

Appearing in Court via Audio Visual Link: Issues for Young People

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This research paper was researched and written by University of Queensland (UQ) law students **Emma Page** and **Claire Robertson** for and on behalf of the Youth Advocacy Centre, a specialist Community Legal Centre that provides free legal services, youth and family support assistance to young people in the greater Brisbane region. The project was undertaken as part of the Manning Street Project, a student pro bono partnership between the UQ Pro Bono Centre and Caxton Legal Centre. The research was conducted from March to June 2016 in alignment with the first semester of the academic year. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession. The authors would like to thank Ms Monica Taylor, UQ Pro Bono Centre Director and Mr Damian Bartholomew, Youth Advocacy Centre Principal Solicitor for their support and assistance throughout this project.



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1. EXECUTIVE SUMMARY

This report examines the issues young people face when appearing in court via audio visual link (AVL) and the effect this technology has on young peoples' access to justice. The authors aim to critically examine the role, rationale, benefits and detriments of AVLs in the youth justice system and suggest recommendations for reform. In particular, this report focuses on the role of lawyers assisting young people and their perceptions of a young person's capacity, understanding and access to justice when appearing via AVL. To our knowledge this research project is unique with no information publicly available relating to AVL use in Queensland and the impact on young people. As such this report fills a gap in current literature, providing an evidence base upon which better policy can be debated and implemented.

The methodology consisted of four stages:

1. Development of a focus group questionnaire for lawyers in the Queensland youth justice system to obtain information about their experience;
2. A 90-minute focus group discussion;
3. An analysis of the findings; and
4. A written critique, suggesting recommendations for reform.

The questionnaire was developed after conducting a literature review of the use of AVLs in Queensland, interstate and internationally, and after observing AVL setups at the Pine Rivers Magistrates Court (PRMC) and the Brisbane Youth Detention Centre (BYDC).

Currently, in Australia, there is no uniform approach to AVL use in youth justice proceedings. In Queensland, the Children's Court has the power to use AVLs for bail proceedings and sentencing pursuant to ss 53 and 159 of the *Youth Justice Act 1992* (Qld).¹ The approaches to AVL use in New South Wales and Victoria were reviewed as they represent Australia's largest and dominant jurisdictions. New Zealand's approach to AVL use is recognised as a 'best-practice' approach and was important to consider as their legal system is comparable to Australia.

In New South Wales, the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) governs the use of AVLs.² The rationale behind the use of AVLs predominantly relates to personal security and safety. Pursuant to r 32A of the *Children's Court Rule 2000*,³ additional considerations must be taken into account where the accused is a child, prior to a direction being made for an AVL appearance.⁴ In contrast, the Victorian Children's Court has implemented a guideline for the use of AVLs. The guideline aims to reduce the transportation of young people to court 'by increasing the use of video-link hearings for preliminary matters'.⁵ The guidelines serve a dual purpose, addressing fundamental procedural fairness requirements and promoting natural justice principles. Finally, the approach taken in New Zealand is considered to be an exemplar model for use and regulation of AVLs. The *Courts*

¹ *Youth Justice Act 1992* (Qld) ss 53, 159.

² *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

³ *Children's Court Rule 2000* (NSW) r 32A.

⁴ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(7).

⁵ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

(Remote Participation) Act 2010 (NZ) applies to all courts, including the Youth Court.⁶ The Act provides key criteria relevant to assessing the appropriateness of an AVL and implements safeguards to protect a defendant's access to justice and procedural fairness. New Zealand has also implemented AVL operating guidelines. The operating guidelines cover every stage of AVL use including: who has the authority to use AVLs, the *Courts (Remote Participation) Act 2010* (NZ) criteria,⁷ testing and setup requirements and instructional requirements.

In addition to the literature review, AVL setups at the PRMC and BYDC were observed. The PRMC has three AVLs: one in each courtroom and a private room fitted with an AVL. The BYDC has two rooms fitted with AVL equipment and hosts up to 21 AVLs in a day. In the AVL appearance observed, the Magistrate was the dominant figure on the screen and only the backs of legal representatives were visible. However, visibility can change depending on the angle of the camera in the courtroom.

A 90-minute focus group discussion was held at the Youth Advocacy Centre. The focus group comprised youth justice lawyers representing a community of practice. The discussion commenced with an overview of the benefits and detriments of AVLs and the rationale behind their use. Participants raised the following benefits of AVLs:

- Reduced travel for the young person and prevention of strip-searching;
- Limited exposure to adult prisoners;
- Less disruption to a young person's structured school day;
- Reduced time at court for lawyers;
- Reduced transportation and holding costs; and
- Increased convenience for the courts.

The discussion of detriments raised five distinct themes: trust, capacity, understanding, participation, and access to justice. AVLs impacted the formation of relationships and trust between young people and their lawyers. Participants noted the use of AVLs makes it difficult to overcome the common perception of most young people that their lawyer is 'just another adult who is going to let them down'.⁸ Participants also indicated good rapport leads to a young person having a better understanding of the lawyer's role and that AVLs do not facilitate this.

The primary reason participants prefer to physically see a young person relates to their ability, as a practitioner, to assess a young person's capacity to give instructions. The overall consensus was AVLs are a poor mechanism for taking instructions. Many participants noted they used a series of questions, techniques and observations to assess a young person's capacity and AVLs often hindered these processes. Participants subsequently raised major concerns about the capacity threshold. Many participants indicated the current threshold was incredibly low.

The charter of youth justice principles states 'procedures and other matters [should be] explained to the child in a way the child understands',⁹ and 'the child should be given the

⁶ *Courts (Remote Participation) Act 2010* (NZ).

⁷ *Ibid.*

⁸ Focus Group Participant (10 May 2016).

⁹ *Youth Justice Act 1992* (Qld) sch 1 s 6.

opportunity to participate in and understand the proceeding'.¹⁰ Participants noted some young people did not understand the concept of the technology itself. This primarily stems from their disadvantaged background. All participants noted they needed to see the young person face-to-face to determine how much they actually understood. The key response from all participants was 'you've just got to keep explaining no matter what it is over and over again because [court] is a difficult place for children to understand'.¹¹ Participants indicated diagrams and visual aids assisted young people to understand the court process. Identifying and dealing with the prevalent issue of 'gratuitous concurrence' is particularly difficult via AVL. Participants believe a Magistrate asking a young person initial leading questions was a poor mechanism for assessing their capacity and understanding due to 'gratuitous concurrence'.

In regards to participation, the view was 95% of children who appear on AVLS are not participating in the proceedings, in direct violation of the *Youth Justice Act 1992* (Qld).¹² Participants also indicated children behave differently on AVL. The general consensus was AVLS significantly limit a practitioner's ability to remind children how to behave in court.

There was general consensus from focus group participants that best practice approaches to Children's Court procedures in Queensland are not being reached.¹³ The lack of consistency in treatment of children throughout the State clearly limits young people's access to justice and undermines procedural fairness requirements. Participants agreed that the limited number of available visits at the BYDC was not realistic.¹⁴ Further, many participants noted the limited opportunities to contact the child before and after court to clarify their understanding of court proceedings.

It is apparent that reform is needed to ensure AVLS do not hinder a young person's access to justice. Whilst technology can promote expedience and convenience, courts must ensure there are adequate safeguards to uphold fundamental principles of natural justice and procedural fairness. It is essential these safeguards are implemented to ensure young people's access to justice is not hindered and the integrity of the legal system is not compromised.

¹⁰ Ibid sch 1 s 7(b).

¹¹ Focus Group Participant (10 May 2016).

¹² *Youth Justice Act 1992* (Qld) s 72.

¹³ General discussion with Focus Group Participants (10 May 2016).

¹⁴ Ibid.

2. SUMMARY OF RECOMMENDATIONS

Recommendation 1: That the Queensland Children's Court implement a practice direction or guideline similar to the Victorian Children's Court Guidelines for Video Conferencing - Criminal Division Video-Link Hearings.¹⁵ (A proposed draft is provided at Appendix 2).

Recommendation 2: That the *Youth Justice Act 1992* (Qld) be amended to preserve a child's right to attend court.¹⁶

Recommendation 3: That the *Youth Justice Act 1992* (Qld) be amended to reduce the scope of the use of AVLs to mentions only.¹⁷

¹⁵ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

¹⁶ *Youth Justice Act 1992* (Qld) s 72.

¹⁷ *Ibid* ss 53, 159.

3. INTRODUCTION

Technology plays an ever-increasing role in our daily lives. It is no surprise technological advancements have infiltrated the court system. The increased use of audio visual links (AVL) and their lack of regulation in the Queensland youth justice system, has resulted in a situation where expedience and convenience can be prioritised over a young person's access to justice. This report examines the issues young people face when appearing in court via AVL and the effect this technology has on young people's access to justice. The authors aim to critically examine the role, rationale, benefits and detriments of AVLs in the Queensland youth justice system and suggest recommendations for reform. In particular, this report focuses on the role of lawyers assisting young people and their perceptions of a young person's capacity, understanding and access to justice when appearing via AVL. As technology continues to evolve, it is important this topic is debated to ensure appropriate practice standards and safeguards are implemented to make certain young people's access to justice is not hindered and the integrity of the legal system is not compromised.

4. METHODOLOGY

Qualitative research was conducted over a three-month period with guidance and support from the Youth Advocacy Centre (YAC). The research methodology consisted of four stages:

1. Development of a focus group questionnaire for lawyers in the Queensland youth justice system to obtain information about their experience;
2. A 90-minute focus group discussion;
3. An analysis of the findings; and
4. A written critique, suggesting recommendations for reform.

The focus group questionnaire was developed after conducting a literature review of existing AVL research and observing the AVL setups at the Pine Rivers Magistrates Court (PRMC) and the Brisbane Youth Detention Centre (BYDC). The literature review familiarised the authors with the background and rationale behind AVL use. Materials reviewed included: Law Reform Commission reports, HANSARD materials, journal articles and government and court websites. Interstate and international materials were considered. To develop informed questions, observing the setup of an AVL was necessary. The AVL setups at the PRMC and the BYDC were observed. Observation was limited to visual aspects including: room layout, camera angle and screen visibility.

The authors then developed a questionnaire to guide the focus group discussion. The questions sought the participant's views on their experiences with AVLs in the Queensland youth justice system as well as their views on interstate approaches to AVL use. The questions were divided into the following five key areas:

- An overview of the benefits and detriments of AVLs;
- Taking instructions from a young person;
- A young person's understanding and comprehension of the court process;
- Technical difficulties associated with AVL use; and
- Recommendations for reform.

UQ Human Ethical Clearance was obtained to conduct the focus group.

On Tuesday 10 May, student researchers hosted a focus group discussion at the YAC's premises. Eight lawyers (five females, three males) who regularly represent young people in the youth justice system across the greater Brisbane area participated in the discussion. A variety of age groups and experience levels were represented. Lawyers signed a 'Participant Information Sheet' and 'Consent Form' before the discussion commenced, and they were also provided with a copy of the 'Victorian Children's Court Guidelines for Video Conferencing - Criminal Division Video-Link Hearings'.¹⁸ Participants were free to refuse to participate, or to withdraw or retract their comments at any point in time throughout the discussion. The focus group took approximately 90 minutes and contemporaneous notes were taken throughout the discussion, with a recording made of the discussion.

¹⁸ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

The findings of the focus group discussion were thematically analysed and divided as follows:

- The benefits of AVL use;
- The detriments of AVL use including:
 - Trust;
 - Capacity;
 - Understanding;
 - Participation;
 - Access to Justice; and
- Recommendations for reform.

These findings are critiqued in this report, along with recommendations for reform.

5. LITERATURE REVIEW

5.1 Background

This report primarily focuses on the communications young people have with their legal practitioners and their participation in court proceedings over AVL. To the authors' knowledge this research project is unique with no information publicly available relating to the use of AVLs in Queensland and their impact on young people. Therefore, this research fills a gap in current literature, providing an evidence base upon which policy can be better debated and implemented.

An AVL allows individuals to remotely communicate and participate in court proceedings through audio-visual technology.¹⁹ These communications usually involve parties in a courtroom contacting an individual at a detention centre. In Australia, there is no uniform approach to the use of AVLs in youth justice proceedings. In the Queensland youth justice system, an AVL can be used for children as young as 11 years old in a variety of matters from mentions to sentencing.²⁰ The approaches to AVL use in youth justice proceedings in Victoria, New South Wales and New Zealand are also considered below.

5.2 Queensland Approach

The *Audio Visual and Audio Links Amendment Act 1999* (Qld) introduced the use of AVLs in the Queensland youth justice system.²¹ The *Juvenile Justice Act 1992* (Qld) (as it then was) was amended to allow AVLs to be used in sentencing where both the prosecutor and child agreed.²² The rationale behind the implementation of AVLs was that 'the benefits [were] obvious—enhanced court efficiency and cost effectiveness'.²³ Further, the proposition for their use where all parties consented was considered by the Opposition in Parliament to be 'unobjectionable'.²⁴ In 2002, the provision was amended to include a requirement the child be legally represented.²⁵ At the same time, a further provision was inserted into the *Juvenile Justice Act 1992* (Qld) allowing AVLs to be used in bail applications where the child agreed and had the opportunity to be legally represented.²⁶ Parliament recognised this would 'ensure that children from regional and remote areas of Queensland [had] the same opportunities to apply for bail'.²⁷

The Queensland Children's Court's power to use AVLs is found in ss 53 and 159 of the *Youth Justice Act 1992* (Qld).²⁸ Pursuant to s 53,²⁹ an AVL may be used in bail applications where

¹⁹ Ministry of Justice (NZ), *Audio Visual Links* Ministry of Justice <<http://www.justice.govt.nz/services/audio-visual-links>>.

²⁰ *Youth Justice Act 1992* (Qld) ss 53, 159.

²¹ *Audio Visual and Audio Links Amendment Act 1999* (Qld) ss 7-8.

²² *Ibid*; *Juvenile Justice Act 1992* (Qld) s 118A.

²³ Queensland, *Parliamentary Debates*, Legislative Assembly, 13 April 1999, 960 (M. J. Foley).

²⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1999, 5386 (Springborg).

²⁵ *Juvenile Justice Amendment Act 2002* (Qld) s 54.

²⁶ *Ibid* s 16; *Juvenile Justice Act 1992* (Qld) s 40B.

²⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 August 2002, 3156 (English).

²⁸ *Youth Justice Act 1992* (Qld) ss 53, 159.

²⁹ *Ibid* s 53.

the child consents and has had the opportunity to be legally represented.³⁰ Under s 159,³¹ an AVL may be used in sentencing where all parties consent and the child is legally represented.³²

There are no specific considerations regarding the use of AVLs for young people in Queensland. However, the charter of youth justice principles provide:³³ ‘ a child ... should have procedures and other matters explained to the child in a way the child understands’,³⁴ ‘the child should be given the opportunity to participate in and understand the proceeding’,³⁵ decisions should ‘be made and implemented within a timeframe appropriate to the child’s sense of time’,³⁶ and ‘a person making a decision relating to a child ... should consider the child’s age, maturity and, where appropriate, cultural and religious beliefs and practices’.³⁷

In Queensland there are three AVL types:

- AVLs in court which are used in proceedings and for taking client instructions;
- AVLs in a separate room in the courthouse which can be used for taking client instructions; and
- AVLs at Legal Aid Queensland’s facilities that link directly to the BYDC facilities.

5.3 Interstate and International Approaches

This section reviews comparative jurisdictional approaches to the use of AVL technology. New South Wales is Australia’s largest population centre and in this respect is a leading jurisdiction. Victoria’s approach to the use of AVLs, in particular the Victorian Children’s Court guideline, represents a recommended approach. New Zealand is also discussed as their ‘best-practice’ approach to AVL use is recognised as preeminent and their legal system is comparable to Australia.

5.3.1 New South Wales

AVLs were primarily introduced in New South Wales to ‘increase court efficiency and effectiveness, reduce prisoner movements and reduce costs’.³⁸ Sections 5BA and 5BB of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) govern the use of AVLs in the New South Wales Children’s Court.³⁹ These provisions were largely modeled on Western Australian legislation.⁴⁰ Under s 5BA(1),⁴¹ an accused must physically appear in ‘physical

³⁰ Ibid.

³¹ Ibid s 159.

³² Ibid.

³³ *Youth Justice Act 1992* (Qld) sch 1.

³⁴ Ibid sch 1 s 6.

³⁵ Ibid sch 1 s 7(b).

³⁶ Ibid sch 1 s 11.

³⁷ Ibid sch 1 s 12.

³⁸ Suzie Forell, Meg Laufer and Erol Digiusto, ‘Legal assistance by video conferencing: *what is known?*’ (*Research Paper No 15, Law and Justice Foundation of New South Wales, November 2011*). 3; John Hatzistergos, ‘The virtues of audiovisual links in the courtroom’ (2008) 46 *Law Society Journal* 57, 57.

³⁹ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 5BA-5BB.

⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2007, 4798 (Barry Collier).

⁴¹ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BA(1).

appearance proceedings' unless the court directs an AVL appearance.⁴² 'Physical appearance proceedings' include:⁴³ any trial or hearing of charges,⁴⁴ inquiry into fitness,⁴⁵ or bail proceedings brought either in the period between the charge and first appearance or on first appearance.⁴⁶ The parties can consent to the accused appearing by AVL.⁴⁷ The court may only make a direction if 'it is in the interests of the administration of justice for the accused detainee to appear before the court by audio visual link'.⁴⁸ The court must consider the factors in s 5BA(6) when deciding whether an AVL appearance is in the interests of the administration of justice.⁴⁹ These factors include:

- risk of personal security;⁵⁰
- risk of accused escaping;⁵¹
- past behaviour of accused in court;⁵²
- conduct of accused in custody;⁵³
- disruption of accused's participation in a rehabilitation or education program if transported to appear;⁵⁴
- safety considerations in transport;⁵⁵
- efficient use of available judicial resources;⁵⁶ and
- any other relevant matters.⁵⁷

Additional considerations must be taken into account where the accused is a child.⁵⁸ The additional considerations are listed in r 32A of the *Children's Court Rule 2000*.⁵⁹ They include:

- the nature of the proceedings;⁶⁰
- the child's right to be heard and to participate;⁶¹
- whether the child would be significantly advantaged or disadvantaged;⁶²
- availability of the Magistrate to hear by AVL;⁶³
- the need for the lawyer to obtain initial or detailed instructions from the child;⁶⁴
- the need for the lawyer to discuss a brief of evidence with the child;⁶⁵

⁴² Ibid.

⁴³ Ibid s 3.

⁴⁴ Ibid s 3(a).

⁴⁵ Ibid s 3(b).

⁴⁶ Ibid ss 3(c), 3(c)(i), 3(c)(ii).

⁴⁷ Ibid s 5BA(3).

⁴⁸ Ibid s 5BA(5).

⁴⁹ Ibid s 5BA(6).

⁵⁰ Ibid s 5BA(6)(a).

⁵¹ Ibid s 5BA(6)(b).

⁵² Ibid s 5BA(6)(c).

⁵³ Ibid s 5BA(6)(d).

⁵⁴ Ibid s 5BA(6)(e).

⁵⁵ Ibid s 5BA(6)(f).

⁵⁶ Ibid s 5BA(6)(g).

⁵⁷ Ibid s 5BA(6)(h).

⁵⁸ Ibid s 5BA(7).

⁵⁹ *Children's Court Rule 2000 (NSW)* r 32A.

⁶⁰ Ibid r 32A(a).

⁶¹ Ibid r 32A(b).

⁶² Ibid r 32A(c).

⁶³ Ibid r 32A(d).

⁶⁴ Ibid r 32A(e).

⁶⁵ Ibid r 32A(f).

- the maturity of the child;⁶⁶
- the child's need for the support of a parent, carer or other support person during proceedings;⁶⁷
- the wishes of the child;⁶⁸
- any special needs including the impact of any intellectual or physical disability or mental illness the child may have;⁶⁹ and
- whether the child requires the assistance of an interpreter and the availability of an interpreter.⁷⁰

There are no similar considerations in Queensland.

In all other criminal proceedings that are not 'physical appearance proceedings', an AVL is used unless the court otherwise directs.⁷¹ Under both ss 5BA and 5BB,⁷² where a child becomes an adult before the conclusion of a proceeding, the accused is entitled to continue to appear per the court's direction.⁷³ Furthermore, under the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW),⁷⁴ facilities for private communication, between the accused and their legal representative, are to be made available when the accused appears via AVL.⁷⁵ In contrast, Queensland has no mechanism in place to facilitate private communication whilst the accused is appearing via AVL.

Since 2008, the Parramatta Children's Court conducts bail applications via AVL on weekends and public holidays.⁷⁶ 'This is an exception to the general practice of dealing with children in person for their first court appearance'.⁷⁷ Conversely, on Saturdays in Queensland, a Magistrate either in person or via telephone hears bail applications whilst the children are physically present in court.

5.3.2 Victoria

Since December 2014, Victoria has implemented safeguards regarding the use of AVLs in Children's Court proceedings. On 1 December 2014, Judge Peter Couzens, President of the Children's Court of Victoria, issued a Practice Direction designed to 'reduce the number of young persons in custody being transported to court unnecessarily by increasing the use of video-link hearings'.⁷⁸ The Practice Direction further sought to minimise disruption to the

⁶⁶ Ibid r 32A(h).

⁶⁷ Ibid r 32A(i).

⁶⁸ Ibid r 32A(j).

⁶⁹ Ibid r 32A(l).

⁷⁰ Ibid r 32A(m).

⁷¹ *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5BB(1).

⁷² Ibid ss 5BA(8), 5BB(5).

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid s 5BC.

⁷⁶ The Children's Court of New South Wales, *Timeline of major events* (undated) Children's Court <<http://www.childrenscourt.justice.nsw.gov.au/Documents/History%20-%20Timeline%20of%20major%20events.pdf>>.

⁷⁷ Email from Paloma Mackay-Siml Research Associate to the President of the New South Wales Children's Court to Claire Robertson, 30 May 2016, 3.

⁷⁸ Children's Court of Victoria, *Practice Direction No 5 of 2014 - Criminal Division - Video-Link Hearings*, 1 December 2014, Preamble.

young person and manage cell capacity at the Melbourne Children's Court.⁷⁹ The Practice Direction stated 'all criminal mention matters where the young person is in custody will be converted to video-link hearings unless'⁸⁰ one of the six factors listed in the direction deemed an AVL inappropriate. Such factors included where the young person did not have the opportunity to meet and establish rapport with their legal practitioner,⁸¹ where the young person wished to attend court,⁸² and where the young person's capacity inhibited their ability to participate in proceedings via AVL.⁸³

On 20 April 2015, the Practice Direction was repealed and replaced with the 'Guidelines for Video Conferencing - Criminal Division Video-Link Hearings'.⁸⁴ The guideline states the same aim as the previous Practice Direction,⁸⁵ but implements three key amendments:⁸⁶

- Statewide application;⁸⁷
- Increase from criminal custody mentions to mentions, committal mentions and special mentions;⁸⁸ and
- A provision that the guideline is not to interfere with the child's statutory right to attend court unless otherwise directed by the Court.⁸⁹

See **Appendix 1** for Victoria's current guideline.

First, the guideline applies statewide and is not limited to the Melbourne Children's Court.⁹⁰ Prior to this, it was possible young people were appearing via AVL in circumstances where it was inappropriate, for example where they did not have capacity. Adopting a statewide approach promotes procedural fairness, ensuring all young people meet the relevant requirements to appear via AVL regardless of their location. In contrast, Queensland currently does not have a statewide approach to AVL use. The Children's Court of Queensland does not provide any practice directions or guidelines.⁹¹ Therefore, AVLs may produce vastly different outcomes across the State and potentially hinder young people's access to justice.

Second, the guideline extends AVL use to criminal mentions, committal mentions and special mentions.⁹² Limiting AVL use to mentions ensures the young person is physically present for

⁷⁹ Ibid.

⁸⁰ Ibid s 1.

⁸¹ Ibid s 1(a).

⁸² Ibid s 1(b).

⁸³ Ibid s 1(d).

⁸⁴ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

⁸⁵ Ibid Preamble.

⁸⁶ Children's Court of Victoria, *Practice Direction No 5 of 2014 - Criminal Division - Video-Link Hearings*, 1 December 2014.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid s 3.

⁹⁰ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

⁹¹ Children's Court of Queensland, *Practice Directions* (22 February 2016) Queensland Courts <<http://www.courts.qld.gov.au/courts/childrens-court/practice-directions/childrens-court>>.

⁹² Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

more serious matters and can easily seek clarification from their legal practitioner. Conversely, Queensland uses AVLs for a variety of matters from mentions to sentencing.⁹³

Third, the guideline is not to interfere with a young person's statutory right to attend court unless the Court directs otherwise.⁹⁴ The guideline further supplements this right, allowing a young person to request to physically attend court, rather than appear via AVL.⁹⁵ In Queensland, young people have a statutory right to participate in proceedings,⁹⁶ however, this does not translate to a right to attend court. As a result, young people may have to appear via AVL when they would prefer to physically attend court.

The Children's Court of Victoria has recognised the need to implement effective safeguards to protect principles of natural justice and ensure all young people are subject to procedural fairness requirements. The Court has acknowledged the benefits of AVLs, including cost-effectiveness and reduced travel for young people, however, has taken precautions to ensure technological advancements do not hinder a young person's access to justice.

Finally, the adult Magistrates' Court of Victoria has issued a 'Video Conference Protocol' for AVL appearances'.⁹⁷ The protocol relates to the matters AVL may be used for. Victoria's technological and procedural success with AVLs has resulted in the Victorian Government introducing legislation to increase the number of 'criminal court proceedings conducted by video-link technology'.⁹⁸ The Justice Legislation (Evidence and Other Acts) Amendment Bill 2016,⁹⁹ will 'make video-enabled appearances for adults remanded in custody the standard procedure, except in instances where a physical presence in court is required'.¹⁰⁰ The Victorian Government plans to invest \$14.7 million in installing video conferencing technology in all 53 Victorian Magistrates' Courts.¹⁰¹ The upgrade will also introduce concurrent video calls.¹⁰² It is likely the Victorian Magistrates' Court will adopt a similar guideline to the Children's Court as it moves towards becoming a more digitally enabled Court.

5.3.3 New Zealand

AVLs were formally introduced in Auckland in 2010.¹⁰³ Prior to 2010, AVLs between a courtroom and a detention centre were used very little. The *New Zealand Bill of Rights Act*

⁹³ *Youth Justice Act 1992* (Qld) ss 53, 159.

⁹⁴ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015, s 3.

⁹⁵ Children's Court of Victoria, *Practice Direction No 5 of 2014 - Criminal Division - Video-Link Hearings*, 1 December 2014, s 1(b).

⁹⁶ *Youth Justice Act 1992* (Qld) s 72.

⁹⁷ The Magistrates' Court of Victoria, *Video Conference Protocols*, Magistrates' Court of Victoria <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Video_Conference_Protocols_Requesting_Parties.pdf>.

⁹⁸ Paris Cowan, *Victorian Video Tech Laws to Keep Prisoners Out of Court* (12 April 2016) IT News <<http://www.itnews.com.au/news/victorian-video-tech-laws-to-keep-prisoners-out-of-court-418076>>.

⁹⁹ Justice Legislation (Evidence and Other Acts) Amendment Bill 2016 (Vic).

¹⁰⁰ Paris Cowan, *Victorian Video Tech Laws to Keep Prisoners Out of Court* (12 April 2016) IT News <<http://www.itnews.com.au/news/victorian-video-tech-laws-to-keep-prisoners-out-of-court-418076>>.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ District Courts of New Zealand, *Annual Report* (30 June 2013) District Courts of New Zealand <<https://www.courtsofnz.govt.nz/district/district/annual-reports-of-the-district-court-judiciary/district-court-judiciary-annual-report-2013-3.pdf>>.

1990,¹⁰⁴ requires defendants ‘to be brought before the courts’ or ‘to be present in court’.¹⁰⁵ New Zealand courts interpreted these requirements to require a physical appearance at court, thus limiting the use of AVLs in court proceedings.¹⁰⁶ The Courts (Remote Participation) Bill 2010 was drafted to enable greater ‘use of audio-visual links ... in New Zealand courts’.¹⁰⁷ The Bill was subsequently enacted as the *Courts (Remote Participation) Act 2010* (NZ).¹⁰⁸ The Act applies to all courts, including the Youth Court housed in the District Court. The Act provides key criteria relevant to assessing the appropriateness of the use of an AVL and a ‘presumption in favour of the use of AVL in criminal procedural matters’.¹⁰⁹

Subject to the Act,¹¹⁰ an AVL appearance is permitted in three circumstances:

- Criminal procedural matters;
- Criminal substantive matters; and
- Civil matters.¹¹¹

Sections 5 and 6 of the Act provide the criteria that must be considered prior to using an AVL.¹¹² Section 5 states the ‘general criteria for allowing use of audio-visual links’.¹¹³ These criteria include the proceeding nature,¹¹⁴ the technology availability and quality,¹¹⁵ and the parties’ rights.¹¹⁶ The ‘additional criteria for allowing use of audio-visual links in criminal proceedings’ are primarily concerned with a defendant’s access to justice and procedural fairness.¹¹⁷ The most important criteria appear in subsection (a),¹¹⁸ considering whether the defendant has the ability to: comprehend the proceedings,¹¹⁹ participate in proceedings,¹²⁰ and to consult and instruct counsel.¹²¹ In criminal substantive matters an ‘AVL cannot be used unless the judicial officer decides to allow its use’.¹²² Where a defendant’s innocence is to be determined, the defendant’s counsel must consent to an AVL.¹²³ Civil matters require the criteria in ss 5 and 7 be considered for an AVL.¹²⁴

In August 2010, AVLs were trialed in the Auckland District Court with the prisoner remaining at the Auckland Central Remand Prison and appearing remotely at court. The trial was

¹⁰⁴ *New Zealand Bill of Rights Act 1990* (NZ).

¹⁰⁵ *Ibid* s 25.

¹⁰⁶ Courts (Remote Participation) Bill 2010 (NZ).

¹⁰⁷ *Ibid*.

¹⁰⁸ *Courts (Remote Participation) Act 2010* (NZ).

¹⁰⁹ Courts (Remote Participation) Bill 2010 (NZ).

¹¹⁰ *Courts (Remote Participation) Act 2010* (NZ).

¹¹¹ New Zealand Ministry of Justice, *Audio-Visual Links* Ministry of Justice (NZ)

<<http://www.justice.govt.nz/services/audio-visual-links>>.

¹¹² *Courts (Remote Participation) Act 2010* (NZ) ss 5-6.

¹¹³ *Ibid* s 5.

¹¹⁴ *Ibid* s 5(a).

¹¹⁵ *Ibid* s 5(b).

¹¹⁶ *Ibid* s 5(c).

¹¹⁷ *Ibid* s 6.

¹¹⁸ *Ibid* s 6(a).

¹¹⁹ *Ibid* s 6(a)(i).

¹²⁰ *Ibid* s 6(a)(ii).

¹²¹ *Ibid* s 6(a)(iii).

¹²² New Zealand Ministry of Justice, *Audio-Visual Links* Ministry of Justice (NZ)

<<http://www.justice.govt.nz/services/audio-visual-links>>.

¹²³ *Ibid*.

¹²⁴ *Courts (Remote Participation) Act 2010* (NZ) ss 5, 7.

successful, with AVL facilities installed in District Courts across New Zealand in 2011.¹²⁵ The following additional facilities were added to ‘help replicate a normal court hearing and ensure a prisoner’s active participation’:¹²⁶

ITEM/S	REASON
Additional cameras	Key participants in the court are visible to the prisoner.
Document camera	The prisoner can view documents and other evidence submitted.
Non-coercion camera (which only the judge can view)	Ensures the prisoner is not being influenced in any way during the proceeding.
Telephone handsets in the court and prison	The prisoner and defence counsel can speak in confidence during the proceeding if required.

*Figure 1: Additional facilities in New Zealand AVL District Courts.*¹²⁷

In 2013, the *Courts (Remote Participation) Act 2010* (NZ) criteria were transcribed into the ‘AVL Operating Guidelines for District Courts & Mason Clinic’.¹²⁸ The operating guidelines cover every stage of an AVL for all parties. This includes who has the authority to use AVLS, the ss 5 and 6 *Court (Remote Participation) Act 2010* (NZ) criteria,¹²⁹ testing and set-up requirements and instructional requirements.

Lastly, the *Children, Young Persons, and Their Families Act 1989* (NZ) lists a young person’s statutory rights during court proceedings.¹³⁰ Section 11 imposes a duty on the court and the young person’s legal representative to encourage and assist participation in proceedings.¹³¹ This is similar to the right to participate in Queensland.¹³² In addition to s 11,¹³³ s 10 further imposes a duty on the court and the young person’s legal representative to explain proceedings ‘in a manner and in a language that can be understood by the child or young person’.¹³⁴ This is similar to s 6 of the Queensland charter of youth justice principles.¹³⁵

Like Victoria, the New Zealand courts have recognised the need to formalise the procedural requirements associated with the use of AVLS. New Zealand’s AVL model is exemplar. Unlike the Victorian approach, New Zealand’s approach applies broadly to all courts and to all accused, both adults and young persons. By adopting a broad application, every single accused who appears via AVL is subject to the same procedural requirements, promoting procedural fairness and natural justice principles.

¹²⁵ New Zealand Ministry of Justice, *Audio Visual Links in Court* Ministry of Justice (NZ) <<http://www.justice.govt.nz/media/in-focus/topic-library/audio-visual-links-in-court>>.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ *Courts (Remote Participation) Act 2010* (NZ).

¹²⁹ Ibid.

¹³⁰ *Children, Young Persons, and Their Families Act 1989* (NZ).

¹³¹ Ibid s 11.

¹³² *Youth Justice Act 1992* (Qld) s 72.

¹³³ *Children, Young Persons, and Their Families Act 1989* (NZ) s 11.

¹³⁴ Ibid s 10(1)(a).

¹³⁵ *Youth Justice Act 1992* (Qld) sch 1 s 6.

6. AVL SETUP OBSERVATIONS

On two separate site-visits, the authors observed AVL setups at the PRMC and the BYDC. Observation was limited to visual aspects including: room layout, camera angle and screen visibility. The PRMC has three AVLs. Both courtrooms are fitted with AVLs and Level 1 houses a private room fitted with an AVL. In Courtroom 2 the setup included a large television screen facing the left of the Bench and a smaller television screen on the back wall. The camera was positioned at the back of the courtroom to face the Bench. The private room had a large television screen and a camera facing a table with two chairs.

The BYDC has two rooms fitted with AVLs and can host up to 21 AVLs per day. One room is slightly bigger than the other. The AVL equipment includes a large television screen, and a plastic box directly under the screen, enclosing a camera and audio equipment. Both rooms fit a table and two chairs (one for the child and one for the Caseworker or the BYDC staff member). The walls are bare. On the screen in the AVL appearance observed, the Magistrate was the dominant figure and only the backs of the legal representatives were visible. However, a BYDC staff member informed the authors that visibility can change depending on the camera angle set up in the courtroom.

7. FOCUS GROUP ANALYSIS

This part comprehensively analyses the focus group discussion with the youth justice lawyers.

7.1 Benefits

The discussion commenced with an overview of the benefits of AVLs, and the rationale behind AVL use. Participants were asked, ‘what do you generally see as the benefits of AVL from your perspective as a lawyer?’ The overall consensus was there are benefits for the young people, the lawyers and the Magistrates. Participants indicated the key benefit to the young person is avoiding the long journey from the BYDC to court. In turn, the young person also avoids being strip-searched.

AVLs further benefit young people by limiting their exposure to adults. Presently, in Queensland, young people are held in the same watch-house cells as adults. There is no separate holding place for young people, clearly violating watch-house conventions and the *Youth Justice Act 1992 (Qld)*.¹³⁶ However, one participant noted, ‘I wouldn’t like us to be saying we want video-link because this is what is happening to children ... that needs to be sorted so children are in a safe place no matter where they are.’

Another benefit participants raised is AVLs are less disruptive to a young person’s structured day. Where a young person is required to physically attend court, they wake up at 4am and are transported to court where they spend most of the day waiting for their appearance, and then return to the BYDC. As a result, the young person misses an entire day of school. One participant said:

There is no benefit for any child to appear by video-link except if it is a really really minor matter where they don’t have to be strip searched, brought in and go through all that nonsense for simply an administrative mention.

AVL also benefits lawyers, particularly those in the private sector, as they reduce the time lawyers spend at court. One participant noted:

Your boss isn’t going to be too happy if you hang around for four hours just waiting for maybe a couple of matters, particularly if it’s just an adjournment. You can’t cost that.

Finally, AVLs benefit Magistrates and the court system. In minimising the number of young people who physically appear, this drastically reduces transport and holding costs. Moreover, AVLs are convenient for the court. Magistrates do not have to wait for the young person to arrive at court or to be brought up from the cells. Via AVL, a young person simply appears during their allocated time slot, reducing the time Magistrates must wait for an appearance.

7.2 Detriments

¹³⁶*Youth Justice Act 1992 (Qld)* sch 1 s 17.

The discussion of detriments raised five distinct themes: trust, capacity, understanding, participation and access to justice.

7.2.1 Trust

A key area of concern in this research is whether AVLs impact the formation of relationships and trust between young people and their lawyers. Participants were asked to identify why face-to-face contact was necessary to develop rapport and trust with young people as opposed to adults. Overall, participants agreed building trust is essential to overcoming the young people's perception that their lawyer is 'just another adult who is going to let them down'. As one participant noted: '[young people] have no reason to trust anybody because they come from very disadvantaged backgrounds'. Participants indicated 'video and phone [are] no good' where the lawyer does not know the young person. Participants considered face-to-face contact necessary in building rapport with a young person, 'to show that you're a real person' and further 'that you are trying to do the best you can for them'. One participant noted a child made a formal complaint because they only knew their lawyer 'as a person on a video'.

Participants indicated a notable difference in trust building with children of African descent, particularly where the lawyer is female. One participant's view was, 'there is no way you're getting anywhere over video-link' with children of African descent.

Participants also indicated good rapport leads to a young person having a better understanding of a lawyer's role and that AVLs do not facilitate this:

Establish as much of a rapport as you can so [the young person] can understand your role. The first 15 minutes of seeing a child is always taken up by that explanation, what your role is, what the court is, and that's a very quick version and getting an understanding of who they are. The video-link system completely prevents you from being able to do that.

7.2.2 Capacity

Further concerns were raised regarding a child's capacity to participate in proceedings. Participants were asked, 'how do AVLs play a role in taking instructions before and after Court from the young person?' The overall consensus deemed AVLs a poor mechanism for taking instructions. Participants identified two AVL methods used to take instructions: where everyone leaves the courtroom and the lawyer speaks with the young person over AVL, or where the lawyer takes instructions from a separate AVL room. However, all participants indicated taking instructions when the young person is physically present is their preferred method. The primary reason participants prefer to see a young person face-to-face relates to their ability as a lawyer to assess a young person's capacity to give instructions. Several participants also indicated they refuse to take instructions via AVL.

All participants indicated they need to see the young person face-to-face to determine how much the young person actually understands. Many participants noted they use a series of questions, techniques and observations to assess a young person's capacity and AVL often hinders these processes. These issues are exacerbated in young people who have frequented the system and have 'learnt a particular way of carrying themselves' and '[learnt] certain

keywords ... so they don't seem quite as impaired as what they are'. Many participants noted they struggle to pick up on these cues over AVL.

Participants indicated there are no means to assess a young person's capacity at the BYDC. The BYDC does not employ an on-site psychologist to perform cognitive assessments, therefore, it is near impossible to detect certain 'red flags'. One participant raised the importance of cognitive assessments in recalling a personal client experience:

I remember with an old young client of mine, who I thought was absolutely fine, got some information that he actually had a full scale IQ of 42. He's [less intelligent] than my five year old but he is fit to give instructions.

Without cognitive assessments, many young people are providing instructions where they may not be fully aware of the consequences. Another participant indicated:

Even if they have been in the system, they might be street-wise but they really have no idea about the protocols, court procedures, or anything at all or even the severity ... there is very little concept of they're getting themselves into a lot of shit here.

Conversely, this participant raised a different approach:

If you raise cognitive type issues and problems and not being able to get proper instructions [via AVL], wandering minds and all that sort of stuff, [courts] tend to be a bit more reasonable and allow the child to be produced for you, but otherwise if you just say "we need to take full instructions" ... no [the young person will not be produced].

Many participants noted the AVL duration is insufficient to take instructions from a young person with a cognitive impairment. Magistrates may only give lawyers five minutes to take instructions via AVL. Participants indicated it was difficult to convey essential information in a manner the young person would understand in such a short period. This issue is further exacerbated in cases where a young person has multiple charges. Therefore, conducting a cognitive assessment is fundamental to determining a young person's capacity to provide instructions and participate in an AVL.

Participants subsequently raised major concerns around the capacity threshold. Cognitive impairments are prevalent throughout the youth justice system and may hinder a young person's capacity to give instructions or comprehend AVL court proceedings. 'There is no legislation in Queensland that sets a specific chronological age for when a child or young person is considered competent to instruct a lawyer'.¹³⁷ In Australia, at common law, a young person's capacity to provide instructions is assessed in accordance with the approach in *Marion's Case*.¹³⁸ A young person is capable of providing instructions when 'he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully

¹³⁷ Anthony Reilly, Queensland, *Guidelines Framework for working with Children and Young People* (April 2015) Legal Aid Queensland <<http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Best-practice-guidelines/Guidelines-framework-for-working-with-children-and-young-people#toc-why-children-and-young-people->>>.

¹³⁸ *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's case*').

what is proposed'.¹³⁹ Many participants indicated this threshold is incredibly low when applied to their clients, particularly those with cognitive impairments.

One participant noted there was a presumption:

If [a young person has] a competent counsel or lawyer that can kind of overcome the deficiency in this kid who might just know the protocol and process and who gets confused etc. Because he's got counsel ... that'll do.

Another participant indicated they had sent 15 young people to the Mental Health Court over three years and 'not a single one had a defence or [was] deemed unfit to instruct'. All participants were of the opinion if AVLs are to continue, safeguards and guidelines must be implemented to address AVLs deficiencies in assessing a young person's capacity.

7.2.3 Understanding

Another key issue raised by participants was the ability of a child to understand court proceedings. The charter of youth justice principles state a young person 'should have procedures and other matters explained to [them] in a way the [young person] understands'.¹⁴⁰ These principles state the young person 'should be given the opportunity to participate in and understand the proceeding'.¹⁴¹ Section 72 of the *Youth Justice Act 1992* further reinforces these principles.

Participants noted some young people do not understand the concept of an AVL itself. One participant indicated 'indigenous [young people], often with FAS [foetal alcohol syndrome], don't even know what the technology is, they don't even understand the technology'. This primarily stems from their disadvantaged backgrounds and disassociation from school. A participant indicated this is particularly confusing where a young person is placed on an AVL, describing it in these terms:

There's a video-link, here's a white lawyer who you've never met. There's a white Magistrate you've never met. There's a police officer, you know what they look like. Here's a Youth Justice Court Coordinator you've never met, and they're just talking about you.

Participants saw AVL as adding another complexity to the already confusing court process. All participants noted they need to see the young person face-to-face to determine how much they actually understand. One participant said:

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

¹³⁹ *Marion's case* (1992) 175 CLR 218, 237.

¹⁴⁰ *Youth Justice Act 1992* (Qld) sch 1 s 6.

¹⁴¹ *Ibid* sch 1 s 7(b).

Another participant noted, ‘the real issue with video-link is that there is very little ability to reassure yourself that [the young person] understands, whereas seeing them face-to-face you can do all of those extra steps’.

Participants were asked, ‘when a young person does not understand the Court process, what steps are taken to ensure they understand?’ The key response from all participants was ‘you’ve just got to keep explaining no matter what it is over and over again because [Court] is a difficult place for children to understand’. Participants also noted they often draw diagrams about the processes. One participant said, ‘I’ve just audited my team’s files and on about 70% of the files [there are] individually drawn flowcharts for the child to explain the process’. One participant added:

If you’re on a video-link it’s really hard to use those sorts of resources ... you can check that they can explain that back to you because it’s there and they’ve got something to work with whereas on the video-link there is nothing for them to work with to show that.

These approaches assist young people with lower literacy levels, visual learners and those who suffer cognitive impairments. Participants commented a young person needs visual aids to supplement detailed verbal explanations. In using AVL, participants felt their ability to ensure their client understood the court process was hindered.

Whilst participants provided these additional explanations and clarifications, one participant recalled their personal experience with the youth justice system, suggesting despite these explanations a young person will still struggle to comprehend the Court process:

You do not have the intellect to understand. I was a kid that went through the youth system, you know the court system, when I was child and when I think back to that I still have no idea what was going on. Wouldn’t have a clue of what went on other than I went into some room that was dressed up like a courtroom and then ended up locked up. That’s about all that I knew. Would not even, don’t even have a memory of what was happening. I don’t even know if there was lawyers there to be quite honest. I’m sure there was but I mean you’re a kid. You don’t have the capacity. You don’t have the intellect to understand.

One participant raised a New South Wales study where young people were interviewed after court and were asked to explain what happened. ‘87% of these young people ‘either got it wrong or said “I’m not really sure”’. Therefore, it seems regardless of how a young person appears, their understanding of court proceedings is limited.

Furthermore, participants indicated ‘gratuitous concurrence’ proves problematic in assessing a child’s understanding. “Gratuitous concurrence” is when a person appears to assent to every proposition put to them even when they do not agree’.¹⁴² Participants noted this was particularly common with Indigenous children ‘especially when they come from low socio-economic backgrounds [where] high illiteracy is quite common’. The young person would rather say ‘yes’ to everything than feel as if their legal practitioner or Magistrate thinks they

¹⁴² Legal Services Commission of South Australia, *How to Assist an Aboriginal Defendant* (11 December 2012) Legal Services Commission of South Australia <<http://www.lsc.sa.gov.au/dsh/ch03s04.php#Ch1245Se240074>>.

are stupid. 'Gratuitous concurrence' is further exacerbated by people in authority such as a Magistrate. Many young people will just say 'yes' when they really do not know. One participant indicated:

If you see a Magistrate do an [AVL], the first thing they will say to a child whether they are indigenous or not is, 'so do you understand why you're here today?' Yes ... 'And you've met so-and-so?' Yes ... So all those leading questions are asked of the child and [the Magistrate goes] 'well yeah they understand, let's get on with it'.

Therefore, the issue of 'gratuitous concurrence', particularly in AVL appearances, prevents lawyers from truly knowing the level of their client's understanding and in some cases may prevent them from acting in their clients best interests. Ultimately, a lawyer will spend the greatest amount of time with the young person and is likely to have a greater understanding of their client's capacity and understanding. Participants believe a Magistrate asking young people leading questions is a poor mechanism for assessing their capacity and understanding.

Finally, participants noted there was no avenue to ascertain whether a young person understood the proceedings that just took place via AVL. Participants noted, 'the feedback from the detention centre staff is that most kids do not understand what has taken place on video-link'. Whilst participants dislike the fact caseworkers can sit in on an AVL, they acknowledged 'the caseworker can help explain what's actually occurred to the child.' All participants noted without the caseworkers being present a young person's AVL understanding would be drastically reduced. However, one participant indicated, 'you don't even get feedback from the caseworkers saying "hey that video-link that kid didn't understand it"'. Therefore, AVLs prevent lawyers from providing clarification and explanation to their client in breach of the *Youth Justice Act 1992 (Qld)*.¹⁴³

7.2.4 Participation

A further area of concern in this research was a child's participation in court proceedings. When questioned why face-to-face contact is different with young people, as their lawyer, participants made reference to a child's right to participate in proceedings:

In order for you to discharge your duties as a legal practitioner and act in the best interests of the child, the child has a right to participate in proceedings ... But the video-link compromises all of that natural ability that a lawyer has with their skills to assess a child's capacity and understanding of what has happened. Because most children, 95% of those ones that appear on video-links are not participating in the proceedings, in direct violation of the *Youth Justice Act*.

Participants also indicated children behave differently on AVL. Participants were asked whether certain demographics or age groups struggled to behave in court and the response was 'it's very variable but you get all types'. The general consensus was AVLs significantly limit a practitioner's ability to remind children how to behave in court. As a result, children participate differently over AVL than in face-to-face, with some children even 'making admissions over the video link conference'. One participant explained it as: 'if they are sitting

¹⁴³ *Youth Justice Act 1992 (Qld)* s 72.

beside you in the courtroom they know I'm talking, you're not'. Another participant had a client who 'flipped the table and lost their temper' because they were not granted bail.

AVL technical difficulties further limit participation in proceedings. Participants were asked if anyone clarifies in terms of audio whether or not each side can hear one another prior to the commencement of proceedings. There was agreement this happens 'sometimes'. One participant noted 'there has been some whole proceedings sentences that have occurred ... where the caseworker says "we didn't hear any of that"'.

7.2.5 Access to Justice

Access to justice is a fundamental notion underpinning the youth justice system and therefore of fundamental concern to participants. There was across the table agreement that 'best practice in terms of Children's Court procedures has been abandoned in Queensland ... for the last 10 years'. The lack of consistency in treatment of children throughout the State was also noted. Participants were concerned AVLs were implemented to mirror the adult system and 'to fast track everything'. One participant considered fast tracking to have the following effect on a child's access to justice: 'even though we say innocent until proven guilty, every action that is taken to be more expedient, is about saying you're guilty before you're innocent'. The issue of expedience was raised again when asked how AVLs effect taking instructions from a young person. One participant responded:

I think the video link-up has huge issues for people's access to real justice in the courts ... It has become this expedient tool for the Magistrates and for the coppers or DPP. It is not about justice for the defendants.

The lack of available visits at the BYDC was raised as a concern when participants were questioned on the frequency of communication with their client. All participants agreed the lack of visits is 'just not realistic'. One participant had to cancel a visit for Monday afternoon and requested another time that week, however, was informed the next available visit was not until the following Monday. Another participant tried to book for a Monday afternoon but was told the first available visit 'was 3:30pm Thursday the following week'. Another participant was quoted as saying: 'I will move heaven and earth to get out there because I prefer in person'.

Further concerns for access to justice were raised when participants were asked why face-to-face contact was different with young people. The limited opportunity to contact the child before and after court was raised. One participant noted in New South Wales telephone contact is made prior to court. Further, in New South Wales' courtrooms there is a phone allowing the lawyer to have a one-on-one conversation with their client in confidence.

7.3 Recommendations

Participants were provided with a copy of the Victorian Children’s Court ‘Guidelines for Video Conferencing - Criminal Division Video-Link Hearings’ (Victorian Guideline),¹⁴⁴ to guide discussion of recommendations for the Queensland youth justice system. The response was positive; one participant remarked:

[It would be] good to be able to refer to [a guideline] if you’re asking for something. Because right now you’re getting a Magistrate who will say “nope not doing it” and it would be good to be able to say “well right there’s this guideline here”.

As a group, participants expressed they were ‘looking for ... Practice Directions coming from the Children’s Court to bring back a best practice regime within Queensland’.

First, participants would reduce the guidelines scope to use AVLs for mentions only. Second, participants noted the capacity requirement in section 1(d) is too broad.¹⁴⁵ One participant suggested the requirement should be, ‘in the opinion of the legal practitioner the young person doesn’t have the capacity’. Participants recommended this amendment as ‘there [are] some Magistrates in Queensland who would say well there’s no evidence before the court that they don’t have capacity’. However, as the lawyer spends more time with the young person than the Magistrate, participants believe they are in a better position to have a greater understanding of a child’s capacity.

Second, the Victorian Guideline states the presumption ‘that all criminal matters listed ... where the young person is in custody *should* be converted to video-link hearing’.¹⁴⁶ However, one participant argued: ‘shouldn’t the presumption be the opposite of what it is here?’ As such, participants recommended the presumption be reversed to read ‘all criminal matters listed ... where the young person is in custody *should not* be converted to video-link hearing’.

Lastly, the Victorian Guideline indicates a young person has a statutory right to attend court.¹⁴⁷ One participant noted a statutory right to attend court was ‘missing in the *Youth Justice Act*’. Currently under s 72 of the *Youth Justice Act 1992* (Qld) a young person only has a right to participate in proceedings. Therefore, participants recommended amending the *Youth Justice Act 1992* to include a statutory right to attend court.

In addition to the above recommendations, one participant suggested there needed to be a provision that no one else is allowed in the room when a child is appearing by AVL. Views were divided on this issue: ‘I mean it’s an issue because you’re trying to figure out what’s ... more important in that moment. Is [it] the child’s right to privacy because there’s no confidentiality with the youth worker?’ And further: ‘there’s pros and cons of there being

¹⁴⁴ Children’s Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

¹⁴⁵ Children’s Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015, s 1(d).

¹⁴⁶ Children’s Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015, Preamble.

¹⁴⁷ Children’s Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

someone in the room. There's a risk to their confidentiality ... versus do they even know what just happened and that's why video links are an issue'. Another participant noted: 'sometimes kids have quite good relationships with their caseworkers and their caseworkers do the AVL with them at the kid's request [and] sometimes that can be a good thing but that's a rare case'. It was suggested 'somebody needs to be ... within reach' particularly where the child is scared or problematic. To overcome this, a further step after court was considered necessary such as phone call with the child. Presently, lawyers rely on the young person returning their phone call in their scheduled break. It was recognised that, 'something immediately after court' is needed.

8. RECOMMENDATIONS

Recommendation 1: Queensland Children’s Court Practice Direction or Guideline

It is recommended Queensland implement a practice direction or guideline similar to the Victorian Children’s Court ‘Guidelines for Video Conferencing - Criminal Division Video-Link Hearings’.¹⁴⁸

To be effective in Queensland, proposed amendments to the Victorian approach are:

1. Presumption

Section 1 of the Victorian Guideline states:¹⁴⁹ ‘it is suggested that all criminal matters listed for the above hearing types where the young person is in custody *should* be converted to video-link hearings’.¹⁵⁰

In Queensland, it is recommended this presumption be reversed to ‘*should not* be converted to video-link hearings’.

2. Capacity

Section 1(d) of the Victorian Guideline states a video-link should take place unless ‘the young person does not have the capacity to participate in proceedings via video-link’.¹⁵¹ This requirement is too broad.

The Queensland provision should read as follows: ‘a video-link should not take place if the young person does not have the capacity, *in the opinion of their legal practitioner*, to participate in proceedings via video-link’.

3. Combination of relationship with legal practitioner and capacity requirements

Section 1(a) and 1(d) of the Victorian Guideline should be combined as a qualified justification.

4. Contact

It is proposed a provision be inserted requiring the young person’s legal practitioner to make contact with the young person before and after court.

See **Appendix 2** for the proposed draft guideline.

Recommendation 2: Amendment to the *Youth Justice Act 1992 (Qld)* to include a right to attend court

Section 72 of the *Youth Justice Act 1992* should be amended to extend the current statutory right to participate in proceedings to include a right to attend court.¹⁵²

¹⁴⁸ Children’s Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.

¹⁴⁹ *Ibid* s 1.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* s 1(d).

¹⁵² *Youth Justice Act 1992 (Qld)* s 72.

Recommendation 3: Amendment to the *Youth Justice Act 1992 (Qld)* to permit the use of AVLs for mentions only

Sections 53 and 159 of the *Youth Justice Act 1992 (Qld)*,¹⁵³ permit AVLs use for bail and sentencing. However, Queensland uses AVL for a variety of matters from mentions, bail and sentencing.¹⁵⁴ Participants indicated AVL use should be limited to mentions only. Therefore, ss 53 and 159 should be amended to restrict AVLs use to mentions only.¹⁵⁵

¹⁵³ Ibid ss 53, 159.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

9. CONCLUSION

Having considered the role, rationale, benefits and detriments of AVLs in the Queensland youth justice system it is apparent reform is needed to ensure AVLs do not hinder a young person's access to justice. Whilst technology can promote expedience and convenience, courts must ensure there are adequate safeguards to uphold fundamental principles of natural justice and procedural fairness. The authors recommend the Queensland Children's Court implement a practice direction or guideline, similar to the Victorian Guideline, to promote best practice. The authors further recommend two legislative amendments to the *Youth Justice Act 1992* (Qld).¹⁵⁶ These amendments should implement a statutory right for a child to attend court and should reduce the circumstances in which an AVL is to be used to mentions only. It is essential these safeguards are implemented to ensure young people's access to justice is not hindered and the integrity of the legal system is not compromised.

¹⁵⁶ Ibid.

10. APPENDICES

10.1 Appendix 1

Children's Court Victoria

GUIDELINES FOR VIDEO CONFERENCING

CRIMINAL DIVISION - VIDEO-LINK HEARINGS

Preamble

The purpose of these guidelines is to reduce the number of young persons in custody being transported to court by increasing the use of video-link hearings for preliminary matters.

These guidelines apply to the following Children's Court criminal hearing types state-wide:

- mentions
- committal mentions
- special mentions

Guidelines

1. It is suggested that all criminal matters listed for the above hearing types where the young person is in custody should be converted to video-link hearings unless:
 - a) the young person has not had adequate opportunity to meet his/her legal practitioner and establish rapport and trust. (e.g. at the first mention);
 - b) the young person requests to come to court;
 - c) the young person requires an interpreter;
 - d) the young person does not have the capacity to participate in proceedings via video-link;
 - e) the proper venue of the Court or Youth Justice Centre cannot appropriately list the matter via video-link because of resource availability;
 - f) otherwise directed by the presiding Magistrate.
2. All matters should be ready to proceed at the time the video-link is listed.
3. These guidelines are not intended to interfere with the child's statutory rights to attend court unless otherwise directed by the Court.

These guidelines commence on 20 April 2015.

Judge Peter Couzens
President
Children's Court of Victoria
17 April 2015

10.2 Appendix 2

Children's Court Queensland

Guidelines for Audio Visual Link Use in the Children's Court of Queensland

Preamble

The purpose of these guidelines is to provide safeguards for young people when appearing by audio visual link hearings for preliminary matters and to promote a young person's access to justice.

These guidelines apply to all matters before the Children's Court state-wide.

Guidelines

1. It is suggested that all matters listed before the Children's Court where the young person is in custody *should not* be converted to audio visual link hearings unless:
 - a. the young person has had adequate opportunity to meet his/her legal practitioner and establish rapport and trust; and
 - b. the young person has the capacity, in their legal practitioner's opinion, to participate in proceedings via video-link; or
 - c. one of the following circumstances applies:
 - i. the young person requests to come to court;
 - ii. the young person requires an interpreter;
 - iii. the proper venue of the Court or Youth Justice Centre cannot appropriately list the matter via video-link because of resource availability;
 - iv. otherwise directed by the presiding Magistrate.
2. All matters should be ready to proceed at the time the audio visual link is listed.
3. These guidelines are intended to promote the child's right to participate in proceedings pursuant to s 72 of the Youth Justice Act 1992.

*These guidelines are based on the Children's Court of Victoria Guidelines for Video Conferencing - Criminal Division Video-Link Hearings dated 17 April 2015.¹⁵⁷

¹⁵⁷ Children's Court of Victoria, *Guidelines for Video Conferencing - Criminal Division - Video-link Hearings*, 20 April 2015.