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Sentencing by Videolink Remote sentencing: Possibilities and Pitfalls

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I am going to give a necessarily brief overview of the legislative framework in Australia around the use of either video- or audiovisual link, as it is termed for sentencing purposes, and I am also going to give some insights from the interview data that we have gained in the course of the project, of which this presentation forms a small part.

We have interviewed over 90 justice system professionals in the course of this project, including judges, magistrates, court officers, court officials, court support workers, defence counsel and prosecutors. I have to say, we have not managed to interview as many defence counsel and prosecutors as we would like, so if there are any of you out there who are interested in the project, feel free to come and talk to us after the session. We would love to hear from you.

To some extent, what I am doing here today is reflecting back some of the information that has been given to us, and I guess trying to interpret that and give some interpretive aspects of that to you.

The legislative framework. There is some specific legislation in some Australian states that does allow for sentencing of accused by video-link and in some states that applies to all accused, in some it only applies to accused in custody. You can see the position summarised there on the screen. I am not going to go through those provisions in detail for you.

The New South Wales legislation is probably the furthest extreme, if you like. There is now a presumption in favour of remote appearance by defendants who are in custody in New South Wales unless the court directs otherwise in the interests of justice, in many types of proceedings including sentencing hearings. I would love to hear from anyone from New South Wales about how that is working in practice. Our project has been mainly concentrating on the interview data, on the positions in Western Australia and Victoria. The interview data I will be talking to you about comes mostly from those two locations

In South Australia, use of the link appears to be largely restricted to pre-trial matters but again there is some scope for that to be altered by regulation. I have not

discovered any relevant regulations but feel free to enlighten me if you are from South Australia.

Where there are no specific provisions, courts in some jurisdictions can fall back on the general provisions. The laws in and around the mid-nineties are moved by most Australian jurisdictions to enable their courts to take evidence, hear submissions and, in some cases, enable appearances by the use of either video- or audio-visual link. You can add to that some specific powers that are given to individual courts in their enabling legislation. The position overall is a bit of a mish-mash and there is certainly not a consistent approach, but a court could fall back on the use of one of these general powers to enable, for example, an accused-in-person to make a submission on behalf of an unrepresented accused or in jurisdictions like the Northern Territory, where the legislation includes enabling appearances, to actually use this legislation to enable an accused to appear by video-link at their sentencing.

The court must generally be satisfied about some things, that the necessary facilities are available; that to take the evidence that way or to hear the matter that way is more convenient; that it is fair, and that all appropriate persons can see or hear each other. The remote premises are considered part of the court for the purposes of those proceedings.

In a number of courts the court rules are not consistent. These examples are from Victoria but there is power to enable courts to lay down some quite specific requirements in addition to those broad discretions, for example the form of the link, the equipment or class of equipment, even things like the camera position, standard or speed of transmission, the quality of the communication and other matters. Judicial officers may also, under some of the legislation, exercise individual discretion to impose conditions about those matters.

The tests generally come down to factors like convenience, fairness, the interests of justice, interests of the administration of justice, reasonable availability. In our interview data we were interested to look at how those provisions were being interpreted in practice. Was video-conferencing or audio-visual link being used to deliver sentence and what were some of the factors influencing the exercise of that discretion? What we found is that it is being used to impose sentence, not infrequently. It has been used both for accuseds in custody and for accuseds who are not in custody, perhaps not surprisingly more often for summary offences than for serious charges. Also, we were surprised about this technology being used not infrequently to provide access to the sentencing process for victims and families.

The Chief Justice will talk a little bit about that in relation to Western Australia, but this example is from Victoria: a family from a regional location whose child was the victim in a child sexual assault proceeding. The judge enabled that family to link back from their hometown to the metropolitan court to witness the sentencing process. The family, according to the court support officer we interviewed, were enormously grateful for that opportunity to feel part of the sentencing process in a safe way. They would not have been able to afford to travel to the metropolitan court for the hearing, and probably would not have wanted to have been physically present.

To get back to the advantages: I think we have probably heard them explained in the case of UK courts in terms of the reduction in travel time for accused and also lesser

disruption to prison routine, one example that is commonly given to justify the use of video-link, not just for sentencing but for other proceedings. We have spoken quite a lot, particularly to magistrates who work in remote or regional locations, people who are managing large or busy circuits. You hear a matter when you are out on circuit on week; you want to reserve sentence and get some more information. The opportunity, then, to sentence by video-link can be very convenient for the court and also can save the defendant a lengthy journey to another place in order to be sentenced. Using it to sentence children particularly, who are in custodial facilities in metropolitan regions, is also not uncommon.

Linking families to the sentencing court is, as I have mentioned, seen as a way of improving public access and, I guess, a way of making best use of court resources. If you have a small number of magistrates serving a large area, if you are a relieving magistrate from a metropolitan court who has heard a case in a country region then is it going to be very efficient to take a day or half a day out of your regular schedule in order to travel back to that location to deliver sentence?

The concerns. Number one would be the quality and the availability of the technology. Departments of Justice, if you are listening, I know our interviewers would like me to stress that one. There is a concern that a sentence delivered remotely has lesser impact on the defendant and perhaps on the community. Amongst several rather disturbing examples we came across was that of the potential for mistaken identity. We did not actually come across any actual cases but on several instances where there were accused in prison being sentenced and people brought up on the video-link in batches we were told you have got to be quite careful that you get the right person because sometimes the correction staff will not necessarily have people in the right order. This was particularly an issue when sentencing in relation to aboriginal offenders in some areas, where people would perhaps tend to agree when they were asked their name, or perhaps the quality of the sound was not terribly good and people did not hear properly. It was important for the magistrate in the court to have a proper protocol for identifying people and making sure that they had the right person.

The other thing that we found was loss of some aspects of non-verbal communication, and less opportunity to clarify the accused's understanding of the sentence. That was particularly an issue for several of our interviewees, particularly where, again, you might have offenders appearing to be nodding and compliant and understanding, but you miss out on some of the non-verbal cues that might enable you to pick up whether that person really has understood what you have said. Several lawyers also mentioned to us that the way the video-links are run and the sort of set-up around it means that there is often less opportunity for them to have access to their client immediately after the sentence, directly, in order to clarify, when they were asked whether the client has got any issues or concerns. One interviewee made the point that it is often difficult to make sure people understand the sentence if they are in the court. If you have got communication difficulties that is going to be doubly difficult if you are dealing with them over a link.

There were also concerns that it may affect the nature of the sentence. This was typified by the quote from one lawyer, not the only one, that it is easier for a magistrate to switch off and perhaps if there is a real person in front of him or her it is

going to be a bit harder to send them to gaol. I do not know what the magistrates in the audience would think of that.

Another concern was around the ability to involve others, the family or the community, in the sentencing process. From a judicial officer who has a great deal of experience in sentencing children this quote [reference to screen presentation] reflects their desire to actually involve the family in that sentencing process, or to ensure that in the sentence that they impose the child is going to have access to family or community support. Being able to see the family and actually have them physically involved in the sentencing was seen as important in order to be able to achieve that.

That particular judicial officer is one of several who gave us the example of actually taking the initiative to reconfigure the way that the link and the remote space was set up, in order to try and get greater involvement from family members who were present. We had an example of a magistrate who would actually require the camera position to be changed so that the defendant, who in that case was actually in custody, was able to see their family on the other side of the link, or actually reconfiguring the link in the courtroom so that the defendant could see, like they did in the nice little introduction, the UK Virtual Courts Pilot, showing the defendant that their family were present. You could do it even by using a three-way split so that you have got the family, the defendant and the magistrate.

There is quite a lot of room for creativity even with the quality of some of the equipment, and I leave you on the thought that one thing I have noticed in the people that we have spoken to and the inspections that we have done is the way that judicial officers do not often seem to feel terribly empowered to exercise some of their powers under their court rules and their Acts to actually make conditions on the use of the link, to actually say no, that this is not good enough. Certainly if the link fails or if you cannot hear people that is pretty standard, people will take the initiative and terminate it, but there is also scope for people to think about ways to request that the link be configured and things be arranged, that perhaps help to achieve a better outcome. I know that is easy for me to say and when you are running a busy court with lots of people and lots of pressures on you to get things done it may be harder to achieve but it is an observation that has been quite striking.

Thank you.