct effect of testifying over CCTV was to lower children’s credibility in the eyes of the jurors”.⁸⁸ Another study found that children who testified over CCTV were viewed as less attractive, less intelligent and less truthful.⁸⁹ This has implications for child defendants as adverse findings may be made against them as a result.

⁷⁹ Harris, Freeman and Duke, n 77.

⁸⁰ KR Shefts, “Virtual Visitation: The Next Generation of Options for Parent-child Communication” (2002) 36(2) *Family Law Quarterly* 303; C Glenn and D Hallmark, “When You Can’t Be There in Person: Virtual Visitation Can Open a Door Into Your Child’s World” (2015) 38 *Family Advocate* 18; J LaMarca, “Virtually Possible – Using the Internet to Facilitate Custody and Parenting Beyond Relocation” (2012) 38 *Rutgers Computer and Technology Law Journal* 146; D Welsh, “Virtual Parents: How Virtual Visitation Legislation is Shaping the Future of Custody Law” (2008) 11 *Journal of Law and Family Studies* 215; E Bach-Van Horn, “Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?” (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 171.

⁸¹ C Gilham and B Moody, “Face to Face: Video Conferencing Creates Opportunities for Incarcerated Youth” (2001) 52 *Journal of Correctional Education* 29; Beeman and Henderson, n 77, 26.

⁸² McKay, n 15, 5.

⁸³ K Myers et al, “Telepsychiatry With Incarcerated Youth” (2006) 38(6) *Journal of Adolescent Health* 643, 646.

⁸⁴ Myers et al, n 83, 646.

⁸⁵ GS Goodman et al, “Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children’s Eyewitness Testimony” (1992) 22 *Law and Human Behaviour* 165; HK Orcutt et al, “Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials” (2001) 25 *Law and Human Behavior* 339; JC Wilson and G Davies, “An Evaluation of the Use of Videotaped Evidence for Juvenile Witnesses in Criminal Courts in England and Wales” (1999) 7 *European Journal on Criminal Policy and Research* 81; G Davies, “Protecting the Child Witness in the Courtroom” (1992) 1 *Child Abuse Review* 33.

⁸⁶ Scottish Government, “Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials” (1995) 4 *Crime and Criminal Justice Research Findings* 1; Goodman et al, n 85, 187.

⁸⁷ Goodman et al, n 85, 196.

⁸⁸ Goodman et al, n 85, 196.

⁸⁹ Goodman et al, n 85, 199.

It has also been found that jurors tend to overestimate a person's maturity when they are viewed over video link.⁹⁰ This also has important implications for child defendants, as their vulnerability may be underestimated.

LAW AND PRACTICE IN AUSTRALIA AND NEW ZEALAND

Audio-visual Link-ups in Australian and New Zealand Courts: Overview

Across Australia and New Zealand, there is no uniform approach to the use of audio-visual links in youth justice proceedings.⁹¹ In the Queensland youth justice system, an audio-visual link can be used for children as young as 11 years old in a variety of matters from mentions right through to sentencing.⁹² In some jurisdictions, there are few safeguards for children in place; however, in New South Wales and Victoria, clear guidelines are in place that govern when video links can be used in youth justice proceedings.

When accused persons appear in court via video link in Australia, they remain at the prison (or detention centre in the case of children and young people). In other jurisdictions, accused persons may appear via video link from other locations, including a police cell, a police station or some other location that has been fitted with cameras and screens that enable them to see, and be seen, by those in the courtroom, such as a library.⁹³

Queensland

The *Audio Visual and Audio Links Amendment Act 1999* (Qld) introduced the use of audio-visual links in the Queensland youth justice system.⁹⁴ At that time, the *Juvenile Justice Act 1992* (Qld), as it then was, was amended to allow audio-visual links to be used in sentencing where both the prosecutor and the child agreed.⁹⁵ There was bipartisan support for this amendment: the relevant Minister told Parliament that “the benefits [were] obvious—enhanced court efficiency and cost effectiveness”⁹⁶ and the Opposition considered this to be “unobjectionable”.⁹⁷ In 2002 the provision was further amended to include a requirement that the child be legally represented.⁹⁸ At the same time, a provision was inserted into the *Juvenile Justice Act* allowing audio-visual links to be used in bail applications where the child agreed and had the opportunity to be legally represented.⁹⁹ This, it was said, would “ensure that children from regional and remote areas of Queensland [had] the same opportunities to apply for bail”.¹⁰⁰

These provisions have since been repealed and, today, the *Youth Justice Act 1992* (Qld) specifically allows for the use of audio-visual links for bail hearings and sentencing. For bail hearings, the child must agree to the use of the audio-visual link, and the court must be satisfied that the child has had an opportunity to obtain independent legal advice.¹⁰¹ For sentencing proceedings, the child must be legally represented, and the child and the prosecutor must agree to the use of the audio-visual link.¹⁰² The

⁹⁰ G Davies, “The Impact of Television on the Presentation and Reception of Children’s Testimony” (1999) 22 *International Journal of Law and Psychiatry* 241, 245.

⁹¹ Rowden, Wallace and Goodman-Delahunty, n 7, 371.

⁹² *Youth Justice Act 1992* (Qld) ss 53, 159.

⁹³ Mulcahy, n 12, 479.

⁹⁴ *Audio Visual and Audio Links Amendment Act 1999* (Qld) ss 7–8.

⁹⁵ *Youth Justice Act 1992* (Qld) s 118A.

⁹⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 13 April 1999, 960 (MJ Foley).

⁹⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1999, 5386 (Springborg).

⁹⁸ *Juvenile Justice Amendment Act 2002* (Qld) s 54.

⁹⁹ *Juvenile Justice Amendment Act 2002* (Qld) s 16; *Juvenile Justice Act 1992* (Qld) s 40B.

¹⁰⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 August 2002, 3156 (English).

¹⁰¹ *Youth Justice Act 1992* (Qld) s 53(1).

¹⁰² *Youth Justice Act 1992* (Qld) s 159(2).

Evidence Act 1977 (Qld) states that the “external location” is considered to be “part of the court location” for the purpose of proceedings.¹⁰³ If the technology fails, the court *may* “adjourn the proceedings or make another appropriate order”.¹⁰⁴ Notably, there are no Children’s Court Practice Directions in Queensland that apply to the use of audio-visual links in youth justice proceedings.

New South Wales

Audio-visual links were introduced in New South Wales to “increase court efficiency and effectiveness, reduce prisoner movements and reduce costs”.¹⁰⁵ Under s 5BA of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), an accused person must appear in person in “physical appearance proceedings” unless the court directs otherwise, or all parties consent to the matter being heard by audio-visual link.¹⁰⁶ “Physical appearance proceedings” include: any trial or hearing of charges (including an arraignment); any inquiry into a person’s fitness to be tried for an offence; and any proceedings related to bail on or before their first appearance.¹⁰⁷

The court may direct that proceedings occur via audio-visual link either on its own motion or on the application of any party.¹⁰⁸ The court can only make such a direction if it is satisfied that this is in the best interests of the administration of justice for the accused person.¹⁰⁹ In making this determination, the court must take into account relevant factors, including: risks related to the personal security of persons other than the accused person; risks related to escape; the behaviour of the accused person when appearing before a court in the past; the accused persons’ conduct in custody; the potential disruption that a physical appearance would cause to the accused person; safety and welfare considerations involved in transporting the accused person; and the efficient use of judicial and administrative resources.¹¹⁰ Further, the legislation states that facilities for private communication between the accused person and their legal representative “are to be made available” when an accused person appears via video link.¹¹¹

Importantly, some additional provisions apply in respect of children and young people. If the accused person is a child, the court must take into account any additional factors that are relevant in the circumstances.¹¹² Such “additional factors” include:¹¹³

- the nature of the proceedings;
- the child’s right to be heard and to participate;
- whether the child would be significantly advantaged or disadvantaged;
- availability of the magistrate to hear the matter by video link;
- the need for the lawyer to obtain initial or detailed instructions from the child;
- the need for the lawyer to discuss a brief of evidence with the child;
- the maturity of the child;
- the child’s need for the support of a parent, carer or other support person during proceedings;

¹⁰³ *Evidence Act 1977* (Qld) s 39U(1).

¹⁰⁴ *Evidence Act 1977* (Qld) s 39S.

¹⁰⁵ Forell, Laufer and Digiusto, n 8, 3; Hatzistergos, n 18, 57. Note that the New South Wales provisions were largely modelled on the Western Australian legislation: New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2007, 4798 (Barry Collier).

¹⁰⁶ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(1), (3).

¹⁰⁷ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 3(1).

¹⁰⁸ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(4).

¹⁰⁹ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(5).

¹¹⁰ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(6).

¹¹¹ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BC.

¹¹² *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(7). Note, however, that such “additional factors” are not listed, nor are any examples provided.

¹¹³ *Children’s Court Rule 2000* (NSW) r 32A.

- the wishes of the child;
- any special needs, including the impact of any intellectual or physical disability or mental illness the child may have; and
- whether the child requires the assistance of an interpreter and the availability of an interpreter.

Since 2008 the Parramatta Children’s Court has conducted bail applications via video link on weekends and public holidays;¹¹⁴ although this is “an exception to the general practice of dealing with children in person for their first court appearance”.¹¹⁵

Victoria

Legislation governing the use of audio-visual links in court appearances has recently been amended in Victoria. The *Justice Legislation (Evidence and Other Acts) Amendment Act 2016* (Vic) made video-enabled appearances for adults remanded in custody standard practice, except in instances where a physical presence in court is required.¹¹⁶ In 2016 the Victorian Government announced plans to invest \$14.7 million in installing videoconferencing technology in all 53 Victorian Magistrates’ Courts.¹¹⁷

In respect of children, s 42P of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) states that a court may direct a child accused of an offence, who is being held in custody, to appear by audio-visual link if it is satisfied that this is consistent with the interests of justice and reasonably practicable in the circumstances.¹¹⁸ When deciding whether or not to make such a direction, the court is required to consider the effect of the direction on the child’s ability to comprehend proceedings and communicate with, give instructions to and express wishes to their legal representative.¹¹⁹ Unless “exceptional circumstances exist”, the consent of all parties is required in order for an accused child to appear by audio-visual link.¹²⁰ The court may direct that an accused child appear by audio-visual link either on its own initiative or on the application of the child or the prosecution.¹²¹

Further, the *Guidelines for Video-Conferencing in Children’s Court* (Criminal Division) matters state that all mentions, committal mentions and special mentions “*should* be converted to video-link hearings” unless:¹²²

- 1) the young person has not had adequate opportunity to meet their lawyer “to establish rapport and trust”;
- 2) the young person requests to come to court;
- 3) the young person requires an interpreter;
- 4) the young person does not have the capacity to participate in proceedings via video link;
- 5) the proper venue of the Court or Youth Justice Centre cannot appropriately list the matter this way due to resource availability; or
- 6) otherwise directed by the presiding magistrate.

¹¹⁴ Children’s Court of New South Wales, *Timeline of Major Events* (undated) <<http://www.childrenscourt.justice.nsw.gov.au/Documents/History%20-%20Timeline%20of%20major%20events.pdf>>.

¹¹⁵ Private email correspondence to Claire Robertson, 30 May 2016: see E Page and C Robertson, “Appearing in Court via Audio Visual Link: Issues for Young People” (2016) 12 <<https://law.uq.edu.au/pro-bono/about/pro-bono-publications>>.

¹¹⁶ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42JA. See further P Cowan, “Victorian Video Tech Laws to Keep Prisoners Out of Court”, *IT News*, 12 April 2016 <<http://www.itnews.com.au/news/victorian-video-tech-laws-to-keep-prisoners-out-of-court-418076>>.

¹¹⁷ Cowan, n 116. The Magistrates Court of Victoria has issued guidelines for legal practitioners regarding the use of AVL: see <<https://www.magistratescourt.vic.gov.au/practice-directions-publications>>.

¹¹⁸ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 42O, 42P(1). See also Children’s Court of Victoria, *Practice Direction No 2 of 2016 – Children in Custody Attending Court*.

¹¹⁹ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42P(8).

¹²⁰ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42P(2).

¹²¹ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42P(5), (7).

¹²² Children’s Court of Victoria, *Guidelines for Video-Conferencing: Criminal Division – Video-Link Hearings* (20 April 2015) (emphasis added). The rationale for this was “to reduce the number of young persons in custody being transported to court”: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42P(5), (7).

New Zealand

Audio-visual links were formally introduced in Auckland in 2010.¹²³ Prior to 2010 audio-visual links between a courtroom and a detention centre were seldom used. The *New Zealand Bill of Rights Act 1990* (NZ) requires defendants “to be brought before the courts” or “to be present in court”.¹²⁴ However, this has not precluded the use of alternative ways of giving evidence; indeed it has been held that there is no presumption that evidence be given in the “ordinary way”.¹²⁵

The *Courts (Remote Participation) Act 2010* (NZ) was aimed at enabling greater “use of audio-visual links” in all New Zealand courts.¹²⁶ During the Bill’s Second Reading, the relevant Minister argued that appearance by video link did not represent “an erosion of [the accused person’s] fair trial rights”.¹²⁷ He said: “Physical presence alone does not ensure participation ... it merely provides an opportunity to participate.” Since then, the use of video link in court appearances has increased rapidly: in 2017 New Zealand’s Ministry of Justice reported that there had been a 50% increase in video link remand appearances over the past two years.¹²⁸

The Act creates a presumption in favour of the use of audio-visual links in certain criminal proceedings. The Act states that audio-visual links *must* be used for the appearance of an accused person in “criminal procedural matters”¹²⁹ if it is available and the person is in custody, unless the judicial officer determines that its use is “contrary to the interests of justice”.¹³⁰ Further, video link *may* be used for the appearance of an accused person in a sentencing matter if it is available and the person is in custody, unless the judicial officer determines that its use is “contrary to the interests of justice”.¹³¹ However, in “criminal substantive matters”¹³² audio-visual links must not be used unless a judicial officer decides to allow it, as long as certain criteria are taken into account.¹³³ Those criteria include:¹³⁴

- the nature of the proceedings;
- the availability and quality of the technology to be used;
- the potential impact of the use of the technology on the rights of other parties, including the ability to assess the credibility of witnesses;
- the potential impact of the use of the technology on the rights of the defendant to a fair trial, and their rights associated with the hearing, in particular the ability of the accused person to comprehend the proceedings, participate effectively in the conduct of their defence, consult and instruct counsel privately, assess relevant evidence and examine witnesses; and
- any adverse impression that may arise by appearing by means of audio-visual links and whether that adverse impression may be mitigated.

For criminal trials, audio-visual links can only be used if the accused person consents to its use.¹³⁵

¹²³ District Courts of New Zealand, *Annual Report* (2013) <<https://www.courtsofnz.govt.nz/district/district/annual-reports-of-the-district-court-judiciary/district-court-judiciary-annual-report-2013-3.pdf>>.

¹²⁴ *New Zealand Bill of Rights Act 1990* (NZ) s 25.

¹²⁵ *R v Shone* [2008] NZCA 313, [28]. See further Y Tinsley and E McDonald, “Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals” (2011) 42 *Victoria University of Wellington Law Review* 705, 719–720.

¹²⁶ *Courts (Remote Participation) Act 2010* (NZ) s 3 (“court” means “a New Zealand court” and “District Court” includes “the Youth Court”).

¹²⁷ New Zealand Parliament, *Hansard: Courts (Remote Participation) Bill 2010: Second Reading*, 29 June 2010, Vol 664, 12266.

¹²⁸ Ministry of Justice New Zealand, “Increasing Use of AVL in Courts” (Media release, 2 August 2017).

¹²⁹ “Criminal procedural matters” are matters where no evidence is to be called: *Courts (Remote Participation) Act 2010* (NZ) s 3.

¹³⁰ *Courts (Remote Participation) Act 2010* (NZ) s 8(1).

¹³¹ *Courts (Remote Participation) Act 2010* (NZ) s 8(2).

¹³² “Criminal substantive matters” are matters where evidence is to be called: *Courts (Remote Participation) Act 2010* (NZ) s 3.

¹³³ *Courts (Remote Participation) Act 2010* (NZ) s 9(1).

¹³⁴ *Courts (Remote Participation) Act 2010* (NZ) ss 5, 6.

¹³⁵ *Courts (Remote Participation) Act 2010* (NZ) s 9(2).

Importantly, the *Children, Young Persons, and Their Families Act 1989* (NZ) includes a number of statutory rights of young people that apply during court proceedings. Section 11 imposes a duty on the court and the young person's legal representative to encourage and assist participation in proceedings. Section 10 further imposes a duty on the court and the young person's legal representative to explain proceedings "in a manner and in a language that can be understood by the child or young person".¹³⁶

METHODOLOGY

In order to explore the use of audio-visual links in youth justice proceedings in Brisbane, this study included a focus group with Brisbane-based lawyers who work with children and young people who are charged with offences. Organisations that deliver legal services to criminalised young people were invited to send one or more representatives to attend the focus group. Eight lawyers from four organisations attended. The focus group ran for 80 minutes; it was audio-recorded and transcribed. The transcript was then coded to identify themes using Miles and Huberman's methods.¹³⁷

A focus group was an appropriate methodology for this research because the goal was to gain a better understanding of the use of audio-visual links in youth justice proceedings. By moderating a discussion with lawyers who work with criminalised children and young people, and who have represented children and young people appearing by video link, insight could be gained into the benefits and problems associated with audio-visual links in a youth justice context, and what improvements could be made.

It is important to concede the limitations of this approach. The findings reported on here are based on the accounts of a very small number of lawyers working in Brisbane.¹³⁸ However, this initial study provides valuable information that may inform legal practice in Queensland, and future research more generally.

RESULTS

Audio-visual Links and Young Persons' Rights

Technical difficulties was one of the key concerns raised by participants. They stated that clarification is not always sought from the young person at the start of proceedings to ensure that they can hear what is being said. They also stated that, at some courts, the technology was very unreliable. Indeed, one participant said:

There have been some whole proceedings that have occurred where the caseworker says, 'we didn't hear any of that.'

Yet, even when the technology does work, the lawyers all agreed that the use of audio-visual links in youth justice matters results in breaches of their young clients' fundamental rights, including their rights to silence, the presumption of innocence, access to justice and their right to participate in proceedings concerning them.

Confidentiality and the Right to Silence

The lawyers noted that when young people appear via audio-visual link they usually have a youth justice worker sitting in the room with them. They felt that this breached their client's confidentiality. Further, some of the lawyers were concerned about the kinds of conversations that might occur between the young person and the youth justice worker. They were concerned that young people could make admissions or disclosures if their lawyer was not physically present to remind them of their right to silence. One of the lawyers said:

You can tell that there's already been a conversation had about the offences before the court ... I know if that child was in court with me then she would not have been saying a word ... you've got another influence who isn't a lawyer and shouldn't even be part of that court process.

¹³⁶ *Children, Young Persons, and Their Families Act 1989* (NZ) s 10(1)(a).

¹³⁷ MB Miles and AM Huberman, "Qualitative Data Analysis" (1994) 55–58, 252–253.

¹³⁸ R Dingwall, "Accounts, Interviews and Observations" in G Miller and R Dingwall (eds), *Context and Method in Qualitative Research* (SAGE, 1997) 52, 54.

Some participants were emphatically of the view that no one else should be present in the room with the child, to ensure confidentiality and avoid the possibility of the child making disclosures without receiving contemporaneous legal advice. Others felt that a caseworker should be present in the room to “ensure the safety of the child”, to ensure the technology was working, where the child is “really scared”, or to provide support and explanations where necessary. Participants summed up the tension by saying:

So, you’ve got this breach of confidentiality where the caseworker is there. But in many ways you need the caseworker there because of the technology and the lack of face-to-face. The caseworker can actually help explain what’s occurred to the child and, without them being there, they would be actually in a far worse position than what we are.

There’s a risk to their confidentiality versus do they even know what just happened?

The issue of confidentiality was raised again in relation to communications between clients and lawyers in the courtroom during the video link. As two lawyers noted, even if the courtroom is empty, the clerk of the court often remains in the room and may be present while instructions are taken. Others added that there was very little time to take instructions in these situations. One participant said, “the magistrate isn’t going to wait until you finish instructions”.

One participant noted that this could be addressed by allowing lawyers to take instructions from clients via audio-visual link-up in a separate room. Participants said this option was available to them in some Queensland courts. However, some participants doubted the confidentiality of these communications, believing that automatic recording mechanisms operated in these rooms: “[Y]ou just can’t be sure that’s a private conversation.”

Understanding the Proceedings

All of the participants agreed that young people often struggle to follow and understand the proceedings when they are conducted by video link. Further, the lawyers felt that they were better able to assess whether or not a young person was understanding what was going on when they were physically present with them. Comments along these lines included:

You can’t tell on a video if a young person is taking it in. Face-to-face I think you can see it in their eyes, you can see the way they hold their body, you can see their movements, if they’re moving around a lot, maybe there’s something else going on that you haven’t picked up on. But you’re not going to pick up on all that stuff on video.

The real difficulties with video link is [sic] that there’s very little ability to reassure yourself that they understand ... There’s more chance that a child will know – having face-to-face being in court and face-to-face with a lawyer – what’s happening than they would on video link.

They also felt that they were not able to make use of all of the strategies they have developed to ensure young people understand the proceedings. The participants explained:

I would draw diagrams when I talk to young people about the process ... if their literacy levels are low, they’ll relate to the diagram.

You’ve just got to keep explaining no matter what it is, over and over again, because it’s a difficult place for children to understand.

Some of the lawyers raised the particular cognitive challenges faced by many accused young people. One participant said:

A lot of our kids have cognitive problems [such as] FASD. They are actually very visual so if you can connect with them visually and they see it, they see you, they hear you personally, not just on the screen thing ...

Providing Advice and Taking Instructions

The lawyers said that the video link prevented them from providing a running commentary on what was happening and providing advice to their young clients during proceedings. Participants discussed this issue in the following exchange:

Participant 1: There might be something you want to say, ‘that’s right, is it?’ or something, very quick things ...

Participant 2: Get your head off the desk.

Participant 3: Uncross your arms. Which is much easier to do when the young person's sitting beside you because some magistrates don't like that defensive ...

Participant 4: You're right, because sometimes you say, 'they're cold, Your Honour, that's why their arms are crossed'.

Participant 1: That's right, but I didn't know that because they're on the video link. You can't give them those friendly reminders on the basic behavioural issues as well, of how you present in that way.

The issue was raised again later on:

If the kid starts, you know, leg's going ... I say, ok, so when you do that in the courtroom, I'm just going to put my hand on your knee ... I'll just slightly put my hand over and stop the leg – because they want to run out.

The lawyers were also concerned that, when children appear by video link, they are not able to assess the frame of mind that the child is in before the proceedings, which means they are not able to suggest that the young person not appear that day, perhaps because something has happened to upset them or they are in a “drugged state”.

Further to this, the lawyers agreed that it was “incredibly poor practice” and often “a waste of time” to take instructions from young clients via video link. In particular, they said it was difficult to “establish rapport”, “build trust” or “figure out how much they actually understand” without communicating in person. Indeed, one participant said it was potentially humiliating for lawyers to take instructions via video link because they could not obtain sufficient information this way. One of the participants explained:

The first 15 or 20 minutes with a child, the first time you see a child, is always taken up with that explanation – what your role is, what the court does ... The video link system completely prevents you from being able to do that ... You need time in order to go through all the material with a child ... you can't assume they know the system ... the video link compromises all of that natural ability that a lawyer has with their skills to assess a child's capacity and understanding of what's happened.

Another remarked:

Every adult in this child's life has let them down, and you're just another adult who's going to let them down. So that's why it's important to have that face-to-face contact, to show that you're a real person.

One of the lawyers specifically remarked that the use of audio-visual link-ups for court appearances was only appropriate if the client had met with their lawyer beforehand. However, for duty lawyers this is not always possible, as often the lawyer will meet the client on the day, and therefore have no choice but to take instructions via video link if the child does not come to court. The participants conceded that not all lawyers can be relied upon to make the effort to have personal contact with their young clients. One of the lawyers said:

I've known one child who's actually put in a complaint to my office and said they just know their lawyer as a person on a video. They've never actually met them face-to-face. They've proceeded all the way through to sentence without them actually ever meeting the lawyer. And that is an absolute – leave out a word – disgrace.

Having said this, the lawyers agreed that accessing clients for legal visit was often difficult. They made comments including:

I try my hardest to get out to the detention centre. The only reason I can't get out is because there's no visits.

They've reduced their staff access, staffing numbers at the detention centre. In addition to that, they've given access to internal staff to use the visits area to do their consultation. So that means there are fewer rooms available, which makes it harder for the rest of us to get in.

The lawyers seemed to suggest that, where clients could not be seen in person, the telephone was perhaps as useful a communication medium as the video link:

If you've already got a relationship with the child then I would do phone.

I take instructions over the phone from the detention centre if I couldn't get out there because if the young person's been refused bail and maybe a program's been prepared or something's occurring then often you'll only get that on a phone conversation and not a video at court.

Psycho-social Impacts of Video Links

Another disadvantage for children of appearing by video link is the loss of an opportunity to see their parents, and to have their parents participate in proceedings. One lawyer said that they tell their clients that court is not a "day out for socialising"; however, the group acknowledged that the support young people receive from friends and family at court can be important and valuable to them.

The lawyers also expressed concern that young people "shouldn't get used to just appearing on video link" because this could have the effect of minimising the importance of the proceedings to them.

Indigenous Children

Some particular concerns were raised with respect to Indigenous young people. For example, concerns regarding the young person's capacity to follow the proceedings were particularly acute in respect of Aboriginal and Torres Strait Islander children from regional and remote areas. One participant explained:

You've got Indigenous kids, often with Foetal Alcohol Syndrome, who don't even know what the technology is. They don't even understand the technology. Kids that have been dissociated from school since primary school. Then say, here you go, here's video link. Here's a white lawyer who you've never met. There's a white magistrate you've never met. There's a police officer, you know what they look like. Here's a youth justice court coordinator you've never met and they're just talking about you. The feedback from the detention centre staff is that most kids do not understand what is taking place on video link.

Participants also raised the issue of "gratuitous concurrence", which occurs with many Indigenous children. Participants made the following comments:

Especially with people in authority, they will say yes when they really don't know.

The first thing the magistrate will say to a child, whether they're Indigenous or not, is 'so you understand why you're here today?' 'Yes.' 'You understand, you've met so and so, haven't you?' 'Yes.' So it's all those leading questions [that] are asked of the child, and they go, 'Oh yeah, well they understand, let's get on with it.'

Benefits of Video Link Appearances in Youth Justice Matters

Benefits for Young People

The lawyers did recognise the benefits for young people in having their matter dealt with via audio-visual link. For example, they acknowledged that appearing by audio-visual link meant that the young person did not have to be woken up early or take the long journey to court, and they did not have to lose a day of school waiting around at the courthouse. It also meant they avoided being strip searched – this was raised as a serious consideration by a number of focus group participants.

Further, appearing via audio-visual link meant they were not exposed to the "appalling" conditions in the watchhouse. One lawyer said of the watchhouse:

Kids often don't want to go there. They want the video. I've had a 12 year old who refused, just said, 'I'm not going' he said, 'I'm just not going up to the watchhouse again' ... We don't have a separate holding place for children as we do for adults so they're held together.

Many of the participants described the watchhouse conditions as "terrible", "disgusting", "scary" and "not appropriate for children" because of the "appalling behaviour that goes on down there" and because "they're with prison officers there, not staff from the detention centre".

On this basis, two participants said that a client's choice not to appear in person should be respected. However, two other participants said that, instead, the "awful" conditions of these facilities should be addressed, and that there should be focus on "sorting out the abusive system". Indeed, one participant remarked, "best practice in terms of children's court procedures has been abandoned in Queensland".

Convenience and Cost Savings Associated with Audio-visual Links

Participants seemed to agree that the main imperative for the use of audio-visual link-ups for court appearances in youth justice matters was the “court’s convenience”. One participant summarised the views of the group, saying:

It’s become this expedient tool for the magistrates and for the coppers and the DPP. It’s not about justice for the defendants.

The lawyers were quick to point out that it was also more convenient, and less costly, for them if their clients appeared in court via audio-visual link. Lawyers’ time is saved because “they don’t have to hang around so much for the kids to come in”. As one participant said:

If you work in the private sector doing Legal Aid kind of tender work, you don’t want to be hanging around – you can’t claim for that.

Some of the lawyers indicated that they objected less to the use of audio-visual links in youth justice matters for administrative mentions, adjournments or a “really, really minor matter”.

However, there was a general sense amongst participants that, when balancing the interests of the child against the convenience of the court, the court was always prioritised. One participant said:

The only factor that seems to be of any concern to the courts in Queensland is whether it’s convenient for the presiding magistrate, and requests to bring children in to avoid video links are usually denied in our experience ... It’s like, ‘sorry, no, it will be a video link because the magistrate might have a meeting or whatever ...’

Another participant said that in their experience the courts had been “quite reasonable” in situations where they had requested a personal appearance, except where this was for the purpose of taking instructions. They said:

Bring in some cognitive impairment type issues and they’re quite reasonable [rather] than if you just say, ‘I wonder if the child could be produced because we need to take instructions’ and that gets knocked back. It’s like, ‘you can go to the detention centre.’

In an attempt to explain these different experiences, participants noted that there were no Practice Directions in place in Queensland and “no consistency” of approach, “so what happens in Mareeba is going to be very different to what happens in Brisbane”.

Participants’ Recommendations

As noted above, the lawyers agreed that video link should only be used for mentions. They also agreed that a Practice Direction should be issued by the Children’s Court to provide procedural guidance and facilitate consistency between the various individual courts. The participants said some clarity was required regarding the circumstances in which a child could or should be produced instead of appearing over video link – they said that some magistrates routinely refused lawyers’ applications for a child to be produced. There was also agreement amongst the participants that video link appearances “shouldn’t be the default position”.

In instances where video link is used in youth justice proceedings, participants agreed that lawyers should have an opportunity to have private conversations with the client during proceedings. Some said that one way you could “make the most of a bad situation” would be to have access to a private phone link during proceedings, as is the case in New South Wales. Others felt this would only be of “limited value”.

Regardless of whether they agreed that a support person should be in the room with the young person or not, participants said that youth workers should not be permitted to “start giving instructions to the child on what to say”, and that children should be reminded not to make disclosures to youth workers because they do not have a duty of confidentiality.

They also agreed that a discussion between the lawyer and the child should occur immediately after the proceedings, at least by phone. They emphasised that this currently does not occur because:

It's really difficult at the detention centre because it's hard to get visits and it's hard to get them on the phone sometimes ... If there was something immediately after court I suppose it might be a bit better.

DISCUSSION

The trend towards paperless, and perhaps even people-less, courts seems impossible to resist.¹³⁹ Yet, the results of this research are consistent with previous studies and evaluations: lawyers, particularly defence lawyers, are sceptical about the use of audio-visual links for court appearances, except for minor mentions.

It could be concluded that lawyers have a “pathological aversion, hardwired into the legal mind, to the inevitability of ongoing advancement in technology”.¹⁴⁰ Certainly the balance of the literature suggests some hostility on the part of lawyers towards some aspects of “virtualisation”. However, it could also be that the pace of technological change “has not been accompanied by sufficient scrutiny of technology’s impact upon court user participation or case outcomes or indeed any rigorous analysis of the normative or social consequences”.¹⁴¹ It is important to “take lawyers along” when changes are made, rather than imposing them without collaboration or consultation.

In the youth justice space, the concerns raised by lawyers regarding the vulnerability of their clients, and the importance of ensuring their understanding of and participation in their own proceedings, are important ones. One must always be mindful of the statutory rights of children and young people when initiating “reforms” to youth justice proceedings. In Queensland, the *Youth Justice Act* contains a “Charter of Youth Justice Principles” (at Sch 1), which recognises the special vulnerability of criminalised children and young people, and requires that proceedings be conducted in a “fair, just and timely way” and that children “be given the opportunity to participate in and understand the proceeding”.¹⁴² The Charter further states that a child being dealt with under the Act “should have access to legal and other support services, including services concerned with advocacy and interpretation”. The lawyers who participated in this study suggested that appearing in court by audio-visual link often conflicted with the realisation of these goals – they felt that young people were less able to participate in and understand the proceedings, lacked access to legal and support services, and received less effective advocacy as a result.

What is interesting is that, regardless of this, participants said their young clients often preferred appearing in court via video link as opposed to appearing in person. This is consistent with the literature, which recognises that video link is “far less intimidating” than a physical appearance and is preferred by most defendants.¹⁴³ As has been noted, the literature indicates that lawyers are often concerned by this, because they fear their clients may not take the proceedings as seriously as they should. This was raised by some of the participants in this study. However, the effect may be different for children and young people. A meta-analysis has indicated that merely appearing before a criminal court is enough to increase a child’s chances of being charged with another offence in future.¹⁴⁴ Researchers have concluded that the evidence-base “suggests that less intervention is rather more effective in reducing offending” amongst young people.¹⁴⁵ Applying this research, it could be concluded that the use of audio-visual links may

¹³⁹ T Carter, “Is a Paperless, People-less Court in Our Future?”, *American Bar Association Journal*, 10 August 2013 <http://www.abajournal.com/news/article/is_a_paperless_people-less_court_in_our_near_future/>.

¹⁴⁰ Thomson and Reuters, n 1, 18.

¹⁴¹ Donoghue, n 6, 1024.

¹⁴² *Youth Justice Act 1992* (Qld) Sch 1, cl 7.

¹⁴³ Plotnikoff and Woolfson, n 9, 34. Indeed, Mulcahy notes that the court building and the courtroom itself contribute to a “ritualized stripping of dignity”, which can have a “paralysing effect” on defendants, so appearing from an alternative place would predictably seem more “attractive”: Mulcahy, n 12, 481.

¹⁴⁴ A Petrosino, C Turpin-Petrosino and S Guckenburg, “Formal System Processing of Juveniles: Effects on Delinquency” (2010) 1 *Campbell Systematic Reviews* 1, 36.

¹⁴⁵ L McAra and S McVie, “Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending” (2007) 4 *European Journal of Criminology* 315, 339.

actually be preferable to physical appearances for young people because “less may be more” amongst this cohort. Further research is required to test this.

Many scholars have recognised that the shortcomings lawyers identify with video link appearances may apply equally to in-person proceedings, and this was borne out in the present study. Lawyers said that the use of video link for court appearances reduces their chances of being able to adequately consult with, and take instructions from, their clients prior to the appearance. However, they also noted that consulting with young people in detention centres was generally difficult, and sometimes impossible, to organise and that this was why they relied heavily on the conversations that took place at court immediately before the appearance.¹⁴⁶ Hatzistergos emphasises that lawyers should not treat court appearances as “pseudo-legal visits”; rather, “it is expected that the legal profession make efforts to obtain instructions prior to court appearance, as has always been the case”.¹⁴⁷ Yet, this ignores the fact that alternative communication channels may not be available to lawyers prior to the hearing.¹⁴⁸

Lawyers in this study also said that they were concerned that their young clients had difficulty following or understanding the proceedings over video link. However, it may be that this is a problem regardless of the type of appearance – it may be that their young clients are just as likely to struggle to understand what is going on when they appear in person.¹⁴⁹ This could explain why, in the evaluations that have been conducted, clients tend not to report lower levels of understanding when appearing by video link.¹⁵⁰

Regardless, there are undoubtedly some problems that are specific to the use of audio-visual links in youth justice matters, particularly the loss of communication between the lawyer and the young person during the proceedings. Lawyers often maintain an ongoing dialogue with their young clients during proceedings to clarify certain points, to ensure their clients understand what is being said, and to ensure clients’ behaviour remains appropriate and (at least outwardly) composed. Any perception that a young person is behaving inappropriately during proceedings can result in adverse findings being made against them.¹⁵¹ By virtue of their immaturity and lack of life experience, and as a result of their negative experiences with authority figures and general lack of trust of adults, it is likely that young people will need more reminders regarding their demeanour and presentation than older defendants. Further, without having immediate physical access to a client, lawyers may not be able to assess their mental health status adequately. An unwell client’s mental health status may change quickly, and instructions may change as a result. Efforts have been made to address this important concern in some jurisdictions. As noted above, some courts have telephones installed so that lawyers and clients can remain in contact; others allow lawyers to step out, or the courtroom to be cleared, to allow for privileged conversations to take place. All of these solutions have drawbacks – there is no easy substitute for personal contact, and the reassurance and clarity that comes with it – but if lawyers and clients could maintain constant phone contact during proceedings, this would go some way towards addressing these concerns, provided the client could mute their audio feed to the court when conversing with their lawyer.

Certainly, the Queensland legislation is inadequate to deal with the myriad challenges that arise for young people and their lawyers when appearances are conducted by video link, and it should be noted that there are no specific guidelines on when and whether audio-visual links should be used in youth justice proceedings. Victoria’s *Guidelines for Video-conferencing* approach best practice, as they require a pre-existing relationship between the young person and their lawyer, an assessment of capacity and consideration of the wishes of the young person.¹⁵² The New South Wales legislation requires similar

¹⁴⁶ Forell, Laufer and Digiusto state that all communications between prisoners and lawyers are “compromised by the custodial environment”: Forell, Laufer and Digiusto, n 8, 7.

¹⁴⁷ Hatzistergos, n 18, 59.

¹⁴⁸ Also, as Bellone notes, lawyers who defend disadvantaged defendants often lack the resources and the time to fully interview clients before their first appearance: Bellone, n 4, 37. See also Cimino, Makar and Novak, n 39, 76.

¹⁴⁹ Plotnikoff and Woolfson, n 9, 43–45; Poulin, n 43, 1094.

¹⁵⁰ Plotnikoff and Woolfson, n 9, 21.

¹⁵¹ Poulin, n 43, 1130.

¹⁵² Children’s Court of Victoria, n 122.

factors to be considered, adding an important overall consideration – namely whether the child would be significantly advantaged or disadvantaged by the use of video link for their appearance. The Queensland Children’s Courts could consider issuing a Practice Direction along these lines. It is also extremely important that proceedings be adjourned where the technology fails, or where the quality of audio or video is insufficient to ensure that all parties are able to hear, follow and participate in proceedings. This aspect is so fundamental to a defendant’s right to a fair trial that it should be legislated.

CONCLUSION

In 2006 Treadway Johnson and Wiggins said this was a “ripe and largely untapped area for research”.¹⁵³ This article’s analysis tends to suggest that a number of research projects and evaluations have been conducted around the world on this subject, and that their findings are highly consistent with one another. In some jurisdictions, the recommendations have been taken on board by courts and legislators. In others, such as Queensland, they have not.

Attempting to balance a young person’s access to justice rights against their express wishes and their emotional wellbeing presents challenges. Of course, a young person will want to avoid strip searches, an early morning, an uncomfortable and undignified ride to the courthouse, hours in the cells and a degrading court appearance. Their wishes to this effect should be respected, and this study’s participants agreed with this. However, it is possible to conceive of a system where children were not required to endure all of this for the sake of a physical appearance in court. The conditions in watchhouses should not be so appalling that children cannot bear to spend time there, and strip searching of children should only occur where absolutely necessary, if indeed it ever is.¹⁵⁴

Poulin says, “the criminal justice system is the wrong place to experiment with videoconferencing” in light of the vulnerability of the defendants involved.¹⁵⁵ She says, “we should not sacrifice the quality of justice to achieve the efficiency that the use of videoconferencing seems to offer”.¹⁵⁶

Yet, the move towards increased use of audio-visual link-ups in courtrooms does appear to be inevitable. It is important that safeguards are put in place that address lawyers’ concerns, and that are protective of their young clients. This research would suggest that court appearances by video link should only be used in respect of young people where:

- a pre-existing relationship exists between the lawyer and their young client, and perhaps other parties, such as the prosecutor and their client’s family/friends;¹⁵⁷
- private communication channels exist between the lawyer and the young person during proceedings, and lawyer and client have access to one another during non-court hours whether this is in-person, over the phone or via videoconferencing;¹⁵⁸
- the camera angle and shots are sufficient to enable the young person to feel as though they are a participant in their own proceedings – eg the judge should be seen to enter and leave, and the young person should be provided with a view of (or at least an opportunity to view) the whole courtroom so they can be introduced to all parties and see who is in the gallery;¹⁵⁹ and
- the young person has a “self-view” so they can monitor their own demeanour.¹⁶⁰

¹⁵³ Treadway Johnson and Wiggins, n 12, 225.

¹⁵⁴ See generally JR Feierman and RS Shah, “Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention” (2007/08) 60 *Rutgers Law Review* 67.

¹⁵⁵ See also Cimino, Makar and Novak, n 39, 98, who are in agreement.

¹⁵⁶ Poulin, n 43, 1093. Ward, n 10, 344–345, also seems to be in agreement.

¹⁵⁷ Bellone, n 4, 36.

¹⁵⁸ Poulin, n 43, 1164–1165; Bellone, n 4, 36, 46.

¹⁵⁹ Mulcay, n 12, 479; Poulin, n 43, 1107, 1156.

¹⁶⁰ Poulin, n 43, 1137.

As Wiggins notes, “experiments” with technology in courtrooms are likely to continue, and the use of virtual reality in the courtroom may well be the next step.¹⁶¹ The important message sent by the existing research is that further developments should not occur without a robust evidence base behind them and enforceable guidelines that reflect a best practice approach.

¹⁶¹ Wiggins, n 63, 742.