

Law Council of Australia

# Principles for determining the appropriateness of online hearings

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Law Council  
OF AUSTRALIA

## Introduction

The onset of the COVID-19 pandemic led to an unprecedented shift in the way Australian courts and tribunals conduct proceedings. Australia's courts and tribunals adapted to implement measures to ensure the continuation of the justice system to the greatest degree possible. These measures included a significant increase in the use of online hearings.

Following this paradigm shift, courts and tribunals are continuing to utilise online hearings across multiple jurisdictions. While the increased use of online hearings may present opportunities to reduce potential barriers associated with physical attendance, it also creates a number of challenges for courts and tribunals and their users, and may separately adversely impact access to justice and the principle of open justice.

The Law Council considers that there is a need for increased clarity and consistency in the approach of courts, tribunals, and practitioners to conducting hearings online in the wake of the significant changes implemented following the onset of the COVID-19 pandemic. Experience since the beginning of the pandemic offers a number of lessons about how to best utilise online hearings to seek to limit potential adverse impacts, while also meeting the needs of the parties.

This document seeks to propose, from the perspective of the legal profession, a set of best practice principles for courts and tribunals when considering the appropriateness of online hearings, with a particular emphasis on promoting access to justice for parties, and maintaining an emphasis of the importance of open justice in the Australian legal system.

These principles have been produced as high-level guidance for the benefit of courts and tribunals with the view to promoting consistency across jurisdictions. It is not intended that the principles be prescriptive, and the Law Council recognises that courts and tribunals will need to determine procedures and practices in accordance with their specific needs.

The Law Council notes that the principles are intended to be a living document and will be subject to a review 12 months after release.

# Determining the appropriateness of online hearings

## Overarching principles

In determining whether an online proceeding is appropriate in the circumstances, a court or tribunal should consider the following principles on an individual, hearing-by-hearing basis. Where possible, parties should be provided with an opportunity to make submissions on how hearings should be conducted, having regard to the factors below.

1. A court or tribunal, when considering implementing online hearings, must ensure that the key values of Australia's justice system are maintained in all circumstances, including:
  - (a) access to justice;
  - (b) procedural fairness;
  - (c) open justice; and
  - (d) the reality and appearance of impartiality.
2. All those involved in court or tribunal hearings have a right to meaningful, effective, and safe (including culturally safe) participation. When determining whether the use of an online platform is appropriate, a court or tribunal should adopt a principles-based approach which considers that a person should:
  - (a) participate in decisions that directly affect them;
  - (b) know how their rights are affected and by whom;
  - (c) be treated equally before the law; and
  - (d) be empowered to claim their rights.
3. Substantive and/or contested hearings (including contested interlocutory hearings) are ideally conducted in-person. This must always be subject to the considerations of justice, fairness, cost, and efficiency. Matters that may be more appropriately conducted by way of electronic hearing include:
  - (a) non-contentious directions and case management hearings, particularly for matters involving counsel or solicitors from interstate;
  - (b) interlocutory applications by agreement with the parties, or at the discretion of the Court; and
  - (c) multi-jurisdictional disputes, by agreement with the parties, or at the discretion of the Court.
4. Hearings should be in person or online, but can be both. However, particular caution should be exercised where one party appears remotely while others are in-person. An in-person hearing should be open to allowing certain aspects of a proceeding to be conducted remotely, such as witness evidence that may be of lower significance.
5. The most appropriate form of proceeding for a particular participant should not be assumed on the basis that a participant has a particular attribute.

6. Whether a hearing is held in-person or online, the court or tribunal should implement all reasonable adjustments to ensure the effective participation of all persons involved in the hearing.
7. The court or tribunal should have particular regard to the capability of any self-represented parties, including technological capability, access to the necessary technology, and whether access to a duty lawyer or other support would be beneficial in resolving the matter. Decisions as to whether a hearing will be held online should occur early in the proceedings, and in accordance with clear and suitable timeframes with respect to the hearing date. This principle does not prevent a decision being made later in proceedings where appropriate.
8. In the event that a hearing is conducted virtually, the court or tribunal should take steps to address factors that may encroach on principles of open justice, including minimising barriers that might prevent or otherwise make it more difficult for members of the public and others in the legal profession to observe an online hearing.
9. The technology (including, cameras, microphones, online platforms, etc) used by the court or tribunal must be able to provide the service it is required to provide at a level of quality and reliability that is consistent with the public importance of the services they are providing, by the use of reliable, advanced, and easy-to-use audio and video technology.
10. All appropriate persons must have access to equipment that enables them to clearly see and hear (in the case of an audio-visual link) or to hear (in the case of an audio link) the person appearing before the court, giving evidence or making submissions, as well as the judicial or tribunal officer. In particular, the judicial or tribunal officer should be seen by the participants and their legal representatives at all times during the hearings (where the hearings are not by telephone only).
11. The court or tribunal must ensure that the necessary cybersecurity measures are in place to ensure the security of the hearings and of the exchange and/or tendering of documents.
12. Each court and tribunal should develop materials to assist participants in accessing and participating effectively in online hearings. This material should be particularly directed at assisting self-represented parties.