

## ACCESSING DIGITALISED CRIMINAL JUSTICE FROM PRISON: COMMUNICATION, EFFECTIVE PARTICIPATION, AND DIGITAL VULNERABILITY

CAROLYN MCKAY\* AND KRISTIN MACINTOSH†

*Since the COVID-19 pandemic, criminal justice has become increasingly digitalised. Specifically, the accelerating use of audio visual links and remote access technologies means that incarcerated individuals are more frequently required to use these technologies from prison to appear in remote courtrooms and to hold legal conferences with their distant lawyers. Concerns have been raised that these arrangements may compromise access to justice.*

*As part of the ARC study - 'The Digital Criminal Justice Project' - this article draws on selected Australian criminal cases to reveal the inclusionary and exclusionary aspects of digital transformation on access to justice for vulnerable incarcerated individuals. Applying content analysis and 'digital vulnerability', we find digitalisation poses potential barriers to justice, particularly in the preparation of a defence or appeal from a carceral situation. However, we also find how digitalisation can often positively facilitate the effective participation of vulnerable people in remote court proceedings. On this basis, we argue that courts and lawyers must be vigilant regarding the use of audio visual links by vulnerable incarcerated individuals and aware of when technologies can mitigate or exacerbate digital vulnerability.*

### I. INTRODUCTION

It has long been recognised that individuals in prison face significant barriers to accessing justice due to their incarceration while simultaneously experiencing major and often unmet legal needs.<sup>1</sup> The fact that a large proportion of incarcerated individuals have multiple and overlapping vulnerabilities, such as youth, substance abuse, and mental health conditions,<sup>2</sup> makes access to justice more complex for them.

For over two decades, criminal justice services and systems have been undergoing a gradual process of digitalisation, incorporating technologies such as electronic filing and documentation, networked computers,

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\* Senior Research Fellow, Co-Director of the Sydney Institute of Criminology, The University of Sydney.

† Ph.D. Candidate, The University of Sydney School of Law; kristin.macintosh@sydney.edu.au; <https://orcid.org/0009-0001-7671-8428>.

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<sup>1</sup> Anne Grunseit, Suzie Forell and Emily McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of New South Wales, 2008) 29.

<sup>2</sup> Australian Institute of Health and Welfare, *Health of Prisoners* (Report, 7 July 2022) <<https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>>.

court transcription services, online legal research,<sup>3</sup> and a web of interconnected justice agencies.<sup>4</sup> Integral to this evolving digital justice matrix, even prior to the COVID-19 pandemic, has been the use of audio visual links (AVL) or videoconferencing in court proceedings.<sup>5</sup> Videoconferencing has been recognised as a means to enhance court efficiency, reduce travel time and expenses for lawyers and witnesses, and improve the experience for vulnerable witnesses and complainants by protecting them from courtroom intimidation and re-traumatisation, enabling them to provide their best evidence.<sup>6</sup> The COVID-19 pandemic ‘acted as a catalyst and accelerator’ of the digitalisation of the justice system,<sup>7</sup> with remote access technologies such as Webex, Microsoft Teams and Zoom connecting courtrooms to various remote locations.

While, on one hand, there are compelling convenience factors (as mentioned above) and a critical need for technologically-led efficiency measures to address ever-increasing court backlogs and modernise access to justice in our contemporary digital society,<sup>8</sup> the digitalisation of the criminal justice system might impose potential barriers to justice, with profound repercussions for people-in-prison attempting to access and effectively participate in remote hearings and legal conferencing. For instance, concerns have been expressed that confidential communications between lawyers and their clients in prison during remote sessions may be compromised, thus challenging the quality of effective legal representation and access to justice in the digital realm.<sup>9</sup> Moreover, the rapid expansion of digitalised platforms for legal information and access to justice in the free world has not been replicated in prisons.<sup>10</sup>

This article is a part of a broader project titled ‘The Digital Criminal Justice Project: Vulnerability and the Digital Subject’<sup>11</sup> which examines the impacts of digitalisation: does it enhance or inhibit access to justice?<sup>12</sup> The project adopts a mixed methods approach to develop an understanding of digital justice and the digital vulnerability of complainants, witnesses and defendants. Qualitative research methods include collating case law, conducting fieldwork interviews, and conducting an online survey. In this article, we focus on the impact of digitalisation on incarcerated people. We draw on content analysis of select Australian case law that has been

<sup>3</sup> Jane Donoghue, ‘The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice’ (2017) 80(6) *The Modern Law Review* 995, 998; Marijke ter Voert, Anna Pivaty and Enguerrand Marique, ‘Access to Justice in the Digital Era’ (2022) 43(2) *Recht der Werkelijkheid* 2, 3.

<sup>4</sup> Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix* (Routledge, 2018) 166.

<sup>5</sup> Carolyn McKay, ‘Face-to-Interface Communication: Accessing Justice by Video Link from Prison’ in Asher Flynn and Jackie Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 103, 103; Meredith Rossner, David Tait and Martha McCurdy, ‘Justice Reimagined: Challenges and Opportunities with Implementing Virtual Courts’ (2021) 33(1) *Current Issues in Criminal Justice* 94, 94.

<sup>6</sup> Anita Mackay and Jacqueline Giuffrida, ‘Ensuring the Right to a Fair Criminal Trial Using Communication Assistance’ (2022) 10(1) *Griffith Journal of Law and Human Dignity* 1, 6.

<sup>7</sup> María Bruquetas-Callejo, Marieke Dubelaar and Karen Geertsema, ‘The Lawyer as a Key Player in Guaranteeing Access to Justice in the Digital Era’ (2022) 43(2) *Recht der Werkelijkheid* 89, 89; Dorris de Vocht, ‘Trials by Video Link after the Pandemic: the Pros and Cons of the Expansion of Virtual Justice’ (2022) 8(1-2) *China-EU Law Journal* 33, 33.

<sup>8</sup> Jenni Ward, *Transforming Summary Justice: Modernisation in the Lower Criminal Courts* (Taylor & Francis, 2016) 32.

<sup>9</sup> ter Voert, Pivaty and Marique, (n 3) 9.

<sup>10</sup> Carolyn McKay, ‘Digital Access to Justice from Prison: Is there a Right to Technology?’ (2018) 42(5) *Criminal Law Journal* 303, 303.

<sup>11</sup> This ARC-funded DECRA project (DE210100586), in turn, builds on McKay’s earlier investigation on access to justice for people-in-prison from the prison endpoint of AVL. In these studies, it was found that this population experienced the positive convenience of AVL while also sometimes experiencing challenges in terms of connection, communication, confidentiality and comprehension. See Carolyn McKay, ‘Glitching Justice: Audio Visual Links and the Sonic World of Technologised Courts’ (2020) 24 *Law Text Culture* 364; McKay, (n 4); McKay (n 10); Carolyn McKay, ‘Video Links from Prison: Court “Appearance” within Carceral Space’ (2018) 14(2) *Law, Culture and the Humanities* 242; McKay, (n 5) 103.

<sup>12</sup> ter Voert, Pivaty and Marique (n 3) 10.

manually coded to reveal the multitude of individuals who find themselves within the increasingly digitalised criminal justice system and the extent of their vulnerabilities. Content analysis provides a systematic way to gather judicial insights on specific issues,<sup>13</sup> in this case concerning incarcerated individuals, their vulnerabilities, and their use of videolinks for court appearance and legal conferencing.<sup>14</sup>

We identified 45 relevant criminal cases involving videoconferencing since 2018 through online legal sources, with a primary focus on coronavirus jurisprudence,<sup>15</sup> and conducted online legal research using the JADE open-access platform, employing Natural Language and Boolean Operators.<sup>16</sup> As demonstrated below in Parts II-IV, the digitalisation of the criminal justice system poses potential barriers to justice for incarcerated individuals. In particular, it may hinder the preparation of a defence or appeal from a carceral situation which is considered essential for access to justice.

At the time of writing and for the purposes of this article, we present these cases as preliminary findings, as the case law in this area continues to develop. To better frame the discussion that follows, Section II of this article examines the concepts of access to justice and digital vulnerability. Section III presents our findings and further discusses their implications, while Section IV concludes this article.

## II. ACCESS TO JUSTICE AND DIGITAL VULNERABILITY

Access to justice is a fundamental, yet multi-dimensional,<sup>17</sup> principle of our legal system and rule of law that safeguards a range of rights encompassing access to: legal information, legal advice, representation and support, legal aid, fairness, having a voice as well as the just and equitable opportunity to participate in both civil and criminal proceedings.<sup>18</sup> There have always been ‘geographic, psychological, linguistic, and cultural barriers’ to accessing justice in the court system.<sup>19</sup> Asbjørn Storgaard argues that the issue of access to justice is complex as ‘[i]t is a series of problems operating in the space between law and society’<sup>20</sup> and, in this article, we would extend this into the spaces between law, society and, importantly, technologies. In relation to the criminal justice system and people who might be in custodial detention, the principle requires access to the courts that provide the essential forum for prosecution and defence.<sup>21</sup> Individuals in prison need to comprehend charges, proceedings and outcomes through access to evidence, documentation, legal information, advice and representation.<sup>22</sup> The principle of access to justice is linked with the right to a fair trial and applies to people

<sup>13</sup> Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) *California Law Review* 63, 64-65.

<sup>14</sup> Carolyn McKay, ‘Remote Access Technologies, Clinical Evaluations of People-in-Prison and Digital Vulnerability’ (2022) 43(2) *Recht der Werkelijkheid* 68, 69-70.

<sup>15</sup> ‘COVID-19 Resources for Criminal Lawyers’, *Public Defenders NSW* (Web Page) <<https://www.publicdefenders.nsw.gov.au/Pages/c19resources.aspx>>; Emrys Nekvapil, Maya Narayan and Stephanie Brenker, ‘COVID-19 and the Law of Australia’ (Web Page) <<https://covid19-law.com.au/index.html>>.

<sup>16</sup> ‘Home’, JADE (Web Page) <<https://jade.io/t/home>>.

<sup>17</sup> ter Voert, Pivaty and Marique (n 3) 4; Asbjørn Storgaard, ‘Access to Justice Research: On the Way to a Broader Perspective’ (2022) *Oñati Socio-Legal Series* 1, 4.

<sup>18</sup> Tania Sourdin, Bin Li, and Donna M McNamara, ‘Court Innovations and Access to Justice in Times of Crisis’ (2020) 9(4) *Health Policy Technology* 447, 448; Law Council of Australia, *The Justice Project* (Report, 2018); *International Covenant of Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), art 14; Donoghue (n 3) 996.

<sup>19</sup> Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice* (Oxford University Press, 2017) 42.

<sup>20</sup> Storgaard (n 17) 4.

<sup>21</sup> Donoghue (n 3) 1002.

<sup>22</sup> McKay (n 10) 303.

subject to criminal proceedings, requiring, *inter alia*, related special measures in place to support complainants, victims and witnesses of crime.<sup>23</sup> Ensuring such democratic access to justice consumes considerable state resources in the face of traditionally slow-paced and expensive proceedings.<sup>24</sup>

### *A. Effective Participation*

Access to justice is linked with the concept of ‘effective participation’. We argue that there is a distinction between the broad concept of access to justice, which might be reasonably easy to satisfy, at least symbolically, and the narrower issue of effective participation. In Australia, England and Wales and many other countries, ‘[i]t is a long-established legal principle ... that people should be able to *participate effectively* in ... proceedings that directly concern them.’<sup>25</sup> Jacobson and Cooper’s edited volume further provides the ‘Ten Points of Participation’.<sup>26</sup> This framework relates participation to how court users can provide information to the court and vice versa; how people are informed, represented, protected, and managed; the function of participation as relevant to exercising legal rights and in decision-making processes; and finally, participation’s legitimating role and the potential for therapeutic benefits from interactions that may contribute to a court user’s well-being or rehabilitation.<sup>27</sup>

Participation is, therefore, multidimensional and fluid. Anne Janssen analyses the ‘ladder of legal participation’, developed by Gráinne McKeever,<sup>28</sup> which ranges from non-participation, to tokenistic participation and finally to effective participation.<sup>29</sup> Mere presence represents participation in its weakest sense. During court hearings, a sense of isolation or segregation can lead to feelings of powerlessness and complete non-participation.<sup>30</sup> Tokenistic participation arises when individuals experience only symbolic engagement and receive ineffective support. Full participation occurs when individuals are enabled to engage with and understand legal procedure in a meaningful way.<sup>31</sup> However, as Janssen observes while examining urgent digital family law hearings during COVID-19, the digital environment presents new barriers to effective participation due to the loss of nonverbal communication, judicial officers’ cues and the courtroom setting.<sup>32</sup>

<sup>23</sup> Various assistance and support measures for complainants and witnesses are afforded in all Australian states and territories while human rights safeguards depend on the jurisdiction, for instance: *Human Rights Act 2004* (ACT); *Victims’ Charter Act 2006* (Vic); *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* GA Res 40/34, UN Doc A/RES/40/34 (adopted 29 November 1985); *Dietrich v The Queen* (1992) 177 CLR 292; Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol University Press, 1<sup>st</sup> ed, 2020) 9-12. The European Court of Human Rights has ruled that fair trial rights are accorded to victims and witnesses. See Roxanna Dehaghani, Samantha Fairclough, Lore Mergaerts (eds) *Vulnerability, the Accused, and the Criminal Justice System Multi-Jurisdictional Perspectives* (Routledge, 2023).

<sup>24</sup> Orna Rabinovich-Einy and Ethan Katsh, ‘Access to Digital Justice: Fair and Efficient Processes for the Modern Age’ (2016) 18 *Cardozo Journal of Conflict Resolution* 637, 639-640.

<sup>25</sup> Jacobson and Cooper (n 23) 1 (emphasis original); see *European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14*, opened for signature 4 November 1950, ETS 5, entered into force 3 September 1953, art 6 (ECHR).

<sup>26</sup> Jacobson and Cooper (n 23) 87, 163-164.

<sup>27</sup> *Ibid.*

<sup>28</sup> Gráinne McKeever, ‘Remote Justice? Litigants in Person and Participation in Court Processes During Covid-19’ (2020) *The Modern Law Review Forum* 005, Pt II.

<sup>29</sup> Anne Janssen, ‘Remote Justice in Urgent Family Hearings During COVID-19: Climbing the Ladder of Legal Participation’ (2022) 43(2) *Recht der Werkelijkheid* 133, 137.

<sup>30</sup> Jacobson and Cooper (n 23) 2.

<sup>31</sup> Janssen (n 29).

<sup>32</sup> *Ibid.*

Can participation be effective, active, meaningful and practical - or even possible - when a person is remote from a courtroom, particularly if that person is vulnerable and incarcerated? Recent research reveals some of the challenges that digitalised justice can pose to effective participation.<sup>33</sup>

### *B. Access to Digitalised Justice*

People-in-prison are recognised as a disadvantaged population with high communication, legal and complex needs given their immediate involvement in criminal law matters and often a range of civil law issues, in addition to their overlapping vulnerabilities.<sup>34</sup> These vulnerabilities can be multi-dimensional in nature encompassing individual, situational and structural issues that impede a person's capacity to engage with and comprehend court matters.<sup>35</sup> These issues may include youth, severe cognitive conditions, traumatic brain injuries, substance abuse, mental health conditions, combined with experiences of childhood deprivations or extreme socio-economic disadvantage.<sup>36</sup> The intrinsically intimidating nature of court proceedings can exacerbate a person's vulnerabilities,<sup>37</sup> as can representing oneself.<sup>38</sup>

At the same time, it is recognised that the ability of individuals in prison to access justice is inherently compromised due to their loss of liberty and the strict security protocols of correctional facilities.<sup>39</sup> For the prison population, the 'traditional' form of access to justice has involved a reliance on 'snail mail' postal services, fixed prison-yard telephones, occasional in-person professional visits from legal representatives, and limited access to shared computers. In the 21<sup>st</sup> century digital or networked society of the free world,<sup>40</sup> such modes of communication are verging on obsolescence.<sup>41</sup> New technological connection, therefore, potentially offers greater access to justice for people-in-prison.<sup>42</sup> The evolution of digital communication technologies has afforded the means to hasten legal procedure and potential new avenues for accessing justice.<sup>43</sup> Especially since the COVID-19 pandemic, we have witnessed an acceleration of digital communication technologies in the criminal justice system, radically transforming how justice is 'done' and how it is accessed by people-in-prison.

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<sup>33</sup> Ester Nir and Jennifer Musial, 'Zooming In: Courtrooms and Defendants' Rights During the COVID-19 Pandemic' (2022) 31(5) *Social & Legal Studies* 725, 725; Bruquetas-Callejo, Dubelaar and Geertsema (n 7) 91; Janssen (n 29) 137; Jacobson and Cooper (n 23) 15-16.

<sup>34</sup> Grunseit, Forell and McCarron (n 1) 22-28; McKay (n 5) 103; Anita Mackay, 'Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison and Transforming the Culture of Victoria Police' in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (Federation Press, 2014); Jacqueline Giuffrida and Anita Mackay, 'Extending Witness Intermediary Schemes to Vulnerable Adult Defendants' (2021) 33(4) *Current Issues in Criminal Justice* 498, 504.

<sup>35</sup> Jacobson and Cooper (n 23) 4; Dehaghani, Fairclough and Mergaerts (n 23).

<sup>36</sup> McKay (n 14) 72.

<sup>37</sup> Jacobson and Cooper (n 23) 8.

<sup>38</sup> Wayne K Gorman, 'Access to Justice in Canada: The Unrepresented Accused and the Role of the Trial Judge' (2020) 56 *Court Review* 48, 48.

<sup>39</sup> McKay (n 10) 304.

<sup>40</sup> Anastasia Powell, Gregory Stratton, and Robin Cameron, *Digital Criminology: Crime and Justice in Digital Society* (Routledge, 2018) 4.

<sup>41</sup> McKay (n 10) 304.

<sup>42</sup> Corrective Services NSW, *Research and Evaluation Strategy for the Transformation of Prisoner Rehabilitation Through Digital Technology* (Strategic Document, May 2022) 1-84.

<sup>43</sup> Sourdin, Li and McNamara (n 18) 447; Rabinovich-Einy and Katsh (n 24) 638.

However, questions have arisen regarding whether the move to online proceedings further entrenches ‘access to justice impediments’, as many users of court technologies come from disadvantaged and vulnerable groups.<sup>44</sup> While people are quick to observe how technology became fundamental in continuing the administration of justice during extended periods of social isolation and lockdowns from 2020 to 2022, particularly in the civil jurisdiction,<sup>45</sup> the use of technology in the context of criminal justice presents unique challenges. Due to the high risks of COVID-19 transmission, individuals in prison experienced extended lockdowns, bans on in-person professional and family visits, a complete reliance on shared prison phones and videoconferencing to access justice and the postponement of many criminal matters due to limited court services.<sup>46</sup> During the pandemic, confidential communications between lawyers and their remote clients in prison were potentially compromised, leading to concerns regarding the quality of effective legal representation and access to digitalised justice.<sup>47</sup> Additionally, the rapid expansion in the free world of digitalised platforms for legal information and access to justice had not occurred in prisons to the same extent.<sup>48</sup> With such a disconnect from human contact, the burden of the pandemic fell heavily on the vulnerable, high-legal-need prison population, possibly deepening the inequalities in their access to justice.<sup>49</sup>

### *C. Digital Vulnerability*

People-in-prison are recognised as inherently vulnerable.<sup>50</sup> Within the emergent digitalised criminal justice environment, we argue they become ‘vulnerable digital subjects’, a concept which brings into sharp relief the power relations that may be exacerbated by their remote, digitalised and uniquely carceral situation.<sup>51</sup> While recognising the accrual of certain benefits of remote criminal hearings, especially for administrative and pre-trial matters, the Law Society of England & Wales found that the remote mode did not work well for those with vulnerabilities,<sup>52</sup> impacting their ability to participate.<sup>53</sup>

The shift to digitalised criminal justice has given rise to an awareness of ‘digital vulnerability’, that is, those unintended consequences of criminal justice innovation on vulnerable individuals.<sup>54</sup> This concept builds upon our understandings of digital inequalities and the digital divide, recognising societal gaps in device accessibility and literacy.<sup>55</sup> The emergent concept of digital vulnerability provides a framework through which to understand how new digital platforms may benefit some groups or contexts while simultaneously generating

<sup>44</sup> Donoghue (n 3) 1025.

<sup>45</sup> Michael Legg and Anthony Song, ‘The Courts, the Remote Hearing and the Pandemic: From Action to Reflection’ (2021) 44(1) *University of New South Wales Law Journal* 126, 127-8.

<sup>46</sup> Public Defenders (NSW), ‘COVID-19: Risks and Impacts for Prisoners and Communities’ *The Bugmy Bar Book* (Web Document, 14 February 2022) <[https://www.publicdefenders.nsw.gov.au/Documents/BBB\\_Covid19\\_chapter-14Feb2022.pdf](https://www.publicdefenders.nsw.gov.au/Documents/BBB_Covid19_chapter-14Feb2022.pdf)>.

<sup>47</sup> ter Voert, Pivaty and Marique (n 3) 9.

<sup>48</sup> McKay (n 10) 3.

<sup>49</sup> OECD and Law and Justice Foundation of New South Wales, *Access to Justice and the COVID-19 Pandemic* (Policy Brief, 2020) 36.

<sup>50</sup> Kate Brown, Kathryn Ecclestone and Nick Emmel, ‘The Many Faces of Vulnerability’ (2017) 16(3) *Social Policy and Society* 497, 499.

<sup>51</sup> McKay (n 14) 78.

<sup>52</sup> Law Society UK, ‘Remote Hearings’ (Web Page, 2022) <<https://www.lawsociety.org.uk/campaigns/court-reform/whats-changing/remotes-hearings>>. See also Equality and Human Rights Commission (UK), *Inclusive Justice: a System Designed for All* (Report, April 2020).

<sup>53</sup> David Peplow and Jake Phillips, ‘Remote Parole Oral Hearings: More Efficient, But at What Cost?’ (2023) *Criminology & Criminal Justice* 1.

<sup>54</sup> McKay (n 14) 78.

<sup>55</sup> Nir and Musial (n 33) 728.

new harms or barriers. It highlights how inequalities may be deeply embedded in technologies<sup>56</sup> and how technologies might ‘heighten existing risks and introduce new harms by exposing people and communities to greater ... inequality.’<sup>57</sup> By adopting a techno-social approach, we can appreciate the circular relationship between technologies and society, with each shaping the other<sup>58</sup> and extend this influence to vulnerability.<sup>59</sup>

In the context of individuals in prison, some examples of digital vulnerability can be identified. For instance, the provision of online legal information services presents challenges for people-in-prison who cannot access the internet and/or lack digital skills.<sup>60</sup> Remote access to justice from a custodial situation may carry a ‘significant risk of disadvantage and the potential for miscarriage of justice’ because of inaccessible legal information for defendants.<sup>61</sup> The remote mode may be particularly unfair and alienating for people-in-prison with neurodiversity and mental health conditions, as indicated by Peplow and Phillips’ study of remote parole oral hearings.<sup>62</sup> This is due to the amplified power imbalance between such vulnerable individuals and the remote court or parole board, and the fact that these individuals may struggle with technical glitches or may not recognise the formality of legal proceedings.<sup>63</sup> Finally, remote clinical evaluations of individuals in prison for sentencing reports may be less than optimal compared to possibly more comprehensive in-person assessments as McKay observed in her content analysis of criminal cases concerning remote psychiatric assessments of vulnerable people-in-prison for court proceedings.<sup>64</sup>

### III. ACCESS TO JUSTICE CASE LAW

In this section, we present the findings of our study and indicate how such cases depict the digital vulnerability of incarcerated persons.

#### *A. Preparing a Defence or Appeal from Prison*

Access to justice issues, as mentioned in several cases, primarily revolve around the lack of infrastructure in prisons for audio visual link (AVL) legal conferences. During the pandemic, professional legal visits were delayed, limited or completely suspended due to general social distancing regulations, specifically to minimise the risk of spreading the virus within the closed environments of prison.<sup>65</sup> It is recognised that ‘for people in prison, access to legal representatives is almost always more constrained than for people who are at large’<sup>66</sup> but these constraints became even greater during the pandemic. The demand for AVL suites and telephone facilities

<sup>56</sup> Robert Vargas, Kayla Preto-Hodge, and Jeremy Christofferson, ‘Digital Vulnerability: the Unequal Risk of E-Contact with the Criminal Justice System’ (2019) 5(1) *RSF: The Russell Sage Foundation Journal of the Social Sciences* 71, 74.

<sup>57</sup> Humanitech, *Future of Vulnerability: Humanity in the Digital Age* (Report, 2020) 1.

<sup>58</sup> Powell, Stratton, and Cameron (n 40) 3-4.

<sup>59</sup> Humanitech (n 57) 1.

<sup>60</sup> Stine PP Nielsen and Ole Hammerslev, ‘Digitalizing Welfare: The Role of Encounters in Supporting Marginalised Citizens’ Access to Rights in the Danish Welfare State’ (2022) 43(2) *Recht der Werkelijkheid* 36, 37; ter Voert, Pivaty and Marique (n 3) 7.

<sup>61</sup> Caitlin Gormley and Nick Watson, ‘Inaccessible Justice: Exploring the Barriers to Justice and Fairness for Disabled People Accused of a Crime’ (2021) 60(4) *The Howard Journal of Crime and Justice* 493, 498.

<sup>62</sup> Peplow and Phillips (n 53) 12.

<sup>63</sup> Ibid.

<sup>64</sup> McKay (n 14) 28.

<sup>65</sup> *Macdonald v R*; *Obeid v R*; *Obeid v R* [2021] NSWSC 1662 (‘Macdonald’); *R v Razzaghipour*; *R v Rixon*; *R v Charbel* [2020] NSWDC 882; *DPP (NSW) v Van Gestal* [2022] NSWSC 973.

<sup>66</sup> *Re MM* [2020] VSC 691, [72] (Jane Dixon J).

increased, resulting in limited time for legal conferencing.<sup>67</sup> In the sudden shift to remote legal conferencing, the courts acknowledged that prison facilities were put under great strain,<sup>68</sup> potentially causing delays in access between lawyers and their clients in custody when preparing a defence<sup>69</sup> or appeal,<sup>70</sup> especially for pre-trial defendants with special vulnerabilities.<sup>71</sup> Pre-trial access to justice for an accused person is critical given they need to prepare for court appearances, obtain legal advice and build an effective defence.<sup>72</sup>

However, the shift to remote professional visits meant that ‘satisfactory interaction’ between a client in custody and their defence team would be difficult.<sup>73</sup> Case law indicates how legal conferencing between an in-court lawyer and their remote imprisoned client sometimes occurs in the actual courtroom. For instance, in *Guest*,<sup>74</sup> Jane Dixon J stated that she would ‘leave the video-link facility open’ so that the lawyer could confer with his client once the court was cleared. While convenient, such a practice potentially challenges confidentiality.

It is not unusual for people-in-prison to represent themselves in court by AVL. The case of *Simpson*<sup>75</sup> recognises the difficulties and vulnerabilities that arise when preparing for court unrepresented from a custodial situation, especially during a pandemic. While the bail applicant was provided with a laptop computer containing the briefs of evidence, there were issues concerning the delay in receiving the laptop less than three weeks before the scheduled trial. There were also delays in receiving materials from the prosecutor via Corrective Services, along with difficulties of preparing a defence using handwritten notes, with a lack of prison furniture, limited access to legal research materials, and distractions from the cellmate. Bail was granted for reasons including that preparing a complex case for trial, while relying on handwritten notes with limited access to legal resources in prison, undermined the prospect of a fair trial.<sup>76</sup> Here the prison environment impeded access to justice due to the absence of opportunities to review digital materials such as the briefs of evidence and access legal research facilities.

However, the unrepresented (convicted) appellant in *Incandela*<sup>77</sup> was not successful in seeking bail. He argued for the need to be at liberty to prepare his appeal due to the lack of resources in prison and the restrictions on access to research, legal materials and communications, particularly limited phone and no internet access. The appellant presented evidence of his dyslexia, illiteracy and Attention Deficit Hyperactivity Disorder (ADHD). While the court accepted these substantial difficulties, it did not find any change in circumstances or fresh evidence to justify a review of bail. In another appeal proceeding, *Edwards*,<sup>78</sup> Hamill J observed how the appellant ‘appeared at the hearing of his appeal by audio visual link from a correctional

<sup>67</sup> Ibid.

<sup>68</sup> *Rakielbakhour v The Director of Public Prosecutions* [2020] NSWSC 323; *Re JMT* [2020] QSC 72.

<sup>69</sup> *Re Ashton* [2020] VSC 231 (*‘Re Ashton’*).

<sup>70</sup> *Macdonald* (n 65).

<sup>71</sup> See eg *Bail Act 2013* (NSW) s 18(1)(k).

<sup>72</sup> Ibid s 18(1)(l).

<sup>73</sup> *Re Ashton* (n 69) [62] (Elliot J).

<sup>74</sup> *Guest v DPP* [2020] VSC 218, [56] (Jane Dixon J) (*‘Guest’*).

<sup>75</sup> *Simpson v R* [2021] NSWCCA 264, [59]-[60] (Dhanji J) (*‘Simpson’*).

<sup>76</sup> Ibid [98] (Dhanji J); *Bail Act 2013* (NSW) s 18(1)(l); see also *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>77</sup> *Incandela v The Queen (No 3)* [2022] ACTCA 63, [7]-[9] (Mossop J) (*‘Incandela’*).

<sup>78</sup> *Edwards v The Queen* [2020] NSWCCA 141 (Hamill J) (*‘Edwards’*).



facility. That was a less than ideal way for him, particularly as an unrepresented person with no legal training, to present his arguments.’<sup>79</sup> The court, in that instance, sought to make due allowance for this vulnerability.

These various cases highlight the significant challenges in legal conferencing for both represented individuals in prison and the amplified problems faced by remote unrepresented defendants or appellants. In terms of legal conferencing, these cases point to some instances of inadequate infrastructure for videolinks that impede access to justice and confidential lawyer-client communications.

### *B. Effective Participation and Digital Vulnerability*

Many people subject to criminal proceedings and appearing remotely have multiple and overlapping vulnerabilities. In *GW*,<sup>80</sup> Yehia J observed that ‘children and young people in detention are a particularly vulnerable group.’<sup>81</sup> This observation held significance in *GW* which involved a bail application brought by an 11-year-old Aboriginal child. This child had various intersecting conditions including ADHD and substance use disorder, and appeared before the court via AVL.

For defendants who suffer from cognitive impairments, appearing through videolink can pose challenges to their access to justice, particularly in terms of effective participation and comprehension, resulting in digital vulnerability. For example, in *Honeysett*,<sup>82</sup> the accused had cognitive impairment, distractibility and difficulties in regulating behaviour, yet was deemed fit to stand trial. These vulnerabilities were found to be surmountable and Hamill J identified a range of modifications and supports that could be put in place to assist the accused. In particular, one psychologist stated that it would be more beneficial for the accused to appear in-person in court rather than by videolink. The psychologist suggested that a distractable person is more likely to be engaged by other distractions in a videolink room, whereas being physically present before the court, ‘it’s likely that his engagement and attention would be better than via a video link, and it then also does provide the opportunity for him to have [a] support person.’<sup>83</sup> It was also recommended that the accused should take more frequent breaks than usual and have access to his solicitor during those breaks. What is interesting about this case is its recognition that some accused people are vulnerable and deserving of support, similar to the support provided ‘for survivors and secondary victims of crime, and for witnesses.’<sup>84</sup> Equating the support needs of a vulnerable defendant to that of vulnerable witnesses demonstrates an empathetic approach to access to justice. While it remains unclear whether this approach is universally adopted by the judiciary, the case highlights how in-person appearances can assist a vulnerable accused’s ability to participate in and understand the nature of the proceedings.

Effective participation can be negatively impacted by videolink appearance. In *ZBA*,<sup>85</sup> the respondent involved in a continuing detention order review participated in the hearing through videolink. However, it was

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<sup>79</sup> Ibid [17] (Hamill J).

<sup>80</sup> *R v GW* [2023] NSWSC 664, [44] (Yehia J).

<sup>81</sup> Ibid.

<sup>82</sup> *R v Honeysett (Fitness to Stand Trial)* [2023] NSWSC 76 (*‘Honeysett’*).

<sup>83</sup> Ibid [29] (Hamill J).

<sup>84</sup> Ibid [33].

<sup>85</sup> *Attorney-General for the State of Queensland v ZBA* [2023] QSC 131, [21] (Cooper J).

noted that he appeared withdrawn and did not engage in any way. He did not ‘appear to have any interest in following what was being said in the courtroom,’ an example of a digital vulnerability.

However, the participation of some defendants is not always welcomed, even by videolink. The case of *Pender*<sup>86</sup> involved a high-risk terrorism defendant with suicide ideation, substance abuse issues, and symptoms consistent with schizophrenia. During a bail appearance conducted via videolink, the defendant threatened the magistrate with extremist phrases and gestured by making a slitting motion across his throat. In this particular case, the security benefits of remote appearance for a vulnerable but potentially violent defendant became evident.

On the other hand, remote appearance has been utilised strategically to improve vulnerable defendants’ access to justice and participation. For example, in the pre-pandemic case of *Knox-Cumming v MacDonald*,<sup>87</sup> the appellant possessed various vulnerabilities, including serious mental illness and cognitive impairment. It was evident that she had limited capacity to endure a prolonged physical court session. Archer J determined that the approach that best takes into account the accused’s vulnerabilities was to deal with the sentencing remarks in the appellant’s absence and then inform her of the sentence by videolink. This approach ensured that her concentration would only be required for a brief period. It also allowed the judge to explain the sentence itself, the underlying reasons for it, and the obligations associated with the order being imposed.<sup>88</sup> While this case predates the pandemic, it highlights the intricate interplay between access to justice, technology and vulnerable defendants. In this instance, technology was employed to assist the defendant’s comprehension of her sentence by encapsulating concise specific information aimed at holding the defendant’s attention. This case exemplifies how AVL can be employed to facilitate access to justice under certain circumstances.

Similarly, in another pre-pandemic case, *Treloar*,<sup>89</sup> the appellant had an intellectual disability, and deteriorating mental health. During the sentencing proceedings, he had made two attempts on his life.<sup>90</sup> The appeal judges noted his distress in attending the physical court, which had serious negative impacts on his mental health. The intimidating court environment was significant given his sentence included a community correction order (CCO) and judicial monitoring. The judicial monitoring was to ensure his compliance with the CCO and also aimed at promoting the appellant’s rehabilitation. The appeal court explored whether the beneficial goals of the judicial monitoring could be achieved without requiring the appellant to attend in-person and instead by videolink.<sup>91</sup> The judges assumed that by using videolink, a representative from Disability Justice could assist him in a remote location, demonstrating the potential use of videolinks to facilitate constructive and supported participation in proceedings for a vulnerable offender who found the justice system overwhelming. Videolink technology could help mitigate the inherently intimidating nature of court proceedings by creating distance and separation, thus improving access to justice for vulnerable individuals.

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<sup>86</sup> *Attorney General of the Commonwealth of Australia v Pender (Final)* [2022] NSWSC 1773.

<sup>87</sup> *Knox-Cumming v MacDonald* [2018] WASC 164 (*‘Knox-Cumming v MacDonald’*).

<sup>88</sup> *Ibid* [16] (Archer J).

<sup>89</sup> *Treloar v The Queen* [2020] VSCA 6 (*‘Treloar’*).

<sup>90</sup> *Ibid* [32] (Maxwell P and Niall JA).

<sup>91</sup> *Ibid* [41].

Courts provide other arrangements for defendants who are very unwell. For instance, in the case of *Evitt*,<sup>92</sup> which concerned fitness to plead, a psychiatrist stated that due to the accused's mental impairment, 'there was the possibility that the accused would, by reason of the court environment, decompensate in his mental state such as to be unable to adequately participate in the court proceedings.'<sup>93</sup> Decompensation was described as 'the change in mental state from one of being able to follow and understand simple, straightforward instructions to a mental state where he is not capable of doing that.'<sup>94</sup> While the accused was found fit to stand trial, the court recognised the need to make adjustments in trial process to prevent the accused's decompensation. This included allowing the accused to attend the trial by videolink if he chose to do so.<sup>95</sup>

There may be other reasons why a vulnerable person-in-prison might benefit from participating remotely. One benefit of AVL appearances for people-in-prison is the avoidance of prison transport. In *Knight (No 1)*,<sup>96</sup> the applicant had pleaded guilty to murdering his partner in the remote NSW town of Bourke. An order was sought for him to appear in-person and on country for sentencing in that town. The deceased's sisters, in particular, sought his physical appearance for cultural reasons; they wished him to physically participate, that is, the participatory aspects were significant to them. However, the applicant applied to appear by AVL from prison. The unchallenged evidence indicated that if he were directed to appear in-person, he would have to endure arduous conditions during transfer. Given the circumstances, the judge was not persuaded by the evidence that the statutory presumption for sentencing by AVL had been displaced.<sup>97</sup> The later sentencing judgment revealed many vulnerabilities of the offender,<sup>98</sup> stemming from a disadvantaged childhood marked by exposure to substance abuse, endemic violence, dysfunction and deprivation, and early disconnection from schooling. The decision in *Knight (No 1)* would likely have been different had it been conducted pursuant to a restorative or therapeutic model of justice, such as in the Walama Court, where there would be a 'cultural imperative for the applicant to appear in-person.'<sup>99</sup> But in the non-restorative context of standard sentencing hearings, it was deemed sufficient for the applicant to attend virtually from prison, while the in-person sentencing proceedings were conducted in the local area where the offence took place, allowing family and community members to observe.<sup>100</sup> Moreover, *Knight (No 1)* indicates that remote sentencing via AVL still serves the various purposes of sentencing, including 'mak[ing] the applicant accountable for his actions... denounc[ing] his conduct, and... recognis[ing] the harm done to the deceased and the community'.<sup>101</sup> This implies that a remote offender can be directly denounced and receive that judicial message.

However, in the sentencing judgment of *Weribone*,<sup>102</sup> a mitigating factor included the unnecessary and long-distance transportation of the offender for his committal hearing, even though it was planned to be conducted via videolink. As a result, he endured a week in police cells in Mildura before being transported back

<sup>92</sup> *The State of Western Australia v Evitt* [2022] WADC 107, [38]-[44], [103] (Black DCJ) ('*Evitt*').

<sup>93</sup> *Ibid* [43] (Black DCJ).

<sup>94</sup> *Ibid* [44].

<sup>95</sup> See also *Re CM* [2023] VSC 194; *R v Hume (a pseudonym) (No 2)* [2022] NSWDC 434.

<sup>96</sup> *R v Knight (No 1)* [2023] NSWSC 195.

<sup>97</sup> *Ibid* [31] (Yehia J).

<sup>98</sup> *R v Knight* [2023] NSWSC 321 [58]-[74] (Yehia J) ('*Knight*').

<sup>99</sup> *R v Knight (No 1)* (n 95) [21] (Yehia J).

<sup>100</sup> *Ibid* [24] (Yehia J).

<sup>101</sup> *Ibid* [25] (Yehia J); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; see also *Veen v R (No 2)* (1988) 164 CLR 465; Mirko Bagaric, Richard Edney, and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 9<sup>th</sup> ed, 2022); Brendon Murphy, John Anderson and Mirko Bagaric, 'The Curious Role of COVID-19 in Sentencing: The Relevance and Mitigating Weight of Ill Health and Harsh Prison Conditions' (2021) 47(3) *Monash University Law Review* 25, 29. Note also that in NSW, sentencing is not considered to be a 'physical appearance proceeding' so the default position is remote appearance by AVL: *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), ss 3, 5BB.

<sup>102</sup> *DPP v Weribone* [2020] VCC 1675.

to Melbourne, a situation that was both disruptive and onerous. This was pertinent given that the offender was described as a ‘fragile and vulnerable young man’ with complex family and trauma history, deprivation during his formative years, and chronic substance addictions.<sup>103</sup> Additionally, he had a history of self-harm, had been diagnosed with ADHD and possibly had other undiagnosed conditions, including Foetal Alcohol Spectrum Disorder (FASD). Unnecessary transportation was also an issue in *Re MM*,<sup>104</sup> where the bail applicant, a man with a history of drug use, was brought to court for his committal mention instead of appearing via videolink. He had been held in court cells but was not actually brought before the physical court, and upon return to prison, he had to spend eight days in quarantine. Once again, videolink participation would have provided a more humane process, utilising digital technologies to alleviate his vulnerability.

Since the pandemic, there have been indications that courts are returning to more in-person appearances, meaning that videolink appearances cannot be guaranteed, and individuals may have to travel. For instance, in *Holt*,<sup>105</sup> an unrepresented Vietnam veteran with a disability and financial vulnerability, living on a pension and on bail awaiting trial (not incarcerated), was unsuccessful in seeking his appearance by Webex for an adjournment proceeding. The court was not persuaded by his situation and required his personal attendance, stating that ‘no good reason has been demonstrated to depart from the usual practice’.<sup>106</sup> This suggests that the pandemic normalisation of remote appearance might now be waning.

#### IV. DISCUSSION AND CONCLUSION

In this article, we have examined access to justice and how that is enhanced or impeded by remote access technologies for a specific vulnerable population: people-in-prison. Our content analysis of criminal cases reveals some aspects of how videolinks can support access to justice, including legal representation and effective participation, as well as tensions arising from the digitalisation of criminal justice. Of course, it is not surprising that the outcomes of the cases turn on specific facts, the particular situation of remote people subject to criminal proceedings, and the type of criminal procedure, whether administrative matters, pre-trial or substantive proceedings. Nevertheless, our content analysis of case law distils critical issues pertaining to the communication and legal needs of remote, vulnerable people-in-prison, their interaction with videolinks, and the emergent concept of digital vulnerability.

When it comes to preparing a defence or appeal from a carceral situation, certain cases highlight the potential barriers to justice when legal conferencing is conducted remotely rather than in-person.<sup>107</sup> Some judicial observations support McKay’s pre-pandemic research on AVL legal conferencing, which found that the remote mode can compromise timely and confidential lawyer-client communication.<sup>108</sup> While remote legal conferencing is increasingly favoured by lawyers for client communication, it can have a negative impact on the lawyer-client relationship.<sup>109</sup> The cases also reveal inadequacies in the videolink infrastructure and scheduling

<sup>103</sup> Ibid [52]-[53], [75], [132] (Lawson J); see also *Bugmy v The Queen* (2013) 249 CLR 571.

<sup>104</sup> *Re MM* (n 66).

<sup>105</sup> *Holt v The King* [2023] VSCA 165.

<sup>106</sup> Ibid [8] (Priest and Niall JJA).

<sup>107</sup> Carolyn McKay, ‘The Carceral Automaton: Digital Prisons and Technologies of Detention’ (2022) 11(1) *International Journal for Crime, Justice and Social Democracy* 100.

<sup>108</sup> McKay (n 4) 166.

<sup>109</sup> Eric T Bellone, ‘Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom’ (2013) 8(1) *Journal of International Commercial Law and Technology* 24, 44–45; Alicia Bannon and Janna Adelstein, ‘The Impact of Video Proceedings

arrangements within correctional facilities, which amplify the differences between preparing a case while at liberty compared to when incarcerated. When individuals in prison do not have ease of communication with their lawyers and easy access to legal resources, they experience inequality, resulting in digital vulnerability. This aligns with findings that defence representatives have reported difficulties in establishing relationships and rapport with clients, seeking instructions,<sup>110</sup> and have experienced a deterioration in effective communication.<sup>111</sup>

The cases demonstrate how unrepresented, remote people-in-prison become even more vulnerable in digitalised criminal justice. It has been recognised that there is a ‘serious access to justice issue entailed with any adoption of internet-based technology for appearances by litigants in person’, that is, self-represented individuals, for whom it is even more difficult to defend or appeal from prison.<sup>112</sup> Some cases provide evidence of situations when courts, based on specific facts and circumstances (for instance, pre-trial versus appeal), acknowledged the difficulties inherent in preparing a defence from prison and granted pre-trial bail. However, other cases demonstrate limited allowance, or none at all.<sup>113</sup> In summary, our content analysis tends to suggest that, for vulnerable defendants and offenders, digitalised criminal justice often generates barriers to justice in terms of timely and confidential access to lawyers. For unrepresented individuals, it poses obstacles to accessing legal resources and difficulties in preparing their cases— all of which constitute forms of digital vulnerability.

When it comes to effective participation in court proceedings, our findings are mixed. On one hand, audio visual hearings are thought to be ‘generally inappropriate for defendants ... [with] identified vulnerabilities.’<sup>114</sup> For some defendants, being absent from the physical courtroom with all its in-person interactions can make it much more challenging to participate, understand and follow the proceedings. One reason for this is that remote communication entails a specific skillset that differs from traditional, in-person conversation.<sup>115</sup> In the physical courtroom, these challenges may be addressed, as seen in the *Honeysett* case.<sup>116</sup> In *Honeysett*, Hamill J adopted recommendations and supports in the physical courtroom, akin to those ordinarily provided to vulnerable witnesses. *Honeysett* highlights the potential benefits and (sometimes) more supportive courtroom environment where the engagement and attention of a vulnerable defendant can be better managed. Conversely, remote technology can lead to some defendants experiencing distraction, a sense of exclusion from the courtroom and disconnection from their own legal matters.<sup>117</sup> Furthermore, it has been suggested that for Indigenous Australians, AVLs may ‘exacerbate existing feelings of remoteness in interacting with a foreign system.’<sup>118</sup> That is, remote access technologies may amplify the ‘in-built power asymmetry’<sup>119</sup> within the colonial criminal justice system. Additionally, the carceral conditions that surround a remote person-in-prison heighten the power imbalance and worsen the sense of disconnect from remote court proceedings.

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on Fairness and Access to Justice in Court’ (Web Page, 10 September 2020) <<https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>>.

<sup>110</sup> Legg and Song (n 45) 138; Nigel Fielding, Sabine Braun and Graham Hieke, ‘Video Enabled Justice Evaluation’ (Final Report, March 2020) 99.

<sup>111</sup> Jenia I Turner, ‘Remote Criminal Justice’ (2021) 53 *Texas Tech Law Review* 197, 205.

<sup>112</sup> Justice John Logan, ‘The Efficient Disposal of Cases After COVID-19’ (FCA) [2021] *Federal Judicial Scholarship* 2.

<sup>113</sup> See Part III, A above; *Guest* (n 74); *Simpson* (n 75); *Edwards* (n 78); cf *Incardela* (n 77).

<sup>114</sup> Magistrates Association, ‘Magistrates Association Response to Judicial Ways of Working 2022: Crime Consultation’ (Consultation Response, 14 June 2018) 5.

<sup>115</sup> Peplow and Phillips (n 53) 2.

<sup>116</sup> *Honeysett* (n 82).

<sup>117</sup> Donoghue (n 3) 1007.

<sup>118</sup> Legg and Song (n 45) 138; Anne Wallace, “‘Virtual Justice in the Bush’: The Use of Court Technology in Remote and Regional Australia” (2008) 19(1) *Journal of Law and Information Science* 1, 16.

<sup>119</sup> Peplow and Phillips (n 53) 13.

This is compounded by the limited view of the remote courtroom provided by the small screens in prison videolink studios.<sup>120</sup> A sense of isolation or segregation can lead to amplified feelings of powerlessness and complete non-participation, to the extent that a vulnerable person-in-prison cannot feel like an effective participant in criminal proceedings. AVL can sometimes serve as a very poor substitute for in-person attendance and human interaction<sup>121</sup> for vulnerable individuals.

While remote technology can result in some vulnerable people-in-prison feeling excluded from the courtroom,<sup>122</sup> others, as seen in *Knight (No 1)*,<sup>123</sup> actually prefer to be isolated from the physical court and public gallery, at least for sentencing. Although the legislation, such as that in NSW, provides that sentencing is no longer a ‘physical appearance proceeding’, making remote appearance the default position for people-in-prison,<sup>124</sup> the question arises: does AVL appearance adequately fulfill the purposes of sentencing? For instance, are the messages of general and specific deterrence, denouncement and accountability<sup>125</sup> effectively transmitted to the offender when they are not physically present in the courtroom dock, confronting the sentencing judge, the public gallery and the victim/victim’s family? Earlier research on sentencing by videolink suggests that the remote mode lacks gravitas and dignity of an in-person proceeding, which can degrade open justice and affect community engagement.<sup>126</sup> The human, symbolic and legitimising functions of the courtroom are missing when an offender appears for sentencing remotely.<sup>127</sup> The impact on victims’ families and the broader community when a serious offender does not physically attend court for sentencing are evident in the 2023 sentencing case in England of serial baby murderer, Lucy Letby. Her non-attendance was described as insulting to the victims and a final act of wickedness and cowardice, leading to calls for serious offenders to be compelled to attend sentencing in-person.<sup>128</sup> This is an example of the tensions in digital criminal justice when an offender refuses to participate effectively and thereby undermines fundamental sentencing purposes.

Returning to situations when vulnerable individuals in prison might benefit from remote appearance, the cases illustrate the advantage of not having to be transported over vast distances under extremely onerous conditions.<sup>129</sup> Several cases discuss unnecessary transport where videolinks would have been a preferable and more humane alternative.<sup>130</sup>

<sup>120</sup> McKay (n 4) 117, 143.

<sup>121</sup> *R v Isaac* [2023] NSWSC 22, [30] (Yehia J) noting this case concerned a vulnerable bail applicant successfully seeking release to attend his wife’s funeral in-person instead by videolink.

<sup>122</sup> Donoghue (n 3) 1007.

<sup>123</sup> *Knight* (n 98).

<sup>124</sup> *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 3, 5BB

<sup>125</sup> Murphy et. al. (n 101) 29.

<sup>126</sup> Emma Rowden, Anne Wallace, and Jane Goodman-Delahunty, ‘Sentencing by Videolink: Up in the Air?’ (2010) 6 *Criminal Law Journal* 34, 36.

<sup>127</sup> Emma Rowden, ‘Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?’ (2018) 14(2) *Law, Culture and the Humanities* 263, 277; Linda Mulcahy, ‘The Unbearable Lightness of Being? Shifts Towards the Virtual Trial’ (2008) 35(4) *Journal of Law and Society* 464, 487; Milena Heinsch, Tania Sourdin, Caragh Brosnan, and Hannah Cootes, ‘Death Sentencing by Zoom: An Actor-Network Theory Analysis’ (2021) 46(1) *Alternative Law Journal* 13, 14.

<sup>128</sup> Holly Bancroft, ‘An Empty Dock and a Final Act of Cowardice: Inside the Lucy Letby Sentencing’ *Independent* (online, 22 August 2023) <<https://www.independent.co.uk/news/uk/crime/lucy-letby-sentencing-remarks-b2397009.html>>; Ralph Blackburn, ‘Lucy Letby: Calls for New Law as Baby-Killing Nurse Refuses to Face her Victims’ Families at Sentencing’ *National World* (online, 21 August 2023) <<https://www.nationalworld.com/news/crime/lucy-letby-new-legislation-baby-killing-nurse-refuses-to-enter-dock-for-sentencing-hearing-4262932>>.

<sup>129</sup> *Knight* (n 98), [28]-[30] (Yehia J).

<sup>130</sup> See *Knight* (n 98); *Weribone* (n 102); *Re MM* (n 66).

Finally, cases like *Knox-Cumming v MacDonald*,<sup>131</sup> *Treloar*,<sup>132</sup> and *Evitt*<sup>133</sup> show the significant opportunities for remote access technologies to positively facilitate participation and comprehension, while minimising the intimidating courtroom environment. In these cases, involving particularly unwell defendants, the usefulness of digital technologies to manage vulnerabilities is evident. In such instances, digital vulnerability is positively addressed and minimised.

There are real possibilities for remote access technologies to support access to justice as this concept extends into the complex space between law, society and digital communication technologies. Nevertheless, our mixed findings demonstrate the requirement for criminal courts to be alive and responsive to digital vulnerabilities, that is, the communication, support and legal needs of remote, vulnerable individuals subject to criminal proceedings.

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<sup>131</sup> *Knox-Cumming v MacDonald* (n 87).

<sup>132</sup> *Treloar* (n 89).

<sup>133</sup> *Evitt* (n 92) [38]-[44], [103] (Black DCJ).