

Submission to the Law Council of Australia
The Justice Project

Prisoners and Detainees: technology-based services

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September 2017

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A submission in response to the Law Council of Australia's *The Justice Project*

Prisoners and Detainees Consultation Paper, August 2017

The purpose of this submission is to contribute findings from the author's doctoral research, completed at the University of Sydney Law School 2016, to *The Justice Project's* discussion priorities. It is noted that the author's book chapter on prisoners' access to justice by video link¹ has been cited in the Prisoners and Detainees Consultation Paper and this submission is designed to complement that material by providing further details of the empirical research.

Background to Doctoral Research

My 2016 PhD thesis 'Audio visual links from prison: Prisoners' experiences of video technologies for accessing justice'² examined the following research question: 'how does custodial appearance by audio visual link from prison impact prisoners' legal experiences?' To evaluate this, I engaged with the population most affected by audio visual link (AVL) technologies – the prisoners themselves – and I focused on the *prison endpoint* of the video link, as distinct from the *courtroom endpoint*. The prison endpoint is critical as it is not easily seen nor accessed, prisoners are a largely disempowered population³, and the 'hardened corrections endpoint'⁴ is qualitatively distinct from the courtroom endpoint.⁵

Research Method

The nucleus of my study was empirical fieldwork undertaken with thirty-one adult prisoners in two New South Wales (NSW) correctional facilities regarding their lived experiences of using AVL to appear in remote courtrooms and to access legal advice and representation. The fieldwork involved interviews with prisoners as well as my own observations of AVL facilitated court appearances from the perspective of the prison video suite. The interviews were audio-recorded, transcribed, thematically coded and analysed using NVivo qualitative research software. Drawing on the resulting data, I interrogated the legal and conceptual shifts brought about by AVL's displacement of physical appearance. In this submission, I reference a few verbatim accounts from the de-identified prisoner participants.

¹ McKay, C., 2017. 'Face-to-Interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn and Jackie Hodgson (eds) *Access to Justice: Comparative Perspectives on Unmet Legal Need*, Hart Publishing: 103-121

² McKay, C., 2016 *Audio Visual Links from Prison: Prisoners' Experiences of Video Technologies for Accessing Justice*, University of Sydney. <https://ses.library.usyd.edu.au/handle/2123/15764>.

³ Grunseit, A., Forell, S. and McCarron, E., 2008. *Taking justice into custody: the legal needs of prisoners*. <http://search.informit.com.au.ezproxy1.library.usyd.edu.au/documentSummary;dn=201215075;res=IELAPA>ISSN:1327-3248>. accessed 23/06/16.

⁴ Polycom, 2012. Polycom Telejustice Solutions: Collaborative Solutions for Courts and Corrections. <http://www.polycom.com.au/content/dam/polycom/common/documents/data-sheets/polycom-telejustice-solutions-br-enus.pdf> accessed 21/02/15.

⁵ McKay, C., 2015. 'Video Links from Prison: Court "Appearance" within Carceral Space.' *Law, Culture and the Humanities*: 1743872115608350: 1-21; Rowden, E., 2011. Remote participation and the distributed court: an approach to court architecture in the age of video-mediated communication, PhD Thesis, University of Melbourne.

Significance

The use of AVL in criminal justice has increased rapidly over the last decade globally and in Australia. The state of NSW leads in AVL usage with 2015-2016 statistics showing 54,456 court and parole appearances being facilitated by AVL (approximately 65% of all court appearances).⁶ I have found that this represents an increase in AVL usage of 532% since 2002-2003. In the same period, 31,200 legal conferences were conducted by AVL⁷, and I have found that represents an increase of 3,226% since 2003-2004.

Legal Needs of the Interview Participants

The majority of the prisoners I interviewed were on remand and had used AVL for bail, sentencing, parole, legal conferences, mentions/adjournments as well as for psychological assessments and family court matters.

Of the 31 participants, there were 17 women and 14 men, with nine participants identifying as Aboriginal or Torres Strait Islander. The average age of the prisoners I interviewed was 35.5 years old for women and 31.5 years old for men.

Overview of Findings

Prisoners identified certain benefits of AVL, particularly as a means to avoid prison truck transportation to and from courts and the associated degrading strip-searches, and in relation to its overall convenience. Nevertheless, for serious legal appearances, many prisoners still expressed a desire to present themselves to court physically in-person, as a human rather than as a generic prisoner on a screen. Furthermore, most prisoners had a preference for face-to-face legal conferences when seeking important legal advice. My findings support the statement in the Consultation Paper⁸ that technologies may be beneficial in *complementing* rather than *replacing* face-to-face legal services and court processes: the diminution of meaningful human association with prisoners is problematic for a number of reasons.

The thrust of my thesis was that custodial appearance by AVL has created a heightened zone of demarcation between prisoners and courtroom participants, manifested by the transformed spatial, corporeal and visual relationships.

- ***Spatial Issues***

***'Oh this is lovely isn't it you know; I'm at court [by AVL] and there's a brawl going on behind me.'* (F12)**

Spatially, criminal justice is increasingly administered in a virtual extension of the courtroom into the non-public, enclosed environment of prison. As the traditional courtroom custody dock has been effectively relocated to the prison video studio for many criminal procedures, justice is being done within a site that conflates the disparate spaces of legal consulting rooms, prosecution and punishment. During AVL appearance, prisoners inhabit a bland video suite, a confined room within the broad carceral

⁶ Department of Justice, New South Wales, Annual Report 2015-2016.

<http://www.justice.nsw.gov.au/Documents/Annual%20Reports/JusticeAnnualReport2015-16.pdf> p.86

⁷ *ibid*

⁸ Law Council of Australia, *The Justice Project*, Prisoners and Detainees, Consultation Paper, August 2017, p. 62.

space of prison, sometimes with a background soundtrack of brawls and yelling.⁹ The isolation of the prisoner during court appearance in this non-judicial space of prison exaggerates the spatial hierarchies and obstacles already implicit in legal procedure. AVL thereby results in the traditional *symbolic* isolation of the defendant in a courtroom custody dock becoming a *literal* expulsion from courtroom space. Common law principles of open and impartial justice and equality of arms are challenged by this spatial disjuncture.

- **Corporeal Issues**

- 'It's all going on there without [you] and ... you're just a face on a screen.'* (M11)**

The physical prisoner is excluded from the human world of the courtroom for many legal procedures, generating a new corporeal demarcation. The NSW AVL legislation delineates a limited set of criminal procedures as being 'physical appearance proceedings' resulting in a presumption *against* the prisoner's physical presence in court.¹⁰ AVL thus increasingly renders prisoners physically absent from court and 'just a face on a screen' (M11). In my analysis, I examined whether the virtual appearance of prisoners is the same as their physical appearance in court. I found that it is not the same; video links are transformative technologies¹¹ that have changed criminal justice from 'face-to-face' to 'face-to-interface'¹² interactions. The absence of an embodied engagement with remote courtroom proceedings can impact prisoners' communication, participation and comprehension.¹³ The lack of physical proximity with lawyers during court matters affects prisoners' abilities to seek confidential legal advice and give instructions.¹⁴ The physical divide thereby generates barriers to communication, comprehension and confidentiality as well as impacting the so-called 'right' to confrontation.

⁹ McKay, C., 2016. 'Video Links from Prison: Permeability and the Carceral World.' *International Journal for Crime, Justice & Social Democracy* 5.1: 21-37.

¹⁰ Kluss, S., 2008. Virtual justice: the problems with audiovisual appearances in criminal courts. *Law Society Journal: the official journal of the Law Society of New South Wales*, 46(4), p.48; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

¹¹ Dumoulin, L. and Licoppe, C., 2015. Trial at a Distance: Videoconference Technology as a Policy Tool?. In *International Conference in Public Policy* (Vol. 1, No. 5); Licoppe, C. and Dumoulin, L., 2010. The "curious case" of an unspoken opening speech act: A video-ethnography of the use of video communication in courtroom activities. *Research on Language and Social Interaction*, 43(3), pp.211-231

¹² Richardson, I., 2010. Faces, interfaces, screens: Relational ontologies of framing, attention and distraction. *Transformations: Journal of Media and Culture*, (18).

¹³ Poulin, A.B., 2003. Criminal justice and videoconferencing technology: The remote defendant. *Tulane Law Review*, 78, p.1089.

¹⁴ McKay, C., 2017. 'Face-to-Interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn and Jackie Hodgson (eds) *Access to Justice: Comparative Perspectives on Unmet Legal Need*, Hart Publishing: 103-121; McKay, C., 2016. 'Pixels, screens and prison video links: changing how lawyers deal with clients', *Law Society Journal*, December 2016.

<https://www.lawsociety.com.au/resources/journal/LSJOnline/2016/December/index.htm>; Bellone, E.T., 2013. Private Attorney-Client Communications and the effect of videoconferencing in the courtroom. *Journal of International Commercial Law and Technology*, 8, p.24.

- **Visual Issues**

'Everyone's going to look at me like ... the lowest form of ... human kind on earth.' (F05)

From my analysis of the interview data, AVL was examined as generating a new visual stigmatization of incarcerated defendants. I argued that the emergent visual demarcation was a function of a number of cumulative factors including the prisoners' attire ('prison greens' instead of civilian court clothing), the labelling of the prison video studio and the designated framing by screen technology. Through the lens of AVL, prisoners feel reduced to 'only a bunch of pixels on a screen' (M04) and 'the lowest form of human kind' (F05), provoking concerns of 'presumptive guilt'¹⁵ instead of presumptive innocence.

- **Impacts on Procedural Justice**

'I think it's very grossly unfair.' (F02)

In conclusion, I found that the cumulative demarcations challenge procedural justice¹⁶, common law principles and recompose prisoners' legal experiences. While there are definitely some benefits for prisoners in using AVL, for every advantage of AVL there may be an associated disadvantage.¹⁷ Therefore, what may benefit governments, the judiciary, lawyers, courtroom officials, corrections personnel and multinational corporations, may not be so advantageous to those who are the subject of criminal proceedings and incarcerated.¹⁸ I found that the expanding ambit of AVL has effected significant legal and conceptual shifts to subtly and incrementally erode the rights of prisoners and common law principles that structure prisoners' legal engagement and access to justice. For instance, I examined the common law 'hearing rule' and how frequent technological glitches and courtroom muting functions directly impact prisoners' audio and visual engagement with the remote courtroom. The lack of physical proximity between lawyers and their incarcerated clients challenges the concept of equality of arms. Regarding open and impartial justice, I found that AVL, in conflating the courtroom with the closed, non-civic space of prison, removes the normal 'checks and balances' of the public scrutiny of legal procedure. In addition, as lawyers increasingly use AVL and decreasingly visit incarcerated clients, their independent scrutiny of prison conditions will diminish.

¹⁵ Grunseit, A., Forell, S. and McCarron, E., 2008. *Taking justice into custody: the legal needs of prisoners*. <http://search.informit.com.au.ezproxy1.library.usyd.edu.au/documentSummary;dn=201215075;res=IELAPA>ISSN:1327-3248>. accessed 23/06/16.

¹⁶ Ward, J., 2014. Transforming 'Summary Justice' Through Police-Led Prosecution and 'Virtual Courts' Is 'Procedural Due Process' Being Undermined?. *British Journal of Criminology*, 55(2), pp.341-358

¹⁷ Ashdown, G.G. and Menzel, M.A., 2002. The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions, *Denver University Law Review*, 80, p.63; Lederer, F.I., 2004. Technology-augmented courtrooms: Progress amid a few complications, or the problematic interrelationship between court and counsel. *NYU Ann. Surv. Am. L.*, 60, p.675.

¹⁸ Poulin, A.B., 2003. Criminal justice and videoconferencing technology: The remote defendant. *Tulane Law Review*, 78, p.1089; Hillman, Z.M., 2007. Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally Present When Pleading Guilty by Video Teleconference. *J. High Tech. L.*, 7, p.41.

It is important to understand that as AVL is embedded in prison infrastructure, the technology represents a fusion of criminal procedure with penal policy and corrections administration¹⁹ that may not necessarily reflect ideals of equality before the law.

Recommendations

As a result of my findings, I proposed a number of recommendations, building upon existing guidelines²⁰ and aimed at improving the situation for prisoners' custodial appearance and legal communications. Below are some of my recommendations:

Preparations for AVL

There is a need for standardised procedures to:

- Familiarise prisoners with the technology: what to expect and how they should behave; how they can communicate with the courtroom; what to do in the event of technical failure and how they can communicate confidentially with their remote legal representative (during and after AVL);
- Provide specific support for Aboriginal and Torres Strait Islander prisoners²¹, those with cognitive difficulties or those who require a translator.²²

Acknowledgement and Technological issues

- There is a need for standardised judicial protocols and opening statements: on commencing the video link, judicial officers should directly address and greet the prisoner by name and confirm that he/she can see and hear.

Comprehension

- Prior to terminating the video link, prisoners should be addressed directly by the judicial officer and/or their legal representative and asked if they have understood the proceedings and outcome;

¹⁹ Aas, K.F., 2004. From narrative to database Technological change and penal culture. *Punishment & Society*, 6(4), pp.379-393; Dumoulin, L. and Licoppe, C., 2015. Trial at a Distance: Videoconference Technology as a Policy Tool?. In *International Conference in Public Policy* (Vol. 1, No. 5).

²⁰ Rowden, E., Wallace, A., Tait, D., Hanson, M. and Jones, D., 2013. Gateways to justice: Design and operational guidelines for remote participation in court proceedings. <http://researchdirect.westernsydney.edu.au/islandora/object/uws%3A15505/datastream/PDF/view> accessed 23/06/16; Rowden, E., 2015. Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?. *Law, Culture and the Humanities*, p.1743872115612966; Rowden, E., 2011. Remote participation and the distributed court: an approach to court architecture in the age of video-mediated communication, PhD Thesis, University of Melbourne.

²¹ Wallace, A., 2008. Virtual justice in the bush: The use of court technology in remote and regional Australia. *JL Inf. & Sci.*, 19, p.1.

²² Braun, S. and Taylor, J., 2011. Video-mediated interpreting in criminal proceedings: two European surveys. in Braun, S. & J. L. Taylor (Eds.), *Videoconference and remote interpreting in criminal proceedings*. Guildford: University of Surrey, 59-84; Fowler, Y. 2013. *Non-English-speaking defendants in the Magistrates Court: A comparative study of face-to-face and prison video link interpreter-mediated hearings in England*. Dissertation. Aston University; Napier, J., 2011. Here or there? An assessment of video remote signed language interpreter-mediated interaction in court. *Videoconference and remote interpreting in criminal proceedings*, pp.45-83.

and further, prisoners should be advised how their legal representative will next make contact to discuss their legal situation.

- Defence lawyers need to maintain close contact with incarcerated clients and keep them informed before and after AVL, especially if their communication is limited to telephone and AVL.

Waiting in the Holding Cells

- There is a need to upgrade the state of the holding cells used before and after AVL sessions. They ought to be maintained in a hygienic manner and provide adequate, humane facilities for prisoners who frequently face prolonged waiting periods.
- AVL scheduling should be examined to optimise efficiency and minimise prolonged periods of 'dead time' for prisoners in holding cells.

Prison Noise and Privacy

- Video studios require greater sound proofing to maximise privacy of confidential discussions and minimise the infiltration and distraction of prison sounds.

Clothing

- For substantive legal proceedings such as sentencing, parole and family law court matters, civilian clothing should be made available to prisoners, for example, a simple jacket, shirt or blouse.
- For serious legal matters, the prisoners should be enabled and encouraged to groom themselves before their AVL session. A real mirror could be installed in a secure location for this purpose.

Screen Size

- Prison AVL screens should be larger to enable the prisoner to have a clear and more immersive view of the remote court, especially for State Parole Authority hearings.

AVL Studio Facilities

- The prison video studio design, fixtures and furnishings should be reflective of a dignified courtroom space.
- New video studios should be designed to avoid cramped and claustrophobic conditions.