Civil courts and COVID-19: Challenges and opportunities in Australia

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Abstract
This article provides an overview of the response of Australian courts to the COVID-19 crisis, and critically examines a number of structures and systemic issues that arise from the shift to the online delivery of justice. It places the current responses in the context of the emerging literature regarding online dispute resolution, and draws upon that literature to consider issues including open justice, symbolism and ‘court architecture’ in the digital space, technological limitations, access to justice and issues of systemic bias. It argues that by examining these issues, the present crisis will help map opportunities for future reform.

Keywords
Judiciary, judicial theory, online dispute resolution, COVID-19, courts, digital

Reforms of courts and judicial processes generally occur at a glacial pace. Not only is law inherently conservative, courts are complex systems. The implications of change need to be carefully considered to ensure relevant protections are maintained and cherished objectives promoted.

All of this makes the breakneck transition to ‘virtual courts’ in response to COVID-19 at once terrifying, thrilling, concerning and exciting. Necessity is forcing changes, particularly in the use of remote and online hearings, that were impossible to imagine just last year. The challenge in such a transition is to find the right balance in protecting both the short- and long-term rights and interests of parties and the public. Not only may bad practices adopted in emergency conditions be difficult to wind back later, but vital protections may be unnecessarily denied as the pandemic continues. On the other hand, this intense period of forced innovation may reveal how technology can make courts better.1 Some changes may be worth keeping. As the Chief Justice of

1Some of the potential benefits are explained in Grata Fund, Australian Courts: How a Global Pandemic Built our Launchpad into the Future (29 May 2020).

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This article seeks to identify and discuss the potential challenges and opportunities raised by this dramatic pivot in court practices. The focus is on general principles of public law principally in the civil context. This article aims to map the landscape of the COVID-19 online transition, highlighting issues of concern for maintaining juridical quality, legitimacy and efficiency. In doing so we adopt a self-consciously conceptual and comparative approach, rather than undertaking substantive analyses of particular areas of law. The article reflects developments to early August 2020 but, at the time of writing, judicial practices remained in flux.

We argue that the transition to online hearings necessitated over the last six months has affected a cultural shift in the profession, such that virtual hearings are likely to continue as a standard feature of legal practice in the post-COVID context. However, the emergency nature of the current responses has meant that many changes were made under intense time pressure, and it is critical that any future model builds upon the lessons of the current measures (both what has worked and what has not) rather than directly replicate them.

**Judicial responses to COVID-19**

Like so many of our social institutions, courts were initially caught flatfooted in response to the emerging crisis. The World Health Organization declared a pandemic on 11 March 2020. In the United Kingdom (UK), the government’s initial reluctance to impose social distancing requirements meant jury trials were still scheduled to start at a point when over 300 people had already died as a result of COVID-19 in that country. In the face of mounting pressure, the Lord Chief Justice (the head of the judiciary in England and Wales) eventually made the call on 23 March to ‘pause’ all jury trials in his jurisdiction. Elsewhere, institutional delay has had tragic consequences. One New York Judge refused to implement social distancing in his court in mid-March. By the end of the month, the virus had killed him.

In Australia, by mid-March this year most courts were moving to delay hearings in all but the most urgent cases. For example, by 17 March the High Court had resolved not to sit as a full court in Canberra until at least August, while the Federal Court had moved to vacate all matters listed through to June. A week later the High Court shut its registry for all face-to-face services. Jury trials in South Australia were suspended on 16 March (a full week earlier than the same decision in the courts of England and Wales), at a time when there had been three deaths in Australia as a result of COVID-19. A week later the ACT Supreme Court vacated a hearing on the basis of the health risks involved in face-to-face court attendance, in circumstances where conducting the final hearing online may have been prejudicial to the litigants. In making this determination, the Judge made explicit that his decision was ‘made without reference to the personal [health] attributes of the plaintiff’s legal team’.

Subsequently, most Australian courts have begun to utilise digital solutions to allow virtual hearings (perhaps best described as emergency remote hearings). Even the High Court has adapted to this context: the case of Cumberland v The Queen was the first to be heard entirely electronically. While there have been many challenges, the speed with which the judiciary and the profession have managed to adjust to the

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2 Chief Justice James Allsop, quoted in Michael Pelly, ‘Chief Justice Tips More “Effective” Courts’, Australian Financial Review (online, 8 May 2020).

3 This article focuses principally on civil proceedings. As criminal proceedings have a longer history of using AV links (with related literature), that jurisdiction would require issues such as jury trials be addressed, demanding a length of analysis inappropriate for this journal.

4 World Health Organization, WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 (11 March 2020).

5 Owen Bowcott, ‘Justice Ministry Urged to Limit Court Hearings to Most Urgent’ The Guardian (online, 23 March 2020) https://www.theguardian.com/law/2020/mar/22/uk-justice-ministry-urged-to-restrict-court-hearings-to-most-urgent-coronavirus.

6 The Lord Burnett of Maldon, Review of Court Arrangements due to COVID-19, Message from the Lord Chief Justice (2020) https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/.

7 Steven Trask, ‘High Court Halts Hearings until August’ The Canberra Times (online, 17 March 2020) https://www.canberratimes.com.au/story/6681872/high-court-halts-hearings-until-august/(cs=14231).

8 The High Court of Australia, Practice Direction No 1 of 2020: Electronic Filing of Document Case Commenced before 1 January, 2020 March.

9 ABC News, ‘Coronavirus Prompts SA Jury Trials to be Suspended and Extra Public Transport Cleaning’ (online, 16 March 2020) https://www.abc.net.au/news/2020-03-16/new-sa-jury-trials-suspended-extra-cleaning-for-public-transport/12058660.

10 Talent v Official Trustee in Bankruptcy (No 5) [2020] ACTSC 64.

11 Ibid [17].

12 Cumberland v The Queen [2020] HCATrans 49.

13 @steve_mcdie (Stephen McDonald) (Twitter, 14 April 2020, 11:25 AM ACST) https://twitter.com/steve_mcdie/status/1249878983235302786.

14 Richard Ackland, “‘Lines ‘Dropped Out, Witnesses Didn’t Know Where to Go’: Justice in Times of Coronavirus‘, The Guardian (online, 21 April 2020).
digital-only landscape is striking. There is already jurisprudence on when it is appropriate to hold virtual hearings, and the Judicial College of Victoria is usefully collating the emerging jurisprudence on, and judicial institutional responses to, the pandemic.

However, there has been very little time in the current crisis to reflect on the constraints of online courts, and how these may be addressed. With COVID-19’s spread slowing (in Australia at least), now is an appropriate time to consider the challenges and opportunities that arise in this new era of digital justice.

**The movement to online courts and online dispute resolution (ODR)**

As dramatic as this shift has been, perhaps equally striking has been the failure to adopt such potentially useful and demonstrably available technologies until emergency circumstances demanded them. The UK apparently only held its first virtual hearing in 2018, while no Australian court had moved beyond pilot stage. This is despite the idea of ODR being around for decades, with its origins in e-commerce platforms.

However, it is only in the last decade that ODR systems and techniques have begun to transition from the private sphere into the public dispute resolution system. Jurisdictions across the world (including Canada, Ireland, the Netherlands, China and the United States) are beginning to examine the opportunities presented by these modern systems, and in some jurisdictions such systems have been adopted. Perhaps the most successful of these public ODR systems is the Civil Resolution Tribunal in British Columbia, Canada. The UK is in the process of investing nearly A$2 billion in digital justice solutions, including a proposed Online Solutions Court. There have been some Australian forays into ODR, for example in the Victorian Civil and Administrative Tribunal.

Part of the challenge, though, in reflecting on such systems is that there is not a common concept of what is being created, or a shared language to describe it. ‘Digital Justice’ can include online lodgement and case management, online evidence submission and management, fully integrated ODR systems (information provision, negotiation, mediation and adjudication), AI-assisted decision-making and the use of virtual hearings. This lack of common language can lead to false comparisons, perhaps causing resistance to the embracing of these solutions.

The literature on the movement towards online courts and public ODR can, however, help shape how we should be responding to the COVID-19-necessitated roll-out of emergency remote hearings. It has helped to identify some of the concerns in the use of online courts, as academics and jurists grapple in the current crisis with how to ensure adequate protections of the interests of the parties and of justice. The conclusions are often quite concerning. In this article, we draw on this literature to help navigate the many issues that arise from this pivot.

**Emergency online courts: Problems, promises and best practices**

**Open Justice**

It has long been accepted that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’. Open justice is an essential feature of the Australian judicial system, with constitutional underpinnings. It is both an ‘overarching principle’ and the source of practical rules, including that judicial proceedings should be conducted in public. As Lord Shaw of Dunfermline famously observed, ‘[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity’.

Initially at least, COVID-19 threatened open justice in Australia. The rapid shift to online courts posed challenges to the ability of the public, and particularly the media, to access judicial hearings. With matters suddenly being heard online, observers could not exactly wander the halls of court buildings and visit court rooms as they

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16 Capic v Ford Motor Company of Australia Limited [2020] FCA 486.
17 Judicial College of Victoria, Coronavirus Jurisprudence (Web Page, 2020) https://www.judicialcollege.vic.edu.au/news/coronavirus-jurisprudence-0.
18 Judicial College of Victoria, Coronavirus and the Courts (Web Page, 2020) https://www.judicialcollege.vic.edu.au/news/coronavirus-and-courts.
19 Owen Bowcott, ‘First Virtual Court Case Held Using Claimant’s Laptop Camera’, The Guardian (online, 26 March 2018).
20 See Ethan Katz and Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes (Oxford University Press, 2017) 31; Louis F Del Duca, Colin Rule and Kathryn Rimpfel, ‘eBay’s de Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers’ (2014) 6 Arbitration Law Review 204.
21 HM Courts and Tribunal Service, ‘The HMCTS Reform Programme’ https://www.gov.uk/guidance/the-hmcts-reform-programme.
22 See Vivi Tan, ‘Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice’ (2019) 24 Desain Law Review 101.
23 Legg, for example, distinguishes between ‘Online Alternative Dispute Resolution’ and ‘Online Courts’: Michael Legg, ‘Online Alternative Dispute Resolution’ (2017) 141 Precedent 32, 33. Sourdin and Liyanage suggest ODR refers ‘to dispute resolution processes conducted with the assistance of communications and information technology’. Tania Sourdin and Chintaka Liyanage, The Promise and Reality of Online Dispute Resolution in Australia in Mohamed S Abdel Wahab, Ethan Katz and Daniel Rainey, Online Dispute Resolution: Theory and Practice (Seven International Publishing, 2012) 483, 484. In contrast, Tan and Palmgren suggest that ‘true’ ODR requires end-to-end resolution of the dispute online: Vivi Tan, ‘Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice’ (2019) 24 Desain Law Review 101, 104; Katarina Palmgren, Churchill Fellowship Report 2018: Explore the use of online dispute resolution to resolve civil disputes (Winston Churchill Memorial Trust, November 2018) 15.
24 Matthew Terry, Steve Johnson and Peter Thompson, Virtual Court Pilot Outcome Evaluation (Ministry of Justice (UK) Research Series 21/10, 2010).
25 R v Sussex Justices; Ex parte McCarthy [1924] KB 256, 259 (Lord Hewart CJ).
26 See Wainohu v New South Wales (2011) 243 CLR 181; Harris v Caladine (1991) 172 CLR 84, 150 (Gaudron J).
27 Scott v Scott [1913] AC 417, 477, quoting Jeremy Bentham.
saw fit. While several Australian courts stated an intention to uphold the principle in their fast-evolving digital practices, their statements were at first sparse on detail. The Supreme Court of Victoria, for example, merely offered that “principles of open justice have been an important part of the Court’s planning of its response to the coronavirus (COVID-19) pandemic. The means of achieving this will be considered on a case by case basis.”

In the Federal Court, a practice note issued on 31 March 2020 observed that the court was ‘considering streaming and other methods of ensuring the requisite degree of public access to hearings conformable with the open justice and open court principles’. The Federal Court adopted a practice of including, in its daily cause lists, a direction for any person who wished to observe an online hearing to contact the relevant Judge’s Associate. Justice Perram considered such methods in a late March hearing (with reasons published in May). His Honour excluded the public from the ongoing proceedings but declared that any member of the public wishing to observe the hearing could contact an associate to receive a videoconferencing link. Of the balance between open justice and practical necessity, Perram J noted:

The result of that – if a virtual hearing of this nature is considered not to be a hearing in open court – would be to have the hearing put off indefinitely. The public has an interest in the work of the Court continuing, as do the parties.

In England and Wales, a memo issued by four of the jurisdiction’s most senior Judges offered three potential solutions:

a. one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room;

b. allowing accredited journalists to log in to the remote hearing; and/or

c. live streaming of the hearing over the internet.

They concluded with a simple statement: ‘The principles of open justice remain paramount’.

None of these solutions is perfect. Restricting access to only accredited journalists is a partial cure at best, preventing other interested observers from attending. There are also valid technological and security concerns surrounding open-access live streaming. Even if every hearing occurring on Zoom, Teams or Skype was available to the public, open justice would not be entirely intact – practically, reporters often rely on guidance from court staff and the ability to move between court rooms to effectively cover the justice system, something not easily replicable digitally. How reporting restrictions and protected evidence coexist with online open justice is yet to be seen, and there is a risk that the pandemic may be used to justify more onerous exceptions to open justice (such as suppression orders) than would be tolerated in ordinary times. Another option would be for audio or video recordings to be made publicly available online following the conclusion of a hearing, or the provision of transcripts for public consumption (as is already done by the High Court).

As the pandemic has continued, Australian courts have engaged further with the dilemma of open justice and digital hearings. In Australian Securities and Investments Commission v GetSwift Limited, Lee J – rejecting an adjournment request – noted that he had considered the ‘demand and necessity of “open justice”’ and was ultimately satisfied that ‘appropriate arrangements can be put in place to ensure the [proceeding] is fully accessible and can be observed by the public; and orders will be made facilitating such access’.

Notwithstanding the potential limitations to open justice posed by digital hearings, a pragmatic attitude has been demonstrated by a number of judges. In another case, Perram J considered submissions on a number of factors bearing on potential adjournment, before observing:

If I could be sure that the crisis would have passed by October I would not hesitate to adjourn all the trials in my docket (save urgent cases) and then begin a process of relisting my entire docket from October 2020. . . . However, there is simply no guarantee that the situation will be any better in six months’ time. It may be that this is a state of affairs which persist for a year or so. It is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period. . . . Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be.

28We understand that once the initial turbulence of the pandemic partially subsided, in some states, where local conditions permitted, staff at the Federal Court installed video monitors to permit members of the public to watch online hearings in physical courtrooms.

29Supreme Court of Victoria, Supreme Court Changes in Response to Covid-19 (20 March 2020) https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19.

30Federal Court of Australia, Special Measures in Response to COVID-19 (31 March 2020) https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf.

31Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing) [2020] FCA 664 (26 March 2020).

32Judiciary of England and Wales, Civil Justice in England and Wales: Protocol Regarding Remote Hearings (20 March 2020).

33Judith Townend, ‘Covid-19, The UK’S Coronavirus Bill And Emergency “Remote” Court Hearings: What Does It Mean for Open Justice?’, InfoRMM (Blog Post, 24 March 2020) https://inforrm.org/2020/03/24/covid-19-the-uk-s-coronavirus-bill-and-emergency-remote-court-hearings-what-does-it-mean-for-open-justice-judith-townend/.

34[2020] FCA 504 (9 April 2020) [41].

35Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486 (15 April 2020) [23].
The shift online also brings opportunity. Most of us cannot, in our everyday lives, take five minutes (or more) to watch a snippet of oral argument in one court or another. If Australia’s judiciary adopted widespread open-access live streaming, its proceedings would suddenly become far more accessible than before – normally the preserve of reporters, specialists and (one might say uncharitably) those with too much time on their hands. The UK Supreme Court’s livestream of important Brexit litigation was reportedly viewed by almost 30 million people. If COVID-19 forces Australian courts to embrace streaming and digital distribution, and that trend persists beyond the immediate pandemic, the open justice dividend will be considerable. An early indication of that potential came in June 2020, when over 1000 people tuned into a live YouTube stream of NSW Supreme Court proceedings as the police sought to prevent a significant public protest.

If Australian courts can capitalise on the good and address the bad, the COVID-19-necessitated shift online could be remembered as a defining moment in the protection of open justice. But it is imperative that the Australian judiciary and legal profession continue to have this conversation in the months ahead. The question of open justice in the COVID-19 era has been much discussed in the UK, in contrast the public debate here has been limited. Given the principle’s importance, and its constitutional overlay (in some circumstances, closed courts might contravene Chapter III of the Constitution), a more sophisticated dialogue is overdue.

**Physical characteristics of the court**

The physical experience of an online hearing will be significantly different from being inside a courtroom. The architecture of court buildings is richly symbolic. Judith Resnik and Dennis E Curtis argue that the architecture and iconography of courts has developed over hundreds of years to convey the legitimacy of State authority. Linda Mulcahy describes the environment in which legal proceedings are conducted as ‘a physical expression of our relationship with the ideals of justice’. The courtroom layout reflects the relationship between the participants: the judge, lawyers, witnesses, jury, accused and the public. There are times when it is appropriate to stand, sit, speak and bow. There are special ways of passing physical items between different participants. The clothing of the judge, lawyers and court staff conveys information about their role and status. These formalities can serve to emphasise the principles of equality before the law and the impartiality of the judge.

None of this is an accident. The symbolism and formality of the physical aspects of courts combine to convey the solemnity of the legal process. It is difficult to replicate this gravitas online, especially when participants appear from their homes. Even a carefully prepared home office just does not match the majesty of a courtroom. That barrister might be wearing a bar jacket and gown, but is it pajama bottoms and slippers down below? (This might be expecting too much; one Florida judge has begged lawyers to wear clothes and get out of bed for online hearings.) Will any court expect people to stand and bow when the judge turns on their video? (The High Court does not.) The overall effect may create a feeling of distance between participants and the court. Emma Rowden has argued that ‘feelings of remoteness and alienation’ associated with online hearings ‘would seem to foster distrust, rather than a belief in the legitimacy of the authority of the court’.

This is not all bad, of course. To many, the ritualistic aspects of a hearing seem archaic and exclusionary. For some litigants and witnesses, the physical environment of the court is not majestic, it is intimidating.

Our point is that these ritualistic aspects of courts ought not be ignored when moving online. What does the user interface convey about the nature of the court? How can impartiality and detachment be performed in the online space? How do seating arrangements and the framing of the webcam shot affect perceptions of the seriousness of the process (for example, it has been

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36See Grata Fund (n 1) 31.
37Gina Miller, ‘How I Won against the Government – And What You Can Do Next’, The Guardian (online, 7 December 2019) https://www.theguardian.com/books/2019/dec/07/gina-miller-how-i-defeated-the-government-over-closing-parliament.
38Supreme Court of NSW (YouTube) https://www.youtube.com/channel/UCloUO0958kcQ5lSOa7scwaw.
39Townend (n 33).
40Liam Boyle, ‘Hinch, Kable And Open Justice: The Appropriate and Adapted Test’ (2012) 11(2) Canberra Law Review 57.
41Judith Resnik and Dennis E Curtis, Representing Justice Invention, Controversy, and Rights in City-States and Democratic Courtrooms (Yale University Press, 2011).
42Linda Mulcahy, Legal Architecture: Justice, Due Process and the Place of Law (Glasshouse, 2011) 1.
43Emma Rowden, “Virtual Courts and Putting “Summary” back into “Summary Justice”: Merely Brief, or Unjust?” in Jonathan Simon, Nicholas Temple and Renee Tobe (eds), Architecture and Justice: Judicial Meanings in the Public Realm (Routledge, 2013) 114.
44Kelly McLaughlin, ‘A Florida Judge is Begging Lawyers to Get Out of Bed and Put on Clothes while Appearing in Court Via Zoom’, Insider (online, 15 April 2020) https://www.insider.com/florida-judge-tells-lawyers-wear-clothes-during-court-zoom-meetings-2020-4.
45High Court of Australia, HCA Video Connection Hearings – PROTOCOL.
46Rowden (n 43) 117.
47Jessica Jacobson, Gillian Hunter and Amy Kirby, ‘Structured Mayhem’: Experiences of Victims, Witnesses and Defendants in Crown Courts (Criminal Justice Alliance, 2015).
48Maria Karras et al, On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW (Law and Justice Foundation of NSW, 2006).
49Keith Fentress, ‘Is Your Courtroom Design Intimidating?’ (Blog Post, 22 June 2017) https://blog.fentress.com/blog/is-your-courtroom-design-intimidating.
suggested that sitting further from the camera increases formality)?

What does the background of the shot convey about a participant’s wealth, social status and education? Should counsel stand to make submissions? Studies on such topics already exist; they should be utilised.

These concerns are not abstract: respect for the court is an integral element of our judicial system. If a person is being disrespectful or disruptive during an online court hearing, can the problem be solved by muting that person or excluding them from the hearing? Would a court ever be justified in commencing contempt proceedings in these circumstances? These questions and many more are sure to arise in future.

Technological limitations, access to justice and equality

Like any use of technology, online courts are vulnerable to garden-variety technological failure. But for courts, technological failure is not just a practical headache, it is also an issue of principle, with implications for access to justice and equality before the law. There are certain opportunities here. Litigants from outside capital cities may find it far easier to attend hearings virtually than to travel for hours to a courthouse. Lawyers will not have to set aside the whole morning to go to court for a five-minute directions hearing; clients won’t have to pay for the whole morning.

On the other hand, it has become painfully clear that not everybody has equal access to technology, creating a potential problem of digital exclusion. There are differences between the software, hardware, internet connection speed and skills of different participants in the court process. These differences will often reflect factors such as the litigant’s location, physical and mental conditions, income and age. To some extent, these differences are mitigated when all parties to a dispute have legal representation and the parties do not wish to attend a hearing; most law firms can be expected to have reasonable access to technology. But when a party is self-represented, when a litigant wishes to attend a hearing (as is their right) or is required to attend (for example, in a criminal case), unequal technological resources might seriously affect the ability of parties to participate in litigation.

Other issues of accessibility are common to both online and normal courts. Ordinary courts have well-developed protocols to accommodate parties, witnesses and lawyers with specific access needs relating to mobility, visual and audio assistance and translation. Here, again, online courts may have advantages over their physical counterparts. A report by the Global Initiative for Inclusive Information and Communication Technologies and the International Disability Alliance identified technology as a key to improving access to justice for people with disabilities. These matters must not be overlooked in the rush online. Accessibility should be a central design priority of any online court.

Systemic bias in decision-making

Finally, and in many ways perhaps most concerningly, the use of digital technology to conduct hearings may impact upon the quality of decision-making of judges, lawyers and parties.

The literature paints a troubling picture. A 2010 evaluation of a UK virtual hearing pilot scheme (allowing defendants’ first hearings to occur from police station via video link to court) deemed the process unsuccessful, finding defendants appearing virtually were less likely to be represented, more likely to plead guilty and were given higher prison sentences. Similarly, a pilot scheme to allow video hearings for bail applications in the US was discontinued once it became apparent that the level of bond set went up with remote hearings.

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50David Tait et al, Towards A Distributed Courtroom (Western Sydney University, 2017).
51Celia Kitzinger, Remote Justice: A Family Perspective, The Transparency Project (Blog Post, 29 March 2020) http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/.
52McDonald (n 14).
53See eg, Carolyn McKay, The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix (Routledge, 2018); Tait et al (n 51); David Tait and Vincent Tay, Virtual Court Study (Western Sydney University, 2019).
54See Grata Fund (n 1) 15; Michael Legg and Anthony Song, ‘The Courts and the Pandemic: The Role and Limits of Technology’ (2020) 66 Law Society of NSW Low Journal 65, 66–7.
55See Grata Fund (n 1) 26–8.
56Derek O’Halloran, ‘5 Ways To Protect Critical Digital Connectivity During COVID-19’, World Economic Forum/Forbes (Web Page, 20 April 2020) https://www.weforum.org/agenda/2020/04/covid-19-5-ways-to-protect-critical-digital-connectivity/.
57Grata Fund (n 1) 13–4.
58Owen Bowcott, ‘Court Hearings Via Video “Risk Unfairness for Disabled People”’, The Guardian (online, 22 April 2020) https://www.theguardian.com/uk-news/2020/apr/22/court-hearings-via-video-risk-unfairness-for-disabled-people.
59Malvika Jagannahon, ‘Remote Hearings: A Gulf between Lawyers and Lay Parties?’, The Transparency Project (Blog Post, 29 March 2020) http://www.transparencyproject.org.uk/remote-hearings-a-gulf-between-lawyers-and-lay-parties./
60The Global Initiative for Inclusive ICT and the International Disability Alliance, Technology & Effectiveness of Justice (July 2018).
61Erin Nealey, ‘Courts Are Moving to Video during Coronavirus, but Research Shows it’s Hard to Get a Fair Trial Remotely’, The Conversation (online, 8 April 2020) https://theconversation.com/courts-are-moving-to-video-during-coronavirus-but-research-shows-its-hard-to-get-a-fair-trial-remotely-134386.
62Matthew Terry, Steve Johnson and Peter Thompson, Virtual Court Pilot Outcome Evaluation (Ministry of Justice (UK) Research Series 21/10, 2010).
63Shani Seidman Diamond et al, ‘Efficiency and Cost: The Impact of Video Conferenced Hearings on Bail Decisions’ (2010) 100(3) Journal of Criminal Law and Criminology 869.
seem that judges ‘may be more punitive towards accused people they see on a screen’. 64

Given many of our own experiences of the difficulties of virtual conferencing, this may not be surprising. It is increasingly clear that ‘zoom-fatigue’ 65 is a demonstrable detriment of working online. The famous Israeli Parole Board study suggested that tired and hungry judges make harsher and more risk-adverse decision. 66 Taken together, this suggests that the extra mental burden involved in virtual hearing may increase the fatigue of judges, which may in turn impact upon the quality of their decision-making.

This should not be taken as suggesting that virtual hearings are juridically improper, but rather, we cannot simply import the schedules and work-patterns of the physical proceedings directly into the virtual proceeding. The psychological impact of the technological medium should affect the design of how such proceedings are conducted.

Conclusion

The events of 2020 have given rise to a multitude of challenges across the legal system, and it may be that some of the issues identified here are a necessary price to be paid for keeping the wheels of justice moving. None of the above commentary should be construed as a criticism of judges or court staff, who are working under immense pressure in turbulent circumstances. But there are both immediate and longer-term concerns. Now that the initial technological challenges are resolved, what steps can be taken to reinstate ordinary judicial principles and processes in the digital sphere? Perfect cannot be the enemy of the good — in the interim, a partial reinstatement may be better than nothing. But how do we ensure that adverse practices developed in recent months are not entrenched in a way that persists in the wider movement towards a digital judiciary, long after COVID-19 fades from memory? 67

Properly managed, this pandemic could represent a great opportunity 68 for the Australian judiciary. Rather than a ‘snapback’ to pre-COVID-19 practice, this could be the beginning of wider digital innovation among Australian courts. Scrutiny, discussion and deliberation will be essential to finding a middle-way that capitalises on potential advantages and avoids the numerous pitfalls.

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64Tait et al (n 50).
65Manyu Jiang, ‘The Reason Zoom Calls Drain your Energy’, BBC (online, 23 April 2020) https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting.
66Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, ‘Extraneous Factors in Judicial Decisions’ (2011) 108(17) PNAS 6889.
67Naomi Neilson, ‘COVID-19 a “Revolution in Thinking” for the Court System’, Lawyers Weekly (30 March 2020).