‘Virtual Justice in the Bush’: The Use of Court Technology in Remote and Regional Australia

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Abstract

Courts and tribunals in Australia are making substantial investments in court technology, in particular, videoconferencing and broadband technology, as a way of delivering justice to remote and regional Australia. While the deployment of technology in this way is most often justified on the grounds of cost-savings and convenience, there has been little in the way of research on the effects of its use.

This paper discusses issues relating to the use of videoconferencing technology in remote and regional courts in Western Australia focussing particularly on a case study of three remote courts in the Goldfields region. In this region, a high percentage of those to be served by the new technology are Aboriginal people who already experience considerable disadvantage in their dealings with the justice system.

It identifies some of those factors that may take on particular significance in the context of the use of videoconferencing technology to take evidence from Aboriginal witnesses. I argue that there is a need to ensure that the use of this technology does not add to the level of ‘remoteness’ experienced by Aboriginal people in their dealings with the non-indigenous justice system, and that definitions of remoteness that concentrate on physical and economic factors may overlook this need.

1. The Technology

The last 20 years have seen a ‘technology revolution’ in Australian courts; both in terms of the ‘back office’ technologies for case processing, and technologies for use in the courtroom. Information and communications technologies (ITC) now play a key role in managing case load, publishing information for court users, managing knowledge within the court, supporting the preparation and conduct of litigation and presenting evidence, providing transcripts and preparing and publishing judgments. Technology is increasingly used to manage transactions between courts and their users, including facilities to enable parties to file documents electronically and search court records.1

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1.1 Remote Witness Technology

Some of the most popular types of technologies deployed in Australian courts to date have been those that link witnesses outside the courtroom (‘remote’) to it, to enable the court to receive their evidence. At its simplest, remote witness technology might be constituted by a telephone link. However, most frequently in an Australian court today it will consist of videoconferencing technology.

At its most basic, videoconferencing (or video linking) is a method of two-way communication that links multiple locations through audio and video technology that enables people at different locations to see and speak with each other in close to real time. The basic components of videoconferencing are cameras, monitors, microphones, speakers and a communications network. At minimum, each location must have a camera, microphone, monitor and a CODEC (a device which encodes video signals at one end, sends the data over a transmission circuit or network and decodes the signal for viewing at the other location). The network may range from a simple coaxial cable link to the use of orbital satellite transmissions. The most common form of network now is provided by ISDN ‘dial-up’ videoconferencing.

Videoconferencing over the Internet (IP solutions) are now available and offer a way to provide cheaper coverage, from a broader range of locations. However, these are used less often, generally because of concerns about maintaining the integrity of the evidence. While software such as Skype might make testimony vulnerable to access or interference, new solutions are being developed that should provide higher levels of security, making likely that more evidence will be taken by this method in the future.

3 Ibid.
4 Ibid.
5 Victorian Parliamentary Law Reform Committee, Technology and the Law, Report (May 1999) [2.27].
6 This is less expensive than satellite-based videoconferencing (which provides better quality transmission), but provides considerably more flexibility than coaxial cable links: See, eg, Frederick I Lederer, ‘The Road to the Virtual Courtroom? A Consideration of Today’s – and Tomorrow’s – High-Technology Courtrooms’ (1999) 50 South Carolina Law Review 799, 819.
Initially, remote witness technology (first closed circuit television (CCTV) and later videoconferencing) was adopted as a means of taking evidence from children, or other vulnerable parties, such as victims of sexual assault, to shield them from the physical presence of the accused in the courtroom and the risk of intimidation. However, courts were quick to realise its potential, perhaps not surprisingly, given the huge distances covered by many Australian jurisdictions. While it is still most commonly used to enable vulnerable witnesses to give evidence from a location outside the courtroom, videoconferencing is also increasingly used to enable other witnesses to give their evidence from a location outside the courtroom for a variety of other reasons, such as cost or convenience.

By 1999, it was observed that: ‘Australia... is internationally recognised for the effective use of videoconferencing in legal processes.’ The use of remote witness technology has become widespread in Australian courts over the past ten years, particularly. It is now used widely to take evidence both within Australia and from overseas.

It is also used increasingly to link prisoners in correctional facilities to court rooms to conduct remand and pre-trial hearings and hear bail applications in criminal cases. This reduces the costs, and security risks, associated with transporting prisoners to and from court houses and correctional facilities. Prisoners dealt with in this way are, again, both physically and geographically remote from the proceedings.

The technology is also used to conduct various types of court hearings: as an alternative to circuit hearings, directions hearings, pre-trial conferences, chamber applications, and applications for special leave to appeal. The Federal Court of Australia has used it on occasion to conduct appeal hearings. On one occasion, at least, in Victoria, it has been used as a temporary expedient to bring a

7 A development from earlier closed circuit television systems used for the same purpose.
8 Victorian Parliamentary Law Reform Committee, above n 5, [10.33].
10 Australian Law Reform Commission, above n 9, [5.41].
12 Australian Law Reform Commission, above n 9, [5.39].
magistrate ‘on-line’ to a country court, when the local magistrate was unexpectedly unavailable to deal with a busy list.\textsuperscript{13} A magistrate who has finished their local list for the day can also be linked to a busier court elsewhere to assist with finalising its caseload.\textsuperscript{14}

Videoconferencing is also being used to provide ancillary services to assist the court process. For example, in Western Australia it is being used to provide interpreting services to regional courts\textsuperscript{15} and to provide forensic psychiatric services to make mental health assessments.\textsuperscript{16}

1.2 The Legal Framework

The use of technology in litigation requires that the laws of evidence recognise and provide for the various methods of taking and presenting evidence electronically.\textsuperscript{17} The taking of evidence by remote witness technology has largely been addressed in Australia by specific legislation and by amendments to court rules. In Western Australia, for example, the relevant legislation is s 121 of the \textit{Evidence Act 1905} (WA) which provides that:

\begin{enumerate}
  \item Subject to this section, a WA court may, on its own initiative or on the application of a party to a proceeding in or before the court, direct that in that proceeding evidence be taken or a submission be received by video link or audio link from a person at a place, whether in or outside this State, that is outside the courtroom or other place where the court is sitting.
  \item The court shall not make such a direction unless the court is satisfied that —
    \begin{enumerate}
      \item the video link or audio link is available or can reasonably be made available; and
      \item the direction is in the interests of justice.
\end{enumerate}
\end{enumerate}

\textsuperscript{13} Author’s notes, ‘Session Five: Videoconferencing – a Multi-purpose Tool’ (Australian Institute of Judicial Administration Technology for Justice Conference, Melbourne, 23 March 1998).

\textsuperscript{14} Author’s notes of conversation with Magistrate Kate Auty 4 August 2008; David Tait, Field Notes, Inspection of Sunshine Magistrates Court, Melbourne, August 2008.

\textsuperscript{15} B Williams, ‘Ministry of Justice Video Link Service’ (March 2001) 28(2) Brief 33.

\textsuperscript{16} Alan Brett and Bruce Blumberg, ‘Video-linked court liaison services: Forging new frontiers in psychiatry in Western Australia’ (2006) 14(1) Forensic Psychiatry 53.

\textsuperscript{17} P Perritt, ‘Video Depositions, Transcripts and Trials’ (Summer 1994) 43 Emory Law Journal 1071, 1078-81, 1092-93.
For the purposes of taking evidence or receiving a submission by video link or audio link from a place in this State in accordance with such a direction, the place shall be taken to be part of the court.

For the purposes of taking evidence or receiving a submission by video link or audio link from a place in a participating jurisdiction, the court may exercise in that place any of its powers that the court is permitted, under the law of the jurisdiction, to exercise in that place.

Most Australian jurisdictions have also implemented legal regimes which require or enable evidence given by vulnerable classes of witnesses – children, victims of sexual assault – to give evidence remotely. The relevant Western Australian legislation is contained in ss 106R, 106N and 106O of the Evidence Act 1905 (WA).

1.3 ‘Remoteness’

It will be apparent from the description of its uses above that ‘remote witnesses’ tend to fall into two categories. Firstly, there are those for whom physical participation in the courtroom may be quite easily possible and convenient in terms of access, but who are shielded from participation in the physical courtroom in their own interests, such as children and other vulnerable witnesses. They are ‘remote’ in a physical sense, but not necessarily geographically. The remote witness facility from which they give their evidence is most likely located in the same city or suburb as the courthouse; frequently it is in the same building.

On the other hand, witnesses who give evidence on videoconference for reasons of cost or convenience are usually both physically and geographically remote from the courtroom. The remote witness facility from which they give their evidence may be another court room (closer to their work location), or a public or private videoconferencing facility in that location, a video-conferencing suite in their laboratory complex, or even the computer at their desk.

Where the technology is used to link the judicial officer in another place to participants in a physical courtroom, it may be the court itself, or the judicial officer, who is in fact characterised as ‘remote’, rather than the witness, or the parties. However, with the introduction of multiple links between participants in different locations, it may be more correct to characterise the nature of participation as ‘virtual’ rather than remote.

1.4 The ‘Virtual Court’

The term ‘virtual court’ is usually employed to describe the use of technologies that provide for hearings and trials with participants in far-flung places, in which the physical location of the courtroom
does not dictate the process or the conduct of the proceedings.\textsuperscript{18} Communications between the parties are conducted over high-speed, high-quality electronic networks that permit interactive data, voice and visual transmissions.

The parties may be located anywhere.\textsuperscript{19} It is now technically feasible, for example, for a magistrate in a regional town such as Kalgoorlie in Western Australia, to use the services of a court interpreter via video link from Perth, for a witness appearing by video-link from another town.

1.5 ‘Virtually remote’ technology in bush courts

The Department of Justice and the Attorney-General in Western Australia has embarked on a program of rolling out technology to remote court locations across that State. It is not the only jurisdiction using technology in remote justice hearings, but is probably one of the most advanced.

To consider the impact of these developments on the delivery of justice in Western Australia, it is first necessary to appreciate the background context. The geographical and demographic environment in which the courts operate is crucial to understanding what the department hopes to achieve.

1.6 The Geographical and Demographic Context

Western Australia itself covers 2,529,880 square kilometres, or one-third of Australia’s total land mass. However, although it is Australia’s largest State it is one of the most sparsely populated, with a population of 2,130,000 (just 10\% of Australia’s total).\textsuperscript{20}

The majority of the population (almost 75\%) live in the Perth metropolitan region, Western Australia’s capital city, or in the South West (10.8\%). However, the remaining 15\% are spread over a remarkably wide area, ranging from the South West, Upper and Lower Great Southern, Midlands, South Eastern, Central, Pilbara


and Kimberly regions each of which has between 1% and 3% of the State’s total.\[^{21}\]

Western Australia also has one of the highest populations of Aboriginal people (Australia’s indigenous people): estimated at 77,900 in 2006 (15% of the total Australian indigenous population and 3.8% of the total Western Australian population). The majority of Aboriginal people in Western Australia live outside metropolitan Perth (66%).

In 2006, 26% of Western Australia’s indigenous population were living in areas classified as ‘very remote’;\[^{22}\] 15% in areas classified as ‘remote’; 15% were living in ‘outer regional areas’ of Western Australia and 9% in areas classified as ‘inner regional’.\[^{23}\]

1.7 The Distribution of Justice

The Western Australian justice system has its headquarters in metropolitan Perth; the Department of Justice and the headquarters for each of the main courts (Supreme, District and Magistrates’ Courts) and the Western Australian Administrative Tribunal, are based in Perth. The main court houses are in the central business district, but there are also several large suburban courts, such as Rockingham and Mandurah.\[^{24}\]

Courts also operate from a number of large regional centres. These include Kalgoorlie (population: 30,903), Broome (15,259 ), Bunbury (31 638), Busselton (27,500).


These regional locations tend to form ‘hubs’ from which circuit courts to a number of other locations in the vicinity are conducted. For example, the Magistrates Court at Kalgoorlie conducts a monthly ‘Goldfields Circuit’ to Laverton (population: 786), Warburton (470) and Warakurna (180).

From the demographic data, it can be seen that in these remote townships, a large proportion of the population served by the courts are Aboriginal.

1.8 The Technology

The technology that is being deployed in regional and remote locations across the Western Australian justice system consists of a number of components. Taken together, these components combine to constitute the basic components of a ‘virtual remote court’.

Firstly, the Department of Justice and Attorney-General is installing video-conferencing facilities. In regional centres which have existing court houses, such as Kalgoorlie, Broome and Carnarvon, this has taken the form of refitting existing courtrooms. In remote locations, such as Warakurna or Warburton on the Goldfields Circuit, video-conferencing facilities have been fitted into courtrooms that form part of what are called ‘multi-function centres’ (discussed below).

Within the court building, or multi-function centre, there is usually another room fitted with videoconferencing facilities. This is designed to be used as a ‘remote witness facility’ for witnesses testifying either to the courtroom in the same building, or to courtrooms at other locations. It can also be used to link to other videoconferencing facilities, either privately owned or operated, or community facilities, such as those found in some shire (local government) facilities and ‘telecentres’.

Telecentres are local community centres equipped with high-tech facilities, including computers, Internet and email access, videoconferencing, photocopiers, fax machines, printers, TV and video machines, decoders, and scanners among other services. Their establishment is part of a program by the Western Australian Government to improve access to technology to improve the delivery of government services generally to remote and regional Western Australia.

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25 The following account derives from the author’s field notes of a study trip taken to Western Australia on 3-12 August 2008 for research undertaken as part of an Australian Research Council-funded study on the use of remote technology in courts.

In addition to videoconferencing facilities, court buildings and multi-function centres are also experiencing an upgrade of their technology infrastructure. The introduction or upgrading of broadband access is providing faster and more reliable Internet and email connections, and faster and more reliable online access to departmental databases. Court officers, corrections personnel and sheriff’s officers are now able to access up-to-date histories of parties before the court from the remote courtroom, and to access and enter information about their cases in court databases. This means that a magistrate hearing a case involving a person in a remote Western Australian court can have access to the most up-to-date information about that person, to the current court file, and to any databases of information that may be relevant for legal research and sentencing purposes.

1.9 A Case Study: Laverton, Warburton and Warakurna

These three towns are served by a monthly circuit from the Western Australian mining town of Kalgoorlie-Boulder, which has three resident magistrates, located some 600 kilometres east of Perth.

The furthest point of the circuit, Warakurna, is situated in part of the Gibson Desert, 750 kilometres north east of Kalgoorlie (1050 kms south-west of Alice Springs). However, these distances alone do not give a true indication of the degree of remoteness. Much of that distance must be travelled on gravel roads (often hazardous in the wet season) and air services are limited.27

On the monthly circuit, the Magistrates Court deals with a range of summary offences, and with preliminary remands and applications in relation to more serious offences that go before the District Court. A large percentage of the matters dealt with involve motor vehicle driving offences — for example, driving without a licence, driving in breach of licence conditions, driving with more than the prescribed blood alcohol concentration. Offences relating to the use or possession of alcohol within alcohol-free communities are also referred to the magistrates court; these offences involve breach of community by-laws.

Many other matters coming before the court relate to alcohol and drug use — most commonly, drunk and disorderly, assault and affray-type offences. Family violence matters are also a significant component of the work of the court and related support agencies, together with preliminary hearings in sexual assault cases (including offences against children).

Both Warburton and Warakurna have relatively new multi-function centres. These are buildings out of which three agencies operate: the

Western Australian police, the Department of Community Services and the Department of the Attorney-General.

In practical terms, the largest part of the building is taken up by a police station (including holding cells). There are offices for Department of Community Services and some ancillary personnel. These are usually only occupied on a transient basis, as personnel come into the town (usually for court circuits); however Warakurna has one full-time domestic violence support worker. Each multi-function centre has a courtroom, which is adjoined to the police facility. In Laverton, the court is held in a ‘courtroom’ constructed in a room which is in fact part of the police-station.

Both Warburton and Warakurna have broadband Internet connections (installed in the last few years) and videoconferencing facilities. In both places the videoconferencing is installed both in the courtroom and in another smaller room within the complex which also doubles as the police interviewing room.

Laverton, which is in fact the less geographically remote court facility, is more remote in terms of technology access. It still has no broadband access and no videoconferencing. Occasionally witnesses from nearby Aboriginal communities give evidence to Perth or Kalgoorlie courts via video-link from the local hospital at Laverton.

1.10 The Rationale

As noted previously, the two major rationales for the use of videoconferencing to take witness testimony have been the desire to protect vulnerable witnesses from trauma that they may experience in the physical courtroom, and the need to find ways to bring information and expertise to a courtroom from a witness located at a distance which makes physical attendance expensive or particularly inconvenient.

These two rationales operate also in the remote court regions, with the ‘tyranny of distance’ a particularly powerful factor. Videoconferencing is seen as a way of avoiding the need for community elders and witnesses to travel frequently to court hearings located at a considerable distance from their communities.28 In addition, the inclusion of secondary remote witness rooms in the multi-function centres (in addition to the courtroom) provides protected remote witness facilities for vulnerable witnesses in those regions. So a child, for example, could give their evidence to the courtroom at Warburton from the remote witness room in the Warburton multi-function centre.

The other aspects of court technology that are being implemented in remote courts — improved access to databases, case management systems, etc. — are designed to provide improved information, enhancing judicial decision-making, resulting in improved and more efficient outcomes.

More broadly, the introduction of new forms of communications technologies into justice services for remote indigenous communities is being rationalised as a way of improving service delivery to those communities. Videoconferencing is seen as a way of facilitating contact between over-stretched Legal Aid, Aboriginal Legal Service lawyers and specialized legal service providers and their clients, and enabling communities to undertake ‘virtual visits’ to relatives serving sentences of imprisonment in distant cities and towns.

Technology is also increasingly being seen as a way of bringing other services into remote communities to deal with problems associated with the justice system. For example, a recent enquiry into family violence and child abuse in Aboriginal communities in Western Australia recommended:

the development of a ‘one stop shop’ or community centre that responds to the range of factors and problems that are linked to and result from family violence and child abuse. In rural and remote communities, teleconferencing, videoconferencing and other forms of electronic support should be provided so that particular expertise can be accessed through government agencies.

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30 Bronwyn Herbertson, above n 29.

2. Issues

It is generally accepted that appropriate and efficient use of technology can bring considerable benefits. It can reduce the travel required for judges, court staff, lawyers, litigants and witnesses and the costs of transporting files and papers. It can make courts more accessible and flexible in their operation and minimise the time and inconvenience involved for all parties in physically attending court. It can enable courts to more efficiently allocate their resources.\(^{32}\)

However, there are concerns about the use of ‘virtual court’ technology in the court process. Those concerns may be exacerbated when dealing with criminal cases involving defendants and parties in remote locations who are already among some of Australia’s most disadvantaged participants in the legal system.

2.1 Aboriginal People and the Justice System

The fact that Australia’s indigenous people are over-represented in their dealings with the Australian criminal justice system is widely recognised.\(^{33}\) The factors contributing to that over-representation are complex.

Factors such as alcohol and other substance abuse have been identified as significant contributors.\(^{34}\) These are often coupled with a high level of violence in Aboriginal communities, particularly family violence\(^{35}\) and sexual offences.\(^{36}\)

However, these indicators themselves can be seen as a product of deeper and underlying causes. These have much to do with a historical legacy of disadvantage and ill-treatment, which has

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\(^{32}\) Australian Law Reform Commission, above n 9, [8.31].


consequences for both the rate at which indigenous people are represented in the Australian criminal justice system and the way they are treated in that system.

A Royal Commission into Aboriginal Deaths in Custody that delivered its findings in 1991, reported on the over-representation of Aboriginal people in prison custody (itself a product of their over-representation in the criminal justice system). The Commission’s findings were that this was a consequence of their overall disadvantage in comparison with the rest of the Australian population, on most major social indicators including employment, health, housing and education.\(^{37}\)

This disadvantage, in turn, the Commission found, derived from an historical legacy including forced dispossession from their land, and government policies of removal, and assimilation, which resulted in the breaking down of family and social structures.\(^{38}\)

Not only are Aboriginal people more likely to come in contact with the criminal justice system, they are more likely to be disadvantaged in their dealings with it. Poor relationships between the police and Aboriginal communities (largely the product of ‘over-policing’),\(^ {39}\) disparities in sentencing practices between indigenous and non-indigenous offenders,\(^ {40}\) difficulties in participation as a result of language and cultural difficulties,\(^ {41}\) and lack of access to legal advice and legal representation\(^ {42}\) have all been identified as factors that contribute to that disadvantage.

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The socio-cultural and linguistic difficulties that may be experienced by an Aboriginal person giving evidence in a court proceeding have been examined by a number of law reform inquiries.\textsuperscript{43} They include:

Language Issues: The fact that the majority of Aboriginal people in Queensland [as in Western Australia] speak an English dialect ‘Aboriginal English’ which has crucial differences in grammar, word meaning, style, pronunciation and usage from everyday English. Some Aboriginal people in more remote areas who speak traditional Aboriginal languages do not speak English at all, or do not speak it well. The formality of legal language and the unfamiliarity of legal concepts adds an additional layer of difficulty, both for Aboriginal witnesses and defendants themselves, and for court interpreters: ‘Sometimes it is hard even for the interpreter to understand, or to put in the Aboriginal language.’\textsuperscript{44} These factors mean that:

Many Aboriginal witnesses have difficulty in fully understanding the questions put to them in court and in expressing themselves clearly in language that the court can understand.\textsuperscript{45}

Cultural Issues: Differences between Aboriginal and Western European communication styles, particularly the emphasis in Aboriginal cultural on ‘more indirect forms of seeking information and dealing with conflict’ may result in Aboriginal witnesses tending to agree with propositions put to them in questioning and giving apparently contradictory answers in evidence;\textsuperscript{46} the phenomenon of ‘gratuitous concurrence’. Different concepts of time and distance and a tendency to use qualitative rather than quantitative descriptors may also cause difficulty in understanding.\textsuperscript{47}

Differences in non-verbal aspects of communication in Aboriginal culture may also be significant in evaluating witness evidence, for example, the valued role of silence in conversation in Aboriginal culture and the preference for avoiding direct eye contact. Again these aspects may be misinterpreted in the court context.\textsuperscript{48}


\textsuperscript{44} Australian Law Reform Commission, above n 43, 119.

\textsuperscript{45} Queensland Criminal Justice Commission, above n 43.

\textsuperscript{46} Ibid; Australian Law Reform Commission, above n 43.

\textsuperscript{47} Queensland Criminal Justice Commission, above n 43.

\textsuperscript{48} Ibid.
There may be cultural inhibitions arising from customary law, such as a reluctance to disclose matters that are not the ‘business’ of the speaker. For example, men may be reluctant to speak of matters that are ‘women’s business’.

Deference to authority: This is sometimes the product of custom, and culture, but also a result of a long history of experiencing conditions of subservience in work and social environments. This too can explain the phenomenon of ‘gratuitous concurrence’ which can lead Aboriginal people to give answers they think are expected rather than to give responses that indicate what actually occurred.

2.2 The Authority of the Courthouse

Defenders of the physical courthouse stress its function as the physical seat of judicial authority. They argue that the trial may lose its potency when stripped of its physical surroundings; the journey to, and the experience of, the remote witness room may not engender the same feeling of awe and respect for the law that a witness experiences when they journey through the architecture of the physical courthouse. With a virtual court may come an absence of the traditional setting and trappings that add legitimacy and dignity to the legal process.

There is little research in relation to this issue, but there is anecdotal evidence to suggest that there is a tendency to less formality in some hearings conducted by video-link, with remote participants tending to adopt a more casual tone in their communications than would normally be the case in the physical courtroom. Some United States jurisdictions have treaties or special statutes that enable prosecution for cross-jurisdictional perjury, to enhance the effective administration of the oath in situations where testimony is taken by remote means. However, there would not appear to be any


50 Australian Law Reform Commission, above n 43, 120.


53 Bermant and Woods, above n 19, 48; Australian Law Reform Commission, above n 9, [8.30].

54 Frederick I Lederer, above n 6, 820. Guidelines laid down by the Florida Supreme Court to aid judges in making decisions about allowing video testimony in criminal cases require there to be in existence an extradition treaty between the witnesses’ country and the United States that permits extradition for the crime of perjury: Harrell v State, 709 So. 2d 1364, 1372 (Fla. 1998), cert. Denied, 119 S. Ct. 236 (1998) cited in Frederick I Lederer, above n 6, 822.
empirical research as yet that might indicate whether remote witnesses are more or less likely to tell the truth than witnesses giving evidence in court.\textsuperscript{55}

For Aboriginal people who may be more likely to feel intimidated or marginalised in the physical courtroom,\textsuperscript{56} will the ‘virtual court’ experience add to or detract from those feelings? Will the additional layer of ‘technology-mediated communication’ only add to the linguistic and cultural difficulties that can impede their effective participation in the courtroom?

On the other hand, is it possible that for those Aboriginal witnesses, the distancing effect, and perhaps a less formal approach, may assist their effective participation? Can they be seen as another type of vulnerable witness?

The location of the remote witness facility may be significant in this regard. The location of these facilities in spaces that are controlled by the police may be particularly problematic.

The co-location of court facilities and police stations in Western Australia has been a long-standing concern, noted by the \textit{Royal Commission into Aboriginal Deaths in Custody}. In effect, the risk is that it detracts from judicial independence by creating the perception that the judiciary is an arm of the police, and enhancing community perceptions of police powers.\textsuperscript{57} Although the tendency now is to multi-function centres, in which a number of justice agencies are co-located, the police are the largest agency operating out of those centres and are in operational control of the building.

For Aboriginal witnesses, remote witness facilities located in multi-function centres, managed by the police, may not be less intimidating places than courtrooms. Where the remote witness room also performs double duty as the normal police interviewing room, the perception that the police and the courts are one entity may only be enhanced.

Courts do see it as important to retain control over the remote witness room. Legislation allowing for the taking of evidence by video link or videoconferencing often specifically provides for this, and some courts set out quite detailed guidelines that extend to

\textsuperscript{55} Frederick I Lederer, above n 6, 820.

\textsuperscript{56} Queensland Criminal Justice Commission, above n 43.

issues such as administration of the oath, camera placement, use of microphones and access to legal advisers.\textsuperscript{58}

The level of court control is in part driven by the need to ensure that witnesses testifying from a remote site that is outside the immediate environment of the court are not coached in their evidence, or subject to undue influence.\textsuperscript{59} This is an important consideration in the physical courtroom as well, but in the physical courtroom the bench can more directly observe what is going on.

On the other hand, there may be a need to provide onsite support to enable people to become confident in using the technology.\textsuperscript{60} Experience also suggests that where people have experience using the technology for one purpose, they are more likely to be more at ease with it when used as a way to participate in court hearings.\textsuperscript{61}

This is probably an argument in favour of locating videoconferencing access in community facilities, such as telecentres rather than in police stations or court houses. It appears that this is already being done on occasions, although its extent is difficult to quantify.

A solution to meeting the court’s needs may be to develop agreed protocols to govern the way those external facilities are configured when used as remote witness facilities. The court could require to be satisfied that those protocols had been met before allowing the facility to be used.

\subsection*{2.4 Quality of the Communication}

The legal framework that has been implemented to govern the use of remote witness technology in Australian courts has largely been uninformed by any research into the effects of using this technology. In particular, little is known about:


\textsuperscript{59} One United States Court overcame such concerns by appointing a retired judge to monitor a plaintiff who, due to ill health, was testifying via video-link from his apartment. See, Frederick I Lederer, above n 6, 824; the author was advised by staff of a similar instance in a UK court when a court officer was stationed in a witness’s bedroom from which a remote link was arranged to the court: Anne Wallace, \textit{Field Notes: Visit to Kingston Crown Court} (April 2008).

\textsuperscript{60} Bronwyn Herbertson, above n 29.

\textsuperscript{61} Ibid.
• the quality of the courtroom experience for the witness;
• the way that witness evidence is received in the courtroom;
• the nature of the interaction between the witness and other parties in the courtroom; and
• the ability of the court to maintain control of the courtroom environment.

Consideration of these issues to date has been confined to two aspects: the ability of a defendant in a criminal trial to ‘confront’ their accuser in a criminal trial, and the extent to which the credibility of a remote witness can be properly assessed in the physical courtroom. These debates would also benefit from more understanding of the remote communication experience, both from the perception of those in the courtroom and, critically, that of the witness.

The ‘right of confrontation’ is seen as a fundamental principle of criminal law and has constitutional protection in the United States.62 While not constitutionally protected, it is also accorded significant weight in Australian common law:

The right of confrontation is one of the fundamental guarantees of life and liberty . . . long deemed to be essential for the due protection of life and liberty.63

Closely allied with it, is the right to cross-examine witnesses to test the strength of their evidence.64 This is seen as a fundamental tenet of a fair trial65 and an important tool in an adversarial justice system, particularly for the defence in criminal cases.

It is important to ask whether the use of remote witness facilities enhances or detracts from the presentation of the evidence to the courtroom. What is the effect of the use of the technology on the quality of the communication and the capacity of the opposing party to test it in cross-examination? What is its effect on the experience of the witness?

These questions take on particular significance in light of the disadvantaged position of Aboriginal people in the justice system,

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62 For a discussion of the constitutional provision and recent case law, see Richard Friedman, ‘The confrontation clause re-rooted and transformed’ (2003-4) Cato Supreme Court Review 439.


64 Ibid.

and the well-documented difficulties that they already experience in effectively participating in a court hearing. Will the use of remote witness technology add to those difficulties? For example, could the use of the technology exacerbate linguistic difficulties or make it more likely that a court may misread body language?

What research there has been on the use of remote witness technology in Australia has largely focussed on the perception of remote child witnesses in sexual assault cases. However, that research has tended to concentrate on the perception of the witness in the courtroom by the other participants in the trial, usually the jury, rather than on the experience of the remote witness.

The findings are somewhat inconclusive. They tend to suggest that there are differences in the way that remote witnesses are perceived, but that these differences do not tend to make any appreciable difference to conviction rates.

Those studies have only explored in a limited way the factors that contribute to, or detract from, effective communication of evidence delivered remotely. There has been some consideration of issues related to the technology, such as the size of the video screen in the courtroom and quality of the picture and sound.

Where studies have focussed on the experience of the witness, or the defendant in criminal trials, they have generally failed to explore the factors relating to effective communication from the witness’s perspective in any detail. Factors that have been examined to any extent largely relate to the quality of the technology itself, with limited consideration of the protocols regarding its use, and the social and environmental context of the communication.}

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69 For example, see Cashmore and Trimboli, above n 66.

70 For example, Judy Cashmore and Lilly Trimboli, An Evaluation of the New South Wales Child Sexual Assault Pilot (2005).

71 Ibid; Joyce Plotnikoff and Richard Woolfson Video Link Pilot Evaluation – A Publication Arising from Section 57 of the Crime and Disorder Act
2.5 Gateways to Justice Project

Research is underway in Australia in this field that hopes to shed some light on this issue. The Gateways to Justice project, funded by the Australian Research Council, involves researchers from seven academic disciplines together with courts in Western Australia and Victoria, prosecutors, police and technology and architecture industry partners. Over a three-year period the project aims to investigate the following questions:

1. How are the video communication facilities currently used for justice purposes?

2. What is the relative impact on presence and quality of communication of upgrading the technological environment of video communication facilities, the social and built form environment and both of these together?

3. How can video hearings be introduced into regular justice processes in a way that best promotes effective communication and sense of presence?

The second question above has recently been investigated by way of a controlled trial experiment conducted using facilities in the County Court of Victoria. While data from that experiment has yet to be fully analysed, it is expected to result in some positive recommendations regarding the type and quality of the technology used to take evidence remotely, the environment of the remote witness space and the human protocols, or social environment, that accompanies the use of the technology.

For these purposes, the social environment that the remote witness experiences includes the level of information and support provided to them, the way they are introduced and orientated to the remote space, the way they are brought into or enter the courtroom from that space and the way they experience the courtroom from that space. Relevant questions might include: What opportunities does the witness have to orientate themselves? To know who is in the courtroom? To see others in the courtroom? To be aware of what view of them is available to those individuals? Is the witness a passive recipient in this process or can they initiate or request alterations in the mediated environment, for example, to move between different views of the courtroom, or to adjust the volume to suit their needs?

The case studies discussed in this article have been undertaken as part of the first phrase of the Gateways project. They were supplemented with a series of interviews with judicial officers, lawyers and court staff involved in the use of this technology in remote regions. The researchers also participated in a number of

community meetings run by a magistrate on circuit and had the opportunity to discuss the use of technology with Aboriginal people at those meetings.

Views expressed included a clear preference for people to be able to remain within the community to deal with legal matters, wherever possible. This is product not just of the difficulties and cost associated with arranging travel from remote locations, but of the desire of Aboriginal people to remain on their own country.

However, it appears that in the design and operation of remote witness facilities to date, little thought has been given to the context in which these facilities operate and how they might be managed and operated in order to achieve the best possible evidence for remote Aboriginal participants. Location of facilities within what are, essentially, police stations, with the remote witness room effectively performing double duty as the police interview room, is one example of that lack of attention.

In addition to the physical or technological environment, the nature of the difficulties already experienced by many Aboriginal people in engaging with the court system, suggest that for remote indigenous witnesses, the social environment around their evidence may be particularly important and may make considerable difference to how effectively the technology serves to take their evidence. Careful attention needs to be given to both levels of support and information, and to the way in which that information and support is provided, to ensure that effective communication between the witness and the courtroom is achieved.

Ignoring the social and cultural context of the communication when remote witness facilities are implemented may impact adversely on their effectiveness, and potentially disadvantage those whose participation in the justice system is already remote. The factors that have emerged in this discussion may provide a starting point for considering how that outcome may be avoided.