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Australian Institute of Criminology

Trends & issues in crime and criminal justice

No. 631 August 2021

Abstract | Young people in detention (10–17) are routinely appearing in court via video link. There is little research on the use of video-link technology for court appearances for this age group. This project maps current practice through systematic courtroom observations, backed up by interviews with judges, lawyers, police, court personnel and others involved in the youth justice system. It identifies strategies to improve current video-link processes and changes to protocols needed to minimise the risk of adverse outcomes for the children appearing via this technology.

Court appearances via video link for young people in detention in Queensland

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Introduction

Young people in detention (10–17) are routinely appearing in court via video link. However there is little research on the use of video-link technology for court appearances for this age group. This project examines the use of video links in the children’s jurisdiction in Queensland. It maps current practice through systematic courtroom observations, backed up by interviews with judges and magistrates, lawyers, court and detention centre personnel, police and others involved in the youth justice system. It identifies strategies to improve current video-link processes and changes to protocols needed in order to minimise the risk of adverse outcomes for the children appearing via this technology.

History and context

Video-link or audiovisual link (AVL) technology has been available in Australia since the 1990s. In January 2014, the Queensland Department of Justice and Attorney-General (DJAG) commenced a program to increase the number of video links for adult defendants.



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In May 2014, the Queensland Government closed the separate Quay Street Children’s Court in Brisbane, and all Children’s Court matters were moved to the courts precinct in George Street. One of the repercussions of the move to the adult facilities was the opportunity for increased use of AVL in the children’s sector. The number of AVL appearances from the Brisbane Youth Detention Centre rose from 9.9 percent of all appearances in 2014 to over 47 percent in 2018. The proportion of AVL appearances from the Townsville Detention Centre in 2018 was even higher (approximately 60%), possibly reflecting use for appearances in more remote and regional courts in the north. The legal system also uses AVL for other children—namely, victims—with a range of protections built in around its use. However, when the same technology is used for children who offend, the protective scaffolding is pulled away. In many cases these are the same children.

Empirical studies on the use of AVL in the criminal courts have tended to focus on the adult sector rather than the youth justice sector. The studies often examine the advantages and disadvantages of the technology (Page & Robertson 2016; Walsh 2018), or concentrate on the experience of child witnesses and vulnerable persons, and the technological and design enhancements required to minimise trauma (Rowden et al. 2013) and promote equity (Kashyap et al. 2017). Recent research also raises concerns about effective participation, communication and engagement between the child and the court process (Gibbs 2017: 25, 30; Harris 2018; Wallace, Roach Anleu & Mack 2019: 54). McKay identified concerns regarding a ‘soundtrack of incarceration’ consisting of the background sounds from the detention setting which are heard in the courtroom during an AVL session, and how the defendant’s appearance from that detention setting might affect perceptions of innocence (McKay 2018, 2016).

The results of UK pilots undertaken nearly two decades ago were equivocal as to comparative results for grants of bail compared with in person appearances (Plotnikoff & Woolfson 1999: 35). A later 2010 UK study suggested that the use of video was leading to harsher outcomes, though one reason may have been that those appearing on video in the study were less likely to have legal representation (Terry et al. 2010: 21, 29). Reports from the UK Bail Observation Project examining AVL use in the immigration process reinforce concerns, with bail being granted to ‘21 out of 41 applicants appearing in person’, but only 54 of 170 appearing by video link (MacKeith & Walker 2013: 5). Contrary to this result, a 2020 UK study found that ‘Bail (conditional and unconditional) was...more common in video court’ compared to the non-video court control groups (Fielding et al. 2020: 10) There are other concerns. Webster, in her 2009 Canadian study, identified a ‘culture of adjournments’ leading to lengthier court processing in a remand situation (Webster 2009). The latest UK study also found that ‘the rate of adjournments was higher in video court’ (Fielding et al. 2020: 10). This is an area for further investigation and requires more extensive gathering of statistics on the use of video links in Queensland.

There are presently gaps in the data being collected by the various agencies involved in the use of video links in the youth justice system, including the courts, the detention centres, child safety, the watch house and police. These agencies need to collect the data required to gain a complete understanding of the way the links are used, and the outcomes of their use for the children. In particular, the agencies should be seeking to ensure that the use of the links is not disadvantaging young people by shortening their time in and access to the court, extending the overall time for matters to be finalised, or resulting in adverse outcomes in terms of sentence or time in detention.

Methodology

The aims of this project are to examine practice in relation to the use of AVL with young people in the youth justice system in Queensland and to identify strategies to improve current AVL processes. To this end, this research includes a review of prior empirical studies along with a critical analysis of the law and academic and policy literature on the use of AVL in the courts. Relevant statistics were collected in order to provide context for the study.

This research includes 35 observations of AVL hearings taking place in Magistrates Courts in three Queensland locations: Brisbane city, Townsville and Beenleigh. The observations took place from August 2018 to June 2019. These courts were chosen because they are representative of three different court localities—a state capital city that is the site of the largest detention centre, a major regional centre with the northern detention centre in its catchment area, and a growing regional town in the south of the state. No video links were observed to take place for children appearing on more serious charges before the Children’s Court of Queensland (CCQ). A Checklist Observation Sheet was used. This covered a number of factors for each matter including the charges, court process, outcomes, time taken for the hearing, young person’s demeanour and dress, courtroom layout, court’s view of the video room, child’s interactions with the court, and technical or noise issues evident during the proceedings.

The qualitative study incorporates 40 interviews with magistrates, judges, solicitors, barristers, and police, together with detention centre, court, Youth Justice and other staff involved throughout the region. Those interviewed were chosen using a snowballing technique targeting practitioners who were familiar with, and frequently appeared within, the children’s jurisdiction. Representatives of Aboriginal and Torres Strait Islander communities were included in the group. No young persons were interviewed for this research given the ethical challenges in gaining access to vulnerable children. However, McKay’s comments, based on interviews with 31 adult prisoners in New South Wales with lived experience of AVL, certainly resonate in the courtroom observations and interviews in this study (McKay 2018: 180–186). The views of young people are vital and it is envisaged these will be canvassed in subsequent research.

Ethics clearance was received from the Southern Cross University Office of Research Ethics Committee (ECN-17-241), and permission to conduct this research was sought and received from all the relevant government and court authorities. The Youth Justice Department organised visits to the detention centres, and the Queensland Police Service assisted by authorising a visit to the Brisbane City Watch House. Both agencies contributed by supplying introductions to persons who would be able to assist the research. The interviews took place from May 2018 to June 2019. All the interviews were undertaken by the researcher. The interviews were taped and a transcription service used together with an analysis of the data by research assistants using NVivo 12 software. The report focuses on some of the issues which arose in the discussions, while incorporating commentary from previous research and observed examples where relevant. There are several recommendations arising from the study.

Results

Young people in detention

The children who are using AVL are the small percentage of young people who are charged with an offence and find themselves in police custody or detention. It is widely acknowledged that the young people in detention tend to come from situations of social and economic disadvantage. Statistics show that the group is predominantly male (over 82%) and some are as young as 10 (CCQ 2019: 37, Figure 11). On an average day, Indigenous children constitute over 70 percent of the young people (CCQ 2019: 2, 38, Figure 12), and 84 percent were on remand rather than in sentenced detention (CCQ 2019: 39, Figure 14).

National statistics demonstrate that those children who have been ‘abused or neglected’ are more likely to enter the youth justice system (AIHW 2019: iv; VSAC 2019). Fifty-seven percent of the young people under youth justice supervision during 2018–19 in Queensland also received ‘a child protection service in the 5 years from 1 July 2014 to 30 June 2019’ (AIHW 2020: 10) due to ‘their experience of trauma, abuse, harm, neglect, parental death or incapacitation or the risk of harm’ (VSAC 2019: 93). Many of the children in detention and appearing before courts in Queensland via AVL have been the subject of a child protection order. Nationally, of all the young people in youth justice supervision during 2018–19, ‘almost one quarter had a care and protection order (23%)’ and ‘just over 1 in 5 (22%) were in out of home care in the previous five years’ (AIHW 2020: 13).

In addition, according to the 2019 Youth Justice Census of young offenders, 53 percent were disengaged from education, training and employment; 21 percent were homeless or in unsuitable accommodation; 80 percent had used at least one substance; 39 percent had used ice or other methamphetamines; 56 percent had mental health and/or behavioural disorders (diagnosed or suspected); 16 percent had a disability (assessed or suspected); 63 percent had experienced or been impacted by domestic and family violence; and 33 percent had at least one parent who had spent time in adult custody (Qld Department of Youth Justice 2019). A number of the young people under 18 were themselves parents of young children. These statistics were substantiated in the accounts of those interviewed. The children in the detention centres are themselves some of the most disadvantaged in Queensland.

The Banksia Hill Project in Western Australia identified that nearly one in two young people in their research group had a language disorder—over half of whom had a language disorder associated with fetal alcohol spectrum disorder (FASD; Kippen et al. 2018: 40). The study concludes that ‘[o]f those with language disorder associated with FASD, 28 percent had a history of ear and hearing problems’ (Kippen et al. 2018: 47). Studies indicate that the young people who find themselves in detention are likely to be suffering from a raft of physical, educational, language and other health deficits that would make them poor candidates for the use of AVL technology if the purpose is for them to participate effectively in court proceedings (Anderson, Hawes & Snow 2016).

Young people with intellectual disabilities are similarly disadvantaged, because of their limited capacity to understand what is happening (Legal and Social Issues Committee 2018: 64). Witness intermediaries, to facilitate communications for complainants in sexual offence cases, are becoming more prevalent. In some jurisdictions this publicly funded assistance is also being extended to vulnerable suspects and defendants (Cooper & Mattison 2017: 353; Cooper & Wurtzel 2013). In the United Kingdom, a June 2020 report by the Equality and Human Rights Commission (EHRC) called for reforms to assist those with cognitive and other impairments in the courts by a wider use of witness intermediaries along with ensuring disability awareness training within professional qualifications (EHRC 2020). To date, assistance by intermediaries is not the norm in the juvenile justice system in Australia despite the communication deficits within this population (Tasmania Law Reform Institute 2016: 32).

Current legislative framework in Queensland

When a child is a defendant in a criminal proceeding, the Queensland *Youth Justice Act 1992* (YJA) provisions apply. According to s 53(1), bail applications may be heard using AVL ‘if the child agrees to the use of the link and the court is satisfied the child has had an opportunity to obtain independent legal advice’. Sentencing may take place using AVL providing ‘the prosecutor and the child agree to the use of the link’ (YJA s 159(1)). Pursuant to YJA s 66, provisions in other legislation, such as the *Criminal Code 1899* (Qld) and the *Justices Act 1886*, are also relevant to the Children’s Court jurisdiction, including these provisions pertaining to mentions, remands and arraignments (see *Criminal Code* s 97C(4), *District Court of Queensland Act 1967* s 110C and *Justices Act 1886* s 178C).

There have been some recent Practice Directions issued in relation to the use of AVL. Practice Direction No. 1 of 2017 deals with sentence proceedings. The purpose broadly is to expedite sentence hearings by allowing arraignments to take place via AVL if a pre-sentence report is required. On 20 November 2019, the CCQ issued a guideline covering the use of AVL (Practice Direction No. 1 of 2019: *Use of video-link or audio-link appearances*). It states that the use of the technology is ‘at the discretion of the presiding judicial officer’ and identifies seven issues that need to be taken into account. Other provisions cover what must occur prior to, during and after the trial or hearing. A similar Practice Direction was issued for the Magistrates Courts on 11 December 2019. All the observations in this study, and most of the comments made during interviews, relate to lower court hearings where the use of video links is more prevalent, and took place prior to the release of the 2019 Practice Directions and to the COVID-19 related changes. The Youth Justice Department and the courts services should monitor the effect of these new directions on practice—for example, by additional collection of statistics on the use of the technology.

Observations in the Magistrates Courts

Observations were undertaken in three geographical areas in Queensland in front of seven different magistrates and using five different courtrooms. In the main, the hearings consisted of bail applications (11), pleas (7), sentencing matters (7) and mentions (6). Approximately 18 of the 35 matters observed lasted less than 10 minutes, with more than five hearings taking one minute or less. Eleven matters took over 21 minutes. There were distinct variations in the style of the hearings and in the quality and extent of the court's view of the young people. In over a third of the cases, the young person was not introduced to those in the court, and there was little to no interaction between the bench and the child. Other magistrates had very open interactions and took time to build rapport with the young person and their parents. The children mainly sat quietly, some for long periods without being addressed or acknowledged, while the magistrates dealt with the lawyers and read the documentation handed to them.

In three observations, the court was completely cleared to allow the young person to communicate privately with their lawyer. At the end of the hearings the solicitors on several occasions took the opportunity to explain the outcomes to the child via the video link. In some cases there was no support person or family member in the court or present by phone, and the magistrates refused to finalise matters in their absence.

Technology in the courts and detention centres

From the observations it appeared that, for most court events, the young people could only see the magistrate and, perhaps, the bar table. At times, the screen in the court froze or the image was jerky or unclear. From the back of the court the images of the young people were very unclear, with shadows on the children's faces and poor lighting and colour. The screen sizes differed between courts and some screens were quite small.

Young people in the watch house were seated extremely close to the camera, so in some cases the image on the screen in the courtroom only showed half of their face, and, in at least one case, just the forehead and eyes. The court's view of children in the Cleveland Detention Centre was from a distance, with the young person seated at a table with one, or sometimes two, detention staff seated alongside them. Brisbane Detention Centre videoconferencing suites were stark rooms with the young person seated at a table in front of a pale green or blue concrete block wall. The walls were bare and windowless. The accompanying staff member, for the most part, was not visible, even though it was evident from the subsequent staff interviews that there was always someone else in the room with the young person.

Consistent with McKay's work, noise issues were apparent in at least 20 of the court events (McKay 2016). The AVL provides a link not just to the young person but to their environment, leading to additional sounds not normally encountered in a court room. These include the sounds of banging iron doors, jangling keys and distracting voices outside the AVL room, some of which were joking and laughing but others of which were rough and visibly unsettling or alarming to the child on screen. There were also loudspeaker announcements in the detention centres, one announcing a lockdown at the centre. Several of those interviewed, including the judges and magistrates, commented on how distracting that background noise can be to them in the courtroom.

Various technical issues were identified during the observations, and appropriate action was taken. These included situations where the young person could not hear the magistrate or where there was feedback on the sound equipment. The court clerks rebooted the court equipment or asked the detention centre to phone in again.

Despite large sums being spent on technology in the courtrooms, particularly in the city centres, many of those interviewed believed the cameras were not voice-activated and commented that the camera remained focused on the magistrate during hearings. Those regularly present in the courts commented on how differently the AVL framed the children depending on the video-link location. The feedback from those interviewed was that the technology and production generally did not result in a quality experience for the young person or others taking part in the hearing in the courtroom. While being committed to the introduction of sophisticated technology, it is important to acknowledge that a different medium is being imported into the courtroom, and that this is not a neutral action (Moore, Clayton & Murphy 2019).

Use of AVL technology to simulate a court hearing involves two very different spaces. Both of those physical spaces require modifications to ensure a much improved experience for the young people in detention as well as those in the courtroom. The courts service should ensure that there is more consistency in the AVL equipment. All personnel using the equipment should have regular updates on changes. Training should include production skills information. The objective should be for the AVL experience to be as similar to the in-person hearing as possible. In addition, the courts should set up enhanced protocols so that when video technology outages occur, a timely warning and information on expected duration is sent to all the agencies involved.

Research has highlighted the importance of including appropriate facilities in remote sites, catering for all stages of the court encounter, including preparation, physical spaces and technology, the court session, and what occurs subsequently (Kashyap et al. 2017: 5, 10; Rowden et al. 2013). The detention centres were working to improve the AVL court suites; however, in doing so detention facilities should ensure that these suites are soundproof. In addition, the detention centres and watch houses should ensure that appropriate support persons are available and present in the remote room with the young person and that those persons are known to the child. Those in the court must be able to see and be introduced to any persons in the remote room before proceedings begin.

The Parramatta study and Wallace's work on remote area link-ups demonstrate the benefits of using AVL when different players are geographically distant (Hatzistergos 2008; SCEPA 2011; Wallace 2008). The interview data in this study supports this research. Telephone link-ups were previously used where a young person lived remotely and are still used during holiday periods when some courts are closed. Given the advances in equipment and facilities now available, the courts should be introducing video links rather than audio links as an interim technological solution during court closures and for more complex configurations, such as when multiple parties are appearing from remote areas.

Procedural fairness

Video links can amplify injustice unless legal rules and procedures are in place to protect the vulnerable (Donoghue 2017: 998; see also Ericson & Berenek 1982). While those interviewed expressed overall support for the use of the technology on simple matters such as adjournments and mentions, the general consensus was that the young person should be present in court for trials and sentencing.

Defence solicitors were concerned about the need to obtain clear instructions from young persons before and during hearings. Some reported having difficulty gaining adequate and timely access to their young clients prior to their video appearance in court. The detention centres and watch houses should ensure that sufficient rooms, staff and resources are in place to guarantee solicitors can visit their clients at the detention centre or watch house well before the hearing in order to obtain instructions and make a judgement as to whether their client should appear in the court via AVL. The courts also should ensure that there are sufficient secure AVL facilities available in the court precinct for lawyers to gain additional instructions.

According to interviewees, the decision regarding the use of AVL needs to be based on the individual child's suitability, with issues such as fitness to plead, English as a second language, and hearing and sight problems being considered. All those taking part during the court hearings should be encouraged to use less formal language and provide additional explanations to ensure that young people are capable of understanding the court processes (see Braun 2016, 2011; Eades 2015, 1992; Fowler 2013; Snow 2019). Youth justice agencies should ensure that children are checked for hearing and sight problems prior to their appearing on video links, and that appropriate changes are made to the set-up as required if the AVL appearance is to go ahead.

A large proportion of the young people in detention are Indigenous. Indigenous community elders spoke of the need for more cultural support and specialised magistrates and practitioners. They also spoke about the need to use community elders more in the process, and about the advantages in treating every child as an individual with ties and connection to their culture and responsibilities. Where necessary, the detention centres should facilitate the provision of culturally appropriate support to young people—for example, through the presence of authorised community elders—throughout the video-link process.

Preparation and appearances

It was obvious in all the court sittings observed that the magistrates were managing extremely heavy work schedules. The expectation is that the magistrate will clear all children's matters in one day of sittings. As a result, matters in the courts generally moved quickly. Some of the courts have set times for hearing AVL matters; others intersperse AVL and in-person appearances; yet others leave the schedule to the solicitors in terms of who is ready to appear with a client, either on video or in the court in person. Detention centre staff pointed out the advantages of having the children appear via AVL in the morning or at set times earlier in the day, which allowed for movements within the detention centre to be planned and controlled in terms of the staff available and the need for certain children to be kept away from others—an issue referred to as 'mix issues'.

Many of those interviewed who were working within these contexts were concerned that young people viewed the link as a one-on-one conversation with the magistrate and had no real concept of it being an appearance before a court. The presiding judicial officer and the court clerk, and the courts service generally, should ensure a clear beginning and end for each AVL appearance, with time warnings and prompts. A formal greeting and standard court introduction to each proceeding would provide clarity for those young people appearing before the court.

The solicitors, prosecutors and detention staff also thought that the technology, court formats and detention centre processes could play a greater role in preparing the children for the court hearing to disabuse them of any notion that this was other than a formal legal process. The detention centres should assist in this process by providing materials such as diagrams of the courtrooms, information on court etiquette and forms of address prior to the hearing (see Kashyap et al. 2017).

Addressing reasons for court avoidance

Most interviewees agreed that AVL is a vital communication tool to assist with remote hearings and special circumstances that sometimes arise in a state the size of Queensland. But many of those interviewed raised issues pertinent to the use of this technology that are less positive. AVL is being used as a way for children to be spared the trauma associated with being transported to court, the watch house experience and the need for body searches.

The logistics, delays and risks associated with transport from the detention centre to the court can dissuade young people from wanting to go to court. The child is taken out of a structured and known environment and placed under the control of different agencies. The children can be assured of long waiting times at various points during the day. They need to be ready to leave the detention centres early, yet because of the need for diversions along the way they may not get to the court quickly. Youth Justice and other relevant agencies should provide specialised training for all police, court and corrections staff coming into contact with young people during the transit process.

Avoiding body searches is a factor in decisions regarding AVL appearances. This issue arose several times during the interviews. Security requires defendants to be searched during transitions, which can possibly amount to four searches for one in-person appearance: at discharge from the centre, when the police admit the child to their care, when the police discharge the child to the care of the court, and when they are readmitted to the detention centre. In this technological age, all detention centres, watch houses and courts should install non-invasive body scanners, such as those used at airports, in order to identify contraband. Up-to-date technology should be made available at all transition points and search spots.

The architecture and conditions in the watch houses at the various courts throughout the state differ markedly. Some of the spaces are long overdue for renovation. The watch houses in some of the older courts are arguably not suitable for adults, let alone children. Several of those interviewed referred to Beenleigh as being in need of renovation. Some courthouses have too few courts with internal dock facilities, meaning that young people are appearing in public areas and foyers in handcuffs. Reopening a separate facility for children's hearings in Brisbane and another in Townsville, or holding court sittings at a facility adjacent to the detention centres, as well as upgrading the older courts and watch house facilities would alleviate some of these issues.

Taking into account the vulnerabilities of this cohort, is the technology being used in the best interests of the child? Moreover, AVL technology is promoted as being cost-effective. Is this true? As part of this investigation, Youth Justice should also examine the reasons for young people refusing to attend court in person, especially when it is in their best interests to do so.

Conclusion and recommendations

There have been a number of recent reports dealing with youth justice (ACCG 2017; SCRGSP 2019). Some examine video links; most include relevant recommendations, and there is consistency in the views being expressed and the suggested reforms. The legal system uses AVL for child victims with a range of protections built in around its use. However, when we use AVL for children who offend, the scaffolding is pulled away. In many cases these are the same children. They are the victims. However, they are demonised as offenders. Implementation of the recommendations will go some way to improving the AVL experience for young people in detention, thus increasing the likelihood of improved efficiency and ensuring that children are diverted from the justice system.

This research has traced the history and context of the use of video links for children in the youth justice system in Queensland. It has examined the available statistics, the demographics of the children in detention, the empirical research in relation to the use of the technology and the legislative frameworks built around the practice in the courts. The recommendations are based on 35 Magistrates Court observations along with 40 interviews with adults working in the system. Overall, there was a strong and widespread view that the system should be improved by ensuring that practice in all respects is more child-centred.

Postscript

The legal world has changed as a result of the COVID-19 crisis. Courts have been closed and, except in the most urgent situations, all appearances have been taking place via AVL. Regulations and Practice Directions have set out responsive court arrangements to adapt to the ongoing crisis. In Queensland, it was business as normal at the commencement of 2020. By the end of March, the President of the CCQ had issued Children's Court of Queensland (District Court) Practice Direction No. 1 of 2020 urging practitioners to consider whether it was necessary for children to attend court and stipulating that those children who were in detention would be appearing via AVL. Similar arrangements were put in place for Children's Court (Magistrates Court) sittings. From 15 June 2020, with a relaxation of the COVID-19 restrictions, more in-person matters were being allowed (Children's Court (Magistrates Court) Practice Direction No. 6 of 2020). Responsive legislative amendments were also made in other Australian jurisdictions (Judicial College of Victoria 2020).

This situation has highlighted some of the advantages of using technology in the courtroom while encouraging more research into means of improving the situation for all actors in the system (EHRC 2020; Fielding et al. 2020). No doubt some encouragement will be given to a widening of the use of video links when the immediate COVID-19 danger abates. However, it is important that young people and others who are vulnerable are assured of a fair hearing. This research project points to a cautious adoption of this technology for young people and highlights many areas for improvement in the system.

Acknowledgements

This research was funded by a Criminology Research Grant.

Ethics clearance was received from the Southern Cross University Office of Research Ethics Committee (ECN-17-241). Permissions were provided by the Queensland Police Service Research Committee, the Director-General of the Office of Child Safety, Youth and Women, the Chief Judge of the District Court, the President of the Children's Court, the Chief Magistrate and the Deputy Chief Magistrate.

Research assistance was provided by Dr Lutfun Nahar Lata PhD (University of Queensland); Megan Parker BJus(Hons), BBehavSc(Psych) (Queensland University of Technology); Elizabeth Englesos BLaws(Hons) (Griffith University), BPharm (University of Sydney); and Dr Amelia Radke BA(Hons), PhD (University of Queensland).

I would like to thank all who contributed to this research, including the Australian Institute of Criminology editorial team, Katalina Foliaki, and the peer reviewers appointed by the AIC. Thanks also to Professor Bill McNeil, Dean of the School of Law and Justice at Southern Cross University for his support, and to Leanne Dietrich, who assisted with administration of the project. Thanks also to Maxine Brown, Research Services Manager in the Faculty of Law at QUT. Special thanks to Professor Rick Sarre, Dean of Law at the University of South Australia, for advice and editorial assistance.

This research would not have been possible without the generosity of those who gave up their time to participate in the interviews.

The opinions expressed and any errors are those of the author alone.

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General editor, *Trends & issues in crime and criminal justice* series: Dr Rick Brown, Deputy Director, Australian Institute of Criminology. Note: *Trends & issues in crime and criminal justice* papers are peer reviewed. For a complete list and the full text of the papers in the *Trends & issues in crime and criminal justice* series, visit the AIC website at: aic.gov.au

ISSN 1836-2206 (Online) ISBN 978 1 925304 98 5 (Online)

<https://doi.org/10.52922/ti04985>

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