

## Judicial Work and AV use: Perceptions from Australian Courts

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For further information, see: <http://www.flinders.edu.au/ehi/law/research-activities/judicial-research-project/>.

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**Abstract**

Use of technology significantly impacts the nature and volume of judicial work and consequently the expectations placed on judicial officers. While there are potential workload efficiencies in the use of audio-visual ('AV') links in Australian courts, the increasing dependence on technology may run counter to other important developments, notably procedural justice and therapeutic jurisprudence, which recognise and valorise the interactive nature of judicial work, especially sentencing in criminal cases. Analysing perceptions of AV technology use in courts creates a clearer picture of its benefits and disadvantages for judicial work, particularly in light of expectations of direct personal engagement in modern, technologically-augmented Australian courts.

**Key words**

Audio-visual links; courts; judicial work

**Resumen**

El uso de la tecnología tiene un impacto significativo en la naturaleza y el volumen del trabajo judicial y, en consecuencia, en las expectativas sobre los agentes judiciales. Si bien es cierto que el uso de enlaces audiovisuales ('AV') implica potenciales aumentos de eficiencia del trabajo en los juzgados de Australia, la dependencia cada vez mayor de la tecnología podría ser contraproducente para con otras mejoras importantes, sobre todo el derecho procesal y la jurisprudencia terapéutica, los cuales reconocen y valoran la naturaleza interactiva de la labor judicial, especialmente a la hora de dictar sentencia en causas penales. El análisis de las percepciones sobre el uso de la tecnología AV en los juzgados permite obtener una idea más clara de sus ventajas y desventajas para el trabajo judicial, especialmente a la luz de las expectativas sobre la implicación personal y directa en unos juzgados australianos modernos y dotados de tecnología.

**Palabras clave**

Enlaces audiovisuales; juzgados; labor judicial

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## 1. Introduction

Australian courts, as with other public institutions, exist in a climate of government fiscal austerity, with constant emphasis on the need to maximise the efficient use of resources (Opeskin 2013 pp. 498-499, Berman 2015 p. 1.). Information and communications technologies are often key components of strategies to promote organisational efficiency and reduce costs (see, for example, Australian Government Productivity Commission (AGPC) 2015 p 7.61; Court Services Victoria 2015, Courts Administration Authority (SA) 2015, Supreme Court of Western Australia 2015). However, courtroom technology may have unintended effects, especially for the quality of communication required for judicial work.

This article first examines the volume and nature of work in Australian courts, then describes the use of audio-visual ('AV') technology to improve the efficiency and accessibility of the courts. Next, is an analysis of AV use which draws on the perceptions and experiences as expressed in interviews of judicial officers, lawyers and court staff. The focus is on two aspects of the use of AV links: (1) providing judicial services, from one court to another court location; and (2) sentencing defendants located outside of the physical courtroom. This focus reflects the concerns of the interviewees, whose courts are dominated by criminal cases, especially non-trial proceedings such as applications for bail or adjournments, and sentencing, particularly in the lower courts. Conceptually, this article investigates implications of AV technology for the reciprocal communication between the judicial officer and others involved in the court process, especially the defendant in criminal cases. This is important in light of developments, notably procedural justice and therapeutic jurisprudence, which valorise the interactive nature of everyday judicial work.

The use of AV technology has implications for managing judicial workloads, perhaps leading to changes in the number of judicial officers required. It also has implications for the skills and qualities they need to perform their role.

The extensive original empirical data used in this article is drawn from two projects. First, investigations undertaken nationally over the past decade by the Magistrates Research Project and Judicial Research Project ('JRP') into several dimensions of judicial work. Second, research undertaken as part of a three-year empirical research project that investigated the use of AV links in Australian court proceedings ('the Gateways project'). For details about the research undertaken by the JRP and the Gateways project, and the research method for this paper, see Appendix.

## 2. Australian courts and judicial officers

In Australia's federal system of government, national courts operate in parallel with separate court systems for each state and territory. The federal courts consist of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court. Each Australian state and territory has at least two court levels —at the highest level, a supreme court, and, at the first level, a magistrates or local court. The larger jurisdictions also have an intermediate trial court, called the district or county court.

The first level magistrates courts account for nearly 97% of all matters finalised in Australian courts (AGPC 2016). Their workload is dominated by criminal cases (AGPC 2016). The number of finalisations per judicial officer in criminal cases increased by 10.3% from 2005 to 2015 (Opeskin 2017) and most of this increase took place in the magistrates courts.

This increase in matters coming to and being resolved in Australia's lower courts translates into judicial officers' experiences of increasing caseloads and insufficient numbers of judicial officers. Two thirds of respondents (67%) to a 2007 national

survey of Australian magistrates report that, since their appointment, their judicial functions have increased and three quarters agree that '[t]he volume of cases is unrelenting' (Mack *et al.* 2012, pp. 31-32). This perception may stem, in part, from the pace at which the large number of cases listed each day must be processed (Mack and Roach Anleu 2007).

Other demands on magistrates' time arise from court users' expectations regarding procedural justice and social engagement which can take up more time than impersonal case processing. In first level courts, where parties are often unrepresented by lawyers, the judicial officer must deal directly, and often quickly, with diverse members of the public and their varied personal, social, individual and material needs and expectations, as well as the legal issues they present (Roach Anleu and Mack 2017). Nearly six in ten magistrates report that their time is always or often taken up with unrepresented litigants, compared with less than one in ten judges in the intermediate and higher courts (Mack *et al.* 2012).

Unrepresented defendants may present a time demand or an opportunity for more direct engagement. Even where a defendant appears with legal representation, many proceedings, especially sentencing, entail direct communication between the magistrate and the defendant (Roach Anleu and Mack 2015, 2017).

### 3. AV links in courts

Technology is often viewed as a way of assuaging problems of volume, enabling courts to better manage their workloads. It may reduce costs and time demands generated by requiring face-to-face interactions with people physically present in the same court location. For example, use of AV links between prisons and court houses reduces costs of transporting prisoners and reduces court delays created by moving prisoners within the court house complex (Hatzistergos 2008). Efficiency gains may enable judicial officers to allocate more of their limited time on tasks which must be done face-to-face.

The last two decades have seen an increasing use of AV technology in Australian courts, to enable defendants, witnesses and (on occasions) judicial officers to participate in court proceedings 'remotely', that is, other than in the physical space of the courtroom or in the physical presence of other court participants (Wallace 2008, Rowden *et al.* 2013, Warren 2015). One magistrate reflects on the increase in AV links:

we are (...) very keen on facilitating, setting up processes whereby matters can be dealt with as efficiently as possible. (...). [T]here's far more video links for example these days, umm, and there's a push for that. We're looking at, we're constantly reviewing our circuits and how they can be, be done more efficiently (...). (I 30)<sup>1</sup>

There is potential tension between increased AV use and the emphasis on engagement and interaction between the judicial officer and the defendant in the criminal jurisdiction. The National Court Observation Study (conducted as part of the JRP) found that engagement is generally demonstrated by the judicial officer looking at defendants while sentencing them, and speaking directly to them, regardless of whether or not they are represented by lawyer (Roach Anleu and Mack 2015).

<sup>1</sup> The source of interview data collected by the Judicial Research Project is indicated by the code 'I ##' or 'W ##'. The letter indicates whether the source was a judicial officer interviewed as part of the Courts, the Judiciary and Social Change interviews in 2012-13 (I ##); or the Workload Allocation Study (W ##). The number refers to an individual interviewee.

Interview data collected by the Gateways project is indicated by the stating the interviewee's role and jurisdiction, e.g. "Judge, Victoria". Quotes are given verbatim, with any identifying details deleted. Any infelicities of language, for example *umms* and *ahs* have been removed from Gateways interviews to improve readability.

All interviews have been anonymised with names and places removed to avoid identification. For more information about the research projects see Appendix.

The increased use of AV technology in these courts raises two important questions. First, does it put at risk the capacity of judicial officers to effectively engage with defendants in the sentencing process, and second, how it might most appropriately be used to better manage the criminal caseload. To address these questions, the article first examines the legal basis of AV use in Australian courts and the extent of its use for overall case and workload management. Next the article considers two specific uses: in relation to regional or remote courts and when sentencing via AV link.

### 3.1. *The legislative framework and extent of use*

One aspect of the efficiency drive emphasises the interest on the part of government and correction agencies in reducing the costs, and security risks of transporting accused persons in custody to and from court buildings for routine court appearances, such as adjournments, remand hearings or bail applications (Diamond *et al.* 2010, Rowden 2011, Wallace 2011, Rowden *et al.* 2013, Supreme Court of Western Australia 2015). Legislation in all Australian jurisdictions now governs the appearance of an accused prisoner in court by AV link (either specifically, or as part of general legislation enabling the use of AV links for appearances by parties and witnesses).<sup>2</sup>

All jurisdictions encourage (either expressly, or by implication) the use of AV links for adjournments, mentions and continuing remand of and subsequent bail applications by defendants in custody.<sup>3</sup> However, legislation in most jurisdictions creates a presumption in favour of a physical appearance in more significant or substantive proceedings. So, all jurisdictions, bar two, specify that an accused person should usually be physically present in court for their first appearance and initial bail application.<sup>4</sup> Most jurisdictions provide expressly, or implicitly, that a person facing criminal charges should be physically present in court for an inquiry into their fitness to stand trial,<sup>5</sup> at committal<sup>6</sup> and trial.<sup>7</sup>

<sup>2</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) s 5BB; Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K; Supreme Court of Queensland Act 1991 (QLD) s 80; District Court of Queensland Act 1967 (QLD) s 110C; Justices Act 1886 (QLD) 178C; Criminal Procedure Act 2004 (WA) s 77; Justices Act 1959 (TAS) s 39, Evidence Act 1929 (SA) s 59IQ (4)-(8). The Northern Territory appears to rely on general powers in its enabling legislation to institute the use of AV links for appearances by defendant in custody for mention: Northern Territory Magistrates Courts, Practice Direction No 2 of 2012 — Videolink Mentions between Darwin Correctional Centre and Don Dale Detention Centre and Courts, 12 December 2012. Legislation in that jurisdiction enabling the taking of evidence by AV links would cover the situation of accused in custody participating in some more substantive proceedings: Evidence Act 1939 (NT) s 49E(1) which permits Northern Territory courts to take evidence or submissions from a defendant in custody via AV link. The Australian Capital Territory does not operate AV links between its courts and its correctional facility.

<sup>3</sup> Some achieve this by specifying the use of AV links in these types of proceedings: This is the approach in Queensland: Supreme Court of Queensland Act 1991 (QLD) s 80; District Court of Queensland Act 1967 (QLD) s 110C; Justices Act 1886 (QLD) s 178C, and Victoria: Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K. Others achieve the same result by establishing a general power enabling (or mandating) the use of AV links for defendants in custody, and exempting from its operation certain categories of proceedings: This is the approach in New South Wales: Evidence (Audio and Audio Visual Links) Act 1998 (NSW) ss 3, 5AB, 5BB; South Australia: Evidence Act 1929 (SA) s 59IQ (4)-(5); Western Australia: Criminal Procedure Act 2004 (WA) s 77; Tasmania: Justices Act 1959 (Tas) s 39A; Northern Territory: Northern Territory Magistrates Courts, Practice Direction No 2 of 2012 — Videolink Mentions between Darwin Correctional Centre and Don Dale Detention Centre and Courts, 12 December 2012, but note that the power to take evidence from defendants in custody in the Northern Territory is merely facilitative, there is no presumption either for or against its use: Evidence Act 1939 (NT) s 49E(1).

<sup>4</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) ss 3 5BA, Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K(3), Evidence Act 1929 (SA) s 59IQ (5)(a)(i), Criminal Procedure Act 2004 (WA) s 77(2), Northern Territory Magistrates Courts, Practice Direction No 2 of 2012 — Videolink Mentions between Darwin Correctional Centre and Don Dale Detention Centre and Courts, 12 December 2012 [1.1]. The exceptions are Queensland and Tasmania.

<sup>5</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) s 5BA; Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K(2)(b); Evidence Act 1929 (SA) s 59IQ (5)(b). In Queensland's Supreme and District Courts, an accused can only participate by AV link for this purpose if parties agree: Supreme

The provisions governing the use of AV links for sentencing defendants in custody generally invest a broad discretion in the judge or magistrate. The court's discretion to order a physical appearance or an AV link often revolves around considerations such as 'the interests of justice',<sup>8</sup> 'the interests of the administration of justice',<sup>9</sup> 'good reasons in the circumstances of the particular case'<sup>10</sup> and the 'reasonable practicability' of the use of the AV link.<sup>11</sup> New South Wales provides more guidance for the courts by specifying a list of factors that they are required to take into account, which emphasise both efficiency and security considerations.<sup>12</sup>

There is no specific legislation governing the use of AV technology to link 'remote' judicial officers to physical courtrooms where the other parties, including the defendant, are located. Presumably its use relies upon the inherent common law right of a court to control its own proceedings.

In spite of concerns live AV links and closed circuit television are now used regularly by courts throughout Australia, and in many other countries (Diamond *et al.* 2010, Jacobson *et al.* 2015, Rowden 2011, Rowden *et al.* 2013, Wallace 2011, Ward 2015). Although the exact extent of AV use across Australia is difficult to quantify (Rowden, *et al.* 2013 and Wallace 2011), in the New South Wales Local Court (Australia's largest magistrates court), over 36,000 court appearances were made by AV link (available from over 411 locations) during the financial year 2013-2014 (Local Court of New South Wales 2015).<sup>13</sup> Well over half (57%) of all court appearances by defendants in custody in New South Wales (including all courts) were made by AV link during 2013-2014 (New South Wales Department of Police and Justice 2014). Research in Victoria estimates that, in 2009, an average of 10 videoconference calls per day were made across the Department of Justice network, including the courts (Rowden *et al.* 2013). Both Victoria and New South Wales are expanding their networks of AV links and upgrading the technology,

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Court of Queensland Act 1991 (QLD) s 80(3); District Court of Queensland Act 1967 (QLD) s 110C, whereas in the Queensland Magistrate's court, a defendant's participation via AV link in their hearing of charges against them is in the discretion of the Magistrate: Justices Act 1886 (QLD) s 178C(3). In Tasmania, the wording of s 39A of the Justices Act 1959 (TAS), which enables the use of AV links only where an accused is not making submissions or giving evidence, arguably implies a requirement to be physical present at an inquiry into their fitness to stand trial.

<sup>6</sup> Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K(2)(a); Evidence Act 1929 (SA) s 591Q(5)(a)(ii); Justices Act 1959 (TAS) s 39A. In Tasmania, the wording of s 39A of the Justices Act 1959 (TAS), which enables the use of AV links only where an accused is not making submissions or giving evidence, arguably implies a requirement to be physical present at trial. In the Queensland Magistrate's court, a defendant's participation via AV link in their hearing of charges against them is in the discretion of the Magistrate: Justices Act 1886 (QLD) s 178C(3).

<sup>7</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) ss 3, 5BA, Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 42K(2)(c); Evidence Act 1929 (SA) s 591Q(4) which only enables appearance via AV link prior to trial; Criminal Procedure Act 2004 (WA) s 77(1)(a); In Queensland's Supreme and District Courts, an accused can only participate in their trial by AV link if parties agree: Supreme Court of Queensland Act 1991 (QLD) s 80(3); District Court of Queensland Act 1967 (QLD) s 110C, whereas in the Queensland Magistrate's court, a Defendant's participation via AV link in their hearing of charges against them is in the discretion of the Magistrate: Justices Act 1886 (QLD) s 178C(3). In Tasmania, the wording of s39A of the Justices Act 1959 (TAS), which enables the use of AV links only where an accused is not making submissions or giving evidence, arguably implies a requirement to be physical present at trial.

<sup>8</sup> Evidence (Miscellaneous Provisions) Act 1958 (VIC) ss 42L(1), 42M(1), Supreme Court of Queensland Act 1991 (QLD) s 80(2), District Court of Queensland Act 1967 (QLD) s 110C(2), Justices Act 1886 (QLD) s 178C(2)(3), Penalties and Sentences Act 1992 (QLD) s 15A(1), Criminal Sentencing Act 1995 (WA) s 14A(2)(b).

<sup>9</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) ss 5BA(5), 5BB(4), Criminal Procedure Act 2004 (WA) s 77(4).

<sup>10</sup> Evidence Act 1929 (SA) s 591Q(5)(c).

<sup>11</sup> Evidence (Miscellaneous Provisions) Act 1958 (VIC) ss 42L(1), 42M(1).

<sup>12</sup> Evidence (Audio and Audio Visual Links) Act 1998 (NSW) s 5BA(6). The New South Wales District Court has also promulgated a list of factors relevant to the exercise of the discretion in the case of child accused in custody: District Court Rules 1973 (NSW) r 16(1).

<sup>13</sup> Those figures did not include the numbers of vulnerable witnesses who appeared in the Local Court by CCTV (installed in 84 court locations) over that period: Local Court of New South Wales 2015, p.27.

expecting it to be used more frequently (Court Services Victoria 2015, Local Court of New South Wales 2015; see also Courts Administration Authority (SA) 2015).

Recent recommendations propose expanded use to enable victims of family violence to access courts, both generally and specifically in relation to Aboriginal and Torres Strait Island women and women from migrant and refugee backgrounds (Judicial Council on Cultural Diversity 2016a, 2016b, State of Victoria 2016, Warren 2015). This further advances one of the original rationales for the use of AV links, the desire to shield witnesses with particular vulnerabilities from further trauma and possible intimidation that may result from having to give evidence in the courtroom (Jacobson *et al.* 2015, Warren 2015). However, AV links are now used for a wider range of witnesses to give evidence remotely (for reasons of cost or convenience),<sup>14</sup> to enable lawyers to participate in directions and case management hearings, to enable judges or parties to participate in appeal hearings, for the delivery of sentencing decisions and to bring a judicial officer to a court other than the one in which they are physically located (Rowden *et al.* 2013, Warren 2015).

Two uses that are relatively widely accepted are the provision of judicial services to remote communities and the general management of judicial workload. These two uses are not mutually exclusive; especially as serving remote or regional communities via AV use also affects workload management and judicial resources.

### 3.2. Court services in remote and regional communities

Magistrates courts in Australia, particularly in some states and territories, cover very large geographic areas, as Table 1<sup>15</sup> illustrates.

**Table 1: Number of magistrates in each Australian state and territory, 2016**

State/Territory	No. of magistrates*	Population <sup>^</sup>	Geographic area (km <sup>2</sup> ) <sup>+</sup>	Magistrates per 100,000 population*	Magistrates per 1,000 km
New South Wales	134	7,596,600	800,642	1.76	0.17
Victoria	117	5,914,900	227,416	1.98	0.51
Queensland	87	4,766,700	1,730,648	1.83	0.05
Western Australia	47	2,587,000	2,529,875	1.82	0.02
South Australia	40	1,696,200	983,482	2.36	0.04
Northern Territory	14	243,800	1,349,129	5.74	0.01
Tasmania	13	516,100	68,401	2.52	0.19
Australian Capital Territory	7	389,700	2,358	1.80	2.97
Total	459	23,711,000	7,691,951	1.94	0.06

Total number of magistrates divided by the whole population (adjusted per 100k).

Sources:

\*Australasian Institute of Judicial Administration 2016.

<sup>^</sup>Australian Bureau of Statistics 2015.

<sup>+</sup>Australian Government Geoscience Australia, Area of Australia 2015.

Given the distances that Australian courts cover, AV links have become an important tool in enabling courts to deliver their services to regional and remote

<sup>14</sup> It has been particularly promoted as a way of saving the cost and time of having expert witnesses attend court: see Wallace 2013.

<sup>15</sup> There are small differences between Australasian Institute of Judicial Administration data (the source for Table 1) and AGPC data due to different ways of counting judicial officers.



communities where access to justice can be limited (Harris *et al.* 2014). The Chief Justice of Western Australia, Australia's largest state covering 2.646 million square kilometres (Table 1), views videoconferencing as an indispensable part of its justice system (Martin 2010). A judicial officer from that jurisdiction interviewed for the Gateways project reports that:

[W]e do lots and lots by video link. The Magistrate's Court, the District Court, the Supreme Court do most of the pre-trial stuff with the accused on video link from whatever prison it is and I deal for instance I do most of the applications for leave to appeal for Magistrate's Courts and if it's a prisoner in person I never bring them in, almost never bring them in. We all do it on video link and they present their arguments, I grant leave or refuse leave but not a great problem so we, we don't we're just not using it just for witnesses. We're using it extensively in the criminal justice system. (Judge, Western Australia)

A court administrator also from Western Australia outlines a very broad vision of how AV links could be used to facilitate participation in court proceedings from people in remote or regional locations, drawing on different types of facilities that provide this technology:

[W]hat I am aiming towards and what I would like is that people don't necessarily have to go to courtrooms to give evidence by video link or, or court buildings. They can go – like particularly say communities, Aboriginal communities (...). I'm just sort of thinking well why don't government agencies all get together in partnership with communities and even private organisations and have some of these centres and then they can all make their own bookings and use it. It'd be far more, I think efficient and might mean that lots of communities have these facilities where otherwise they wouldn't if it was just left to the criminal justice system. (Court Administrator, Western Australia)

An AV link can provide an efficient way of dealing with matters in a country location without a resident magistrate:

Well I know when dealing – I used to be in [location X] a few years ago and if there was anything sort of coming up and they needed to remand someone for however long, instead of taking someone for 2 and a half hours to [location Y] they'd be able to, you know do a link-up, everyone before the, the court and just go to the magistrate that way. (Court Administrator, Victoria)

One court administrator indicated that, when a magistrate from a city court goes to a country court, an AV link can be used to complete matters that they have begun to deal with in their usual city list:

If you know a particular magistrate may be sick at – they might have a week off or something at [country location] – so if one of the [relieving] magistrate who's – is from [city court] (...) and their part heard is coming back on they will just organise a link between the two courts and, and do that. (Court Administrator, Victoria)

This comment suggests a way that using AV links to provide court services to a regional location can also assist an individual magistrate to meet the obligation of hearing pending cases in different locations, and so manage the magistrate's own workload.

### 3.3. Workload management

While AV links have a significant role to play in regional or remote locations, which would otherwise have more limited access to court services, they can also be used more systematically to manage workload across a number of courts. According to one magistrate:

We also used videoconferencing throughout the [regional area] where I was the senior magistrate to make sure that the [location X] Court picked up the lists in other courts. So if there was a list in [location Y] that needed to be dealt with, in particular things like domestic violence matters, you might not have a magistrate in one of those courts and you would connect up by video and deal with the matter in

the umm, in a headquarters court at [location X] and we did that fairly frequently. (Magistrate, Western Australia)

That magistrate indicates that court staff had been supportive of that practice because it saved re-listing things later and duplicating resources (Magistrate, Western Australia).

AV links might also be used to assist with overflow matters from other courts, as this quote makes clear:

[O]n the odd occasion I would do a [capital city] list from [regional town, 190km distant]. So if I finished my list in [regional town] we would connect to [capital city] and I would use the videoconferencing facilities for umm a criminal list of pleas of guilty with a prosecutor in [capital city], the defendant in [capital city], lawyers in [capital city] and me as the magistrate in [regional town]. We did that infrequently but when we did it, it meant that we alleviated a whole lot of pressure on other lists in [capital city] and it meant that my time was being used efficiently in [regional town]. (Magistrate, Western Australia)

Another country magistrate reports using AV links to continue to manage workload in a regional court while visiting a metropolitan location:

So two days a week I go down to M [court location] which is the eastern most metropolitan courts about 80-90 kilometres away. I'll do at lunch time between one and two when the courtroom number 1's not being used I do a, I do a video link back to N [court location] or P [court location] or sometimes I've been to D [court location] and I'll do it by video link and they'll have you know four or five people lined up ready to do applications for video link or I'll do people in custody that the Police have arrested. So I'll sort of just switch in for an hour and just knock over – (...) that's the best way I can deliver that service, otherwise we're calling in JPs or we're saying to people travel long distances or wait three days. (Magistrate, Western Australia)

One area where there may be potential for AV use is to contain the costs of resourcing circuit courts, as a court administrator notes:

It appears to us that it's haphazard the way resources are allocated, like for example we've got a magistrate in XX who's away for 2 weeks (...), but what they've done is they've organised for three separate magistrates to go to XX over the next 2 weeks and that's just, I mean that's just, that's total madness. Well, every time, you know, every time we send someone down there it's costing us money. (W 03)

Another court administrator expresses the view that 'it would be very easy for a headquarters court in a country circuit to do a lot of its work in Victoria by video' (Court Administrator, Victoria).

To sum up, the use of AV links to service remote and regional courts or to manage judicial workload more generally appears to have much appeal to at least some Australian magistrates, judges and court administrators. While some of these uses are restricted to more procedural matters (such as adjournments or case management) others may involve more substantive matters, such as imposing sentence.

#### 4. Concerns about AV use

For centuries, legal process has relied on distinctive visible symbols and ceremony associated with the court building, the courtroom and the judicial officer (Mulcahy 2011, Resnik and Curtis 2011). The gravitas, ritual, decorum, and seriousness of proceedings are experienced directly by those physically present in the courtroom. 'Decisions and judgments require particular social, temporal and spatial framing to have effect' (Rowden 2015, p. 3; see also Mohr 2000, p. 70, Mohr and Contini 2011, Branco 2016). Reliance on AV links alters the representation of the judicial officer, who is the embodiment of law, and so may weaken these distinctive symbolic and cultural dimensions (Wiggins 2006). Communication with the court

becomes like any other communication that relies on Skype or AV technology. Mulcahy (2011, p. 163) argues:

[B]eneath the inadequacies of adversarial adjudication there may continue to be some design ideals enshrined in court practices which we want to retain in a technological age (...). [W]e are in danger of forgetting that requiring the physical presence of people in a special building continues to have considerable cultural resonance.

Interview participants in both projects identify a number of issues regarding the effectiveness of the use of AV links in court. These include potential for de-humanising participants, a negative effect on remote communities, risks of inappropriate behaviour from defendants, technical difficulties, and strain on court staff and judicial officers. These problems can all limit the capacity of the judicial officer to effectively communicate and engage with the remote participant. While these concerns may not be specific to sentencing, the distinctive nature and purposes of communication in sentencing means that problems with AV use have special significance when an offender is being sentenced.

#### *4.1. Impersonal/de-humanising*

One judicial officer explains the importance of the 'human aspect' of the court experience:

It is about the affirmation of a community, of a society (...). The need that we all feel to be understood by those who are questioning us and to be able to directly communicate with those who are questioning us or accusing us and to feel that they know what we're talking about. (Judge, New South Wales)

The potential for the use of AV links to have a de-humanising effect in relation to defendants is noted by another judicial officer: 'I think that there's, there's a sense in which you don't want them to become just the object at the back of the Court. There's a sense in which they have to be recognised as, as having a human identity' (Judge, Victoria).

Themes of the de-humanising effects of technology, the importance of judicial performance as a human process and the value of physical presence as part of the court experience for judicial officers and court users also emerge in the JRP interviews. One judge comments:

[G]overnments, you know, are trying to cut their expenditure and cutting out human beings and replacing them with technology (...) the point I'm trying to make is they're running down the human resources (...) courts are very human places but they're being affected by technological change and as I say, it will work sometimes for the good but I can see it, we'll have virtual courts (...) I'm sitting here, there's two screens there, there's two barristers and they're arguing a matter and I'm sitting here at a computer and I'm writing up an order, umm, for their case (...) a place where there's no human being actually in court. (I 22)

The judge paints a somewhat dystopian view of the increasing use of AV technology, especially in criminal cases. He attributes this as resulting simply and directly from government commitment to cost reduction without perhaps sufficient consideration for the consequences, whether in terms of court process or wider public access (see also Johnson and Wiggins 2006, Rowden 2015, Ward 2015).

Concerns about increasing use of technology are also associated with a desire to achieve procedural justice and ensure that parties in the court feel that they are being treated with respect, as another judicial officer elaborates:

If people think that they really are just being conveyed along a process for expedition and they're in a dodgy little back room and which doesn't reflect the gravity of them or their evidence or their concerns – (...) I think we do have some problems about losing the court, be it in losing the structure, losing the power and importance of it, and we need to be balancing that really carefully (...). [W]hat

happens if speed and, come to govern the manner in which we treat people (...), then we have allowed the machine to take over. (Magistrate, Western Australia)

There are also concerns that any loss of engagement when court proceedings are conducted using AV links will be felt most by those who are already the most disadvantaged participants in the criminal justice system:

[T]here are also potentially the enormous downside and (...) we'll potentially provide for real inequities for those who are least able to resist what's happening to them often because they've got young inexperienced lawyers or they've got an Aboriginal field officer who's getting railroaded or their lawyer's got 50 other matters in the list, and so it's going to build in that poverty. (Magistrate, Western Australia)

An analysis of interview data collected in the Gateways project finds that views among judicial officers about the appropriateness of sentencing via AV link reflect the diversity of views in the enabling legislation. Interviewees emphasised the importance of engagement in the sentencing process — both for the defendant and the community (Rowden *et al.* 2010). As one judicial officer explains:

[I]f you want someone to leave the Court with a sense of why they got the sentence they got, what's expected of them and to understand it, you need to have communicated, not just spoken at someone (...). So it's an engagement. (Judge, Western Australia)

Many judicial officers take the view that sentencing by AV link detracts from the ability to achieve the necessary level of interaction or engagement. In the case of the defendant, this includes concerns about the defendant's level of understanding of the sentence, and the impact of the sentence on them (Rowden *et al.* 2010). A judicial officer explains how understanding could be even more difficult to gauge when sentencing over an AV link:

It's a real concern in my view to sentence over a video because you've obviously just got someone on the other end who's going to be nodding and appear to be compliant and understanding (...). But it's very difficult to ensure that the person has understood what's going on and you haven't got the person there to at least feel some vibe (...). It's difficult enough when you're dealing with people who come from an Aboriginal background to ensure that they are understanding when you're in court (...) let alone if they are somewhere else. (Judge, Western Australia)

This statement assumes that physical presence during sentencing enhances or even assures understanding, or at least enables the judicial officer to accurately assess a defendant's understanding. However, there is considerable empirical research demonstrating that defendants physically present during sentencing may not fully understand the nature or consequences of the penalties they have received (Carlen 1976, Jacobson *et al.* 2015).

The delivery of a sentence in an open court, and the capacity of the community to witness that, reflects the importance of sentencing as 'a highly symbolic and public declaration of how society regards the offence, the offender, and society's formal reaction to them' (Findlay *et al.* 2006, p. 253). The extent to which this is 'traded off' against considerations of time, efficiency and inconvenience appears to turn on a number of factors, especially seriousness of the offence. Generally, there is agreement that it is usually preferable to sentence 'in person' for more serious offences (Rowden *et al.* 2010). Given this, it is not surprising that magistrates, who impose sentences in less serious matters, are more likely than judges to report using AV links to sentence (Rowden *et al.* 2010).

Judicial officers (in JRP interviews) also identify the importance of the physical courthouse and courtroom to emphasise the gravitas of the court proceeding and the significance of judicial authority, which is thought to increase or enhance compliance (see also Gibson *et al.* 2014, Jacobson *et al.* 2015). One judge suggests that:

the diminishing physical presence of courts (...) will diminish the authority of judges and the authority of courts because you can criticise the grandeur of the Victorian [era] (...) architecture and that (...), but it actually brought a sense of majesty which enabled people to accommodate the power of the courts and accept the decision of courts in some respects (...). [I]f people are just communicating with one another through a Skype system or a television monitor or by computer well what's going to make a court any different than Twitter or Facebook. (I 22)

This judicial officer emphasises the value of physical presence in a formal court location to reinforce judicial and legal authority, perhaps also with potential for greater engagement. Courts can be intimidating or alienating for those who are unfamiliar or who lack authority or professional status in the court process (Roach Anleu *et al.* 2014). The judge points to the potential inability to distinguish court processes experienced via AV from other social or broadcast media.

The problem with the majesty of the court is it's scary to be in court, you know, you go along and there's this old man sitting, or an old woman sitting up there and they're wearing a wig if they wear wigs and you're dwarfed by. I don't believe in people being intimidated by courts, don't misunderstand what I'm saying about court but if everybody's Skyping, nobody's going to be afraid of courts because I'll just be a face (...). It might free up people to express themselves and not feel intimidated by the experience which is, which is good. (I 22)

This judge identifies potential advantages and disadvantages of a more virtual courtroom. On one side, informality may offset the negative effects of intimidation and enable court users to express themselves, an aspect of 'voice' in procedural justice terms (Tyler 1988). On the other, a genuine court process, embodying legal authority may be conflated with fictional TV depictions of judges and court processes and so be diminished (Moran *et al.* 2010, Marder 2012).

Recent research involving interviews with 31 New South Wales' prisoners who have appeared by AV link (mainly on bail and remand matters) finds that they experience significant distractions. They express concerns relating to intrusions from noise within the prison and about privacy and confidentiality of communications over the link (McKay 2016). Some prisoners find the link intimidating. Technical faults with the equipment also impair their participation (McKay 2016). While they appreciate the convenience of not having to be removed from the prison to attend court for routine appearances, many express a preference to appear physically in the court for substantive matters (McKay 2016).

#### 4.2. Effect on remote communities

Replacing regional court services with AV links, and the use of 'remote' magistrates, may also result in a loss of engagement with local communities and have an adverse effect on the communities. The Chief Magistrate of New South Wales expressed concern that government cuts to the numbers of magistrates may result in fewer magistrates going to country courts observing that:

[C]ourts are part of the social cohesion in a democratic society and their appearance on the landscape contributes to the sense within communities that access to justice is real and their relevance as a community to the common good is not abandoned or overlooked. (Henson 2014, p. 2)

One judicial officer saw replacing resident or circuit magistrates with AV link as a lack of respect for local communities, as well as potentially impacting on their ability to access services usually associated with the court, and explained:

You could effectively pull a Magistrate out of [regional court location] and then deal with 90 per cent of your work by video link. Now my view is, is that that's not good for the community and not good for the circuit that you're running. And the economic (...) rationalists would tell you that it was great because you don't have to provide a house, you don't have to provide (...) that person to be there (...). But (...) if we go into a town to a Court (...), what follows us is the community corrections officers, alcohol and drug people (...), Department of Child Protection, they follow us

through. Juvenile Justice come and a lot of other agencies will come with us. So the down side that you get when you do everything by video link these people don't go there. That's the excuse not to go. So what you do is you then strip the country the visits of these services (...) everything will just be centralised into the, the capital city or the major regional towns. (Magistrate, Western Australia)

Magistrates courts are often described as the face of the justice system, directly serving communities (Gray 2002). As former Chief Justice of the Northern Territory Brian Martin (2010, p. 8) observes:

In the judicial hierarchy, however, the special position occupied by magistrates as the major link between the community and our system of justice imposes a very large responsibility to respond accordingly as representatives of that system (...). [I]t is magistrates who present the face of the system to the vast majority of those persons who are brought into contact with it.

There is also an opportunity for the judge or magistrate who travels to the regional and remote community to see and experience first hand the wider context of those appearing before them in court (Harris *et al.* 2014). This opportunity is lost when the encounter takes place by AV link. Sentencing on site enables the community, if they choose to attend court, to see and hear the basis for the sentence and for the sentencing judicial officer to incorporate an understanding of the local circumstances when deciding on and communicating the sentence.

#### 4.3. *Inappropriate behaviour*

One of the (unintended) consequences of reduced levels of engagement where court proceedings are conducted by AV link is that the behaviour of participants may appear to be incongruent with the normal expectations of decorum and ceremony that apply in a courtroom. A participant appearing by AV link may be unable to understand how they present to the courtroom and, as a result, present inappropriately (Rowden 2011, Wallace 2011). Factors include the inability to make eye contact with courtroom participants, to orientate one's body to them, a lack of information as to which parts of oneself is visible to the court so as to understand, for example, whether hand-gestures and other body language are visible (Rowden 2011).

A number of interview participants describe less formal or inappropriate behaviour by defendants appearing on the AV link. One judicial officer reports:

I have tried it on a few occasions sentencing someone on video link (...) but what's happened almost every time I've done that is it seems that the person if they're on the other end of a video screen are more likely to arc up and ah swear, shout, complain ah about how they're being dealt with (...) whereas they tend not to do that if they're in Court and, and you've got them face to face. So it seems they feel like there is a greater liberty to ah go ballistic on the other end of a video camera than if they're in Court. (Magistrate, Western Australia)

Two defence lawyers interviewed jointly recount that:

Yeah, occasionally you know I've seen umm people appearing on the video link who are accused appearing before the Magistrate and I've seen one or two sort of, just a, you know fits of laughter 'cause it's such a strange you know thing to be appearing over, like a – one in particular I can think of was I had an Aboriginal background and you know he just thought it was extremely funny the whole setup, so it, it does reduce the formality of the proceedings (...). And there's, there's a bit of a tendency to say "see you later" like you're hanging up on a phone call or goodbye. (Lawyer, Western Australia)

This did not appear to be a universal problem. One support officer located at a remote facility at a prison reports that defendants are generally very respectful in their behaviour at the facility:

[They] respect what we do, and they need it, so therefore they tend to not (...) create any more dramas in here than they need to, or than they would or should.' (Remote Room Support Officer, Victoria)

Where inappropriate behaviour occurs, it might be attributable to the inability of the remote participant to gauge how to conduct themselves, in the absence of cues from courtroom participants especially judicial officers. A defendant in a remote location may be unaware of who else is in the courtroom, such as members of the public, or be unable to see the faces of all lawyers at the bar table. A defendant in a remote location may not have seen the earlier matters in the courtroom and would not have observed the behaviour of others or heard any instructions about appropriate conduct given generally or to earlier participants. Inappropriate behaviour may also indicate the defendant's perception that lack of transport indicates that certain proceedings are less important and so less deserving of courtroom behaviour. If a proceeding is not sufficiently important to require transportation to the court, it also may not demand a high standard of behaviour.<sup>16</sup>

On the other hand, one judge thought that their courtroom attire and the court background visible on the AV link assisted defendants to understand how to behave: 'I think maybe because they see you, and they see you robed, and they see you're in an obvious courtroom setting ... they tend to behave as if they were present in the courtroom' (Judge, Western Australia). This comment assumes a fairly wide scope for the video image visible to the remote participant, which may not be the case. Even an image that includes more of the courtroom setting might not be effective, especially for defendants who are not already familiar with court dress or courtroom environments and associated ritual.

A judicial officer also noted that participants on AV links are often unaware of when and how their behaviour was visible to the courtroom:

People need to understand whether they're actually on the video, that they know that their image and whatever they do is actually being seen by people and they don't think, oh well because someone else is talking the video's not on me anymore, you know so, I can do what I otherwise would do if I think I'm in private. (Judge, Western Australia)

These comments reflect an awareness among some judicial officers that the courtroom is more than a location for a technical legal function. Direct face-to-face interactions, whether with defendants or others present in the courtroom, have important cultural and symbolic significance, especially for defendants during sentencing.

#### 4.4. Technical difficulties

In addition to problems with simulating eye contact and displaying body language, AV links can produce distorted, unlife-like images of the remote participant presented to the courtroom. Displaying multiple images can be difficult. Audio can be hard to hear or distorted, the sound can come from a different location than the image of the speaker, and the sound may not be synchronised with the speaker's facial movements (Rowden 2011, Wallace 2011, Rowden *et al.* 2013). English research in the Crown Court also finds various difficulties with the quality of basic technical equipment including the AV link devices (Jacobson *et al.* 2015).

An interviewee recounts how technical difficulties can cause stress for court staff, who 'don't know that they really are there with the controls ... and of course if a link goes down then the court officer loses that confidence if they're not skilled up in it' (Magistrate, Western Australia). A former judge's associate agrees that the use of an AV link increased the pressure on them because of the risk of technical problems:

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<sup>16</sup> The authors thank Jordan Tutton for some of the observations in this paragraph.

I found having a video link quite stressful because if it dropped out then and if there, if it dropped out and there were people like there was a party in the court and then there was a party in another city there'd always be like a kind of a slight panic of 'yeah can we get the video link back up' and I didn't know how to work it so you kind of would hope that the operator who was in the back of the room could do it. (Judge's Associate, New South Wales)

#### 4.5. Effect on judicial officers and court staff workload

Despite its potential for assisting the management of workloads, increasing use of AV links may impact on the workloads of judicial officers and court staff in negative ways. One magistrate expresses concern that it might increase the pressure to fit more work in and require country magistrates to be available after hours to deal with matters such as bail applications:

So it's sort of, it sounds like it's a bit of a double edged sword in that it sort of allows for this sort of freedom that you don't necessarily have to go up to these places but then it potentially increases expectations on the workload (...). (Magistrate, Western Australia)

This magistrate also comments on use of AV links to continue to deliver services to courts in their region when temporarily at a metropolitan court location: '[T]hat's impacting on my downtime where I might be trying to write a judgment or working through other issues there and it cuts into my time'. (Magistrate, Western Australia).

Interviewees also recognise that widespread availability of AV technology could make it possible to spread workload evenly, for example by, managing the after-hours work centrally, 'out of say a city location' (Magistrate, Western Australia).

Another judicial officer reports that the use of AV links had some impact on the workload of judicial officers in their court, but that is not very significant in the overall picture:

I suppose it has the potential to increase your workload in any one given day but I mean the workload's the workload and, and we're here and it doesn't result in us sitting later than we would have otherwise sat (...). It might make the day a little bit busier but that's the nature of the work. (Magistrate, Western Australia)

Limitations on the number of links available in a court location at any one time can be a source of pressure, though, as one interviewee recounts:

We try (...) and do things [in] less than 15 minutes unless there's an actual witness. If it's a particular case we try and say we're not doing it unless it's less than 15 minutes because so many other people need it, we can't sort of accommodate it to – for it to go for all day. (Court Administrator, Victoria)

The previous two comments suggest that increased time pressure created by AV use is met by shortening the time available for other matters heard on the day. Given the very short times in which non-trial matters such as bail, or sentencing are heard in lower courts already, this would certainly adversely affect the potential for genuine engagement with court participants, whether virtual or physically present (Mack and Roach Anleu 2007, Mack *et al.* 2012).

AV links can require considerably more planning. The limited number of courtrooms with videoconferencing facilities has to be factored into the case allocation and listing process. AV links can be especially difficult in matters involving documents, as one interviewee explained:

Because you've got to make sure that (...) you've either got (...) the technology available and [the document] can be seen on the screen. Or alternatively that it's faxed or reproduced to them in some way or delivered so that at the time that the communication takes place they've got the document or thing to which reference is being made (...) I've certainly had that as an issue where proper planning hasn't been done. And sometimes people are trying to see things over a screen it's not



possible. You've had to stand down. Things have been faxed and the quality of their copying's not been good. (Magistrate, Victoria)

#### 4.6. Resistance to AV use

There is reluctance on the part of some judicial officers to use the technology, as one interviewee explained, when asked whether the court would entertain the idea of integrating the matters requiring the use of AV links into the general list:

Not at the moment. You see, magistrates don't like change. That's why it never worked previously – they didn't want to use it. They're frightened to use it, I think. Until they see it being done, and they're confident with it, it'll take off. (W 11)

Some judicial officers are concerned that the availability of the technology has increased the pressure on them to use it. As one notes:

Without a critical assessment of whether it's desirable, whether it's more efficient to do it another way, in other words if it can be done by technology it must be done, that seems to be the rule, rather than well it can be done but actually would it be better done some other way, the old way (...). The technology buffoons have been carried away and carrying us away better quicker cheaper faster etc. etc. (Judge, New South Wales)

Improvements in the quality of the AV technology available in the courts can overcome resistance among judicial officers especially as more recently appointed judicial officers are accepting of this technology:

Oh there's no doubt that acceptance has increased. I mean the legal – the judiciary's terribly conservative (...). I think with the arrival of (...) judges from different backgrounds, women there's much more of a willingness to embrace change now and of course younger people are much more accepting of technology than older people. (Judge, Victoria)

A court administrator suggests that 'people really have come to accept that that's really the way the courts are headed more often than not' (Court Administrator, Western Australia). A judicial officer thinks that judicial leadership has played an importance role in promoting this acceptance:

I think the Court has taken the lead in strongly, that accused persons appear by video link for matters other than trial or sentencing (...) now I think practitioners have just – and accused persons – have just come to accept that that's the way it will be done, but it started by the Court basically saying "well this is the way it will happen". (Judge, Western Australia)

However, others report resistance from the legal profession to its use. As two interviewees explain, this is prompted at least in part by perceived barriers to communication with their clients that are created when an AV link is used for a court appearance:

[A]nd I mean certainly there appears to have been some resistance from practitioners. Often it's difficult to get instructions so they like to get people here so that they can actually see them, rather than for them going to visit them at the prison. (Magistrate, Victoria)

I think there are some real impediments which are around partly culture for solicitors, but also some practicalities – how do they consult with their clients in a way that is private, um, and where are these facilities located. (W 16)

## 5. The importance of engagement

The way that judicial officers relate to, and interact with, court participants has been identified as a key factor in judicial legitimacy (Tyler 1984, Rottman and Tyler 2014, Roach Anleu and Mack 2017). The importance of judicial engagement has become more apparent with the creation of new types of problem-solving or therapeutic courts, directed toward issues underlying offending behaviour such as drug use or mental health problems (King *et al.* 2014). 'Restorative justice'

approaches have also been incorporated into the criminal jurisdiction of some courts (King *et al.* 2014).

These innovations reflect theoretical models that require greater and more direct engagement by judicial officers, who may also work as part of a team with specialised support staff including social services professionals (Wallace *et al.* 2012, King *et al.* 2014, Bennett 2016, Lens 2016). These methods of judging are more time-intensive and require greater deployment of personal and interactional skills, including recognition and management of emotions (Winick 2003, Mack and Roach Anleu 2011, Wallace *et al.* 2012, Roach Anleu and Mack 2013, Roach Anleu *et al.* 2014).

An emphasis on communication, listening, and showing respect for others is central to the concept of procedural justice as developed by social psychologists (Lind and Tyler 1988, Tyler 1984, 1988). In this relational or interactional approach to judging, judicial authority can be supported and enhanced by the 'quality of the interpersonal treatment that people experience' (Tyler 2003, pp. 350-51). Such an approach is effective as it 'shapes people's feelings of responsibility and obligation to obey rules and accept decisions because it enhances the legitimacy of rules and authorities' (Tyler 2003; see also Tyler 2007).

It is therefore not surprising that nearly all (97%) of the respondents to the 2007 Magistrates Survey rate communication as either essential or very important for their daily work (Mack and Roach Anleu 2011). As shown in Table 2, they also place a high value on various skills and qualities that might be considered necessary to engage with court users, as Table 2 demonstrates, such as being a good listener, demonstrating patience, courtesy, compassion and empathy, and managing the emotions of court users (Mack and Roach Anleu 2011).

**Table 2: Magistrates' and judges attitudes toward interactional skills**

Interactional skills	Magistrates		Judges	
	Essential	Essential and very important	Essential	Essential and very important
Communication	81%	97%	72%	94%
Being a good listener	61%	91%	53%	84%
Courtesy	56%	91%	53%	89%
Patience	50%	86%	50%	83%
Interpersonal skills	45%	84%	31%	75%
Compassion	38%	70%	29%	60%
Managing emotions of court users	25%	65%	17%	49%
Empathy	32%	63%	25%	51%
Sense of humour	27%	55%	19%	53%
N*	238-242		303-308	

\*The number of respondents is given as a range. This indicates that not all magistrates or judges who completed the survey responded to this question or to each part of it. Percentages are calculated on the basis of respondents who answered the particular component of the question. Differences of less than ten percentage points are not considered to be actual or meaningful differences.

Source: National Survey of Australian Magistrates 2007 and National Survey of Australian Judges 2007.

The sentencing process provides an important opportunity for direct engagement between a judicial officer and a defendant (King 2006, Roach Anleu and Mack 2015). The sentencing decision is particularly significant in terms of individual and socio-cultural considerations. It represents loss of freedom for the defendant even where the sentence is non-custodial. For the individual, and their significant others, the conviction and sentence can result in status degradation and continuing stigmatisation and disadvantage (Garfinkel 1956, Pager 2003). Following Durkheim (1984), court proceedings, especially in criminal matters, can symbolise (or galvanise) collective consciousness and be important sites for the affirmation or articulation of social norms and emotional expression (Rock 1998, Garland 2001, Smith 2008).

## 6. Conclusion and the future

Judicial officers appear to accept arguments about the need for AV use for greater efficiency, especially in routine or uncontested appearances such as adjournments or other managerial proceedings, but they have clear concerns about some consequences of increased reliance on this technology. Technology can expand opportunities for some judicial contact, especially with people in remote locations; however, it generates interaction that is different, and perhaps problematical, compared with the face-to-face interaction between the judicial officer and defendants in the physical space of the courtroom (Mulcahy 2011, Diamond *et al.* 2015, Rowden 2015, Ward 2015). It is essential not to romanticise the pre-technology days in terms of users', especially defendants' experiences of courtroom interaction (Carlen 1976, Jacobson *et al.* 2015, Rowden 2015). Especially in lower courts, the large volume of cases, the rapid pace of the proceedings, courtroom workgroup dynamics, and the depersonalisation of participants can result in the marginalisation of the defendant, even when physically present, who then experiences the process as alienating (Mileski 1971, Carlen 1976, Baldwin and McConville 1977, McBarnet 1981, Emerson 1983, Petersen 1983, Jacobson *et al.* 2015).

This is not to suggest that inadequate levels of interaction in the physical courtroom justify accepting other or different inadequacies associated with and generated by use of AV links. Both physical and virtual courtroom processes must be managed in ways that maximise core legal values.

Rowden (2011) proposes that indicators of procedural justice — respectful treatment, voice, and perceived neutrality and trustworthiness of the decision-maker— should be taken into account when assessing the effect of AV links on communication. She argues the loss of non-verbal cues limit the ability of the remote participant to 'voice', that is, 'to convey their position to a decision-maker,' (Rowden 2011, 232). Technical difficulties associated with the link and the inability to control self-presentation to the court can also impact adversely on the remote participant's sense of being treated with respect and dignity (Rowden 2011). The inability of the remote participant to perform with equivalent capacity to participants in court might also reduce the perceived neutrality and trustworthiness of the court.

This is a central tension in contemporary judging. On one side is a movement, largely driven by cost and efficiency concerns, towards greater use of AV technology which allows court users, especially defendants in custody, to 'appear' in court or before a judicial officer, without being physically present in the same location. On the other hand there is a parallel and competing drive for more human engagement between the judicial officer and court users. Both demands require specific and different judicial qualities and skills, and associated technological training, management and administrative infrastructure. The question for the future is not how many judicial officers, but rather how to select and prepare judicial

officers to communicate effectively, engage appropriately and judge well in different types of environments – face-to-face and virtual.<sup>17</sup>

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<sup>17</sup> A recently published report that draws on some of the research referenced in this paper contains a series of recommendations designed to improve the experience of all participants on court AV links (see Rowden *et al.* 2013). Their implementation would go some way to improve the ability of participants to engage in the sentencing process, and the quality of interactions that occur when AV link is used for more 'administrative' occasions. They include improvements in the technology, in the way it is configured and designed for the 'remote encounter' and in the built environment in which it operates (both in the courtroom and the 'remote' space). The recommendations also identify changes in court processes, protocols and rituals, to recognise the differential nature of appearing 'in court' by AV link, and for training for court staff, lawyers and judicial officers in these respects. The findings and recommendations make it clear that the use of AV links in court requires a specific set of skills and actions on the part of judicial officers, to undertake the task of judging in this new technologically enhanced world.

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Evidence (Miscellaneous Provisions) Act 1958 (VIC).

Evidence Act 1929 (SA).

Evidence Act 1939 (NT).

Justices Act 1886 (QLD).

Justices Act 1959 (TAS).

Penalties and Sentences Act 1992 (QLD).

Supreme Court of Queensland Act 1991 (QLD).

## Appendix: Methodology

The Judicial Research Project consists of several studies undertaken sequentially:

- *National Consultations* with magistrates 2000-01.
- *The Magistrates Survey* 2002.
- *The National Court Observation Study* 2004-05.
- *The National Survey of Australian Judges* 2007.
- *The National Survey of Australian Magistrates* 2007.
- *Judicial Officers and Workload Allocation Study* 2007-2012.
- *National Interviews* with judges and magistrates 2012-13.

Mail surveys were sent nationally to all Australian judges and magistrates. Following on from an earlier survey sent only to magistrates, the 2007 surveys covered several aspects of judicial officers' everyday work and career background. An observational study of criminal cases in the non-trial criminal list in magistrates courts provided further detail on magistrate interactions with various court participants, both professional and lay. Interviews with judicial officers and court staff addressed issues of workload and its allocation, and most recently interviews investigated judicial officers' own perceptions and experiences of judicial work and change (Roach Anleu and Mack 2017). While the use and effects of technology in the courtroom has not been a specific focus of the JRP research, inevitably judicial officers discussed technological innovation and change as part of their everyday judicial work.

The Gateways project collected data using a variety of methodologies, including site visits, court observations, interviews and experiments. This paper draws on the interview data. Interviewees comprised 56 stakeholders (judicial officers, lawyers, expert witnesses, individuals who manage or work in courts in a variety of roles, and architects), drawn primarily from two jurisdictions (Victoria and Western Australia) who were industry partners in the research. Interviewees were selected for their experience and exposure to the use of AV links in court processes, via consultation with industry partners, and a subsequent snowballing process, to represent a diversity of views. Interviews lasted 30-90 minutes, and were semi-structured to ensure similar coverage. They were recorded, anonymised, and transcribed for analysis. For this paper, responses were scanned to elicit data about the way AV links were being used for both sentencing and management of judicial workload and then analysed in more detail to encode specific advantages and disadvantages that interviewees associated with their use for these purposes.