



**New South Wales Bar Association
Court Protocols**

Protocol for In-Person Hearings while Social Distancing

Introduction

1. The impact of COVID-19, in particular social distancing restrictions, is having a direct impact on the manner in which courts are able to administer justice. In particular, the conduct of hearings in the range of courts and tribunals of New South Wales and nationally is being undertaken through remote (ie online/virtual) methods to avoid any attendance in person in court.
2. The purpose of this document is to provide guidance to practitioners who are required to appear in court **in person** during the COVID-19 pandemic while social distancing restrictions continue or risks to health otherwise persist.
3. The primary consideration in these circumstances must be health and safety of all participants and to constrain the spread of COVID-19.
4. There may be circumstances where, within and notwithstanding the current health requirements including social distancing, it is necessary and desirable and in the interests of justice for a hearing to proceed in a manner that involves the in-person appearance of:
 - a. judicial and court officers;
 - b. legal practitioners;
 - c. parties; and/or
 - d. witnesses.
5. This protocol is intended to provide guidance as to the minimum standards for in person hearings in such circumstances. It is divided into three categories: Procedural, Personal Conduct and Technical.

Procedural

6. A court or tribunal hearing is ordinarily conducted with all participants attending in person. Over the last two decades, there has been increasing use of audio-visual technology to conduct directions hearings, call-overs and bail hearings; and to take evidence from vulnerable or physically remote witnesses.
7. With the onset of the COVID-19 pandemic, the legislature has empowered courts to order that all participants (including parties, legal practitioners and witnesses) attend using virtual technology (see eg s.22C of the *Evidence (Audio and Audio Visual Links) Act 1998 (NSW)*). Consistently with these powers, practice directions that courts and tribunals have issued have, for the most part, directed that only in limited circumstances are proceedings to be conducted in person.
8. The following general considerations may be apposite to a court's determination as to whether or not it should proceed with an in-person hearing:
 - a. the reason(s) to depart from in person hearing (eg social-distancing restrictions);
 - b. the implications of (further) delay in the matter;
 - c. procedural fairness; and
 - d. open justice principles.
9. There will also be considerations which are applicable to particular types of proceedings, such as:
 - a. in a criminal trial, the overarching consideration that the accused receives a fair trial;
 - b. in Family Law proceedings, the interests of any child or children; and
 - c. in civil proceedings more generally, a just determination of the issues in dispute in the most efficient, timely and cost-effective manner.

Physical circumstances and conduct

10. Practitioners should identify in advance those whose attendance in person is necessary, in accordance with the interests of justice. While in some cases this could mean all participants, it is more likely to be a sub-set of participants, with the remainder attending using remote (ie online/virtual) means. Although it will depend on the nature of the case, those who could potentially participate in a meaningful way by remote means might include:
 - a. stenographers/transcript-providers;
 - b. some witnesses;
 - c. parties;
 - d. additional members of the legal team;
 - e. members of the media; and
 - f. members of the public.

It is not to be suggested by this protocol that it is anticipated or expected that criminal jury trials will be conducted other than with the presence of the accused in person.

11. Where there are persons attending court by AVL, practitioners present at court may request the court to inform or remind those persons of the provisions of ss 9 and 9A Court Security Act 2005.

12. Practitioners attending in person should take such steps as are reasonably practicable to ensure strict adherence to government-mandated social distance restrictions in operation at the time (currently, at least 1.5 metres away from one another).

13. No person should attend or remain in court if they are suffering from any respiratory or flu-like symptoms consistent with COVID-19 (including fever, cough, runny nose, sore throat, shortness of breath, loss of taste or smell) unless having first taken a COVID-19 test and been informed of a negative result. If a person who has been in attendance in person at court develops symptoms, they should immediately report this to the Court (through appropriate channels).

14. Where feasible, practitioners should endeavour to manage electronically all documents in the case, so as to minimise the number of hard-copy documents being circulated and handed up in court (in this regard, see the accompanying protocol issued by the Bar Association for remote hearings, particularly regarding electronic management of court documents).

15. Where hard copy documents are to be used, an arrangement for minimal and safe handling of documents should, if possible, be agreed by the parties and provided to the court for consideration.

16. The Bar Association will liaise with the courts and tribunals in relation to the following:

- a. whether the court or tribunal is able to provide health checks at the entrance to the court building which includes temperature testing and enquiry about any symptoms (as listed at para 13 above) of each person entering the building;
- b. the availability of hand sanitiser in accessing both the building (including at any security screening point) and the relevant hearing rooms, and the frequency and/or adequacy of the sanitisation of touch points throughout the court building;
- c. whether access to the court or tribunal building can take place at a particular time so as to minimise personal contact with other persons. This may include whether the starting time for hearings and adjournments for morning tea and luncheon could be staggered to permit safe entry through security and access

to lifts (having due regard to the ability of practitioners to attend during the expanded hearing hours);

- d. whether lift access and use is compliant with government-mandated social distance restrictions in operation at the time, and whether additional time may be required to comply with those restrictions, noting that multiple courts and tribunals may occupy the same premises; and
- e. assessment of any common areas of premises (including lift lobbies), and the need to permit effective management of the number of people using those areas of the premises at any one time.

17. Practitioners are encouraged to raise with the Bar Association any concerns they have in relation to the matters in paragraph 16 above in attending courts and tribunals.

18. In addition to the above, practitioners are encouraged to raise with any court or tribunal any of the following concerns:

- a. whether social distancing requirements cannot be met;
- b. if the person's health and safety may otherwise be put at risk; or
- c. if the person has a genuinely-held concern about his or her health or safety (or that of members of their household) which cannot be alleviated by the court allowing the person to take appropriate precautions (for example, by allowing the person to wear a face mask).

19. Practitioners who are concerned about being required to appear in court in person in circumstances which, in their view, risk their health and safety or the health and safety of others, should seek assistance or advice from a member of the Executive of the NSW Bar Association or a Senior Counsel on a Professional Conduct Committee.

Technical aspects

20. If all participants attend in person, no special technical issues arise.

21. However, if only a sub-set of participants is to attend court in person, consideration should also be given to the accompanying protocol issued by the Bar Association for virtual hearings, in order to better ensure the hearing is conducted in a fair and transparent manner for those attending by virtual means.