



THE LAW SOCIETY
OF NEW SOUTH WALES

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18 June 2025

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
BRADDON, ACT 2612

By email: [REDACTED]

Dear Dr Popple,

REVIEW OF THE LAW COUNCIL'S PRINCIPLES FOR DETERMINING THE APPROPRIATENESS OF ONLINE HEARINGS

The Law Society is grateful for the opportunity to provide feedback to inform the Law Council's internal review of its *Principles for determining the appropriateness of online hearings (Principles)*.

General comments

We note that the Principles were developed in 2022 by the Law Council's Access to Justice Committee, with input from constituent bodies including the Law Society¹, in response to concerns in the wake of the COVID-19 pandemic, that there had been a significant increase in the use of online proceedings with no national framework to promote consistency across jurisdictions.

Processes for online hearings have evolved considerably since 2022. Most jurisdictions have developed detailed policies and protocols to facilitate the conduct of certain proceedings without the need for participants to attend in person. Our members consider that the Principles continue to provide a central frame of reference against which evolving online practices should be continuously measured to safeguard key values including access to justice, procedural fairness and open justice.

We note recent developments in the NSW criminal justice jurisdiction and make a number of suggestions in our responses to the specific consultation questions below.

(a) To what extent are current court and tribunal practices aligned with the Law Council's Principles?

In our view, court and tribunal practices are generally aligned with the key justice values reflected in the Principles. However, we note the following recent developments in the NSW criminal jurisdiction signalling a

¹See Law Society submission to the Law Council, *Draft best practice principles for online proceedings* dated 28 October 2022. Our submission also referred to the Law Society's Research Summary Report, *A Fair Post-COVID Justice System: Canvassing Member Views* (January 2022) which considered, among other things, the extent to which members supported changes that facilitated virtual court. The Report is available online, <https://www.lawsociety.com.au/sites/default/files/2022-02/21051%20Post-COVID%20Justice%20System%20Summary%20Report%20FINAL%2020220124.pdf>.

divergence from the principle that substantive and/or contested hearings are ideally conducted in-person (Principle 3) and incompatibility with principles in relation to the appropriate and efficient use of fit for purpose technology (Principles 8 – 10).

From July 2025, it is intended that a Bail Division of the NSW Local Court will be established and that all NSW bail proceedings will be conducted, by default, in online court rooms utilising audio visual technology.² These arrangements will be formalised with the expected passage of the Evidence (Audio and Audio Visual Links) Amendment (Local Court Bail Division) Bill 2025, currently before Parliament. Additionally, the Bill contemplates, in limited circumstances, that an accused person may appear in bail proceedings via audio link where the audio visual link fails or is otherwise not available.³ It is currently unclear how the proposed Local Court Bail Division will enable attendance by members of the public at these hearings and how adequacy of current audio visual technology and sound-proofing of cells to properly facilitate remote bail hearings may be assured.

This is a significant departure from the previous legislative presumption that first instance bail proceedings be conducted in-person.⁴ We acknowledge that the proposed reforms confer a discretionary power on the court to issue a practice note / directions to provide for exclusions from the presumption.⁵ In our view, this emphasises the importance of the Principles as a stated set of values designed to assist courts/tribunals in the development of online hearing practice.

b) Do the Principles strike an appropriate balance between the risks of overreliance on virtual hearings (such as impacts on open justice or digital exclusion) and the practical benefits of online proceedings (such as reducing travel time and costs), particularly for RRR lawyers and their clients?

In our view, the Principles generally strike an appropriate balance between the risks of overreliance on virtual hearings and the practical benefits of online proceedings. We also note that the Principles are very broadly drawn to encompass high-level values that apply to all proceedings. It is suggested that the framework may benefit from the incorporation of second-level principles applicable to particular types of proceedings. For example:

- In criminal proceedings – the right to a fair trial and that the accused receives a public and impartial hearing.
- In civil proceedings – the just, efficient, timely, and cost-effective resolution of disputes.
- In family law proceedings – prioritising the safety of children and vulnerable parties.

² NSW Government, Statement of Public Interest, Evidence (Audio and Audio Visual Links) Amendment (Local Court Bail Division) Bill 2024, 25 May 2025, online: [https://www.parliament.nsw.gov.au/tp/files/190998/SPI%20-%20Evidence%20\(Audio%20and%20Audio%20Visual%20Links\)%20Amendment%20\(Local%20Court%20Bail%20Division\)%20Bill%202025.pdf](https://www.parliament.nsw.gov.au/tp/files/190998/SPI%20-%20Evidence%20(Audio%20and%20Audio%20Visual%20Links)%20Amendment%20(Local%20Court%20Bail%20Division)%20Bill%202025.pdf).

³ Evidence (Audio and Audio Visual Links) Amendment (Local Court Bail Division) Bill 2024 (AVL Bill), Schedule 1[6].

⁴ Evidence (Audio and Audio Visual Links) Act 1998, s 5BA.

⁵ AVL Bill, n 3, Schedule 1[7].

This may encourage a deeper focus on essential considerations when determining the appropriateness of online hearings which, in our view, may be warranted given the proliferation of audio and audio visual technology since the onset of the COVID-19 pandemic. It may also allow for a more effective balancing of competing considerations. For instance, audio visual technology is commonly utilised in NSW criminal courts to enable convenient remote attendance by inmates for non-contentious or administrative court appearances. Notwithstanding this convenience, it is observed that, in some cases, remote appearances of defendants in custody can make it more difficult for a presiding judicial officer to be sensitive to indications of physical or mental health issues or cognitive impairments (see also under c), Principle 5).

c) What updates or changes, if any, would you recommend to ensure that the Principles remain relevant and reflective of the profession's perspective on appropriate hearing modes in a post-pandemic legal system?

Apart from the incorporation of second-level principles relevant to particular types of proceedings as suggested under b), we provide the following additional comments in relation to particular principles.

Principle 2

While we acknowledge this principle contemplates a right to culturally safe participation we suggest it may be improved with the addition of further factors to be taken into account by the court in the context of Aboriginal and Torres Strait Islander litigants and defendants. For example, appearance via an online platform if a hearing is on Country may be more acceptable.⁶ Consideration should also be given to countervailing concerns that appearances via online platforms may leave some litigants feeling isolated, and that this method of hearing does not allow for the real-time presence of support people.

Principle 3

We endorse the principle that substantive and/or contested hearings are ideally conducted in-person. In the case of an accused detainee, it is important that they are able to participate fully in substantive court proceedings, including seeing and hearing the legal representatives and the presiding judicial officer. In our view, particular care should be exercised if a court is contemplating the use of an audio link without video technology.

Currently, under this principle, examples of matters that may more appropriately be conducted by way of electronic hearing are listed. We suggest the framework would benefit from express reference to those proceedings that should *not* be conducted remotely or by audio link alone.

⁶ See, for example, *R v Knight (No 1)* [2023] NSWSC 195 [20]–[31], which involved sentencing proceedings involving an accused and deceased from the same Indigenous community in Bourke. The Crown opposed the accused's application to attend the sentencing proceedings via AVL on the basis that the accused should be on Country for the proceedings, citing Indigenous cultural values. Although Yehia J found in favour of the applicant, her Honour contemplated circumstances where a person may be required to be on Country for sentencing proceedings, such as matters in the Walama List which are being conducted pursuant to a restorative or therapeutic justice model.

Principle 5

This principle is currently expressed in the negative as follows:

The most appropriate form of proceeding for a particular participant should not be assumed on the basis that a participant has a particular attribute.

Our members suggest that the principle would promote a more balanced assessment that is reflective of current practice, by the inclusion of the following qualification, or similar:

However, if a particular participant has a particular attribute this should be taken into account when determining the appropriate form of proceeding.

This suggestion is intended to ensure factors such as age, disability and Aboriginal and/or Torres Strait Islander heritage are appropriately taken into consideration. Notably, audio visual technology is utilised in a number of Indigenous court lists, such as the Indigenous List in the Federal Circuit and Family Court of Australia, the Aboriginal Tenancy List in the NSW Civil and Administrative Tribunal and the Walama List in the NSW District Court. The ability to virtually attend proceedings in these lists facilitates access to justice for Aboriginal and Torres Strait Islander persons living in regional and rural communities and encourages their participation in proceedings.

Principles 9 and 10

These principles are concerned with the use of fit for purpose technology and access to equipment to ensure the appropriate quality and scope of service consistent with its public importance. However, neither principle encompasses the concept of online court technology also capturing processes that may technically fall outside of court proceedings, but which may be critical to the efficient resolution of a dispute.

For example, in our members' experience, online court removes the incidental opportunity to settle a matter outside of a hearing. We suggest Principle 10 may be expanded to include access to quarantined spaces in the online environment, such as virtual "break-out rooms" or "advocate rooms" to enable consultations that will not be recorded as part of proceedings.

Principle 12

Under this principle, courts and tribunals are encouraged to develop materials to assist participants in accessing and participating in online hearings. Our family law practitioner members have noted significant variations in applying online hearing practices as between different registries within the Federal Circuit and Family Court of Australia. This inconsistency creates planning and costing difficulties, particularly for those in regional, rural, and remote areas who regularly appear across multiple registries. We suggest that this principle is extended to promote internal consistency and certainty in respect of online hearing practice through harmonised procedural and guidance materials within a particular jurisdiction.



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Thank you for the opportunity to comment. Questions at first instance may be directed to Sonja Hewison, Policy Lawyer, at (02) 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

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President