

THE COURTS, THE REMOTE HEARING AND THE PANDEMIC: FROM ACTION TO REFLECTION

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With the onset of the COVID-19 pandemic, courts around the world rapidly shifted to remote hearings. Balancing public health directives with the need to continue upholding the rule of law, what followed was the largest, unforeseen mass-pilot of remote hearings across the world. For courts this was necessarily a time of action, not reflection. However, after having maintained court operations, it is now necessary to reflect on the experience of remote courts and their users during an otherwise unprecedented situation. Unlike previous iterations of remote hearings, the COVID-19 experience was fully remote – whereby all participants took part in the hearing remotely. The difficulty is until now, almost no prior empirical data has existed on this type of fully remote hearing with the majority of previous research focused on the use of audiovisual links ('AVLs') to facilitate partially remote appearances within courtrooms. To bridge the research and data gap on fully remote hearings, this article draws on the previous body of literature to both examine the COVID-19 experience, and to assist in guiding future research and use of remote hearings.

I INTRODUCTION

On 11 March 2020, the World Health Organisation declared the public health crisis under COVID-19 a pandemic.¹ In a matter of weeks the world shifted to digital ways of working under government directives to social distance and self-isolate. As open public spaces,² courts in particular were forced to pivot to remote

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1 Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020' (Speech, 11 March 2020).

2 See, eg, Dennis W Quirk, 'Verified Complaint and Jury Demand', Submission in *Quirk v DiFiore*, (SDNY, 20-CV-05027-CS, 30 June 2020) [23]. A labour union initiated a class action against the New York Southern District Court alleging the Court's inadequate safety standards had 'created a breeding ground for and spread of COVID-19'.

hearings to ensure they could continue performing their essential service of quelling disputes as to rights and obligations.³ In particular, in the context of the pandemic, this included performing the role of judicial review as the state imposed restrictions on freedom of movement backed up by criminal enforcement.⁴ The seriousness of the situation is explained by the observations of former Chief Justice of the High Court of Australia Sir Gerard Brennan:

[Courts] are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.⁵

Consistent with this sentiment, courts rapidly transitioned to the remote provision of justice. Courts were varied in their success,⁶ with judiciaries that had previously embarked on court digitisation projects generally finding adaptation easier.⁷ Australia and the United Kingdom were quick to close most court buildings by 23 March 2020, with all personal appearances other than in continuing jury trials moving online.⁸ Likewise, after moving to Level 4 lockdown on 25 March 2020, New Zealand's courts instituted 'remote participation' for all but the most serious proceedings.⁹ In Hong Kong, to meet resource constraints, paper disposals were considered suitable for most civil cases not involving live witnesses.¹⁰ Elsewhere, many other countries that did not have the pre-existing infrastructure to facilitate remote hearings were substantially more delayed in switching to new modes of working.¹¹ In Spain for instance, legislation to allow virtual hearings did not pass until 28 April 2020, with the first hearing taking place

3 Michael Legg, 'The COVID-19 Pandemic and Courts as Essential Services' (2020) 94(7) *Australian Law Journal* 479.

4 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152–3 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ), 157 [56] (Gaudron J).

5 Sir Gerard Brennan, 'The State of the Judicature' (1998) 72(1) *Australian Law Journal* 33, 35.

6 For an overview: see *Remote Courts Worldwide* (Website) <<https://remotecourts.org/>>. For criminal justice systems see: 'COVID-19 Justice Project', *Fair Trials* (Website) <<https://www.fairtrials.org/covid19justice/>>.

7 Richard Susskind, 'The Future of Courts' (2020) 6(5) *The Practice* (online, July/August 2020) <<https://thepractice.law.harvard.edu/article/the-future-of-courts/>> ('The Future of Courts').

8 See, eg, Federal Court of Australia, 'Special Measures in Response to Covid-19 (SMIN-1)' (Information Note, 31 March 2020); Supreme Court of New South Wales, 'COVID-19 – Changes to Court Operations' (Media Release, 23 March 2020); District Court of New South Wales, 'Covid-19 Update on the District Court's Operations' (Media Release, 23 March 2020); Her Majesty's Courts and Tribunals Service, 'HMCTS Daily Operational Summary on Courts and Tribunals during Coronavirus (COVID-19) Outbreak' (Media Release, 25 March 2020).

9 Chief High Court Judge Geoffrey Venning, 'Operations under COVID-19 Alert Level 4' (Media Release, 25 March 2020).

10 Chief Judge Jeremy Poon, 'Guidance Note for Remote Hearings for Civil Business in the High Court' (Media Release, 2 April 2020).

11 Paulo Roberto Dornelles Junior, 'Judicial Activity During the Coronavirus Pandemic' (Research Report, 22 March 2020).

in May.¹² Likewise in parts of the United States, delays in remote hearings had devastating consequences on public health and the judiciary.¹³ Overall though, despite headwinds, by mid-July 2020, 56 countries were able to implement some form of remote courts.¹⁴

The concept of a remote hearing is not new. Remote technology has been used by courts for decades, even before the internet, when closed-circuit television ('CCTV') facilitated remote appearances. Across that time, various different ways of conducting a hearing remotely developed.¹⁵ Thus, it is first necessary to distinguish between these different types. In a general sense, a remote hearing is defined as a hearing conducted, at least partially, outside the physical courtroom. There are then three subtypes – audio, visual and paper hearings.¹⁶ Audio hearings are conducted by telephone or by audio-only systems, video hearings rely on videoconferencing software, while a hearing on the papers is one using written submissions and evidence, typically affidavits.

These types of hearings can be further classified as fully remote or semi remote. A fully remote hearing is defined as a full hearing that is conducted entirely with participants appearing from remote locations. A semi remote hearing is one where the trial is still physically conducted in the courtroom, but where one or more participants, usually a witness, appears from a location outside the courtroom. Remote hearings before COVID-19 were all semi-remote, outside of a select few small-scale pilots of fully remote hearings.¹⁷

Remote hearings are also distinguished from online dispute resolution ('ODR') platforms, which generally digitise disputes involving lesser value claims by providing a communication platform for parties to attempt to resolve their dispute using alternative dispute resolution. ODR platforms may also be a first step before

12 Roca Junyent, 'Royal Decree Law 16/2020, of April 28th, on Procedural and Organizational Measures to Deal with COVID-19 in the Field of the Administration of Justice' (Report, 29 April 2020); 'Se celebra en España el primer juicio a través de Internet', [First internet trial held in Spanish courts], *Diariolaley [Dailylaw]* (online, 11 May 2020) <<https://diariolaley.laleynext.es/dll/2020/05/14/se-celebra-en-espana-el-primer-juicio-a-traves-de-internet>>.

13 Andrew Denney, '3 New York Judges Died From Coronavirus: Almost 170 Court Workers Infected', *New York Post* (online, 28 April 2020) <<https://nypost.com/2020/04/28/coronavirus-in-ny-3-judges-die-almost-170-court-workers-infected/>>; Debra Cassens Weiss, 'Second Probate Judge in Georgia Dies from COVID-19: 8 Others Also Became Ill', *ABA Journal* (online, 19 August 2020) <<https://www.abajournal.com/news/article/a-second-probate-judge-in-georgia-dies-from-covid-19>>.

14 Susskind, 'The Future of Courts' (n 7).

15 For example, terms like telephone hearings, virtual hearings, distributed hearings, digital hearings or online hearings are used interchangeably with remote hearings.

16 Susskind, 'The Future of Courts' (n 7).

17 See the United Kingdom's pilot study: Meredith Rossner and Martha McCurdy, 'Video Hearings Process Evaluation (Phase 2): Final Report' (Research Report, Her Majesty's Courts and Tribunals Service, July 2020) ('HMCTS Phase 2 Report'). See Australia's Virtual Court Study: David Tait and Vincent Tay, 'Virtual Court Study: Report of a Pilot Test 2018' (Research Report, Western Sydney University, 16 October 2019) <<https://courtofthefuture.org/publications/virtual-court-study/>> ('Virtual Court Study'). See China's Internet Court: Xuhui Fang, 'Recent Development of Internet Courts in China' (2018) 5(1–2) *International Journal on Online Dispute Resolution* 49.

the court or a judge is involved. Many jurisdictions including Australia,¹⁸ Canada,¹⁹ the United States²⁰ and China²¹ have experimented with these systems in an effort to provide inexpensive access to justice for smaller matters ill-suited for costly court proceedings. Unlike conventional court cases, these may operate asynchronously, allowing for greater convenience and omitting the need to align diaries or time zones.

While a substantial body of literature exists for both semi-remote hearings and ODR platforms, there is a significant empirical research gap on fully remote hearings. With the advent of COVID-19, swiftly adopting remote proceedings was necessary to maintain the continuity of court services without risking the safety of court users and staff.²² Accordingly for courts, this was a time of action, not reflection. This article seeks to begin that reflection by drawing upon pre-pandemic learnings and research to examine and critique the experience of remote hearings during the pandemic. In doing so, the aim is to identify the matters that must be weighed in determining when and how to employ remote hearings and build a foundation for the future research agenda on remote courts. At the time of writing, several ‘rapid’ consultation reports have been produced, primarily arising out of the UK, while feedback from Australian Courts is still pending.²³

This article proceeds by first, in Part II, providing an overview of remote hearing technologies and then drawing on the literature to outline both its benefits and problems as identified pre-pandemic. Part III then tentatively assesses the operation of remote courts during the pandemic, including comparing the experience to the previous findings in the literature. Finally, Part IV then looks to the future of the remote hearing, synthesising the matters for consideration in determining when and how to employ a remote hearing and mapping out where further data and analysis is needed.

18 The Victorian Civil and Administrative Tribunal piloted an ODR platform in 2018: see Vivi Tan, ‘Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice’ (2019) 24 *Deakin Law Review* 101, 137.

19 See British Columbia Civil Resolution Tribunal: *Civil Resolution Tribunal Act*, SBC 2012, c 25.

20 See Michigan’s Matterhorn platform which is used by over 110 courts, mediation centres and municipalities across 17 states: *Matterhorn* (Web Page) <<https://getmatterhorn.com/>>; and see Utah’s ‘pajama court’: Justice Deno Himonas, ‘Utah’s Online Dispute Resolution Program’ (2018) 122(3) *Dickinson Law Review* 875.

21 The Supreme People’s Court of China promotes the use of ‘mobile micro court’ on the social media platform WeChat in 12 provinces and cities to help courts conduct trials on the Internet: see Kelly Wang, ‘China Using WeChat for a Digital Justice System’, *Asia Times* (online, 7 December 2019) <<https://asiatimes.com/2019/12/china-using-wechat-for-a-digital-justice-system/>>.

22 Esquire Deposition Solutions, LLC, ‘Courthouses Innovate to Safely Dispense Justice’, *JD Supra* (online, 11 August 2020) <<https://www.jdsupra.com/legalnews/courthouses-innovate-to-safely-dispense-55105/>>.

23 See, eg, ‘Virtual Hearing and Electronic ADR Feedback Form’, *Federal Circuit Court of Australia* (Web Survey, 1 May 2020) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-feedback/>>; Felicity Bell and Michael Legg, ‘Judicial Views of Remote Hearings’ (UNSW Human Ethics approval HC200454, 23 June 2020).

II THE REMOTE HEARING PRE-PANDEMIC

A Use of Audio-Visual Links

Contrary to public perception, technology has always had a significant role within courts.²⁴ Supportive technology is used as a matter of routine,²⁵ and includes audio-visual links ('AVLs'), e-filing, e-discovery, real-time transcription services, and the use of devices on the bench and at the bar table.²⁶ AVL technology in particular has been in use for decades,²⁷ reaching ubiquity across all Australian courts by 2004.²⁸ Legislation authorises the appearance by AVL for witnesses and parties, including criminal defendants,²⁹ and is a matter for the primary judge's discretion exercised in accordance with the circumstances of a particular case.³⁰

In general, a direction to use AVL requires certain minimum technological requirements to be met.³¹ In New South Wales ('NSW'), three further restrictions exist, most significantly, that AVL is not to be used if it would be unfair to any party to the proceeding.³² Unfairness is a broad evaluative judgment that considers if there are issues relating to credibility, documents, technology, length of cross-examination³³ or availability of alternatives.³⁴ Traditionally, in a criminal context, the physical appearance of self-represented prisoners during cross-examination is favoured,³⁵ while in civil matters, it has been held that viva voce evidence is

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- 24 Lyria Bennett Moses, 'Artificial Intelligence in the Courts, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561, 561.
- 25 Chief Justice Tom Bathurst, 'ADR, ODR and AI-DR, or Do We Even Need Courts Anymore?' (Speech, Supreme Court of New South Wales, 20 September 2018) 4.
- 26 Michael Legg, 'Changes' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis, 2013) 13; Margaret Beazley, 'Law in the Age of the Algorithm' (Speech, New South Wales Young Lawyers, 21 September 2017) 9–10.
- 27 Victoria Law Reform Commission, *Technology and the Law* (Report No 52, May 1999) 181 [10.33]; Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Judicial Engagement and AV Links: Judicial Perceptions from Australian Courts' (2019) 26(1) *International Journal of the Legal Profession* 51, 53 ('Judicial Engagement and AV Links').
- 28 Anne Wallace and Ros Macdonald, 'Review of the Extent of Courtroom Technology in Australia' (2004) 12(3) *William and Mary Bill of Rights Journal* 649, 651.
- 29 Wallace, Anleu and Mack, 'Judicial Engagement and AV Links' (n 27). In NSW see *Civil Procedure Act 2005* (NSW) ss 61–2; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B; *Uniform Civil Procedure Rules 2005* (NSW) r 31.3. For federal courts: see *Federal Court of Australia Act 1976* (Cth) ss 47–47G; *Federal Circuit Court of Australia Act 1999* (Cth) ss 66–73.
- 30 *Australian Securities and Investments Commission v Rich* (2004) 49 ASCR 578 ('*ASIC v Rich*'); *Kirby v Centro Properties Limited* (2012) 288 ALR 601, 605 [11] (Gordon J); *KN v The Queen* (2017) 95 NSWLR 767, 778 [66] (The Court).
- 31 See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B(2)(a); *Federal Court of Australia Act 1976* (Cth) s 47C(3). However, note it has been recommended that more definitive operating guidelines for AVL use should be implemented in Australia: see Emma Rowden et al, 'Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings' (Research Report, 20 March 2013) 8 ('Gateways to Justice').
- 32 *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B(2)(c). The other requirements are that AVL should not be used if the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting, or the court is satisfied that the person in respect of whom the direction is sought will not participate in the hearing.
- 33 *ASIC v Rich* (2004) 49 ASCR 578, 583 [19] (Austin J).
- 34 *Antov v Bokan [No 2]* (2019) 10 NSWLR 142, 153 [46], 154 [50]–[51] (Bell P).
- 35 *R v Potter* [2006] NSWSC 1174 [9] (Johnson J).

preferable to evidence adduced using AVL.³⁶ Judges are also accorded broad discretion to sentence over AVL, based on similar considerations such as the interests of justice and the reasonable practicability of using AVL.³⁷

Generally, there are four well-established precedents for using AVLS: (1) for vulnerable witnesses, such as children; (2) for other witnesses, such as those in a foreign jurisdiction, to testify from a location outside the courtroom for cost-saving or convenience; (3) to link prisoners in correctional facilities to courtrooms to conduct remand, pre-trial hearings or bail applications; and (4) to provide ancillary services such as language interpreting or expert reports.

1 Vulnerable Witnesses

From their first deployment through CCTV to videoconferencing today, AVLS have served the essential purpose of allowing vulnerable parties such as children or intimidated witnesses to give evidence in relation to sensitive matters.³⁸ Early studies found children preferred giving testimony by AVL and were ‘significantly less unhappy, more audible and more forthcoming’,³⁹ or less likely to cry, report fear, or describe the trial as unfair.⁴⁰ Later studies confirmed that remote testimony can increase the confidence of victims in criminal trials when they described intimate experiences and lead to higher quality testimony.⁴¹

AVLS are also preferred over the alternatives of using physical screens, intermediaries, written submissions, or pre-recorded evidence, as it preserves judges’ ability to interpret demeanour, and witnesses can also still participate in the ‘warm-up’ of an examination in chief.⁴² The Local Court of NSW has acknowledged that the remote witness facility provides a measure of comfort and

36 *ASIC v Rich* (2004) 49 ACSR 578.

37 *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 5BA(5), 5BB(4); *District Court of Queensland Act 1967* (Qld) s 110C(2); *Justices Act 1886* (Qld) s 178C(2)(3); *Supreme Court of Queensland Act 1991* (Qld) s 80(2); *Penalties and Sentences Act 1992* (Qld) s 15A(1); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 42L(1), 42M(1); *Criminal Procedure Act 2004* (WA) s 77(4); *Criminal Sentencing Act 1995* (WA) s 14A(2)(b); *Evidence Act 1906* (WA) s 121(2)(b). For a discussion on how these considerations have been interpreted: see Emma Rowden, Anne Wallace and Jane Goodman-Delahunty, ‘Sentencing by Videolink: Up in the Air?’ (2010) 34(6) *Criminal Law Journal* 363, 373 (‘Sentencing by Videolink’).

38 Rowden et al, ‘Gateways to Justice’ (n 31) 24–5; Joyce Plotnikoff and Richard Woolfson, ‘“Measuring Up?” Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings’ (Research Report, July 2009) 12 (‘Measuring Up?’).

39 Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (Home Office, 1991).

40 Linda Mulcahy, ‘The Unbearable Lightness of Being? Shifts Towards the Virtual Trial’ (2008) 35(4) *Journal of Law and Society* 464, 469 (‘The Unbearable Lightness of Being?’); Kathleen Murray, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Stationery Office Books, 1995).

41 Mandy Burton, Roger Evans and Andrew Sanders, ‘Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales’ (2007) 11(1) *International Journal of Evidence and Proof* 1, 15 (‘Vulnerable and Intimidated Witnesses’); Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27(2) *Journal of Law and Society* 219, 248.

42 Mulcahy, ‘The Unbearable Lightness of Being?’ (n 40); Burton, Evans and Sanders, ‘Vulnerable and Intimidated Witnesses’ (n 41) 11.

security to victims, being highly utilised by over 2,050 witnesses in 2018.⁴³ Continuing support is also evident from projects such as the redevelopment of the Surry Hills Children's Court in NSW including a private area for vulnerable witnesses to give evidence.⁴⁴

For other disadvantaged groups, AVLs can be useful where the structure and formality of the courtroom may otherwise be alienating. Not having to enter the foreign setting of a courtroom may assist in Indigenous Australians' effective participation in the justice system; as they are 'seen as another type of vulnerable witness'.⁴⁵ Similarly, legislation empowers the use of AVL for 'a cognitively impaired person',⁴⁶ as some research shows persons with mental illness can more easily become stressed and aggressive in a court environment and have negative 'experience[s] of justice' as a result.⁴⁷

2 Remote Participation

AVLs have also been recognised as a way to improve accessibility and expedite the administration of justice where distance, cost or poor health is an issue.⁴⁸ The technology is used to facilitate remote appearances both domestically and internationally.

In Australia, adoption of AVLs has been especially prevalent as it helps mitigate large geographical distances.⁴⁹ The technology is used across all courts, up to and including the High Court, where it is often used for hearings of special leave applications and single Justice hearings,⁵⁰ to lower courts, where there is the greatest concentration of use.⁵¹ In the face of a wider decline in Local Court circuit services, AVLs help minimise delay for regional participants and free up court resources by omitting the need for court staff to travel.⁵² Reflecting on the state's geography, the former Chief Justice of Western Australia, Wayne Martin has publicly acknowledged AVLs as indispensable to its justice system.⁵³

43 Local Court of New South Wales, *Local Court of New South Wales Annual Review 2018* (Report, 2018) 30 ('Annual Report 2018').

44 New South Wales Department of Justice, *Annual Report 2018–19* (Report, 2019) 36. The Youth Koori Court was expanded to the Surry Hills Children's Court in February 2019.

45 Anne Wallace, "'Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19(1) *Journal of Law and Information Science* 1, 16 ('Virtual Justice in the Bush').

46 *Criminal Procedure Act 1986* (NSW) ss 306ZB, 306ZC. 'Vulnerable person' is defined in s 306M to include 'a cognitively impaired person'.

47 Maria Karras et al, 'On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW' (Research Report, Law and Justice Foundation of NSW, May 2006) 137.

48 Rowden, Wallace and Goodman-Delahunty, 'Sentencing by Videolink' (n 37) 373; *R v Yates* [2002] NSWCCA 520, [218]–[221] (The Court).

49 Wallace, 'Virtual Justice in the Bush' (n 45) 3.

50 High Court of Australia, *Annual Report 2018–19* (Report, 2019) 14.

51 For example, in the New South Wales Local Court, court appearances made by AVL increased from 48,000 in 2016 to 52,800 in 2018. See Local Court of New South Wales, *Annual Report 2018* (n 43) 29.

52 Law Council of Australia, 'The Justice Project' (Final Report, August 2018) 33.

53 Rowden, Wallace and Goodman-Delahunty, 'Sentencing by Videolink' (n 37) 373, citing Chief Justice Wayne Martin, 'Sentencing By Video Link: The Western Australian Experience' (Canberra, Judicial College of Australia and ANU Sentencing Conference, 6–7 February 2010).

Remote witness technology also allows evidence to be taken from overseas.⁵⁴ Prior to the advent of AVL such testimony would need to be obtained through evidence on commission, including through *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* ('Hague Evidence Convention').⁵⁵ Drafted when videoconferencing was only a theoretical possibility, the Hague Evidence Convention required the judicial authorities of the foreign state to act as the 'eyes, ears and mouth' of the requesting state⁵⁶ by sending a court appointed commissioner to travel to the witness to take their evidence.⁵⁷ The advent of AVLs allowed countries to skip the slow and cumbersome process of sending formal letters through diplomatic channels to achieve the Hague Evidence Convention's requirements.⁵⁸ It also eliminates logistical burdens such as visas, prevents forum shopping and is less environmentally harmful.⁵⁹ While initially courts disapproved of overseas witness testimony where credit was an issue, this has become less of a concern with the availability of high quality AVL.⁶⁰ However, a continuing practical difficulty is the witness's willingness to appear. An overseas witness cannot be compelled to participate in a trial in Australia unless the Hague Evidence Convention or other treaty is employed to have the foreign state compel them to participate and answer questions.⁶¹ This will still require a letter of request sent to the foreign country's court to compel the witness.⁶²

3 Prisoners

All jurisdictions have legislation allowing for an accused prisoner to appear in court by AVL, with certain matters such as adjournments, mentions, continuing remand and subsequent bail applications, even being encouraged.⁶³ They are also used regularly for consultations between prisoners and defence solicitors.⁶⁴ However, for more serious proceedings, most jurisdictions have a presumption in favour of a defendant's physical appearance.⁶⁵

54 *Foreign Evidence Act 1994* (Cth) pt 2; *Evidence on Commission Act 1995* (NSW) pt 4; *Uniform Civil Procedure Rules 2005* (NSW) pt 52.

55 *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October 1972). Australia signed 23 October 1992 (entered into force 22 December 2012).

56 Martin Davies, 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' (2007) 55(2) *American Journal of Comparative Law* 205, 207 ('Bypassing the Hague Evidence Convention').

57 BC Cairns, *Australian Civil Procedure* (Thomson Reuters, 11th ed, 2016) 626 [15.160].

58 Davies, 'Bypassing the Hague Evidence Convention' (n 56) 206.

59 Christopher Fobes, 'Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change' (2020) 24(1) *Lewis and Clark Law Review* 299, 317.

60 *DPP (NSW) v Alexander* (1993) 33 NSWLR 482. See also below Part II(B)(1).

61 See *Joyce v Sunland Waterfront (BVI) Ltd* (2011) 195 FCR 213, 230 [60], 231–2 [65].

62 See *Foreign Evidence Act 1994* (Cth) s 7(1)(c) and state equivalents, eg, *Evidence on Commission Act 1995* (NSW) s 6(1)(c); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 9B(1)(c). See generally *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* (1987) 14 FCR 461; *DPP (NSW) v Alexander* (1993) 33 NSWLR 482, 486 (Hunt CJ at CL).

63 Wallace, Anleu and Mack, 'Judicial Engagement and AV Links' (n 27) 53.

64 Equality and Human Rights Commission, 'Inclusive Justice: A System Designed for All' (Research Report, 22 April 2020) 7 ('Inclusive Justice').

65 Wallace, Anleu and Mack, 'Judicial Engagement and AV Links' (n 27) 53.

Security was also a relevant imperative for using AVLs, as a way of mitigating risks associated with inmate movement between correction facilities⁶⁶ or where court participants may be endangered in certain mafia-type trials.⁶⁷

Some scholars have argued that AVLs are more humane for defendants in custody, as it avoids prison transport trips, strip searches and waiting in holding cells.⁶⁸ In one study, many prisoners were happy to have their matter ‘over and done with quick as possible’; although others were still required to wait long hours before and after their AVL.⁶⁹

There is also the concern that prisoners are purposely waiving their rights to appear in-person to avoid prison transportation or otherwise being pressured into appearing by AVL to save cost.⁷⁰ In NSW, a Bureau of Crime Statistics and Research (‘BOCSAR’) study found that after AVL facilities were installed across five local courts in NSW, the average number of in-person appearances fell from 96 per month to 44 per month, saving an estimated \$367,118 in prison transport costs.⁷¹ However, where Local Courts added extra, or upgraded existing, AVL-capable courtrooms, there were no significant reductions of in-person court appearances, tentatively pointing against the view that prisoners are being pressured to appear by AVL.⁷²

4 Ancillary Services

AVLs also facilitate access to services including interpreters and expert witnesses that might otherwise not be available on site at the court or tribunal.⁷³ The role of an expert witness is to assist the court with technical and scientific expertise.⁷⁴ Although expert evidence can be admitted into evidence by consent, it is often common, especially in criminal trials, for experts to give evidence either

66 Rowden, Wallace and Goodman-Delahunty, ‘Sentencing by Videolink’ (n 37) 375.

67 David Tait et al, ‘Towards a Distributed Courtroom’ (Research Report, Western Sydney University, 15 July 2017) 80 (‘Towards a Distributed Courtroom’); Camille Gourdet et al, ‘Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology’ (Research Report, RAND Corporation, January 2020) 10.

68 Tait et al, ‘Towards a Distributed Courtroom’ (n 67) 11.

69 Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix* (Routledge, 2018) 154 (‘*The Pixelated Prisoner*’).

70 Ibid 157; Emily McCarron, Anne Grunseit and Suzie Forell, ‘Taking Justice into Custody: The Legal Needs of Prisoners’ (Research Report, Law and Justice Foundation of New South Wales, July 2008).

71 Neil Donnelly, ‘The Impact of Audio Visual Links (AVL) in Courtrooms on Prison Transport Costs’ (Issue Paper No 137, NSW Bureau of Crime Statistics and Research, September 2018) 4.

72 Ibid 7–8.

73 Wallace, ‘Virtual Justice in the Bush’ (n 45) 4; Sabine Braun, ‘The European AVIDICUS Projects: Collaborating to Assess the Viability of Video-Mediated Interpreting in Legal Proceedings’ (2016) 4(1) *European Journal of Applied Linguistics* 173 (‘The European AVIDICUS Projects’); Alan Brett and Bruce Blumberg, ‘Video-linked Court Liaison Services: Forging New Frontiers in Psychiatry in Western Australia’ (2006) 14(1) *Forensic Psychiatry* 53.

74 Emma Rowden and Anne Wallace, ‘Performing Expertise: The Design of Audiovisual Links and the Construction of the Remote Expert Witness in Court’ (2019) 28(5) *Social and Legal Studies* 698, 700 (‘Performing Expertise’); Neal Feigenson and Christina Spiesel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (New York University Press, 2009).

in-person or remotely using AVL.⁷⁵ Because expert witnesses often lack availability, AVLS can help overcome delays arising from scheduling.⁷⁶ However, some research has underscored that remoteness can reduce the quality of communication and lead to higher error rates with interpreting services⁷⁷ or lower quality expert testimony.⁷⁸

B Critique of AVLS Pre-Pandemic

Despite their widespread use, AVLS have received significant criticism by various scholars across a range of disciplines. These most often relate to the limitations of the technology, the impact it may have on fairness, and the disruption its use causes on the civic nature of the courtroom.

1 Availability and Quality of Technology

It has long been recognised that a limit to the effectiveness of any AVL is the quality of the technology and equipment.⁷⁹ AVL systems comprise four key technological components: 1) transmission system; 2) camera/microphone/screen/speaker; 3) CODEC (encoder/decoder); and 4) compression/decompression hardware and software.⁸⁰ The type of transmission system and telecommunication infrastructure (such as telephone wires, satellite cables, or mobile networks) determines the bandwidth of the signal, which affects the quality transmitted. The latter components can be separate pieces of hardware, or packaged together in either specific videoconferencing units,⁸¹ or with computers (including desktops, laptops, tablets, or smartphones) using chosen software (eg, Microsoft Teams, Skype, WhatsApp, Cisco Webex, Zoom) installed on devices.

While the actual underlying hardware of AVLS is relatively unsophisticated, the quality of output has remained a persistent issue.⁸² In the early days of AVL in the 1980s, the limited bandwidth and primitive compression techniques led to frequent dropouts, high latency (delay) or freezing, and video unsynchronised with

75 Rowden and Wallace, 'Performing Expertise' (n 74) 701; Anne Wallace, 'Using Videolink to Take Forensic Evidence: Lessons from an Australian Case Study' (2013) 17(3) *International Journal of Evidence and Proof* 221.

76 European Council, 'Guide on Videoconferencing in Cross-Border Proceedings' (Report, European Union, 2013) 6.

77 Braun, 'The European AVIDICUS Projects' (n 73); Chief Justice Marilyn Warren, 'Embracing Technology: The Way Forward for the Courts' (2015) 24(4) *Journal of Judicial Administration* 227, 231 ('Embracing Technology').

78 Rowden and Wallace, 'Performing Expertise' (n 74) 698.

79 Anne Bowen Poulin, 'Criminal Justice and Video Conferencing Technology: The Remote Defendant' (2004) 78(4) *Tulane Law Review* 1089, 1104 ('Criminal Justice and Video Conferencing Technology').

80 Jordan Gruber, Christopher Nicholson and Joshua Reichek, 'Video Technology' (2020) 58 *American Jurisprudence Trials* 481, § 102.

81 See, eg, 'Videoconferencing Guide', *Federal Court of Australia* (Web Page, October 2016) [2.4] <www.fedcourt.gov.au/going-to-court/videoconferencing-guide>. The Court uses Tandberg videoconferencing units.

82 Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) *Modern Law Review* 995, 1007 ('The Rise of Digital Justice').

audio.⁸³ While the Internet brought vast improvements, 21st century studies have still found that video and connection quality remain recurring issues.⁸⁴ In one study, 40% of children surveyed described difficulties in giving evidence due to equipment failure and poor audio-visual quality,⁸⁵ while another study emphasised confidentiality risks in AVL booths that leaked sound.⁸⁶ Thus, scholars have cautioned that the reliability, acoustic and visual quality should match the standard of a courtroom before AVLs are used.⁸⁷

However, given the pace of advances in technology, it is logical to give newer studies greater weight when assessing the quality of AVL technology. Since 2016, Her Majesty's Courts and Tribunals Service ('HMCTS') in the United Kingdom has embarked on a £1.2 billion court reform programme which include remote hearing pilots.⁸⁸ In the first pilot for basic appeals for the First Tier Tribunal (Tax Chamber), the technology was generally successful although some technical issues arose from the product requiring a specific browser and hardware specifications.⁸⁹ The second pilot for Civil, Family and short notice hearings that took place between March 2019 to March 2020 found technical issues were 'less significant' and easier to remedy, with audio quality generally high.⁹⁰ It was also reported that though in some cases lighting made it difficult to distinguish features or there were some delays in speaking, this was only distracting and did not impact the proceedings.⁹¹

Another evaluation of a booking tool implemented in October 2018 to book remand hearings found that AVLs worked successfully on the first attempt in almost 90% of cases.⁹² Nonetheless, there were still instances of overlapping speech, especially where there was more than one remote participant.⁹³ The report concluded that ultimately, despite upgrades to AVL equipment, performance was still dependent upon existing court infrastructure.⁹⁴ Likewise in Australia's case, it has been found that 'investment [in information technology] has been uneven

83 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 57 ('Online Courts and the Future of Justice').

84 Suzie Forell, Meg Laufer, and Erol Digiusto, 'Legal Assistance by Video Conferencing: What Is Known?' (Paper 15, Law and Justice Foundation of New South Wales, November 2011) 11–12 ('Legal Assistance by Video Conferencing').

85 Plotnikoff and Woolfson, 'Measuring Up?' (n 38) 10–11.

86 Lulham et al, 'Court-Custody Audio Visual Links: Designing for Equitable Justice Experiences in the Use of Court-Custody Video Conferencing' (Research Report, University of Technology Sydney, 1 September 2017) 9 ('Court-Custody Audio Visual Links').

87 Penelope Gibbs, 'Defendants on Video: Conveyor Belt Justice or a Revolution in Access?' (Research Report, Transform Justice, October 2017) 1 ('Defendants on Video').

88 Susskind, *Online Courts and the Future of Justice* (n 83) 166–7; 'The HMCTS Reform Programme', *Her Majesty's Courts and Tribunals Service* (Web Page, 9 November 2018) <<https://www.gov.uk/guidance/the-hmcts-reform-programme>>.

89 Meredith Rossner and Martha McCurdy, 'Implementing Video Hearings (Party-to-State): A Process Evaluation' (Research Report, Ministry of Justice, September 2018) 1 ('HMCTS Phase 1 Report').

90 Rossner and McCurdy, 'HMCTS Phase 2 Report' (n 17) 1.

91 *Ibid* 36.

92 See Nigel Fielding et al, 'Video Enabled Justice Evaluation' (Research Report, Sussex Police and Crime Commissioner, March 2020) 7 ('Video Enabled Justice Evaluation').

93 *Ibid* 8.

94 *Ibid* 109–11.

across jurisdictions and the availability, quality and use of technology varies widely'.⁹⁵ These reports suggest that despite hardware or software upgrades, a continuing bottleneck to performance is the infrastructure of the transmission system.⁹⁶

2 Fairness

Much of the literature evaluates AVL from the perspective of whether it affects procedural fairness. Procedural fairness includes an opportunity to tender and challenge evidence, and to advance arguments in favour of, and respond to arguments against, a party's interests in issue in a trial.⁹⁷ Moreover, importantly for remote hearings it may include the opportunity to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.⁹⁸ Procedural fairness is essential to upholding the rule of law and maintaining public confidence in the legal system.⁹⁹ However, procedural fairness does not have 'immutably fixed content' but 'may vary according to the circumstances of particular cases'.¹⁰⁰ The aim is to avoid practical injustice.¹⁰¹

Past scholarship has critiqued the use of AVL and its impact on fairness from multiple perspectives. Scholars have criticised how users appearing on video may have greater difficulty engaging in the proceedings and may feel alienated, stressed or fatigued.¹⁰² Early research also argued that AVLS removed non-verbal cues in proceedings and distorted gestures, leading to a weaker standard of communication that can potentially cause evidence to be less believable.¹⁰³ However, later research has suggested that AVL appearances can actually significantly improve the jury's

95 Productivity Commission, 'Access to Justice Arrangements: Inquiry Report' (Report No 72, 5 September 2014) 573.

96 Rowden et al, 'Gateways to Justice' (n 31) 49–61.

97 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 144–5 (The Court); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ), 379–80 [141] (Heydon J); *HT v The Queen* (2019) 93 ALJR 1307, 1313 [17] (Kiefel CJ, Bell and Keane JJ), 1321 [64] (Gordon J). See also *Al Rawi v Security Service* [2012] 1 AC 531, 542 [14] (Lord Neuberger MR for the Court).

98 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 224 [8.20], citing the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *Lee v The Queen* (1998) 195 CLR 594, 602 [32] (The Court) ('Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.'). See also *Al Rawi v Security Service* [2012] 1 AC 531, 541–2 [13] (Lord Neuberger MR for the Court); Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 90, 97.

99 Chief Justice Robert French, 'Procedural Fairness: Indispensable to Justice?' (Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010) 1.

100 *HT v The Queen* (2019) 93 ALJR 1307, 1313 [18] (Kiefel CJ, Bell and Keane JJ), 1321 [64] (Gordon J).

101 *Ibid.*

102 JUSTICE, 'Understanding Courts' (Research Report, 2019) 54 [2.75] ('Understanding Courts').

103 Poulin, 'Criminal Justice and Video Conferencing Technology' (n 79) 1110; Tait and Tay, 'Virtual Court Study' (n 17) 30.

ability to ‘see expressions of the accused’s face’ as well as the audio quality of their testimony.¹⁰⁴

In relation to prisoners, criticism arises from how the ‘blanket use’ of AVLs affect the right to effective access to counsel by alienating defendants from lawyers.¹⁰⁵ Besides greater difficulty taking instructions remotely,¹⁰⁶ defence advocates have found it harder to build rapport with clients or discuss their cases as part of pre-hearing conversations as consultations tended to be one-off.¹⁰⁷ Thus, despite its potential as a ‘major portal for prisoners to access justice,’ there is the concern of a second-rate experience.¹⁰⁸ Nonetheless, it should be noted that to date, there is no empirical support to affirm or disprove that remote legal services cannot provide advice to an appropriate standard.¹⁰⁹

Similarly, research has also demonstrated that AVL hearings are ‘generally inappropriate for defendants ... [with] identified vulnerabilities’.¹¹⁰ For defendants with autism, not being in the physical court can confuse their understanding of the proceedings.¹¹¹ AVL may also make it more difficult to identify court users’ vulnerabilities or disabilities,¹¹² or when a person is struggling to understand and needs a break.¹¹³ Likewise, users from non-English speaking cultures may find it harder to communicate without face-to-face contact.¹¹⁴ For Indigenous Australians, while AVLs can create some security by generating some distance from a foreign system,¹¹⁵ it can also exacerbate existing feelings of remoteness in interacting with a foreign system.¹¹⁶ Moreover, in ‘high stakes’ scenarios such as asylum hearings, an appearance by AVL ‘reduces mutual trust and understanding’¹¹⁷ and inhibits the ability to convey stories.¹¹⁸ One study found litigants in United States immigration adjudications appearing by AVL were more likely to be deported because they were less able to engage with the hearing.¹¹⁹

104 Tait et al, ‘Towards a Distributed Courtroom’ (n 67) 60. However, the study did note this may be more a reflection of the acoustics and lighting of the older North Sydney courtroom in which the pilot was held rather than the inherent superiority of vision and audio of an AVL appearance.

105 McKay, *The Pixelated Prisoner* (n 69) 157–60.

106 JUSTICE, ‘Understanding Courts’ (n 102) 55 [2.76].

107 Nigel Fielding et al, ‘Video Enabled Justice Evaluation’ (n 92) 99.

108 Carolyn McKay, ‘Video Links from Prison: Permeability and the Carceral World’ (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 21

109 Donoghue, ‘The Rise of Digital Justice’ (n 82) 1014–15.

110 Magistrates Association, ‘Magistrates Association Response to Judicial Ways of Working 2022: Crime Consultation’ (Consultation Response, 14 June 2018) 5.

111 Gibbs, ‘Defendants on Video’ (n 87) 23.

112 JUSTICE, ‘Understanding Courts’ (n 102) 56 [2.77].

113 Jo Hynes, Nick Gill and Joe Tomlinson, ‘In Defence of the Hearing? Emerging Geographies of Publicness, Materiality, Access and Communication in Court Hearings’ (2020) 14(9) *Geography Compass* 1, 7.

114 Susan Kluss, ‘Virtual Justice: The Problems with Audiovisual Appearances in Criminal Courts’ (2008) 46(4) *Law Society Journal* 49, 50.

115 Wallace, ‘Virtual Justice in the Bush’ (n 45) 12–16.

116 *Ibid* 16.

117 Mark Federman, ‘On the Media Effects of Immigration and Refugee Board Hearings Via Videoconference’ (2006) 19(4) *Journal of Refugee Studies* 433, 433.

118 Aaron Haas, ‘Videoconferencing in Immigration Proceedings’ (2006) 5(1) *Pierce Law Review* 59, 75.

119 Ingrid Eagly, ‘Remote Adjudication in Immigration’ (2014) 109(4) *Northwestern University Law Review* 933.

However, where the heaviest contention lies is in relation to the fairness of remote witness testimony. A critical part of trials is cross-examination.¹²⁰ This provides parties the opportunity to test the other side's evidence, including credibility.¹²¹ Generations of lawyers have argued this should be done in person with an elevated witness box, to allow for proper assessment of demeanour based off the view that AVLs cannot fully capture cues such as hand gestures, facial expression, gaze, and posture.¹²² Tempering this however are equally longstanding studies that argue demeanour is an ineffective tool for determining credibility.¹²³

In Taylor and Joudo Larsen's study on sexual assault complainants, it was found that the mode of victim testimony, whether by AVL or face-to-face, does not influence jury outcomes.¹²⁴ Conversely, Tait and Tay's 'Virtual Court Study', found witnesses were less credible on screen than in face-to-face environments.¹²⁵ In the 'Gateways to Justice' study, it was shown the way AVLs are implemented has a real impact on the court's service delivery and hence its justice outcomes.¹²⁶ Through a controlled mock trial, the study found that improving the quality of the process (the interactions including orientation and support) and the environment (video link technology and remote space comfort) in turn improved the subjective ratings from observers and participants (including witnesses and prosecutor).¹²⁷ This was further confirmed in the subsequent 'Towards a Distributed Courtroom' study which found placing the accused in a distributed condition – so that they sit alongside their lawyer in a remote room – led jurors to consider the accused as less culpable.¹²⁸ In contrast, seeing the accused in-person and alone in the dock had the strongest effect in increasing the perceived strength of the prosecution case.¹²⁹ Where the accused in the mock trial was innocent, the distributed condition delivered the most accurate verdicts and best protected the presumption of innocence.¹³⁰

120 Cross-examination has been said to be 'the greatest legal engine ever invented for the discovery of truth': *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 388-389 [74] (Heydon, Crennan and Bell JJ), quoting John H Wigmore.

121 Trial judges generally must refrain from making adverse findings as to the credibility of parties and witnesses absent cross-examination directed to the frankness or completeness of their evidence: *MWJ v The Queen* (2005) 80 ALJR 329, 339 [39] (Gummow, Kirby and Callinan JJ); *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 389 [75] (Heydon, Crennan and Bell JJ).

122 Poulin, 'Criminal Justice and Video Conferencing Technology' (n 79) 1110; Mulcahy, 'The Unbearable Lightness of Being?' (n 40) 484.

123 John Hocking et al, 'Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Cues' (1979) 6(1) *Human Communication Research* 33; Olin Wellborn, 'Demeanor' (1991) 76(5) *Cornell Law Review* 1075.

124 Natalie Taylor and Jacqueline Joudo Larsen, 'The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study' (Research Report No 68, Australian Institute of Criminology, 2005).

125 Tait and Tay, 'Virtual Court Study' (n 17) 29-30.

126 Noting that improving both the process and environment compounded the positive effects, see: Rowden et al, 'Gateways to Justice' (n 31) 10.

127 *Ibid* 10, 41-4.

128 Tait et al, 'Towards a Distributed Courtroom' (n 67) 49.

129 *Ibid* 56.

130 *Ibid* 49.

Courts similarly have competing viewpoints, with authorities both for and against the use of remote testimony. Evidence by video link requires the party making the application to satisfy the court that it is in the interests of the administration of justice.¹³¹ Decisions in favour of AVLs argue a substantial case is needed to decline an AVL order, given the savings in time, cost and convenience AVLs provide.¹³² The opposite view prefers evidence in person ‘unless cause to the contrary is shown’.¹³³ These reflect concerns that by using AVLs ‘the effectiveness of cross-examination as a weapon in the fight for truth’ may be hindered¹³⁴ and witness demeanour cannot be fully observed.¹³⁵ It has been held that ‘any tension between the two streams of authority’ be reconciled by the facts of a particular case.¹³⁶

However, the High Court has cautioned that there are ‘dangers [in] too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses’.¹³⁷ In *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*, Kirby J observed the utility of re-examining long-accepted principles ‘in light of social and technological changes.’¹³⁸ Regarding remote testimony, he adverted to two considerations: (1) the altered character of civil trials, moving away from the continuous oral jury trial to one more conducive to the efficient disposal of litigation; and (2) the studies of psychology that have since confirmed the danger of placing undue reliance upon appearances in evaluating credibility.¹³⁹ Thus, demeanour should weigh less than more objective considerations. While courts recognise evidence by AVL may impose disadvantages in cross-examination,¹⁴⁰ they also found there is no absolute ‘right of confrontation’ for a face-to-face trial with witnesses.¹⁴¹ A fair trial does not equate to a perfect one ‘free from possible detriment or disadvantage of any

131 *Evidence (Audio and Visual Links) Act 1998* (NSW) s 5B; *R v Yates* [2002] NSWCCA 520, [216] (The Court).

132 *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261, [25] (Katz J); *Versace v Monte* [2001] FCA 1454, [16] (Tamberlin J).

133 *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court of New South Wales, Giles CJ Comm D, 11 March 1997) 6.

134 *Ibid* 6. See also *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* (2002) 119 FCR 303, 305–6 [7] (Spender J).

135 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502, 2–3 [7] (Stone J); *Campaign Master (UK) Ltd v Forty Two International Pty Ltd [No 3]* (2009) 181 FCR 152, 171 [78] (Buchanan J). For a contrary view see *Bayer AG v Minister for Health (Cth)* (1988) 96 FLR 50, 116 (Young J); *R v Ngo* (2001) 124 A Crim R 151, 154 [14] (Dunford J).

136 *ASIC v Rich* (2004) 49 ACSR 578; *Campaign Master (UK) Ltd v Forty Two International Pty Ltd [No 3]* (2009) 181 FCR 152, 170 [76] (Buchanan J).

137 *Fox v Percy* (2003) 214 CLR 118, 129 [30] (Gleeson CJ, Gummow and Kirby JJ).

138 (1999) 73 ALJR 306, 327 [87].

139 Porter et al, ‘Secrets and Lies: Involuntary Leakage in Deceptive Facial Expressions as a Function of Emotional Intensity’ (2012) 36(1) *Journal of Nonverbal Behavior* 23.

140 *R v Yates* [2002] NSWCCA 520, [218] (The Court).

141 *R v Ngo* (2003) 57 NSWLR 55, 67 [93] (The Court).

kind¹⁴² and accordingly a wide range of witnesses have all been examined over AVL.¹⁴³

Nonetheless, the party making the application for AVL must still satisfy the court that an AVL direction is in the interests of the administration of justice.¹⁴⁴ In the Federal Court, it has been argued that the favoured approach to meet this standard is that cross-examination should take place in a courtroom.¹⁴⁵ Applications for remote testimony have been denied where cases involved lengthy cross-examination, substantial documentation, time zone differences and issues of credit.¹⁴⁶ In addition to a more conducive environment for assessing credibility, two additional benefits of in-court testimony have been noted by the court: (1) that it ensures the witness remains conscious of the solemnity of the occasion; and (2) that the cross-examiner is not prejudiced from the loss of this gravitas on the witness.¹⁴⁷ These reflect the literature's view of the importance of the traditional courtroom space.

3 The Civic Courtroom

Spanning decades, from when CCTV links were first used to facilitate remote appearances, a substantial body of the literature has examined the impact of AVLS on the courtroom's social, public and civic qualities.¹⁴⁸ Scholars have pointed out the need for trials to be conducted in large public spaces since 'time immemorial' to ensure open justice.¹⁴⁹ Open justice means that courts 'sit in public' so that the courtroom and the evidence tendered are accessible to the public and 'anybody may publish a fair and accurate report of the proceedings'.¹⁵⁰ The rationale for open justice is that a 'public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect'.¹⁵¹ Open justice secures objectives such as decisions according to law, procedural fairness and impartiality, which in turn

142 Ibid 68 [99]; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *R v Glennon* (1992) 173 CLR 592; *Dietrich v The Queen* (1992) 177 CLR 292.

143 *KN v The Queen* (2017) 95 NSWLR 767.

144 *Evidence (Audio and Visual Links) Act 1998* (NSW) s 5B; *R v Yates* [2002] NSWCCA 520, [216] (The Court).

145 *Campaign Master (UK) Ltd v Forty Two International Pty Ltd [No 3]* (2009) 181 FCR 152, 171 [78] (Buchanan J); *Blackrock Asset Management Australia Services Ltd v Waked [No 2]* [2011] FCA 479, [45]–[46] (Perram J); *Ellis v Green Tower Pty Ltd* [2017] FCCA 1390, [42] (Judge Lucev).

146 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502, [5]–[8] (Stone J); *Hua Wang Bank Berhad v Commissioner of Taxation [No 4]* [2013] FCA 495, [17]–[19] (Perram J).

147 *Campaign Master (UK) Ltd v Forty Two International Pty Ltd [No 3]* (2009) 181 FCR 152, 171 [78] (Buchanan J).

148 David Doret, 'Trial by Videotape: Can Justice Be Seen to Be Done?' (1974) 47(2) *Temple Law Quarterly* 228, 256; Eric Bellone, 'Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom' (2012) 8(1) *Journal of International Commercial Law and Technology* 24, 24 ('Private Attorney-Client Communications').

149 Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23(4) *Communications Law* 183, 1.

150 *Hogan v Hinch* (2011) 243 CLR 506, 530 [20], 532 [22] (French CJ). See also *Dickason v Dickason* (1913) 17 CLR 50; *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

151 *Scott v Scott* [1913] AC 417, 463 (Lord Atkinson).

promotes public confidence in the courts because the courts are made accountable and open to scrutiny.

Concurrently, design jurisprudence approaches open justice from the perspective of the importance of sightlines. Besides ensuring all evidence can be seen as it is given, sightlines also emphasise the impartiality of the judge and how they supervise and deal with a dispute.¹⁵² More than just architectural motifs, the courtroom's wide spatial distances, public gallery and exaggerated demarcations, convey important messages and behavioural cues.¹⁵³ Knowing when to sit, stand, speak, bow, and the tradition of 'handing' documents reflect the principles of equality before the law, the impartiality of the judge, and the solemnity of the legal process. In contrast, AVL spaces are often anonymous, cold, bland, windowless and small,¹⁵⁴ or in one witness's description 'like a cupboard'.¹⁵⁵ Consequently, academics dispute that AVL facilities are legally an extension of the courtroom,¹⁵⁶ and instead argue they are enclosed, non-public and informal sites that do not reflect the legal civic space of a physical courtroom.¹⁵⁷ However, as the 'Virtual Court Study' demonstrated, where the AVL suite was upgraded into an immersive pod, the quality of communication experienced was no different to face-to-face communication.¹⁵⁸ In addition to establishing a more comfortable remote environment, the pod used three 40-inch screens to surround the user's view, adding additional sightlines to allow the user to see other participants turning to talk to one another.¹⁵⁹

Nevertheless, some scholars argue that justice without courtrooms is conceptually impossible.¹⁶⁰ Without the courtroom, the 'trial may lose its potency' as the experience of the remote witness room may not engender the same feeling of awe and respect of the law.¹⁶¹ Judges have also flagged that anecdotally, the 'weight' of witnesses' evidence can be lost over AVL as they may not fully

152 Linda Mulcahy and Emma Rowden, *The Democratic Courthouse: A Modern History of Design, Due Process and Dignity* (Routledge, 2020) 260–1.

153 Emma Rowden, 'Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?' (2018) 14(2) *Law, Culture and the Humanities* 263, 274–5 ('Distributed Courts and Legitimacy').

154 Rowden, Wallace and Goodman-Delahunty, 'Sentencing by Videolink' (n 37) 379.

155 Joyce Plotnikoff and Richard Woolfson, 'In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings' (Research Report, National Society for the Prevention of Cruelty to Children, 2004) 38.

156 *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5C; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2009) 258 ALR 598, 602–3 [18] (Barrett J).

157 Rowden, Wallace and Goodman-Delahunty, 'Sentencing by Videolink' (n 37) 379; Carolyn McKay, 'Video Links from Prison: Permeability and the Carceral World' (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 21, 25; Gerald Ashdown and Michael Menzel, 'The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions' (2002) 80(1) *Denver University Law Review* 63, 106.

158 Tait and Tay, 'Virtual Court Study' (n 17) 24.

159 *Ibid* 23–30.

160 Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011).

161 Wallace, 'Virtual Justice in the Bush' (n 45) 15; Mulcahy, 'The Unbearable Lightness of Being?' (n 40) 481–2.

comprehend the gravity of their sworn evidence.¹⁶² While for some witnesses, the informality of AVLs was ‘much less intimidating than being in a courtroom’,¹⁶³ others found it put them at a disadvantage.¹⁶⁴ In particular, expert witnesses may experience a loss of framing as an authoritative figure.¹⁶⁵ Factors like a visually intrusive background, as was the case in one doctor’s experience testifying from a crowded hospital lunch room, requires witnesses to expend greater energy to mitigate environmental distractions.¹⁶⁶ Of perhaps greater concern are the findings by the Western Sydney University that this loss of authority may apply to prosecutors and adjudicators. In the ‘Towards a Distributed Courtroom’ study, it was found having the prosecutor appear on screen made her seem to the jurors ‘significantly less aggressive ... less believable, less credible, weaker and less convincing’.¹⁶⁷ Similarly, in the ‘Virtual Court Study’, the tribunal member’s authority was perceived by participants to be weaker on screen, even where his background was made brighter and donned with two symbolic black strips.¹⁶⁸

The literature also highlights the dangers of losing the human element of the hearing. Academics argue presence by AVL is not equivalent to physical presence¹⁶⁹ as the loss of sensory engagement leads to a less humane experience. Consequently, without ‘human temperature’, the perceived coldness of a screen stifled real connections with others.¹⁷⁰ This may have grave consequences in criminal matters. One study reported the experience of two defendants to being like the ‘caging of animals’.¹⁷¹ In another instance, a judge misidentified a prisoner for another’s identity.¹⁷² One more interviewee felt they were treated like ‘a number’ and that they had a better chance of arguing their case face-to-face.¹⁷³ These experiences show there are real risks of AVLs dehumanising the trial and significantly affecting the perception of parties, witnesses and the public on court processes.

Another dramatic risk is in sentencing. Studies have found sentences by AVL to increase the likelihood of receiving custodial sentences¹⁷⁴ and more expensive bonds for bail.¹⁷⁵ Some attribute this to it being easier for adjudicators to ‘switch-

162 Warren, ‘Embracing Technology’ (n 77) 231.

163 Rowden and Wallace, ‘Performing Expertise’ (n 74) 709.

164 Bellone, ‘Private Attorney-Client Communications’ (n 148) 24.

165 Rowden and Wallace, ‘Performing Expertise’ (n 74) 708.

166 Ibid.

167 Tait et al, ‘Towards a Distributed Courtroom’ (n 67) 56.

168 Tait and Tay, ‘Virtual Court Study’ (n 17) 28.

169 Wallace, Anleu and Mack, ‘Judicial Engagement and AV Links’ (n 27) 53.

170 Rowden, ‘Distributed Courts and Legitimacy’ (n 153) 273.

171 Fielding et al, ‘Video Enabled Justice Evaluation’ (n 92) 107.

172 Rowden, Wallace and Goodman-Delahunty, ‘Sentencing by Videolink’ (n 37) 376.

173 McKay, *The Pixelated Prisoner* (n 69) 160.

174 Ministry of Justice, ‘Virtual Court Pilot: Outcome Evaluation’ (Research Series 21/10, December 2010) 25. However, it should be noted that prisoners were also more likely to receive a community sentence or fine, and that in the study the type of offence and difference in rates of representation was not controlled for.

175 Shari Seidman et al, ‘Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions’ (2010) 100(3) *Journal of Criminal Law and Criminology* 869.

off¹⁷⁶ during video links.¹⁷⁶ One study found judges felt they asked fewer questions and were less likely to interrupt during AVL testimony.¹⁷⁷ Others argue that judicial officers can be harsher due to the disconnection of a screen and the limited ability to engage with others outside the remote space, such as families of defendants.¹⁷⁸ Outside the courtroom, there is greater difficulty in building trust and rapport between prosecution and defence, considered ‘an important asset when working to resolve complex issues’.¹⁷⁹ Face-to-face communication is viewed as a ‘more complete’ form of communication and this nuance is important when engaging in sensitive matters such as the plea.¹⁸⁰ Without these informal ‘corridor conversations’ communication felt disjointed and could potentially further contribute to heavier sentences for defendants.¹⁸¹

These issues demonstrate the risks of using AVLS and how the court must look beyond mere convenience to determine whether, on balance, their use is beneficial to the administration of justice in each case. Indeed, many authors cautioned that additional research on AVLS and justice outcomes was needed before remote hearings were widely implemented.¹⁸² However this research gap was never filled in time as the pandemic unfolded, compelling the rapid, ubiquitous deployment of video hearings worldwide.

III THE REMOTE HEARING DURING THE PANDEMIC

A The Judicial Response in Overview

Ranging from the United Kingdom’s Nightingale Courts, Luxembourg’s Crisis Councils, Brazil’s Crisis Observatory to Rwanda’s Judicial Taskforces, courts responded with emergency solutions to ensure the ongoing provision of the administration of justice in the face of the COVID-19 pandemic.¹⁸³ In addition to swiftly implementing new rules, procedures and protocols, judiciaries substantially invested in technological infrastructure. An international survey of courts, with 115 respondents from 38 countries, found that 77.87% of judiciaries were satisfied with their technological infrastructure.¹⁸⁴ However, some countries such as South Africa, Albania, Nepal and Serbia continue to lack electronic

176 Rowden, Wallace and Goodman-Delahunty, ‘Sentencing by Videolink’ (n 37) 377.

177 Meghan Dunn and Rebecca Norwick, ‘Report of a Survey of Videoconferencing in the Courts of Appeals’ (Research Report, Federal Judicial Center, 2006) 13.

178 Rowden, Wallace and Goodman-Delahunty, ‘Sentencing by Videolink’ (n 37) 377.

179 Fielding et al, ‘Video Enabled Justice Evaluation’ (n 92) 98.

180 Rowden, ‘Distributed Courts and Legitimacy’ (n 153) 272–3.

181 Fielding et al, ‘Video Enabled Justice Evaluation’ (n 92) 9–10.

182 Donoghue ‘The Rise of Digital Justice’ (n 82); Justice Committee, ‘Court and Tribunal Reforms: Second Report of Session 2019’ (Research Report, House of Commons, 30 October 2019) 69 [14].

183 Luciana Ortiz Zanoni, Antonio Cesar Bochenek and Vladimir Passos de Freitas, ‘International Survey of the Judiciary System: COVID 19 Pandemic’ (Research Report, International Association for Court Administration, 2020) 2 (‘International Survey of the Judiciary System’).

184 *Ibid.*

processes.¹⁸⁵ Conversely, in Australian courts, even complex, multi-party hearings were heard by AVL, notwithstanding some challenges.

1 Matters Heard during COVID-19

In contrast to one participant taking part remotely for improved accessibility, convenience, or efficiency, the context of the pandemic required all participants to appear by AVL to keep courts operating.¹⁸⁶ Simultaneously, the range of subject matter expanded beyond criminal and family matters of vulnerable witnesses to all types of cases.¹⁸⁷ Instead of for predominantly procedural steps, remote hearings were used across all types of hearings, including fully contested hearings, at both trial and appeal.¹⁸⁸

Using AVLS also involved a shift in the balancing exercise undertaken as part of a court's exercise of discretion due to the emergency circumstances where the time frame for a return to face-to-face hearings was uncertain. New COVID-19 related law, guidance and practice directions allowed courts to make directions for AVL appearances if it was in the interests of justice to do so.¹⁸⁹ Courts took a pragmatic approach in applying these, stating that they must do all they can to facilitate the dispensing of the essential service that is the administration of justice,¹⁹⁰ with adjournments only being made where virtual solutions were not feasible or just.¹⁹¹ Consequently, the starting point shifted to proceeding by remote hearing, with the caveat that the hearing can always be paused if any unfairness arises.¹⁹² Similar rulings were made in the United Kingdom, based off the same default position that hearings will continue remotely.¹⁹³ Although, like Australia, the final decision still lies with the court and its consideration of the particular circumstances before it.¹⁹⁴

185 Ibid.

186 See above Part II(A)(2), (4).

187 See above Part II(A)(1).

188 See above Part II(A)(3).

189 See, eg, *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Act 2020* (NSW); Magistrate's Court of Queensland, *Practice Direction No 3 of 2020: Court Arrangements (COVID-19)*, 7 April 2020, para 7; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 22C(3)–(4); *COVID-19 Emergency Response Act 2020* (SA) s 17; *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 17(e); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) pts 3.2–3.3, 3.8–3.9; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 42L(7), 42M(7), 42MA, 42E(1), 42P(7); Chief Justice James Allsop, 'Special Measures in Response to COVID-19 (SMIN-1)' (Media Release, 31 March 2020) 2–3 [7].

190 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38, [8] (Buss P, Vaughan JA).

191 *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486, [6] (Perram J) ('*Capic*'); *Ozemat Pty Ltd v Jackanic* [2020] VCC 790, [6] (Judge A Ryan); *Australian Securities and Investments Commission v GetSwift Ltd* [2020] FCA 504, [25] (Lee J).

192 *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504, [35] (Lee J). See also *A Local Authority v Mother* [2020] EWHC 1086 (Fam), [44] (Lieven J).

193 Judiciary of England and Wales, *Civil Justice in England and Wales Protocol Regarding Remote Hearings* (Protocol, 26 March 2020) [1] ('The current pandemic necessitates the use of remote hearings wherever possible.'). *Re Blackfriars Ltd* [2020] EWHC 845 (Ch), [32] (Kimbell QC); *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC), [16]–[32] (Eyre J); *Re P* [2020] EWFC 32, [24] (McFarlane P).

194 See, eg, *Crime and Disorder Act 1998* (UK) s 57C(6A) states that a live link direction 'may not be given unless the court is satisfied that it is not contrary to the interests of justice to give the direction'.

While some courts such as the New South Wales Local Court¹⁹⁵ and the High Court of Australia¹⁹⁶ vacated all except urgent matters, others adapted to full remote ways of working. In New South Wales, the Supreme Court was able to essentially operate at normal capacity, with judges hearing close to 20 matters a day and over 500 case-management matters a week.¹⁹⁷ The Court of Appeal heard all 130 cases which were scheduled prior to the pandemic and delivered 142 judgments (from 1 March to 6 August 2020).¹⁹⁸ The District Court used over 40 courtrooms that could hear matters remotely.¹⁹⁹ In the Federal Court of Australia, after an initial hurdle obtaining transcripts for online proceedings, adoption rapidly accelerated with the number of remote hearings growing from 5 to 65 in the space of 6 weeks.²⁰⁰ Of the 200 hearings listed during this period, 95 were case-management, 3 were settlement approvals, 50 were interlocutory hearings and 52 were full hearings – either at trial or on appeal.²⁰¹

However, courts have demonstrated a willingness to adjourn trials where there is a risk of unfairness by continuing virtually.

2 Matters Not Heard during COVID-19

Data so far indicates there have been over 100 applications for adjournments on the basis of COVID-19 across Australia.²⁰² While success was case-specific,²⁰³ reference was commonly made to certain fundamental rights that needed to be protected. For example, where parties have been unrepresented, the presumption favouring litigants-in-person being granted the opportunity to appear in physical court on their final hearing has been upheld.²⁰⁴ In *Kahil v The Queen* the New South Wales Court of Criminal Appeal vacated and overturned a trial judge's decision to proceed with a trial in circumstances where the defence counsel withdrew due to coronavirus concerns and where the defence solicitor had little to no criminal trial experience, leaving the accused effectively unrepresented.²⁰⁵

195 Judge Graeme Henson, 'Downing Centre Civil Listing Arrangements During the Covid-19 Pandemic' (Media Release, New South Wales Local Court, 27 March 2020).

196 The High Court of Australia held their first case remotely on 15 April 2020: Transcript of Proceedings, *Cumberland v The Queen* [2020] HCATrans 49.

197 Supreme Court of New South Wales, 'NSW Supreme Court Moves Towards Resuming Face-to-Face Hearings' (Media Release, 20 May 2020).

198 Justice AS Bell, 'The Court of Appeal and the Coronavirus', *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/court-of-appeal-and-the-corona-virus-for-bar-news/>>.

199 Nicola Berkovic, 'Judges Cut Holiday to Clear Backlog of Jury Trials', *The Australian* (online, 30 April 2020) <<https://www.theaustralian.com.au/business/legal-affairs/judges-cut-holidays-to-clear-backlog-of-jury-trials/news-story/976f59830998b6edd4d2785979272d61>>.

200 Michael Pelly, 'Chief Justice Predicts More "Effective" Courts, Cheaper Justice', *Australian Financial Review* (online, 8 May 2020) <<https://www.afr.com/companies/professional-services/chief-justice-predicts-more-effective-courts-cheaper-justice-20200506-p54qjh>>.

201 Ibid.

202 Christina Trahanas, 'Adjournment in the Time of the Pandemic', *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/covid-adjournment/>>.

203 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732, [81]–[82] (Robb J).

204 *French v Bremner* [2020] NSWCA 77, [16]–[21] (Basten JA).

205 *Kahil v The Queen* [2020] NSWCCA 56.

Harrison J noted that no alternatives, whether continuing with the solicitor, retaining new counsel or trial counsel appearing by AVL, could mitigate the unfairness that arose through no fault of the accused.²⁰⁶ Concerns about unfairness arising due to cross-examination of key witnesses only being possible by AVL also resulted in adjournments.²⁰⁷

Adjournments have also been made in cases where AVLs would not be suitable. In *R v Macdonald [No 11]*, Fullerton J adjourned the part-heard trial due to complexities of running the case by AVL.²⁰⁸ Factors such as multiple parties, connectivity issues, a court book exceeding 7500 pages, and a large pool of witnesses to cross-examine necessitated a face-to-face hearing to preserve the accused's right to a fair trial.²⁰⁹ Likewise in *Roberts-Smith v Fairfax Media Publications Pty Limited [No 4]*, Besanko J vacated the trial in circumstances where both sides did not oppose the vacation, the alleged imputations in the defamation trial were 'very serious', and Microsoft Teams was not suitable for communicating national security information.²¹⁰ In *Australian Securities and Investments Commission v Rio Tinto Ltd* an adjournment was granted where evidence as to serious allegations spanned multiple time-zones (Sydney, New Jersey, London and others depending on where witnesses were located) and where cross-examination required timely instructions from the defendants as it was in relation to statements attributed to the defendants by lay witnesses that were not recorded in documents.²¹¹ Meanwhile, in *Motorola Solutions, Inc v Hytera Communications Corporation Ltd*, the trial was vacated due to legal difficulties of cross-examining witnesses in China and 'when an actual face to face hearing [was] still going to be necessary'.²¹²

In accordance with existing principles, applicants must still demonstrate an element of unfairness or prejudice in an application for an adjournment. The current approach seeks to strike a balance between procedural fairness and the efficient administration of justice.²¹³ Adjournments give rise to delay which impacts not just the parties but also other court users.²¹⁴

B Availability and Quality of Technology

In general, the availability and quality of technology for remote hearings during the COVID-19 pandemic vastly improved, with media reports of superior

206 Ibid [3] (Harrison J), [21]–[25] (Adamson J).

207 See, eg, *Quince v Quince* [2020] NSWSC 326; *Australian Securities and Investments Commission v Wilson* (2020) 146 ACSR 149.

208 [2020] NSWSC 382.

209 Ibid [29]–[31].

210 [2020] FCA 614, [22].

211 [2020] FCA 1721, [52]–[55] (Yates J). See also *Australian Securities and Investments Commission v Wilson* (2020) 146 ACSR 149 discussed below.

212 [2020] FCA 539, [17] (Perram J).

213 Grata Fund, 'Australian Courts: How a Global Pandemic Built Our Launchpad into the Future' (Research Report, 29 May 2020) 7 ('Grata Report').

214 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 214 [101] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

quality of video, smoother audio and more functionality than in previous times.²¹⁵ This may partly be explained by the shift to using enterprise technology, such as Microsoft Teams, Zoom, or the like. It has previously been pointed out that private sector video link technologies are considerably higher quality than those utilised by courts and tribunals.²¹⁶ Consequently, in a report conducted by the England and Wales Civil Justice Council ('CJC Report'), 71.5% of lawyers surveyed described the experience of remote courts as positive or very positive, with drivers of satisfaction including, not experiencing technical difficulties and being able to participate fully in the hearing.²¹⁷

The longstanding criticism in the literature that technology could not fully capture cues such as hand gestures, facial expression, gaze, and posture has also been challenged.²¹⁸ Perram J in *Capic v Ford Motor Co of Australia Limited* ('*Capic*') stated that the authorities which highlight the unsatisfactory nature of cross-examination by video were not 'made with the benefit of seeing cross-examination on platforms such as Microsoft Teams, Zoom or Webex'²¹⁹ stating that his 'perception of the witness' facial expressions is much greater than it is in Court'.²²⁰ Similarly, Lee J in *Australian Securities and Investments Commission v GetSwift Ltd* found no diminution in observing the 'hesitations and idiosyncratic reactions when being confronted with questions' of cross-examination and that in some respects it was easier to do so compared to a 'distant witness box'.²²¹

Notwithstanding this, familiar technical issues still occurred at times, including connection stability, audio quality and problems with devices.²²² For example, in *Quality Solicitors Harris Waters v Okonkwo*, because the line started 'breaking up' in the course of an *ex tempore* judgment over BT Meet Me,²²³ the judge had to adjourn and give reasons in writing instead.²²⁴ Further, better software does not

215 Naomi Neilson, 'COVID-19 a "Revolution in Thinking" for the Court System', *Lawyers Weekly* (online, 30 March 2020) <<https://www.lawyersweekly.com.au/biglaw/27849-covid-19-a-revolution-in-thinking-for-the-court-system>>; Jonathan Ames, 'Lord Burnett, the Lord Chief Justice, Hails Courts' Tech Solution to Coronavirus Crisis', *The Times* (online, 9 April 2020) <<https://www.thetimes.co.uk/article/lord-burnett-the-lord-chief-justice-hails-courts-tech-solution-to-coronavirus-crisis-7gp3qd06g>>.

216 Donoghue, 'The Rise of Digital Justice' (n 82) 1007.

217 Natalie Byrom, Sarah Beardon and Abby Kendrick, 'The Impact of COVID-19 Measures on the Civil Justice System' (Research Report, Civil Justice Council, May 2020) 50 ('CJC Report'). It should be noted that this dataset was also primarily only for audio hearings, rather than full video hearing experiences.

218 Poulin, 'Criminal Justice and Video Conferencing Technology' (n 79) 1110 [5.64].

219 [2020] FCA 486, [19].

220 *Ibid.*

221 *Australian Securities and Investments Commission v GetSwift Ltd* [2020] FCA 504, [33].

222 Mary Ryan, Lisa Harker and Sarah Rothera, 'Remote Hearings in the Family Justice System: A Rapid Consultation' (Research Report, Nuffield Family Justice Observatory, April 2020) 28 ('Nuffield Report'); Jo Hynes, 'Remote Hearings in the Immigration Tribunal: What Could Possibly Go Wrong?', *Free Movement* (online, 27 March 2020) <<https://www.freemovement.org.uk/remoted-hearings-in-the-immigration-tribunal-what-could-possibly-go-wrong/>>; Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 37–8; Grata Fund, 'Grata Report' (n 213) 15.

223 BT Meet Me is a conferencing software.

224 [2020] EWHC 1168 (QB), [2]–[3] (Murray J).

solve accessibility issues related to resource disparities.²²⁵ In the New South Wales Court of Appeal for instance, while ‘some of the technological challenges rested with the Court and server capacity; others rested with those participating from remote locations’.²²⁶ Because videoconferencing is an all synchronous, two-way stream of communication requiring all participants to have the necessary technology and bandwidth to access the court,²²⁷ this multiplies the probability of technology failure while also re-emphasising digital exclusion. Where previously court users would participate through court-provided AVL suites, the remote hearing during COVID-19 required participants to have access to their own devices. Reports found that often court users either did not have such access or only possessed inadequate devices.²²⁸ Similarly, full participation was inhibited by lack of access to dual screens so parties could see everybody, read the required documents and take notes easily.²²⁹ Stable internet was also not a given, as regional differences in availability of WiFi access, broadband, and phone reception affected the quality of participation.²³⁰ For example the taking of evidence from a witness in rural South Australia had to be abandoned and rescheduled to a time and place where a better internet connection could be found in central Adelaide.²³¹ A loss of connection is not only disruptive, but can also cause individuals to miss important information and generate unfairness.²³²

While functionality substantially improved with private sector technologies, the lack of a single platform could cause confusion beyond already complex court processes. In Australia, Microsoft Teams, Cisco WebEx, Zoom, Skype for Business and in-house electronic courtroom software were all used.²³³ Some courts were able to mitigate this in some respects by providing guidance, such as the Federal Court.²³⁴ However, authors argue that there still needs to be greater detail and consistency in formal guidelines.²³⁵

A further concern of using private sector technology apps also means that cybersecurity and privacy must be considered.²³⁶ Transitioning court operations to

225 Julie Marie Baldwin, John Eassey and Erika Brooke, ‘Court Operations During the COVID-19 Pandemic’ (2020) 45 *American Journal of Criminal Justice* 743, 750.

226 Bell, ‘The Court of Appeal and the Coronavirus’ (n 198).

227 Forrell, Laufer and Digiusto, ‘Legal Assistance by Video Conferencing’ (n 84) 3.

228 Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 66; Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 26.

229 Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 26, Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 63.

230 Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 26.

231 *Capic* [2020] FCA 486, [10] (Perram J).

232 Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 28.

233 Michael Legg and Anthony Song, ‘Commercial Litigation and COVID-19: The Role and Limits of Technology’ (2020) 48(2) *Australian Business Law Review* 159, 160–1. Similarly, in the United Kingdom up to five platforms were used: Zoom, Microsoft Teams, Skype for Business, Cloud Video Platform, Lifesize: see Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 23.

234 Federal Court of Australia, *National Practitioners and Litigants Guide to Virtual Hearings and MS Teams* (Web Page, 26 May 2020) <https://www.fedcourt.gov.au/_data/assets/pdf_file/0019/62416/National-Practitioners-and-Litigants-Guide-V5.pdf>.

235 Grata Fund, ‘Grata Report’ (n 213) 6–7; Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 28.

236 Grata Fund, ‘Grata Report’ (n 213) 16–17.

a digital format involves integrating several different platforms, each which may have their own set of vulnerabilities. Commercial applications are also not specifically designed for a court and tribunal context like previous AVL software. While this design offers flexibility to suit a range of jurisdictional requirements and hearing types,²³⁷ this larger scale attracts other risks such as data breaches. For example, Zoom has attracted controversy for its security risk and privacy risks.²³⁸ In regard to document management and cloud storage, the absence of state managed platforms saw companies like Dropbox, Microsoft and Google fill the gap. However, the servers for these are often located offshore, which is problematic when accessibility is called for and especially because hearings often store sensitive, personal information.²³⁹ Some courts are already grappling with such issues, as seen for example in India, where a petition has been filed against India's Supreme Court for using platforms that 'are owned by foreign companies and pose a data security risk', namely Zoom and Vidyo Mobile.²⁴⁰

Advances in technology and its more ready availability improved the quality and accessibility of remote hearings. However, the greater use of remote hearings by more participants also placed greater demands on the technology and supporting infrastructure and generated new logistical and security challenges.

C Fairness

Many of the concerns identified in the literature relating to procedural fairness pre-pandemic resurfaced in fully remote hearings. A majority of respondents to the CJC Report felt that remote hearings were less effective in terms of facilitating participation, primarily because of the impact on the ability to communicate.²⁴¹ Likewise, interviewees from the Public Law Project Report ('PLP Report') participating in administrative matters found it difficult to 'establish whether the judge had grasped a certain point, or to spend longer elaborating on it'.²⁴² In the Nuffield Family Justice Observatory Report ('Nuffield Report'), respondents participating in remote family courts found difficulty in judging reactions of witnesses, either because they could not be seen or were visible only in miniature.²⁴³ In the criminal realm, the Justice Under Lockdown Report by Fair

237 Rossner and McCurdy, 'HMCTS Phase 2 Report' (n 17) 10.

238 Baldwin, Eassey and Brooke, 'Court Operations During the COVID-19 Pandemic' (n 225) 751; Ellen Bardash, 'Zoom Directors Accused of Knowingly Underplaying Security Risks in Shareholder Suit', *Delaware Business Court Insider* (online, 31 July 2020) <<https://www.law.com/delbizcourt/2020/07/31/zoom-directors-accused-of-knowingly-underplaying-security-risks-in-shareholder-suit/>>.

239 Grata Fund, 'Grata Report' (n 213) 16.

240 Blake Candler, 'Court Adaptations during COVID-19 in the World's Two Largest Democracies' (SSRN Scholarly Paper No ID 3609521, Social Science Research Network, 24 May 2020) 7 <<https://papers.ssrn.com/abstract=3609521>>. See also Michael Legg, 'New Sources of Discovery and Evidence: Electronically Stored Information, Social Media and the Internet of Things' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2016) 357.

241 Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 9.

242 Joe Tomlinson et al, 'Judicial Review in the Administrative Court During the COVID-19 Pandemic' (Research Report, Public Law Project, 15 April 2020) 12 ('Judicial Review in the Administrative Court').

243 Ryan, Harker and Rothera, 'Nuffield Report' (n 222) 9.

Trials reported 60% of respondents expressed that remote hearings had a noticeably negative impact on the overall fairness of the hearings.²⁴⁴

Similar to earlier findings, concerns were again raised that the use of AVL for a remote hearing was prejudicial for certain disadvantaged groups. For parties from non-English speaking backgrounds, the existing difficulty of communicating was amplified over AVL, especially where interpreters or intermediaries were required.²⁴⁵ As previously pointed out, even the best language interpreters might not be able to participate meaningfully if issues with the AVL arise.²⁴⁶ Similarly, parties with disabilities were reluctant to proceed remotely due to feelings they needed additional support to participate.²⁴⁷ Studies also reiterated the propensity for disadvantage or difficulty complying with directions when persons with a disability appeared remotely.²⁴⁸ For litigants-in-person ('LIPs'), authors have underscored the importance of trust on a LIP's participative potential. In face-to-face proceedings, this trust was often achieved through informal discussions with court actors, and judges being able to respond to physical cues when LIPs became upset, agitated or confused.²⁴⁹ Omitting these safeguards creates an additional barrier for effective participation.²⁵⁰ Collective responses from the Brighton Housing Trust in the CJC Report stated that a 'remote hearing may lead litigants [in person] to feel robbed of their day in court. There might never be a feeling that procedures were conducted fairly and openly'.²⁵¹

Further issues arose in relation to communications between lawyers and clients or witnesses. As all communication moved digitally, respondents to the CJC Report found dialogue to be less fluent and reactions harder to gauge and respond to.²⁵² Some lawyers also found it more difficult to ensure parties experienced the same level of support before, during and after hearings as when they were present in-person, driven largely by the absence of the 'pre- and post-hearing minutes and the times in the adjournments for sensible liaison'.²⁵³

Courts have suggested instant messaging applications such as WhatsApp to bridge the communication gap between lawyers and clients,²⁵⁴ but it has been noted

244 Fair Trials, 'Justice Under Lockdown: A Survey of the Criminal Justice System in England & Wales between March and May 2020' (Research Report, 25 June 2020) 7 ('Justice Under Lockdown').

245 Ryan, Harker and Rothera, 'Nuffield Report' (n 222) 12–13. Justice MacDonald, 'The Remote Access Family Court' (Research Report, Courts and Tribunals Judiciary, 3 April 2020).

246 Gourdet et al, 'Court Proceedings in Criminal Proceedings' (n 67) 12.

247 Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 61.

248 Equality and Human Rights Commission, 'Inclusive Justice' (n 64). It should be noted that the bulk of their enquiry focused on remand review hearings before the coronavirus pandemic.

249 Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during COVID-19' (Research Report, Modern Law Review Forum, 3 August 2020) 6 ('Remote Hearings: Litigants in Person').

250 Ibid.

251 Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 62 [6.6].

252 Ibid 54 [5.78].

253 Ibid 10, 45–6; Robert Sheldon, 'Reflections on Litigation in the Time of COVID-19', *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/litigation-in-the-time-of-covid-19/>> ('Reflections on Litigation').

254 *Capic* [2020] FCA 486, [13] (Perram J).

the WhatsApp group chat often ‘fell short of the usual hearing experience’²⁵⁵ or was too distracting holding multiple conversations simultaneously.²⁵⁶ In one case, a defendant attending the trial from home had limited computer skills and could not type quickly enough to provide ongoing instructions.²⁵⁷ Additionally, greater risks relating to confidentiality sometimes eventuated from participants forgetting to mute their microphones or participate from shared homes.²⁵⁸

The inadequacy of communication was also seen to indirectly affect trial outcomes.²⁵⁹ Some judges perceived opportunities for settlement negotiations during court breaks and after adjournment to be curtailed, with negotiations by telephone less likely to be fruitful than in-person discussions.²⁶⁰ For criminal matters, there was an increase in plea bargains because of greater efforts to seek early guilty pleas and to discontinue matters where there was no reasonable prospect of conviction.²⁶¹ This has raised concerns defendants are feeling pressured to plead guilty to stay out of jail due to health concerns of the pandemic.²⁶² Experts have called for plea agreements to declare defendants have agreed of their own volition and are not under such distress.²⁶³

A remote hearing also has practical impacts on the conduct of the hearing. In *Capic*, Perram J pointed out that some difficulties ‘can arise when dealing with objections’.²⁶⁴ Some commentators found that the flow of questioning and discussion may be more stilted in remote hearings²⁶⁵ and it was more difficult to get ‘a rhythm in cross-examination’.²⁶⁶ Perhaps more concerning is one study finding that due to the removal of courtroom social cues, delays of video-streaming and problems of over-speaking, some judges were less interventionist.²⁶⁷ While this encourages more listening, it also weakens debate – a core tenet of the common law adversarial system. For some lawyers, this led to difficulty in adequately addressing points during the hearing, and ultimately, a limited ability to engage with the judge.²⁶⁸ This potential for greater disconnection was particularly stark for telephone links, as some participants voiced they were left

255 Jean-Pierre Douglas-Henry and Ben Sanderson, ‘Virtual Hearings Report’ (Research Report, DLA Piper, 14 May 2020) 12.

256 Tomlinson et al, ‘Judicial Review in the Administrative Court’ (n 242) 12.

257 *R v Macdonald [No 11]* [2020] NSWSC 382.

258 Tomlinson et al, ‘Judicial Review in the Administrative Court’ (n 242) 12.

259 McKeever, ‘Remote Hearings: Litigants in Person’ (n 249) 5.

260 Justice Jan Stevenson, ‘Family Court Hearings by Video’, *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/family-court-hearings-by-video/>> (‘Family Court Hearings by Video’).

261 Lloyd Babb, ‘Impact of COVID-19 on the Criminal Justice System’, *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/impact-of-covid-19-on-the-criminal-justice-system/>>.

262 Baldwin, Eassey and Brooke, ‘Court Operations During the COVID-19 Pandemic’ (n 225) 752.

263 Council on Criminal Justice, ‘Facing COVID-19 in the Courts’, *Justice Roundtable* (Webinar, 16 April 2020) <<https://justiceroundtable.org/event/council-on-criminal-justice-facing-covid-19-in-the-courts/>>.

264 *Capic* [2020] FCA 486, [19].

265 McKeever, ‘Remote Hearings: Litigants in Person’ (n 249) 7.

266 Sheldon, ‘Reflections on Litigation’ (n 253).

267 Tomlinson et al, ‘Judicial Review in the Administrative Court’ (n 242) 12.

268 *Ibid.*

‘just staring into the abyss’.²⁶⁹ Another consideration is that removing the performative aspect of the hearing may require lawyers to develop new advocacy skills. In an interview with the Victorian Bar, Chief Justice Allsop discussed how the reduction of non-verbal cues, even with good sound and visual reproduction, means that loud, boisterous advocacy may no longer be appropriate.²⁷⁰ In turn, an area of difficulty for some lawyers has been adapting long-established mindsets and converting courtroom technique and presence to remote means.²⁷¹

Nonetheless, courts are cognisant of these risks, and have recognised circumstances where remote hearings would be inappropriate for procedural fairness reasons or where there are disadvantaged persons involved.²⁷² Likewise, United Kingdom courts have indicated that longer and more emotional hearings may not be appropriate where the parties are litigants in person or non-native English speakers.²⁷³ In an appeal dealing with the position of a vulnerable individual taking part in remote hearing, Jackson LJ flagged that the individual needs to be ‘genuinely able to participate effectively in the hearing, both in and out of the witness box’ and that being questioned by an advocate who is not physically present, even assuming that the technology works in an optimal way, ‘removes many of the visual cues that are so valuable to individuals with a cognitive impairment’.²⁷⁴

However, for many general matters, forgoing these visual cues or relying on them being reliably conveyed through the AVL was a necessity to ensure cases continued to be heard. As all manner of hearings shifted online, the courts’ original position on the suitability of remote testimony inevitably had to change. Traditionally judges tended to exercise a degree of caution over AVL directions.²⁷⁵ For example, it was not uncommon for the direction to be rejected where it would be easier to ‘evaluate the credit ... without the complications ... of evidence given by video link and by remote reference to documents and folders’.²⁷⁶ During the pandemic however, similar submissions have been rejected where the experience with AVL for witness examination was far more positive and the alternative was

269 Ibid 13.

270 Conversation with James Allsop, Chief Justice of the Federal Court of Australia and Wendy Harris QC, Victorian Bar President (Darren Ferrari, Victorian Bar, 13 May 2020) <<https://player.vimeo.com/video/418301286>>.

271 Peter Cummings, ‘Conducting Family Law Hearings from Home’, *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/conducting-family-law-hearings-from-home/>>.

272 *Capic* [2020] FCA 486, [7] (Perram J) (giving the example of a hearing for an asylum seeker who could not speak English).

273 Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 13; Lord Burnett, Sir Terence Etherton and Sir Andrew McFarlane, ‘Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division’ (Media Release, 19 March 2020).

274 *Re S* [2020] 4 WLR 97, [26]–[27].

275 *Hanson-Young v Leyonhjelm* [No 3] [2019] FCA 645, [2] (White J); *Campaign Master (UK) Ltd v Forty Two International Pty Ltd* [No 3] (2009) 181 FCR 152, 171 [78] (Buchanan J).

276 *Vasiliades v Commissioner of Taxation* [No 2] [2017] FCA 185, [13] (Davies J).

an adjournment of unknown length.²⁷⁷ It appears now, with the improvements to AVL technology in concert with existing findings cautioning against the use of demeanour to assess credibility,²⁷⁸ the previous low threshold for accepting arguments against remote testimony will no longer apply.²⁷⁹

Although, where there is a real risk of unfairness, courts will still reject an AVL trial, as demonstrated by *Australian Securities and Investments Commission v Wilson*.²⁸⁰ The case concerned a defendant allegedly breaching his director's duties and a crucial witness, Dr Castella who could only testify by AVL from Texas. Jackson J had to balance the competing interests of protecting the public interest of avoiding delay with the risk of practical injustice by proceeding by video hearing.²⁸¹ Though there were serious allegations and credibility of evidence was in issue, this alone did not make cross-examination unsatisfactory.²⁸² The decisive issue was the complete absence of any other relevant written evidence, which made Dr Castella's evidence critical.²⁸³ His Honour determined that over AVL, there would be a real risk that the defendant would not have a fair and proper opportunity to test the evidence of Dr Castella.²⁸⁴ Additionally, the substantial time zone difference and expected length of cross-examination was 'beyond mere inconvenience'.²⁸⁵ This shows the continuing need for courts to weigh the potential disadvantages of video links in deciding whether other options might produce fairer, if somewhat delayed, outcomes.

As the pandemic continues to drag out, the alternatives to the use of AVL are impacted. The alternative of requiring the witness to travel from overseas or interstate is not possible until borders are reopened, necessitating delay, possibly for a prolonged period. Equally in other circumstances where the witnesses are in the jurisdiction a court room or rooms adopting social distancing may be an available alternative. In summary, the steps that may be taken to 'avoid practical injustice'²⁸⁶ have changed.

277 *Capic* [2020] FCA 486, [19], [23] (Perram J); *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* (2020) 147 ACSR 521, 530 [46]–[49] (Stewart J); *McDougall v Nominal Defendant* [2020] NSWDC 194, [9]–[11] (Abadee DCJ). See also *Porter v Mulcahy and Co Accounting Services Pty Ltd* [2020] VSC 430, [26] (Delany J).

278 *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ).

279 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502; *Roach v Malsave Pty Ltd* [2020] NSWSC 364, [36], [44]–[45] (Adamson J). For a contrary view see *Rooney v AGL Energy Limited [No 2]* [2020] FCA 942, [18]–[19] (Snaden J).

280 [2020] FCA 873.

281 *Ibid* [37]–[38].

282 *Ibid* [27].

283 *Ibid* [28].

284 *Ibid* [26].

285 *Ibid* [31].

286 *HT v The Queen* (2019) 93 ALJR 1307, 1313 [18] (Kiefel CJ, Bell and Keane JJ), 1321 [64] (Gordon J).

D The Civic Courtroom

During COVID-19 hearings, as cases moved outside courtrooms, the loss of the solemnity and court atmosphere has been voiced as a common issue.²⁸⁷ In the Federal Court of Australia, over half the judges have been reported as ‘working from home’.²⁸⁸ Another international survey reported an 89.7% increase in number of judges working-from-home, with this reaching 100% in several countries.²⁸⁹ This in turn led to many comments that remote hearings amplified the informality of the court experience. As discussed previously, while informality can humanise legal processes and improve accessibility, it can also impact the perception of the trial’s legitimacy.²⁹⁰ For instance, under the High Court Videoconferencing Hearings Protocol practitioners are no longer required to rise.²⁹¹ In live hearings this process of standing while the judge is seated is a means by which to signal the authority of the judge and the solemnity of the occasion.²⁹² As various scholars have noted, the courtroom and its associated rituals have symbolic and practical significance.²⁹³ Some surveyed lawyers consistently expressed the loss of the ‘feel’ of the hearing room, a ‘loss of chemistry between counsel and the opposing side, the tribunal and the witnesses’²⁹⁴ or the loss of the ‘same spontaneity of interaction between counsel and the justices’ as an in-person hearing.²⁹⁵ Consequently, while those who experience high levels of stress or anxiety attending hearings in person might find appearing by AVL to be a helpful adjustment,²⁹⁶ other authors reiterate that being in physical court is still better for witnesses or participants to understand and appreciate the gravitas of the full court process.²⁹⁷

Fully remote hearings also raise substantial challenges with open justice as they remove physical space for public audiences. As noted, the principle of open justice is one of the hallmarks of the common law system and requires the public to have the ability to observe the courtroom.²⁹⁸ This promotes procedural fairness and just outcomes.²⁹⁹ Public hearings are also recognised as a fundamental

287 Celia Kitzinger, ‘Remote Justice: A Family Perspective’, *Transparency Project* (Web Page, 29 March 2020) <<http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>>; Grata Fund, ‘Grata Report’ (n 213) 27; JUSTICE, ‘JUSTICE Response to HMCTS Survey on Conducting Video Hearings’ (Research Report, April 2020) 8–9 (‘JUSTICE Response to HMCTS Survey’); *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* (2020) 147 ACSR 521, 531 [51] (Stewart J); *Rooney v AGL Energy Limited [No 2]* [2020] FCA 942, [19] (Snaden J).

288 Pelly, ‘Chief Justice Predicts More “Effective” Courts, Cheaper Justice’ (n 200).

289 Zanoni, Marinho and de Freitas, ‘International Survey of the Judiciary System’ (n 183) 6.

290 Rowden, ‘Distributed Courts and Legitimacy’ (n 153) 269; Mulcahy, ‘The Unbearable Lightness of Being?’ (n 40) 481–2; Warren, ‘Embracing Technology’ (n 77) 231; Fielding et al, ‘Video Enabled Justice Evaluation’ (n 92) 80.

291 High Court of Australia, *HCA Video Connection Hearings – Protocol* (online, 2020) <https://www.hcourt.gov.au/assets/registry/information/VC_Hearings_Protocol.pdf>.

292 Rossner and McCurdy, ‘HMCTS Phase 2 Report’ (n 17) 41.

293 See Part II(B)(3).

294 Douglas-Henry and Sanderson, ‘Virtual Hearings Report’ (n 255) 12.

295 Susskind, ‘The Future of Courts’ (n 7).

296 Equality and Human Rights Commission, ‘Inclusive Justice’ (n 64) 10.

297 Ruth Higgins, ‘Courts in the Pandemic: A View from the Bench’, *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/courts-in-the-pandemic/>>.

298 *Grollo v Palmer* (1995) 184 CLR 348, 379 (McHugh J).

299 Rowden, ‘Distributed Courts and Legitimacy’ (n 153) 266.

component of the right to a fair trial.³⁰⁰ Courts overall have appeared mindful of the requirements of open justice and sought to address the challenge by having most cases be observable by invite³⁰¹ or through having some high-profile cases livestreamed.³⁰² While live-streaming hearings was not unheard of pre-pandemic, the array of proceedings streamed virtually is notable.³⁰³ In the United States, over 30 state supreme courts have livestreamed their proceedings, which according to the justices involved, were an ‘unqualified success’.³⁰⁴ However, for everyday cases, difficulties remain, as the need to obtain dial-in details excludes people who intend to observe a hearing but are unable to due to lack of preparedness or technical difficulties.³⁰⁵ Reports have also voiced criticism where the public was not given the same access as accredited media,³⁰⁶ or there was great difficulty in requesting access to observe certain courts.³⁰⁷

The research also provides insight into the consequences of removing the human element to hearings, which was particularly pronounced due to social distancing rules. Where ‘everything else in terms of contact can and has been duplicated’ it is the ‘warmth of the proximity of humans’ that AVLS cannot recreate.³⁰⁸ This was reflected in the Nuffield Report, where respondents found it extremely difficult to conduct hearings with the level of empathy necessary for the family justice system.³⁰⁹ In turn, some clients voiced that they wished to adjourn their hearings until it could be heard in person due to the perceived ‘impersonal’ nature of remote hearings.³¹⁰

The remote hearings attempt to facilitate a public yet virtual space and human yet virtual engagement also had ramifications for the wellbeing of users. A prevalent concern has been the common experience of ‘zoom-fatigue’ – a phenomena whereby the use of Zoom or other videoconferencing software has appeared to exhaust people, so that remote hearings are found to be more tiring than in-person hearings.³¹¹ Besides requiring higher levels of concentration,³¹²

300 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3).

301 *Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing)* [2020] FCA 664, [5] (Perram J).

302 See, eg, the Supreme Court’s livestream of the Dick Smith Class Action: Supreme Court of New South Wales, ‘Dick Smith Holdings Class Action Before Justice Ball’ (YouTube, 30 March 2020) <<https://www.youtube.com/watch?v=n0vQJWjO4Tw>>.

303 See Baldwin, Eassey and Brooke, ‘Court Operations During the COVID-19 Pandemic’ (n 225) 748.

304 Amy Howe, ‘Courtroom Access: Laboratories for Live-Streaming?’, *SCOTUSblog* (Blog Post, 29 April 2020) <<https://www.scotusblog.com/2020/04/courtroom-access-laboratories-for-live-streaming/>>.

305 Michelle Hamlyn, ‘A Health Check on Open Justice in the Age of COVID-19: The Case for the Ongoing Relevance of Court Reporters’ (2020) 42(5) *Bulletin* 6, 8.

306 Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 11.

307 See, eg, the Administrative Court in the United Kingdom: Tomlinson et al, ‘Judicial Review in the Administrative Court’ (n 242) 3.

308 Rowden, ‘Distributed Courts and Legitimacy’ (n 153) 273.

309 Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 10.

310 Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 61.

311 Manyu Jiang, ‘The Reason Zoom Calls Drain Your Energy’, *BBC* (online, 23 April 2020) <<https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting>>; Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 52.

312 Stevenson, ‘Family Court Hearings by Video’ (n 260).

psychologists have also pointed to the subconscious pressure of a video call, where participants are more self-aware of their own appearance.³¹³ This issue was foreshadowed by the previous literature which found that presenting evidence by AVL ‘creates a greater cognitive load’³¹⁴ for expert witnesses as they also have to consider factors like framing and presentation through video. The AVL experience was also more tiring and stressful for judges, because additional judgecraft was needed to manage the hearing because the lack of physical cues around turn-taking meant parties were more likely to talk over one another.³¹⁵

The role of the court as a civic space in society that conveys the serious nature of the matters being addressed while also being open to observation and accountability are important objectives for consideration in the remote hearing environment. Equally pursuing those objectives has ramifications for the participants. While the challenges are not a reason to discontinue remote hearings altogether, they do reflect the need to consider remote hearings more mindfully.

It is also important to consider that much of the data is derived from a series of ‘rapid reviews’ that often relies on volunteers to provide their reflections. As such, it should be flagged these reports may not have the same detail, diverse sampling and data collection of more conventional evaluations. It is also important to situate these experiences within the wider context of the pandemic, which has brought about sweeping changes to society’s sentiment and an increasing reliance on technology. The acceptability or desirability of using AVL may vary with the possible alternatives. During the pandemic the alternatives were courtroom hearings with the risk of virus transmission depending on factors such as available social distancing, wearing of masks, sanitation, ventilation/air flow and the strain or variant of the virus in circulation (the risk varying by jurisdiction),³¹⁶ or no hearing. Post-pandemic the traditional courtroom hearing, or some version of it, may be available. Moreover, the pandemic may see increased investment in AVL related infrastructure and greater use and familiarity by the population with AVL related technology which may reduce problems with the use of AVL.

313 Shira Feder, ‘A Cyberpsychologist Explains Why You Can’t Stop Staring at Yourself on Zoom Calls (and Everyone Else Is Probably Doing the Same)’, *Business Insider* (online, 2 May 2020) <<https://www.businessinsider.com.au/why-you-stare-at-yourself-zoom-calls-psychologist-2020-4>>; Kate Murphy, ‘Why Zoom Is Terrible’, *The New York Times* (online, 29 April 2020) <<https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>>.

314 Rowden and Wallace, ‘Performing Expertise’ (n 74) 710.

315 Rossner and McCurdy, ‘HMCTS Phase 2 Report’ (n 17) 41.

316 See, eg, Carolyn Barber, ‘Protecting against COVID’s Aerosol Threat’, *Scientific American* (online, 1 October 2020) <<https://www.scientificamerican.com/article/protecting-against-covids-aerosol-threat/>>; Zahra Noorimotlagh et al, ‘A Systematic Review of Possible Airborne Transmission of the COVID-19 Virus (SARS-CoV-2) in the Indoor Air Environment’ (2021) 193 *Environmental Research* 110612: 1–6.

IV THE FUTURE OF THE REMOTE HEARING

It has been widely acknowledged that years of progress in remote hearings were achieved in weeks due to the pandemic.³¹⁷ While there are clear risks, almost all authors and commentators admit they are not insurmountable so as to render remote hearings incompatible with effective court proceedings in many cases. With a return to the pre-pandemic status quo unlikely, there is now a need to determine what elements of the experience should be preserved and what needs to be improved upon.

Data is essential to evaluate how best to approach remote justice. Because fully remote hearings were unprecedented, there is no certainty about how remote justice affects participants' experiences or case outcomes. Consequently, there has been an urgent call to improve data collection,³¹⁸ noting that 'in the melee of keeping courts operational, the gathering of data about the performance of remote courts has been modest and uneven'.³¹⁹

The data collected should capture both subjective and objective perspectives. A subjective viewpoint is reflected in many of the reports and literature today. It consists of asking how participants found the remote hearing in relation to a number of criteria. An objective perspective requires observation of the remote hearing and a comparison to benchmarks such as whether the reliability, acoustic and visual quality match the standard of a courtroom. Collection also needs to ensure valid sampling, rather than being based on anecdote or group reporting, to prevent self-selection bias towards those who are predisposed to be positive towards technology.³²⁰

Similarly, research is important because economic considerations might make replacement of physical hearings attractive, especially given the backlog of cases built up both during the lockdown and prior to the pandemic.³²¹ Others are concerned the lure to implement remote courts in suburban or regional locations runs the risk of fundamentally disadvantaging those communities by delivering a lesser version of justice than in the metropolitan.³²² These are large questions about how justice is best delivered and whether cost savings and goals of efficiency improve or detract from the delivery of justice.

This Part identifies the matters for consideration in determining when and how to employ a remote hearing. It also maps out where further data and analysis is needed.

317 Justice Nye Perram, 'Video Justice: 10 Years of Progress For Courts in Eight Weeks', *Australian Financial Review* (Sydney, 15 May 2020) 33 ('Video Justice'); Karin Derkley, 'LIV Tells Parliament of Pandemic's Impact on Profession', *Law Institute Victoria* (Web Page, 20 May 2020) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/May-2020/LIV-tells-parliament-of-pandemic%E2%80%99s-impact-on-profe>>.

318 Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 82.

319 Susskind, 'The Future of Courts' (n 7).

320 Rossner and McCurdy, 'HMCTS Phase 2 Report' (n 17) 13.

321 Fair Trials, 'Justice Under Lockdown' (n 244) 7.

322 Bruce Smyth et al, 'COVID-19 and Separated Families' (Issue Paper, Centre for Social Research and Methods, Australian National University, 17 May 2020) 10.

A Identify Technology – What Technology is Suitable?

For a remote hearing to be undertaken access to the necessary technology, including computers, tablets or telephones, the chosen software (eg, Zoom, Microsoft Teams), and the necessary telecommunication infrastructure (so as to provide sufficient bandwidth) for each participant is crucial.

Equally to assess the remote hearing experience during the pandemic and going forward, future research needs to be precise about what technology was employed and how it was used in the hearing. Currently, the lack of detail on the specific technology used, including for example the screen size, resolution or quality of the audio or internet connection creates opacity in any broad evaluation of the success of remote hearings. In turn, it is difficult to compare the reported experiences among each other, and against previous literature. Further work needs to be done to categorise the data in order to better chart a path for best practice.

One key consideration is whether the hearing was purely audio or audio-visual. As the reports demonstrate, the remote medium varied significantly between jurisdictions and matters. For instance, in the CJC Report, only 27% of their dataset were full video hearing experiences.³²³ Judges have also commented that on telephone hearings there is greater difficulty distinguishing between parties, particularly if voices overlap and there is a time lag.³²⁴ While videoconferencing was preferred, sometimes it was not available or telephone conferencing technology could otherwise be used to best effect.³²⁵

Hardware and equipment also differed between jurisdictions, such as whether laptop computers or smart phones were used, and whether multiple screens were used. Regarding software, courts can either run hearings themselves or use enterprise software. Often, this software will claim to be the most secure, reliable and fast, however there is a need to evaluate the evidence to distinguish between whether these claims are largely a facet of marketing or actually applicable for court cases. Because of variations in infrastructure, to mitigate server overload, courts may use numerous platforms. Identifying each combination of technologies' advantages and disadvantages is necessary when exploring optimal functionalities for future hearings. For example, in the Supreme Court of New South Wales, initially enterprise software worked more smoothly compared to the Court's video facilities, but eventually both software became equally efficient after improvements to court bandwidth and the 'triaging' of virtual hearings.³²⁶

Care needs to be taken that in identifying poor experiences, the source of that experience is accurately identified. Equally, in addition to focussing on the technology and its various features or drawbacks, attention must be paid to the user.

323 Byrom, Beardon and Kendrick, 'CJC Report' (n 217) 34.

324 Higgins, 'Courts in the Pandemic: A View from the Bench' (n 297).

325 See Ryan, Harker and Rothera, 'Nuffield Report' (n 222) 39–40. In the United Kingdom, the BT System for teleconferencing was seen as providing a more intuitive dashboard to control directions hearings.

326 Higgins, 'Courts in the Pandemic: A View from the Bench' (n 297).

B Participants

AVLs have historically been directed at assisting vulnerable or disadvantaged people. Past research has found that the type of witness or party (eg, legally-represented or self-represented, the existence of any disability) impacts on the suitability of using AVL and, if AVL is to be used, whether additional accommodations are needed. To assess the remote hearing experience in the pandemic, and for future research, it is important to identify and examine the experience of all participants – judges, lawyers, parties, witnesses, and those in the criminal justice system. Some categories of participants may be more or less able to engage with AVLs, which in turn affects issues such as procedural fairness.

The shift to fully remote hearings raises further matters for consideration and research. Until COVID-19, the only empirical data available was for partially remote hearings.³²⁷ Further empirical research and substantive data is needed on the impact of having all participants, or different variations of participants appearing remotely (eg, if only one barrister and the judge appear in person, while other participants are remote), including whether it affects the smooth and fair functioning of the hearing. Related to this issue is how parties and their lawyers are able to interact during a remote hearing. Preliminary research recommends having virtual ‘breakout room’ functions available, especially when a party and their legal representative cannot be together,³²⁸ or where there are vulnerable participants with support needs.³²⁹ Research as to how instructions or support services may be effectively provided would provide an important step forward for the conduct of remote hearings.

Related to participant identification and characteristics is the location of remote participants (eg, home/office/chambers and city/suburbs/regional). While remote hearings can improve accessibility, other issues such as connectivity, digital skills and having the space at home to focus on the hearing need to be considered.³³⁰ Videoconferencing from home also detracts from the formality of the courtroom experience, and backdrops can also be distracting, or intimidating for lay participants.³³¹ Many historical and present studies have advocated for the need of private rooms and neutral backdrops during remote hearings.³³²

Given the empirical data on Zoom fatigue and shorter attention spans when participating outside the face-to-face court environment, determining the optimal frequency and duration of break times is necessary. This is especially for witnesses

327 With the exception of the limited data from the first HMCTS Report in 2018: see Rossner and McCurdy, ‘HMCTS Phase 1 Report’ (n 89).

328 JUSTICE, ‘JUSTICE Response to HMCTS Survey’ (n 287) 10.

329 Jaime Lindsey, ‘Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection’ in Carla Ferstman and Andrew Fagan (eds), *Covid-19, Law and Human Rights: Essex Dialogues* (University of Essex, 2020) 257, 263.

330 McKeever, ‘Remote Hearings: Litigants in Person’ (n 249) 5; Tomlinson et al, ‘Judicial Review in the Administrative Court’ (n 242) 9.

331 JUSTICE, ‘JUSTICE Response to HMCTS Survey’ (n 287) 8–9; Rossner and McCurdy, ‘HMCTS Phase 2 Report’ (n 17) 4, 25, 40.

332 Rowden and Wallace, ‘Performing Expertise’ (n 74) 708; JUSTICE, ‘JUSTICE Response to HMCTS Survey’ (n 287) 8–9; Lulham et al, ‘Court-Custody Audio Visual Links’ (n 86) 9.

with vulnerabilities, where AVLs may cause additional confusion or emotional toll.³³³

C Purpose of the Hearing – What is at Stake?

A further important matter that affects how and when a remote hearing can or should be used is the purpose of the hearing. The purpose of a hearing may be classified by three different criteria. First, is the importance of the matter. This may be examined in terms of the step or issue that is to be addressed (ie, is it a procedural or timetabling step or is it the resolution of important questions of fact or law). Another dimension is the type of matter, (ie, is it criminal, family or civil) and what are the ramifications from the outcome in the matter (ie, a fine or imprisonment, loss of child custody or large damages payouts). In short, what is at stake?

Second, and related to the purpose of the hearing is the type of hearing, including whether it is a: (1) directions hearing/call over/scheduling conference; (2) interlocutory dispute/motion; (3) trial; or (4) appeal. The type of hearing may align with the importance of the step or issue to be addressed (ie, the trial hearing generally determines key matters that affect success while a directions hearing may not). However, important issues may also be resolved at interlocutory hearings.

Third, is the procedural steps or interactions that will occur at the hearing (ie, argument/submissions, tendering of documentary evidence, objections, witness examination and cross-examination). In some steps the interaction is only between the court and one or more lawyers. However, with witness examinations the number of active participants increases – there is a lawyer examining a witness, but also the opposing lawyer who may wish to object, and the judge that needs to be able to rule on the objection – all need to be able to engage. The importance of the step or interaction may vary, and the provision and testing of evidence may align with the trial and the resolution of important questions of fact.

The effectiveness of a remote hearing must take account of the underlying purpose of the hearing. This in turn informs the functionality of the AVL that is required. Further, the ramifications of malfunctioning AVL will be more or less significant, depending on the purpose of the hearing.

Previous research formed a consensus that remote hearings were suitable for civil trials of less complex matters or ‘where the outcome is likely to be less contested’³³⁴ such as short hearings, case management directions, submissions, judgments or interlocutory hearings.³³⁵ Indeed, interlocutory matters were already being piloted in the Online Court of New South Wales well before COVID-19.³³⁶ The remote court experience today supports this view, with some even suggesting that directions and case management hearings are better dealt with remotely due

333 See Part II(B)(2) and Part III(D).

334 Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 9.

335 Rossner and McCurdy, ‘HMCTS Phase 2 Report’ (n 17) 37.

336 District Court of New South Wales, ‘NSW Pioneers Online Courts’ (Media Release, Communities and Justice, 6 November 2015).

to the benefits in costs, travel-time, work/life balance and the environment.³³⁷ During COVID-19, Murphy J, while presiding over a class action interim application using Microsoft Teams commented ‘in some ways it makes hearings a bit easier because they can be conducted iteratively issue-by-issue’.³³⁸ Likewise, Chief Justice Bathurst of the Supreme Court of New South Wales noted that the technology had proved ‘entirely successful’ for call overs and short motions and ‘quite successful’ for short civil hearings.³³⁹ Indeed the cost, convenience and informality may be preferred by certain parties, as one survey found a commercial client felt ‘much more connected with the proceedings’ as everyone was on equal footing in the virtual hearing room.³⁴⁰

While less complex proceedings worked well during COVID-19, the experience to date has demonstrated that remote hearings could also be suitable for more complex civil cases.³⁴¹ For instance, in *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd* – despite at its peak, hosting 14 external participants, 450 exhibits, and a concurrent evidence session involving 5 experts, all in different locations over 3 days – the proceedings went smoothly.³⁴² Conducted using Pexip videoconferencing and eFile document management, the Court was also able to facilitate a ‘virtual’ site inspection using helicopter footage which actually provided more information than the usual in-person inspection.³⁴³

Further, contrary to some scholars’ perspectives that remote hearings may be better suited to high-volume, low-margin cases, it has also been shown that low-value cases can just as easily raise highly sensitive personal issues that are best handled in person.³⁴⁴ Equally, others found lower courts involved in fact-finding based on lay participation may be less suitable compared to courts dealing with questions of law, such as courts of appeal.³⁴⁵

Before the crisis, there was little debate over the suitability of fully remote criminal trials as such an approach was unthinkable.³⁴⁶ But with the pandemic exacerbating an existing backlog of criminal cases, discussion over alternative solutions began. Having seen successful use of AVL for bail and remand, courts conducted lesser criminal offences, without juries, such as those before

337 Ryan, Harker and Rothera, ‘Nuffield Report’ (n 222) 43; Byrom, Beardon and Kendrick, ‘CJC Report’ (n 217) 53; Perram, ‘Video Justice’ (n 317).

338 Transcript of Proceedings, *Gall v Domino’s Pizza Enterprises Ltd* (Federal Court of Australia, No VID 685 of 2019, Murphy J, 29 April 2020) cited in Jean-Pierre Douglas-Henry and Ben Sanderson, *Virtual Hearings* (DLA Piper, 2020) 13.

339 Berkovic, ‘Judges Cut Holiday to Clear Backlog of Jury Trials’ (n 199).

340 Douglas-Henry and Sanderson, ‘Virtual Hearings Report’ (n 255) 14.

341 See Part III(A)(1) and Part III(C); Rossner and McCurdy, ‘HMCTS Phase 2 Report’ (n 17) 4.

342 [2020] QLC 27; Land Court of Queensland, ‘The Land Court of Queensland’s First Fully Electronic Hearing’ (online, July 2020) <https://www.courts.qld.gov.au/_data/assets/pdf_file/0005/653891/the-land-court-of-queenslands-first-fully-electronic-hearing.pdf>.

343 *Ibid.*

344 Susskind, ‘The Future of Courts’ (n 7).

345 McKeever, ‘Remote Hearings: Litigants in Person’ (n 249) 2.

346 Richard Susskind and Jonathan Zittrain, ‘What Carries Over?’ (2020) 6(5) *The Practice* <<https://theppractice.law.harvard.edu/article/what-carries-over/>>.

magistrates, by AVL.³⁴⁷ In New South Wales, from mid-March until 6 June 2020, 54 judge-alone trials were conducted.³⁴⁸ Besides questions of constitutional validity relating to such provisions,³⁴⁹ existing concerns of using judge-alone trials instead of juries may be amplified remotely.³⁵⁰

However, perhaps even more uncertain are virtual jury trials.³⁵¹ For the common law criminal system in particular, jury trials serve an essential role of preventing the arbitrary exercise of state power by directly involving the community in the administration of justice.³⁵² Following the COVID-19 outbreak, all Australian states and territories suspended the commencement of jury trials,³⁵³ with some states and territories moving towards judge-alone trials as an alternative.³⁵⁴

At the time of writing, jury trials across Australia have resumed but with the requirement of social distancing.³⁵⁵ To ensure compliance with health directives, these trials now rely substantially on AVLS for witness testimony beyond just vulnerable or geographically separated witnesses. However, remote jury trials are more complex both from a technical and practical perspective. For instance, video can be distorting and biasing, so courts must consider how lighting, framing, and camera angles may affect jurors' assessments of witnesses and defendants.³⁵⁶ This is especially so given previous studies finding defendants were more hesitant to appear by AVL for fear it may be viewed suspiciously by the jury.³⁵⁷

From a technical perspective, familiar issues of connectivity, cost of hardware and using software arose. One report from the United Kingdom found that after testing four variations of virtual trial experiments, the most successful option was

347 Susskind, 'The Future of Courts' (n 7); *Supreme Court Act 1933* (ACT) s 68B(4); *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) div 4; *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) ch 9.

348 Babb, 'Impact of COVID-19 on the Criminal Justice System' (n 261).

349 See, eg, *R v UD* [2020] ACTSC 88, [4] (Elkaim J).

350 For a discussion on the belief within the profession that the 'best evidence' is that which is obtained live in court before a jury, see: Samantha Fairclough, "'It Doesn't Happen...and I've Never Thought It Was Necessary For It Was Necessary For it to Happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2016) 21(3) *International Journal of Evidence and Proof* 209, 221 ('Barriers to Vulnerable Defendants').

351 Linda Mulcahy, Emma Rowden and Wend Teeder, 'Exploring the Case for Virtual Jury Trials During the COVID-19 Crisis' (Research Report, University of Oxford, April 2020).

352 See *Kingswell v The Queen* (1985) 159 CLR 264, 298 (Deane J); *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J).

353 Law Council of Australia, 'Principles on Jury Trials in the Context of COVID-19' (Research Report, May 2020) 1.

354 See *Supreme Court Act 1933* (ACT) s 68B(4); *Criminal Procedure Act 1986* (NSW) s 365; *Criminal Procedure Act 2009* (Vic) s 420ZN.

355 See, eg, announcements from courts: Supreme Court of New South Wales, 'NSW Supreme Court Moves Towards Resuming Face-to-Face Hearings' (Media Release, 20 May 2020); Supreme Court of Victoria, 'Resumption of Jury Trials – Q&A' (Media Release, October 2020); District Court of South Australia, 'Jury Trials – District Court' (Media Release, 25 November 2020).

356 Tim McCormick and Robert Lufano, 'Will Virtual Jury Trials Be Part of the "New Normal" Ushered in by the COVID-19 Pandemic?' (2020) 10 *National Law Review* 157:1–2, 2.

357 Fairclough, 'Barriers to Vulnerable Defendants' (n 350) 220.

when a physical ‘jury hub’ was provided to jurors.³⁵⁸ This was a centralised socially distanced civic space where all the equipment such as screens, equipment and internet were provided. The most serious problems from the other three trials derived from the jurors’ own computer and internet connectivity problems, or the concerns about their activities being unregulated.³⁵⁹ Additionally, maintaining the confidentiality of the case and security against data breaches is an additional factor to consider as each extra remote participant adds an additional point of failure.

Many of these issues also arose in the United States. While most states halted or limited their jury trial operations,³⁶⁰ a number of courts piloted fully remote criminal jury trials.³⁶¹ A white paper by the American Board of Trial Advocates pointed out there are no requirements that compel a voir dire to only be conducted in a courtroom.³⁶² Despite this, some issues have persisted. In *Griffin v Albanese Enterprises*, jury selection took two days to complete in a one-day trial and one juror had to be removed due to connectivity issues.³⁶³ It has also been common for jurors to be more easily distracted, for instance completing their own activities during the proceeding rather than focussing on their responsibilities as a juror.³⁶⁴

In light of these concerns, it is imperative that before proceeding with any remote jury criminal cases, further clarity is sought on their impacts. An alternative approach adopted in Texas requires a waiver and consent from the accused and prosecutor before any remote jury proceedings are conducted.³⁶⁵

In the course of these discussions, it is important to recall that the literature has demonstrated the importance of the courtroom setting in generating gravitas, which in a jury trial means ensuring that the members of the jury comprehend the serious and important nature of their task, even if sitting in their homes.

D Values

Across history courts have largely maintained their traditions, rituals, and fundamental way of operating. Indeed, an adherence to tradition is often perceived as a strength of courts, imbuing their procedures, including the hearing, with legitimacy. This is especially so for common law systems which have their roots in precedent. The legal values that have been discussed – the rule of law, open

358 Linda Mulcahy, Emma Rowden and Wend Teeder, ‘Testing the Case for a Virtual Courtroom with a Physical Jury Hub’ (Research Report, University of Oxford, June 2020) 4.

359 Ibid.

360 For a list of how court operations differ between each state: see ‘Court Operations During COVID-19: 50-State Resources’, *Justia* (Web Page, January 2021) <<https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/>>.

361 See Judge Bruce Anderson, ‘Remote Civil Jury Trial Pilot Project Fourth Judicial Circuit’ (Project Report, 2 October 2020); Supreme Court of Illinois, ‘Illinois Courts Response to COVID-19 Emergency/ Remote Jury Selection in Civil Cases’ (Media Release, 27 October 2020).

362 ABOTA Covid-19 Task Force, ‘Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic’ (Research Report, American Board of Trial Advocates, 2020) 8.

363 *Griffin v Albanese Enterprises Inc* (Fla 4th Cir, No 16-2019-CA-1555, 10 August 2020).

364 See *People’s Trust Insurance Co v Corchero* (Fla 11th Cir, No 2019-CA-018363, 14 July 2020); Defendant Fryer-Knowles Inc’s Motion for Mistrial, *Wilgenbusch v American Biltrite Inc* (Cal Super Ct, No RG19029791, 16 July 2020) 4.

365 Texas Judicial Branch, ‘Guidance for All Court Proceedings During COVID-19 Pandemic’ (Media Release, 1 October 2020) 2.

justice and fairness – are essential because courts perform a unique function of society – the administration of justice.³⁶⁶ This not only means protecting individual's rights, but also involves upholding the rule of law, reflecting the community's values, and acting as a civic forum for citizens to ventilate their disputes. If these functions are compromised, or even seen to be so, trust and confidence in the justice system may diminish.

Courts and parties in implementing remote hearings need to ensure that key values are achieved. Similarly, future research needs to examine how values are given effect or compromised by the specific manner in which a remote hearing is conducted. For example, the existing law gives primacy to the notion of an individual being able to put his or her case effectively. As the preliminary research has alluded to, remote hearings can affect this ability, whether from technological issues or the loss of nuanced interactions. However, judicial authority has indicated that values such as open justice and procedural fairness are not absolute or have a fixed content.³⁶⁷ Much turns on the circumstances of particular cases. This is recognised in the discussion above that focusses on what is at stake and who are the participants, as these are important to the circumstances to be addressed.

It is also necessary to consider whether there are additional values that should inform the conduct of remote hearings. The research discussed above points to maintaining the solemnity of court proceedings, encouraging honesty, ensuring equal treatment of, and respect for, participants, and maintaining human or humane interactions. In the context of online alternative dispute resolution the values identified have included security, accessibility or convenience and cost.³⁶⁸ The requirements in governing legislation or court rules in all Australian jurisdictions to consider justice, cost and delay,³⁶⁹ at least in the civil jurisdiction, suggest that there is scope for additional values to be adopted by courts.

Maintaining key values does not equate to adherence to the conduct of litigation as currently conceived. Technology provides the capacity to reconfigure the court hearing to maintain important values essential to the exercise of judicial power but also to embrace additional values for a more efficient and accessible justice system. Nonetheless, this opportunity must be monitored and critiqued. Obtaining input from the users the court serves – the public itself, will also be necessary in paving the way to ensure justice systems continue to meet society's needs.

366 Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) *Federal Law Review* (forthcoming).

367 *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21] (French CJ); *HT v The Queen* (2019) 93 ALJR 1307, 1313 [18] (Kiefel CJ, Bell and Keane JJ), 1321 [64] (Gordon J).

368 Leah Wing, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field' (2016) 3(1) *International Journal of Online Dispute Resolution* 12, 25–7; Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4) *Australasian Dispute Resolution Journal* 277.

369 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37M; *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Uniform Civil Rules 2020* (SA) r 1.5; *Civil Procedure Act 2010* (Vic) s 7; *Rules of the Supreme Court 1971* (WA) r 4B.

V CONCLUSION

In the emergency of the pandemic, where there was a real risk to court participants' lives, remote hearings were seen to be a logical compromise to allow courts to continue to dispense timely justice. The experience to date has provably demonstrated that holding full hearings over AVLS can be a satisfactory alternative in times of crisis. While overall, they have been fairly successful on face value, the previous literature on AVLS illuminates many concerns which have transferred over and re-emerged during the COVID-19 era of remote hearings. As scholars have emphasised, technology in the context of courtrooms is far from a neutral insertion. Rather, its use alters the nature of court proceedings, and by changing the medium of the trial the qualities of the proceeding are inevitably impacted. Whether this is consequential or inconsequential is case-specific, however, because of the real possibility for unfairness or loss of legitimacy to result there is a need to stay vigilant. As remote hearings evolve from an emergency measure to a matter of course, the lessons learnt from the decades of research into AVLS combined with the experience from fully-remote hearings during the pandemic can provide a strong anchor for innovation to flourish without losing sight of the fundamental principles of our legal system.