



Allens Hub
for technology, law & innovation



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NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia
By email: nsw-lrc@justice.nsw.gov.au

Submission to NSW Law Reform Commission, Open Justice: Court and tribunal information: access, disclosure and publication

About us

The Future of Law and Innovation in the Profession research stream ('FLIP Stream') is a strategic alliance between the Law Society of NSW and UNSW Faculty of Law & Justice to undertake and disseminate research into the future of the legal profession in the digital age. The alliance was formed to consider and respond to the issues raised by the Law Society's Future of Law and Innovation in the Profession (FLIP) Report, which examined new forms of legal technology, including artificial intelligence, clients' needs and expectations, new ways of working, community needs and legal education, and technological solutions to facilitate improved access to justice. In 2020 the FLIPstream undertook research into technology and dispute resolution, especially the use of online or remote hearings due to the COVID-19 pandemic. More information about the FLIP stream can be found at <https://www.lawsociety.com.au/about-us/Law-Society-Initiatives/flip/UNSW-collaboration-FLIP-stream#Sustain>

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Overview of Submission

We welcome the opportunity to provide a submission to proposed reforms by the NSW Law Reform Commission ('LRC') to the operation of open justice in courts and tribunals regarding access to information, disclosure and publication.

We recognise the wide scope of the matters raised in the terms of reference across many important issues. However, the purpose of our submissions is to specifically address open justice and technology, drawing on our research in the area. In sum, our submissions are:

- i) Technology and remote hearings can expand open justice in ways beyond a conventional in-person hearing.
- ii) Simultaneously, the ineffective operation of technology or lack of access to adequate technology can detract from open justice.
- iii) To fully enliven the principle of open justice, the public should have the same access to remote hearings as the media.

To begin, we establish some background on open justice, technology and the impact of COVID-19. We then address the terms of reference that relate to technology. Finally, we make submissions on the draft proposals.

Open Justice

Courts are unique institutions that exercise judicial power in accordance with the rule of law. An important aspect of the judicial process, so that the public can see that the law is being applied fairly and impartially, is that it 'proceeds by way of open and public inquiry'.¹

The principle of open justice has been said to be 'one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public ... is an essential quality of an Australian court of justice'.² The rationale behind open justice includes that it operates as a 'check on the performance of judges'³ by allowing for scrutiny, and in turn accountability, which promotes public confidence in the Courts.⁴ Open justice means that courts 'sit in public' so that the courtroom and the evidence tendered are accessible to the public and 'anybody may publish a fair and accurate report of

¹ *Harris v Caladine* (1991) 172 CLR 84, 150. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 461, 496.

² *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) NSWLR 344, 352 [18]. See also *Daubney v Cooper* (1829) 109 ER 438, 441; *Dickason v Dickason* (1913) 17 CLR 50, 51 ('one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings.').

³ Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45, 46.

⁴ *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506, [20] (French CJ); *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, [44]. See also Lord Atkinson's statement in *Scott v Scott* [1913] AC 417, 463 that 'in public trial is to [be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect'.



the proceedings'.⁵ Further, the provision of publicly available reasons gives effect to open justice by explaining the outcome of the trial.⁶ Limited exceptions exist.⁷

Indeed, the first guiding principle adopted by the proposals paper states:

'Open justice, as a principle that is fundamental to the integrity of and confidence in the administration of justice, should only be departed from where necessary'.⁸

Open Justice and COVID-19

Traditionally, court hearings were conducted with all or most participants attending in person. During the peak of the COVID-19 pandemic, courts, being characterised as open public spaces, were forced to close off to the public around the world.⁹ The COVID-19 health measures meant that it would be difficult for courts to continue to operate in their traditional form of a physical courtroom that could be attended by any citizen or members of the media, which would allow for observation, reporting and therefore dissemination of the court's activities.¹⁰

To continue functioning, courts pivoted to remote hearings to ensure they could continue performing their essential service of resolving disputes and prosecutions.¹¹ Under new COVID-19 related law, guidance and practice directions, courts were permitted to make directions for appearance by audio-visual (AVL) technology if it was in the interests of justice to do so.¹² While in recent years there has

⁵ *Hogan v Hinch* (2011) 243 CLR 506, [20], [22] (French CJ). See also *Dickason v Dickason* (1913) 17 CLR 50; *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

⁶ Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494.

⁷ Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49 *Federal Law Review* 161, 167 ('The COVID-19 Pandemic, the Courts and Online Hearings'). *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131, 160; *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21] (French CJ). The exceptions include where it is 'really necessary to secure the proper administration of justice' in a particular case, such as to ensure procedural fairness: *John Fairfax and Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477. Legislation may also place restrictions on open justice: see, e.g. *Civil Procedure Act 2005* (NSW) s 71; *Court Suppression and Nonpublication Orders Act 2010* (NSW) sch 2 item 2; *Coroners Act 2009* (NSW) s 47(2); *Crimes (Appeal and Review) Act 2001* (NSW) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30K.

⁸ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) 7 [1.26].

⁹ See e.g. *Quirk v DiFiore*, SDNY, No. 20-2057, [23] (when a labour union initiated a class action against the New York Southern District Court alleging the Court's inadequate safety standards had 'created a breeding ground for the spread of COVID-19').

¹⁰ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 167.

¹¹ Michael Legg, 'The COVID-19 Pandemic and Courts as Essential Services' (2020) 94 *Australian Law Journal* 479.

¹² See for example *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020* (NSW); *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 22C(3) and (4); *COVID-19 Disease*



been increasing expansion of the use of AVL technology to conduct procedural matters such as directions hearings, call-overs or bail hearings, the full trial has been excluded outside of a few pilot projects.¹³ AVLs were mostly a tool to improve accessibility, security, convenience or efficiency in specific circumstances.¹⁴

However, during COVID-19, AVLs were used for all types of cases, including fully contested hearings, at both trial and appeal.¹⁵ This was principally a period of action, where courts sought to continue operations and dispense justice without building backlogs.¹⁶ Adjournments were only made where virtual solutions were not feasible or just.¹⁷ Similar responses occurred around the world.¹⁸

Technology became the universal substitute for physical access.¹⁹ Even if courtrooms were open, the majority of the public should not have attended if acting consistently with health advice and supporting laws. Technology facilitated open justice, and indeed the wheels of justice, where otherwise there may have been none.²⁰

Emergency (Miscellaneous Provisions) Act 2020 (Tas) s17(e); *COVID-19 Emergency Response Act 2020* (SA) s17; *COVID 19 Omnibus (Emergency Measures) Act 2020* (VIC) Part 3.2, 3.3, 3.8, 3.9; Magistrates Courts of Queensland, *Practice Direction No. 3 of 2020 – Court Arrangements (COVID-19)* [7]; *Evidence (Miscellaneous Provisions) Act 1958* (VIC) ss 42L(7), 42M(7), s42MA, s42E(1) and 42P(7); Federal Court of Australia, *Special Measures in Response to COVID-19 (SMIN-1)*, 23 March 2020, [7].

¹³ Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *UNSW Law Journal* 126, 128 ('The Courts, the Remote Hearing and the Pandemic').

¹⁴ Generally, there are four well-established precedents for using AVLs: (1) for vulnerable witnesses, such as children; (2) for other witnesses, such as experts or witnesses in a foreign jurisdiction, to testify from a location outside the courtroom for cost-savings or convenience; (3) to link prisoners in correctional facilities to courtrooms to conduct remand, pre-trial hearings or bail applications; and (4) to provide ancillary services such as language interpreting or expert reports. See *ibid* 131.

¹⁵ *Ibid* 144-146.

¹⁶ *Ibid* 129.

¹⁷ *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486, [6]; *Ozamac Pty Ltd v Jackanic* [2020] VCC 790, [6]; *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504, [25]; *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504, [35]. See also *A Local Authority v Mother* [2020] EWHC 1086 (Fam), [44] (Lieven J).

¹⁸ See Luciana Ortiz Zaroni, Caio Marinho and V্লাইডিমির Passos de Freitas, 'International Survey of the Judiciary System – COVID 19 Pandemic' (Research Report, International Association for Court Administration, 2020) 2.

¹⁹ Legg and Song, 'The Courts, the Remote Hearing and the Pandemic' (n 13) 144.

²⁰ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 169.



Open Justice and Technology

Contrary to public perception, technology has always had a significant role within courts.²¹ Supportive technology is used as a matter of routine,²² and includes AVs, e-filing, e-discovery, real-time transcription services, and the use of computing devices on the bench and at the bar table.²³ AV technology in particular has been in use for decades,²⁴ reaching ubiquity across all Australian courts by 2004.²⁵ The Federal Court was the first Australian court to broadcast live AV of a judgment summary over the internet.²⁶ Meanwhile, since 1 October 2013, in an effort to ‘improve public access to its hearings’, the High Court began to publish audio-visual recordings of Full Court hearings heard in Canberra on their website.²⁷ In New South Wales, the Online Court was pioneered well before COVID-19 in 2015²⁸ and more recently the Supreme Court began livestreaming cases on popular streaming services such as YouTube.²⁹

Thus, while COVID-19 brought remote hearings into the spotlight, a significant amount of progress and research has previously been made on the impact of technology on essential judicial values like open justice. Additionally, the use of other non-technology-related steps, such as the availability of transcripts (typically at a price) and the provision of reasons (usually some time after the hearing), were all in addition to the public having physical access to a hearing.³⁰

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- ²¹ Lyria Bennett Moses, ‘Artificial Intelligence in the Courts, Legal Academia and Legal Practice’ (2017) 91(7) *Australian Law Journal* 561, 561.
- ²² Chief Justice Tom Bathurst AC, Supreme Court of New South Wales, ‘ADR, ODR and AI-DR, or Do We Even Need Courts Anymore?’ (Inaugural Supreme Court ADR Address, 20 September 2018) 4.
- ²³ Michael Legg, ‘Changes’ in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis 2013) 13; Margaret Beazley, ‘Law in the Age of the Algorithm’ (State of the Profession Address, Sydney, 21 September 2017) 9-10.
- ²⁴ Victorian Parliamentary Law Reform Committee, *Technology and the Law*, Report (May 1999) [10.33]; Anne Wallace, Sharyn Roach Anleu and Kathy Mack, ‘Judicial Engagement and AV Links: Judicial Perceptions from Australian Courts’ (2019) 26(1) *International Journal of the Legal Profession* 51, 53.
- ²⁵ Anne Wallace and Roz Macdonald, ‘Review of the Extent of Courtroom Technology in Australia’ 12(3) (2004) *William & Mary Bill of Rights Journal* 649, 651.
- ²⁶ See Federal Court of Australia, ‘Videos: Archive of Judgment Summaries’ (Webpage) <<https://www.fedcourt.gov.au/digital-law-library/videos>>. The case was *Australian Olympic Committee Inc v Big Fights Inc* [1999] FCA 1042. See also ‘Webcasts and Podcasts’, *Supreme Court of Victoria* (Web Page) <<https://www.supremecourt.vic.gov.au/about-the-court/webcasts-and-podcasts>>.
- ²⁷ High Court of Australia, *Media Release: Audio-Visual Recordings of Full Court Proceedings*, (Media Release, 1 October 2013) <https://www.hcourt.gov.au/index.php?option=com_acymailing&ctrl=archive&task=view&listid=6-judgment-delivery-notification&mailid=28-media-release>.
- ²⁸ District Court of New South Wales, *NSW Pioneers Online Courts*, (Media Release, 6 November 2015).
- ²⁹ For example see: Supreme Court of New South Wales, “Judgment – Queensland Flood Class Action” (YouTube, 29 November 2019) <<https://www.youtube.com/watch?v=YJXVTEg7TT4&t=3796s>>; Supreme Court of New South Wales, “Dick Smith Holdings Class Action Before Justice Ball” (YouTube, 30 March 2020) <<https://www.youtube.com/watch?v=n0vQJWjO4Tw>>.
- ³⁰ Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings’ (n 7) 169.



Where the physical hearing was unavailable during COVID-19, courts were forced to fully pivot to remote hearings. We categorise the remote hearings that took place into four broad types based on the technology employed: (1) telephone; (2) third party audio visual links (e.g. platforms such as Microsoft Teams, Cisco WebEx and Zoom); (3) court-based or supplied audio visual links; and (4) third party online streaming services (e.g. YouTube).³¹ While these forms of remote hearing were typically alternatives and therefore the use of one, meant that another would not be used, third party online streaming services stand alone as they typically only permit the one way broadcast of the hearing rather than two way audio-visual participation. We discuss each from the perspective of open justice and various related elements, such as capacity to permit observation of the hearing, but also judicial control and the ability to protect confidential/sensitive information. The analysis is summarised in Table 1.

³¹ Michael Legg and Anthony Song, 'Commercial Litigation and COVID-19 - the Role and Limits of Technology' (2020) 48(2) *Australian Business Law Review* 159, 160-161 ('Commercial Litigation and COVID-19'); Legg and Song 'The Courts, the Remote Hearing and the Pandemic' (n 13).



Table 1 – Comparison of Types of Remote Hearing

Elements of Open Justice	Type of Remote Hearing			
	Telephone	Third Party bi-directional Audio visual links (AVLs) (e.g. Zoom, Microsoft Teams)	Proprietary Court-based Audio visual links (AVLs)	Third Party one-directional Online Streaming (e.g. YouTube)
Virtual Courtroom Capacity	Small capacity	Large capacity	Varies, but generally substantially less capacity than third party solutions.	Effectively unlimited capacity
Means of Access	Calling in	Weblink and/or password required	Invite-only Generally hearing participants only	Weblink, often posted on social media
Ease of Access: Journalists	Low	Medium	Medium	High
Ease of Access: General Public	Low	Medium	Low	High
Infrastructure Required to Observe	Low	Medium	Medium	Medium
Level of Judicial Control	Low	Medium – High (depends on access method)	High	Low
Protection of Confidential/Sensitive Information	Medium	Medium (depends on access method)	High	Low



The extent to which technology can be used to facilitate open justice in hearings largely hinges on two aspects: 1) the technology that is used; and 2) the purpose of the hearing.

1) Technology Used in the Hearing

The technology that is used in the remote hearing has a direct impact on whether open justice is expanded or reduced compared to the in-person hearing.³²

Telephone Hearings

The online hearing where some or all participants ‘dial in’ is frequently promoted as having the advantage of efficiency—with there being no need for travel, no documents to copy and carry, and less waiting.³³ However, the need to obtain dial-in details excludes people who intend to observe a hearing but are unable to do so due to lack of preparedness or technical difficulties.³⁴ The capacity of telephone is also a limiting factor compared to other technologies. In general, calls are designed and best used for one-on-one conversations, or for a couple of people where a teleconference is used.

Regarding the quality of communication in telephone hearings, judges have also commented there is greater difficulty distinguishing between parties as they must rely on audio only, particularly if voices overlap and there is a time lag.³⁵ For observing citizens, this can hinder their ability to listen in and properly understand what is occurring in a case. There is a further lack of immersion as participants are unable to see evidence that is presented to the court. This may generate a greater sense of disconnection when trying to observe phone hearings for the public, negatively impacting a person’s perception of whether ‘justice is seen to be done’. During COVID-19, while videoconferencing was preferred, sometimes it was simply not available due to resource constraints.³⁶

³² Legg and Song, ‘The Courts, the Remote Hearing and the Pandemic’ (n 13) 141, 143; 155-156.

³³ Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings’ (n 7) 155; Emma Rowden, ‘Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?’ (2018) 14(2) *Law, Culture and the Humanities* 263, 271 (finding that participants in remote hearings saw it as ‘speeding up court processes’). These advantages do not necessarily materialise, with many courts and parties finding that online hearings take longer than face-to-face hearings: Nye Perram, ‘Video Justice: Ten Years of Progress for Courts in Eight Weeks’, *The Australian Financial Review* (Sydney, 15 May 2020) 33 (estimating an online trial as between 20 and 40 per cent slower and describing it as ‘like swimming in aspic’).

³⁴ Michelle Hamlyn, ‘A Health Check on Open Justice in the Age of COVID-19: The Case for the Ongoing Relevance of Court Reporters’ (2020) 42(5) *Bulletin (Law Society of South Australia)* 6, 8.

³⁵ Ruth Higgins, ‘Courts in the Pandemic – A View from the Bench’, *Journal of the NSW Bar Association* (online, Winter 2020) <<https://barnews.nswbar.asn.au/winter-2020/courts-in-the-pandemic/>>.

³⁶ Legg and Song, ‘The Courts, the Remote Hearing and the Pandemic’ (n 13) 159.



Third Party Bi-directional AVLs

As to AVLs, facilitating access to a court through a weblink can be both beneficial or detrimental to open justice.

On one hand, accessing a hearing through an internet weblink is far more convenient than having to physically travel to the courtroom to attend the hearing. The draft proposal articulates that virtual access to proceedings can improve public access to proceedings, particularly in regional or remote locations.³⁷ We agree and note it is widely recognised amongst scholars that AVLs can improve accessibility and expedite the administration of justice where distance, cost or poor health is an issue.³⁸

However, the accessibility of a hearing using third party provided AVL turns on the ease with which the internet weblink can be obtained. The link may be provided to parties and their lawyers only, be provided to non-parties upon request, or be published to the public generally. This has little to do with technology and more to do with court procedures. However, while making a link publicly available will promote open justice there are other challenges such as security and confidentiality.

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A high-profile public example of such problems is “Zoombombing” – where uninvited persons attending a meeting remotely either surreptitiously listen in or, where the link is bi-directional, disrupt the meeting. For example, a public forum hosted online by Events South Australia and online teaching at a Queensland primary school over a bidirectional link were interrupted by the display of pornography by an anonymous Zoombomber.³⁹ Such conduct in a trial could derail the administration of justice.

Where you have proceedings that involve, for example ... the child victim of a crime, or a police informer, or a trade secret, proceedings should continue in public but there should be [at] various times either no reference or a pseudonym reference ... to the name or the object. Now if you’re doing a hearing in person, every now and then a lawyer slips up and it comes out. And it’s dealt with by the judge reminding everyone who is present of the severe penalties that would occur to them if that is breached.

³⁷ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) 99.

³⁸ Legg and Song, ‘The Courts, the Remote Hearing and the Pandemic’ (n 13) 132-133.

³⁹ See Michael Legg, ‘OK Zoomer: The impacts and future of working from home’ (2020) 73 *Law Society of NSW Journal* 77.



When you have an online system without a delay you can't do that. And so you have this incredible risk of it all getting out of control. You would need a platform that allowed a delay for third party people who were viewing and on an instantaneous, as it were, for the parties and the witnesses. And the technology is simply not there at the moment.⁴⁰

These concerns show that the requirements of open justice in an online hearing need to be handled carefully with attention to the circumstances of each situation.

It has also been suggested that having a video link may convey more information about a party or witness than an in-person hearing. For example, in *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486 Justice Perram observed that '[m]y impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court'.⁴¹ For public observants, this is of particular benefit, as in a large hearing room, usually the view from the public gallery is not as clear as what judges, juries or parties to a case see. One survey conducted, albeit of a commercial client (who often sit behind counsel) stated they felt 'much more connected with the proceedings' as everyone was on equal footing and there was an identical experience in the virtual hearing room.⁴²

However, a key limitation of whether AVLS can properly facilitate open justice is whether there is adequate capability and capacity in the technology and telecommunications infrastructure currently installed.⁴³ This concern was highlighted in Consultation Paper 22 that some courts or tribunals may not have adequate technology and resources to facilitate virtual access to proceedings.⁴⁴ For instance, the Supreme Court of New South Wales, while accepting that open justice applied to the Virtual Courtroom, also discouraged practitioners from 'the wide sharing of Virtual Courtroom contact information in order to minimise interruptions in the Virtual Courtroom environment'.⁴⁵ The Court was mainly concerned about the number of lawyers seeking to be part of the Virtual Courtroom.⁴⁶ This is because where there are multiple people using the technology, this can create connection

⁴⁰ Gilbert + Tobin Centre of Public Law, University of New South Wales and Australian Institute of Administrative Law, 'Fairness in Virtual Courtrooms' (Webinar, 14 August 2020).
<https://www.youtube.com/watch?v=eectPocLjdl&feature=youtu.be>.

⁴¹ *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486, [19].

⁴² Jean-Pierre Douglas-Henry and Ben Sanderson, 'Virtual Hearings Report' (Research Report, DLA Piper, 14 May 2020) 14.

⁴³ Legg and Song, 'Commercial Litigation and COVID-19' (n **Error! Bookmark not defined.**) 167.

⁴⁴ NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) 266 [12.13].

⁴⁵ Supreme Court of New South Wales, *Virtual Courtroom Practitioner's Fact Sheet* (Fact Sheet, March 2020) 3 <<https://www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/Fact%20Sheet%20-%20Practitioners.pdf>>.

⁴⁶ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 168.



problems such as time delays and disconnections. Such a problem can be magnified by trying to provide open access to the public.⁴⁷

These infrastructure barriers to open justice can be exacerbated by the inequality of access to technology by the public. This may arise from the lack of digital literacy or equipment to access online services. To observe an AVL at a similar level to participants in an in-person hearing, factors such as a fast internet connection, a large enough screen and a clear audio device are needed. Thus, often access to technology may not be an all or nothing experience but rather a question of speed and quality.⁴⁸ A review of the use of AVL found that the way in which an AVL is employed, such as the quality of the image and sound, can impact on service delivery, and in turn on justice outcomes.⁴⁹ During COVID-19, there were examples of parties having difficulty maintaining connections to virtual hearings, not as a result of the court's system, but as a consequence of people's own internet connections or devices.⁵⁰ While the court does not require perfection in performance, it must be satisfied at a minimum the AVL is watchable without dropping out. Otherwise AVLs can detract from open justice compared to the standard of an in-person hearing.

Projecting forward it is relevant to note that bi-directional third party platforms such as Zoom and Microsoft Teams are developed and supported by large experienced engineering teams with substantial global budgets to support hundreds of millions of daily meeting participants. They devote considerable engineering design effort to provide audio visual quality even when user bandwidth is low or erratic. Smaller proprietary platforms such as current court-based AVLs are unlikely to be able to provide comparable service quality and reliability.

Court-based AVLs

Court-based AVLs provide audio visual connectivity in a similar manner to general third party bi-directional platforms such as Zoom, but differ in that they are web portals designed and used specifically for court-established video links. Users must obtain access from the court.

During the pandemic the Supreme Court of New South Wales found that initially third party platform AVLs worked more smoothly than the Court's video facilities. However, after improvements to court bandwidth and the 'triaging' of virtual hearings, eventually both became equally efficient.⁵¹

⁴⁷ Ibid 168.

⁴⁸ Ibid 179; *R v Macdonald (No 11)*[2020] NSWSC 382. Capic at [10] (Perram J).

⁴⁹ Emma Rowden et al, 'Court of the Future Network, Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings' (Research Report, 28 May 2017) <<https://courtofthefuture.org/publications/gateways-to-justice-guidelines-for-remote-participation-in-court/>>.

⁵⁰ Legg and Song, 'Commercial Litigation and COVID-19' (n **Error! Bookmark not defined.**) 167.

⁵¹ Higgins (n 35).



As to means of access, cases are mostly observable by invite.⁵² For instance, the Family Court and Federal Circuit Court allows remote hearings to be observed by any member of the public, subject to a judge's usual discretion to determine that only certain people should be present. However, in order to access the webcasts, a weblink (and potentially a password) are required. Thus, members of the public are required to contact the Registry by email by no later than 8:30am local time on the morning of the hearing.⁵³

These contrasts to the spontaneity of access with in-person hearings, where a person can arrive at the court on any given day without needing to plan ahead. There is also the loss of flexibility as observers can no longer join at any time of the day and enter and exit cases as they please. This flexibility is often indispensable as it is not uncommon for observants to join a hearing to then find the hearing needs to be adjourned.

It may be possible to meet the needs of the court and the public.⁵⁴ One option is to provide a separate audio channel or technology for the observing public to use, such as a livestreaming platform (discussed below) so that interruptions to the parties are avoided.⁵⁵

One-directional Livestreaming Platforms

One-directional livestreaming technology such YouTube could substantially extend open justice because the constraint of courtroom capacity is removed. In the Federal Court, a Special Measures Information Note (SMIN-1), in considering how longer hearings could be conducted, stated that consideration must be given to 'the ability to live stream hearings so as to facilitate open and accessible courts.'⁵⁶ The Supreme Court of Victoria in their terms of use for their webcasts states the footage is provided to 'enable litigants and interested persons to view the proceedings'.⁵⁷ While live-streaming courts was not unheard of pre-pandemic, the array of proceedings streamed virtually is

⁵² Legg and Song, 'The Courts, the Remote Hearing and the Pandemic' (n 13) 156; See e.g. *Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing)* [2020] FCA 664, [5].

⁵³ Family Court of Australia, *Practitioner and Litigant Guide to Virtual Hearings and Microsoft Teams* (Web Page, 22 April 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/virtual-hearings>>.

⁵⁴ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 169.

⁵⁵ Joint Technology Committee, *Strategic Issues to Consider When Starting Virtual Hearings* (Bulletin Report, 7 April 2020) 3 <<https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf>>.

⁵⁶ Federal Court of Australia, *Special Measures in Response to COVID-19 (SMIN-1)*, 23 March 2020, [9.3].

⁵⁷ See Terms of Use 2(a): Supreme Court of Victoria, *Supreme Court of Victoria Webcasting – Terms of Use* (Web Page) <<https://www.streaming.scvwebcast1.com/>>.



notable.⁵⁸ For example, in the US, over 30 State Supreme Courts have livestreamed their proceedings, which according to the justices involved, were an ‘unqualified success’.⁵⁹

Technology offers the prospect of increasing open justice by making the courts’ work available for viewing, not just in the courtroom or through the provision of reasons in a written judgment but through videoconferencing and streaming services such as YouTube.⁶⁰ However, while livestreaming over the internet provides the greatest dissemination, it may not be necessary for every case.⁶¹

The one-directional nature of livestreaming removes the danger of “Zoombombing”-style disruptions.

2) Purpose of the Hearing

Whether, and what type of technology, is needed to promote open justice, but also to guard against unwanted intrusions or the protection of confidential and sensitive matters, depends on the purpose of the hearing and what is at stake.⁶²

In our previous research the purpose of a hearing has been classified by reference to three different criteria.⁶³ Two are of relevance to open justice. First, is the importance of the matter. This may be examined in terms of the step or issue that is to be addressed i.e., is it a procedural or timetabling step or is it the resolution of important questions of fact or law. Another dimension is the type of matter, i.e., is it criminal, family or civil, and what are the ramifications from the outcome in the matter, i.e., a fine or imprisonment, loss of child custody or large damages payouts. In short, what is at stake?

Second, and related to the purpose of the hearing is the type of hearing, including whether it is a: (1) directions hearing/call over/scheduling conference; (2) interlocutory dispute/motion; (3) trial; or (4) appeal.⁶⁴ The type of hearing may align with the importance of the step or issue to be addressed i.e., the trial hearing generally determines key matters that affect success while a directions hearing may not. However, important issues may also be resolved at interlocutory hearings.

Matters that are procedural or interlocutory probably do not need to be broadcast through some form of livestreaming platform. Making the link to the AVL available to a person who registers with the court is probably sufficient. Equally trials, sentencing hearings and appeals are dealing with the resolution of important questions of fact or law and may need to be made generally available to the

⁵⁸ Julie Marie Baldwin, John Eassey and Erika Brooke, ‘Court Operations During the COVID-19 Pandemic’ [2020] 45 *American Journal of Criminal Justice* 743, 748.

⁵⁹ Amy Howe, ‘Courtroom access: Laboratories for live-streaming?’ *SCOTUSblog* (Blog Post, 29 April 2020) <<https://www.scotusblog.com/2020/04/courtroom-access-laboratories-for-live-streaming/>>.

⁶⁰ Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings’ (n 7) 168; Jason Bosland and Judith Townend, ‘Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom’ (2018) 23(4) *Communications Law* 183, 190.

⁶¹ Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings’ (n 7) 168.

⁶² Legg and Song, ‘The Courts, the Remote Hearing and the Pandemic’ (n 13) 161-164.

⁶³ *Ibid* 161.

⁶⁴ *Ibid*.



public. Of course, the subject matter of some cases is likely to attract more interest than others. However, depending on the type of matter and what is at issue in the particular hearing it may be necessary for the court to have the functionality available to be able to exclude the public so as to protect confidentiality and other sensitive information.

All cases, at all steps should be able to accessed by the public, but the type of technology employed may differ.

After considering the positives and negatives of a particular technology and the purpose of the hearing, courts need to make a choice on which technology is appropriate for their remote hearing. 'Appropriate' means that the technology is capable of supporting the necessary level of public viewing. The manner in which the hearing is conducted, including the technology employed, also needs sufficient security and functionality to protect confidentiality and other sensitive information. The concern is that appropriate technology may not be available in all cases or that insufficient support for the judiciary may see inappropriate technology employed because of a lack of expertise.

It is the court which determines whether such openness will be provided and its extent. Access may be straightforward, for instance, by clicking on a link; or there may be additional hurdles, such as requesting invitations. Courts' choices about technology are also choices about who or how many members of the public have access.⁶⁵

3) Security Considerations

Exploring the question of appropriate technology from a security perspective involves three questions: (1) What are we trying to protect? (2) What could go wrong? (3) Who or what are the threats to the system.

The purpose is to protect both the smooth administration of justice (judicially controlled proceedings in compliance with court rules, minimal disruption to proceedings, those participating can follow the proceedings, etc) and open justice (the ability of the media and the public to follow proceedings to the extent normally permitted by law, with some assurance that what they are seeing is authentic). It is also important that certain information uttered or shown in the court room *not* become public where a judge determines this is necessary for reasons such as confidentiality, risk of personal harm, and national security. What was previously accomplished by physical architecture, court officers, and security measures must now be accomplished through digital means.

A variety of things could go wrong. In terms of smooth administration of justice, there are technical failures such as lost connections, Zoom-bombing, and the possibility that witnesses will inappropriately access a virtual stream of proceedings. Further, if recordings of proceedings were available, jurors could watch an earlier mistrial. Open justice might also go further than what was possible in a standard courtroom. Information that should not be public may become public. Court proceedings may also become like theatre – judges and witnesses may become more conscious of

⁶⁵ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 169.



minute-by-minute public opinion and false accusations may find a larger audience. Personal anonymity and so security of courtroom actors (judges, lawyers, prosecutors, witnesses and jurors) may be compromised alongside increased celebrity. Further, if recordings of streams are available, hearings may become searchable, with testimony (including false allegations) hard to remove from the Internet.

Threats come from various sources. There are some (activists, parties and others affected by outcome, hostile nation states) who may seek to disrupt specific proceedings or *all* proceedings. Some people (e.g. for laughs, disgruntled employees, corrupt officials, terrorists) may manipulate streams or recordings to manipulate what people apparently said or how they appeared in the virtual court room. Such behaviour (if it exists or if people think it is happening) may lead the public to distrust what they “see” happening in virtual courtrooms, which itself could undermine open justice. The stream could also be manipulated by those inside the system to hide corruption or incompetence. Platform providers may also exploit the reliance of courts on their systems, exploiting them financially by threatening to reduce quality.

While there are many different solutions to these security challenges, some are more effective at achieving a good balance than others. For example, security screening those wishing to attend the hearing may limit attendance to a “trusted” audience (and thus reduce the threat of bad behaviour), but would have a very significant effect on open justice. Open pre-registration to authenticated viewers will still reduce open justice, but to a far lesser degree, albeit increasing the risk that people will disobey the rules (such as a requirement not to record proceedings). But any solution will be a compromise and will depend on how the goals are weighted.

The best solution is likely to involve a bi-directional password-protected meeting (either court based or third party platform) for those entitled to participate in proceedings, together with an additional one-directional delayed livestream available to public viewers (the issue of registration is discussed below). For simplicity and security likely the two streams should be provided by distinct and physically disconnected systems. The password protected meeting should have a court officer able to mute or eject unruly participants where a judge so orders. While there should be rules (legal and technical) against recording proceedings, these are unlikely to lead to perfect compliance, and recording is likely impossible to prevent by entirely technical means. The experience of even mature streaming platforms such as Netflix shows that in practice unauthorised copying cannot be prevented. While this means the stream *may* be available to future jurors and witnesses, this is very difficult to prevent without abandoning open justice altogether. Registration might reduce the risk, and oral or written undertakings can also be asked of those who should not view the proceedings. Details, such as the time lag on the live stream, will depend on the time that it might reasonably take to raise a motion that particular information be suppressed (once the motion is raised, the live stream can be paused). There should also be an agreed protocol as to what occurs if the system fails (for example a backup technology platform that can be used).



Proposal 11.1: Virtual access to proceedings

Proposal 11.1(1) A clear process should be established for journalists and the public to access court and tribunal proceedings virtually.

We agree that a clear process should be established for journalists and the public to access court and tribunal proceedings virtually. As outlined above, this would involve a careful consideration of the appropriate technology against the purpose of the hearing.

However, we argue that the current arrangements are unduly weighed towards the media and do not meet the guiding principles articulated by the proposal which call for any departure from open justice to be the least restrictive approach.⁶⁶ Based on our definition of open justice, we submit that any person should have equal access to the courts as the media does. Journalists should not be given privileges above ordinary citizens as to do so would be a departure from the underlying principle of open justice that ‘anybody may publish a fair and accurate report of the proceedings’.⁶⁷ Various reports have criticised that the public were not given the same access as accredited media and there was often great difficulty to request access to observe certain courts.⁶⁸

The existing proposals justify the focus on the media on the assumption that ‘few members of the public have the time, or even the inclination, to attend courts in person.’⁶⁹ This is elaborated on in Consultation Paper 22 that while historically it was more common for people to attend and observe court proceedings in person, it is rarer today as the public now mostly relies on media reports for information about what has taken place in courts.⁷⁰

The evidence today does not suggest this to be true. For example, in *The Queen v The Herald & Weekly Times Pty Ltd* [2021] VSC 253 (involving George Pell) the Supreme Court of Victoria noted that about 42,000 viewers tuned into the livestream of the hearing in June. The hearing held over two days was

⁶⁶ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) 7. Particularly Guiding Principles 4. Any legislation that departs from the principle of open justice and/or limits the discretion of judicial officers should (so far as practicable) be uniform and consistent; and 5. Any departure from open justice should be the least restrictive approach, as appropriate for the circumstances of the case.

⁶⁷ *Hogan v Hinch* (2011) 243 CLR 506, [20], [22] (French CJ). See also *Dickason v Dickason* (1913) 17 CLR 50; *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

⁶⁸ Joe Tomlinson et al, ‘Judicial Review in the Administrative Court During the COVID-19 Pandemic’ (Research Report, Public Law Project, 15 April 2020) 11; Natalie Byrom, Sarah Beardon and Abby Kendrick, ‘The Impact of COVID-19 Measures on the Civil Justice System’ (Research Report, Civil Justice Council, May 2020) 50.

⁶⁹ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) 2 [1.13].

⁷⁰ NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) 5 [1.22].



ultimately viewed about 139,000 times.⁷¹ While this was a matter of high public interest, the general upwards trend of the increase in proceedings livestreamed from the Supreme Court of Victoria from 27 in 2016, 30 in 2017 and 38 in 2018 suggests there is increasing demand for the service.⁷² In the United Kingdom, a livestream of the Brexit hearing in UK Supreme Court recorded four million hits on the first morning of the hearings alone.⁷³ Similarly, in the United States, an average of 11 million viewers watched the opening arguments of Donald Trump’s impeachment hearing.⁷⁴ While these are high-profile cases, the numbers alone suggest there is a growing interest by the public in seeing court cases unfold first-hand. There is not yet enough data to conclude that the public simply have no interest in watching livestreamed court cases as it is only recently that the phenomena has entered the public’s consciousness.

Reference should also be made to multi-party proceedings and class actions where there are numerous members of the public who are group members and will have their rights determined by litigation but they cannot all be physically present.⁷⁵ Moreover, there will also be cases which have a high precedent value so that even though they do not determine a person’s rights directly (i.e. they are not a party or group member), the operation of stare decisis means that their claim will be resolved in line with the case that creates a precedent. Full access to these cases for the public should be provided.

We also note that academics who conduct research into the law and the legal process may require access to hearings as part of their research. Moreover, academics will often be a source of explanation for the public (and the media) as to the meaning and ramifications of court cases. To favour the media over the public is to hamper the important role of academic research. Similarly the provision of open justice supports legal education, both for law students and equally for those in the general public who might wish to gain a deeper understanding of the law and how justice operates in Australia. Otherwise the predominant material available to watch online are real (open justice) and fictionalised (cinema and tv) hearings of other countries.

There is also symbolic importance to equalising the access to the greater public. Open justice is broader than just the media and journalists. Open justice is actually an element of the rule of law as it instils confidence in the public. While in performing the reporting role, media organisations act as

⁷¹ Marnie Banger, ‘Thousands Watched Pell Hearing Online’, *7NEWS* (online, 14 November 2019) <<https://7news.com.au/news/crime/thousands-watched-pell-hearing-online-c-556910>>.

⁷² Supreme Court of Victoria, *Annual Report 2017-19*, (Annual Report, November 2019) 11.

⁷³ Amy Howe, ‘Courtroom Access: No “Performances,” Just a “Massive Civics Lesson” When Supreme Courts Overseas Live-Stream Their Hearings’ *SCOTUSblog* (Blog Post, 30 April 2020) <<https://www.scotusblog.com/2020/04/courtroom-access-no-performances-just-a-massive-civics-lesson-when-supreme-courts-overseas-live-stream-their-hearings/>>.

⁷⁴ Brian Stelter, ‘How Many People Are Watching the Impeachment Trial? Here Are the Numbers...’ *CNN* (online, 12 February 2021) <<https://www.cnn.com/2021/02/11/media/us-senate-impeachment-trial-reliable-sources/index.html>>.

⁷⁵ Michael Legg, ‘Class Action Settlements in Australia - The Need for Greater Scrutiny’ (2014) 38 *Melbourne University Law Review* 590, 614-618.



surrogates for the public,⁷⁶ the law should not exclude the option for the public to attend and observe the proceeding themselves.

Proposal 11.1(2) Courts and tribunals should be able to control registration for virtual access to proceedings.

Concerns have been raised that the courts and tribunals may be unable to control the conduct of observers who access proceedings virtually. Potential risks include unauthorised recording of proceedings or reporting of proceedings or information that is subject to suppression or non-publication orders.

We generally agree that a system of registration should be used in situations where it is needed to protect the rights of victims, witnesses, national security and confidentiality. This is especially for cases where a non-publication or suppression order are in place as it will assist in determining liability in the event of a breach of the order. Further an appropriate broadcast delay should be included in conjunction with a pause button to permit the removal of material from the transmitted stream by the judge. More symbolically however, retaining a measure of control is important in ensuring the authority of a court is transferred into the digital realm. Even before COVID-19, the literature had discussed the need for judges to be, and seen to be, actively ‘taking control’ of proceedings.⁷⁷ In line with this, the third guiding principle of the proposals states:

The power and discretion of the judicial officer to control court proceedings and to determine open justice issues, in accordance with the circumstances of each case, should be preserved to the maximum extent possible.⁷⁸

The work undertaken by a judge in a courtroom is the most publicly visible aspect of their role and helps to sustain their impartiality and authority.⁷⁹ The judge embodies the independent authority of the court, as an adjudicator and as the authority responsible for managing the court and its participants.⁸⁰ One essential judicial task of the judge is to control and manage the conduct of court proceedings to achieve a fair trial. This requires not just monitoring the behaviour of all the parties, witnesses, lawyers and jurors, but also the public observants including the media and members of the public.⁸¹

^{76.} NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) 6 [1.23]; Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) [5.30].

^{77.} Emma Rowden and Anne Wallace, ‘Remote Judging: the Impact of Video Links on the Image and the Role of the Judge’ (2018) 14(4) *International Journal of Law in Context* 504, 511 (‘Remote Judging’).

^{78.} New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) [1.26] 7.

^{79.} Rowden and Wallace, ‘Remote Judging’ (n 77) 504-505.

^{80.} Ibid 505.

^{81.} Ibid 510



Traditionally, the location of the judge has been synonymous with the courtroom.⁸² Moving outside the courtroom can impact the image of a judge and potentially weaken the public's perception of their judicial authority.⁸³ This is most pronounced for digital hearings, where the case can for example, be conducted in a living room. Historically, the place of trial had significance.⁸⁴ Without the location of the courtroom, the 'trial may lose its potency' as 'the experience of the remote witness room may not engender the same feeling of awe and respect of the law.'⁸⁵

Conventionally, the cultural image of the judge and courtroom and their mere judicial presence alone may serve to deter any challenges to authority, such as choosing to ignore rules or behaving impolitely towards the judge or court staff.⁸⁶ We agree that giving the court the power to register and control courtroom participants, while punishing inappropriate behaviour as contempt of court can otherwise preserve judicial authority in the absence of the civic atmosphere of a courtroom.⁸⁷

A further concern is that additional people may watch the proceedings 'off screen'.⁸⁸ This may be intentional or unintentional, especially as participants join from shared-homes.⁸⁹ This is a major issue in circumstances where suppression or non-publication orders are in force. In the literature, this issue has often focussed on cross-examination, where besides other lay witnesses being able to listen to the cross-examination, it is also possible for witnesses to be coached, coerced or influenced.⁹⁰ This was recently illustrated in one viral video from the United States where an accused was found to be in the same house as the victim during a virtual court case, violating his restraining order.⁹¹ Judges in Australia have also considered this issue. For instance, in *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486, Justice Perram accepted that there was a risk of somebody being in the room coaching the witness or suggesting answers out of earshot. However, in the particular case, being 'a class action about allegedly defective gear boxes, not a fraud trial,' the problem was not thought to be acute.⁹² However, because suppression and non-publication orders are for more sensitive cases, this argument is not directly applicable. Thus, more pragmatic solutions such as registration of users and acknowledgement of the prohibition on recording the proceedings and declarations that no

⁸² Ibid 504.

⁸³ Legg and Song, 'The Courts, the Remote Hearing and the Pandemic' (n 13) 143.

⁸⁴ Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings' (n 7) 182.

⁸⁵ Linda Mulcahy, 'The Unbearable Lightness of Being? Shifts Towards the Virtual Trial' (2008) 35(4) *Journal of Law and Society* 464, 481-482.

⁸⁶ Rowden and Wallace, 'Remote Judging' (n 77) 515.

⁸⁷ Legg and Song, 'The Courts, the Remote Hearing and the Pandemic' (n 13) 141-144, 155-157.

⁸⁸ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information: Access Disclosure and Publication*, Draft Proposals (2021) 100 [11.6]; NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*, Consultation Paper 22 (2020) [12.16].

⁸⁹ Tomlinson et al. (n 68).

⁹⁰ Rowden and Wallace, 'Remote Judging' (n 77) 512.

⁹¹ David Li, 'Michigan Assault Suspect Caught, in Live Courtroom Feed, Violating Restraining Order' *NBC News* (online, 12 March 2021) <<https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698>>.

⁹² *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486, [16].



unauthorised party is attending with them need to be adopted in circumstances where confidential or sensitive information exists.

While the concerns about unauthorised recording of proceedings, or reporting of proceedings or information that is subject to suppression or non-publication orders, need to be addressed. It is important that limiting access to remote hearings or requiring registration is not adopted as a default position or in an overly broad manner. Rather, the public should be encouraged to engage with the judicial system and observe hearings. As the LRC has stated, the least restrictive approach to open justice should be adopted.

Proposal 11.1(3) Section 9 of the Court Security Act 2005 (NSW) should be amended to expressly prohibit the recording of court or tribunal proceedings by a person who accesses them virtually

In line with our discussion above we agree with the proposed amendment, but propose that the prohibition should be on recording **without the consent of the judicial officer** - in accordance with the desired principle of ensuring the power and discretion of the judicial officer to control court proceedings and to determine open justice issues.

Proposal 11.1(4) People who access court or tribunal proceedings virtually should, as a condition of access, be required to acknowledge the prohibition on recording the proceedings and declare that no unauthorised party is attending with them.

In line with our discussion above we agree with the proposed amendment.

Our submission reflects our personal views, and does not reflect the views of our employers, clients, workplaces or any other associations of which we may be affiliated with.

Yours sincerely,

Professor Michael Legg, Director of the Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream at UNSW Faculty of Law & Justice.

Anthony Song, Research Assistant, Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream at UNSW Faculty of Law & Justice.

Professor Lyria Bennett Moses, Director of the UNSW Allens Hub for Technology, Law and Innovation, UNSW Sydney.

Professor Richard Buckland, Director of SECedu, UNSW Sydney.