



**New South Wales Bar Association
Court Protocols**

Protocol for Remote Hearings

Introduction

1. The purpose of this protocol is to provide guidance to practitioners, particularly counsel, appearing at remote hearings - described in various publications and practice notes as a 'virtual hearing' and described herein as a 'remote hearing'.
2. The protocol addresses minimum standards for such remote hearings, divided into three categories: General aspects of court hearings, Conduct and Technical. Practitioners should have regard in addition to this protocol to relevant court websites, practice directions and guidelines.
3. This document is likely to evolve over time as required and to take account of recent developments. The protocol has particular relevance to the current COVID-19 pandemic, while social distancing requirements are in force. However, the Protocol may well remain relevant beyond the current pandemic, in circumstances where it is considered necessary or appropriate in the interests of justice for a hearing to be held remotely.
4. It is not the purpose of this protocol to address the functional aspects of particular online platforms which might be utilised to conduct remote hearings (eg, Microsoft Teams, WebEx, Zoom) by the different jurisdictions, nor the particular procedural circumstances of each jurisdiction. Rather, the protocol is aimed at providing guidance for the standards to be adopted and applied, whichever platform is being utilised, or whatever jurisdiction counsel is appearing in.
5. The use of remote hearings has the potential to aid in the provision of access to justice. It may also improve efficiency in the delivery of justice in limited circumstances. At the same time, it is necessary to ensure that the features of the Australian judicial system, which embrace the rule of law and open justice, are not unreasonably compromised. In this context, the use of remote hearings might form part of various additional procedural innovations in the context of courts and tribunals to gradually adapt their processes.
6. It is not to be suggested by this protocol that it is anticipated or expected that criminal jury trials will be conducted by audio visual link or other than with the presence of the accused in person.

Court hearings: general

Judicial Authority

7. In Wallace and Rowden 'Remote Judging: the impact of videolinks on the image and role of the judge', *International Journal of Law in Context* (2018), 14, 504-524, the authors observe that the work undertaken by a judge in a courtroom is the most publicly visible aspect of their role. Furthermore, the place of justice, 'the court', has traditionally been synonymous with the location of the judge. The presence of the judge reinforces their role, emphasising their authority and neutrality, thus supporting the legitimacy of the court as an institution.
8. For these reasons, fundamental judicial tasks such as monitoring participant behaviour, exercising control of proceedings, ensuring a fair trial, and facilitating witness testimony are affected when performed via video-link. Accordingly, in an online hearing, there are a number of aspects of the conduct of participants (addressed below) that bear upon the extent to which judicial authority is promoted and maintained. The judicial officer will also be alert to the factors affecting judicial authority in an online hearing.
9. A court hearing is ordinarily conducted with all participants attending in person, although over the last two decades there has been increasing use of audio-visual technology to conduct directions hearings, call-overs, bail hearings, and to take evidence from vulnerable or physically remote witnesses.
10. 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 online/virtual technology (see eg s.22C of the *Evidence (Audio and Audio Visual Links) Act 1998 (NSW)*). In keeping with these powers, practice directions emanating from courts and tribunals of NSW have for the most part directed that only in exceptional circumstances are proceedings to be conducted in person.
11. All practitioners persons who work within the court system are encouraged to be alive to the limitations that may arise with online hearings and that can affect the interests of justice. Such limitations may include:
 - a. the capability and capacity of participants to utilise technology;
 - b. equal access to technology - including the remote appearance of an accused/witness;
 - c. adducing of oral and documentary evidence;
 - d. cross-examination of certain witnesses, such as vulnerable witnesses; complex and lengthy cross examinations; and cross examination on credit.

These limitations may give rise to the need for counsel to apply to vacate/adjourn the online hearing, and counsel should not hesitate to make such an application where the interests of justice require it.

12. Practitioners are reminded that a matter which has been identified as being of particular concern is the appearance of an accused or offender via remote means for any final hearing, as studies have shown they may frame the individual in the context of their detention, intruding on legal process, and affecting their comprehension and participation (see McKay C “Video links from prison: Permeability and the carceral world”, *International Journal for Crime, Justice and Social Democracy*, 2016, 5(1): 21-37. DOI: 10.5204/ijcjsd.v5i1.283). Similar considerations may apply to individual litigants.
13. The following general considerations may be apposite to a court’s determination as to whether or not it should conduct an online 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. open justice principles;
 - d. procedural fairness;
 - e. suitable arrangements for witnesses and the testing of evidence.
14. There may 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;
 - c. in civil proceedings more generally, a just determination of the issues in dispute in the most efficient, timely and cost-effective manner.
15. A number of these considerations are addressed in further detail below.

Open Justice

16. Safeguarding the public interest in open justice is a primary objective of the administration of justice (see eg *Court Suppression and Non-Publication Orders Act 2010* (NSW), s 6).
17. Accordingly, and subject to the *Court Security Act 2005* (NSW) (referred to below), appropriate steps may be taken to permit members of the public and the media to attend remote hearings (subject to cases which would, in any event, be the subject of suppression orders). If this cannot occur, it may constitute a powerful consideration weighing against the remote hearing proceeding.

18. However, there may be circumstances where the interests of justice favour limiting remote non-party attendance if there are capability or capacity issues in relation to the technology - particularly in criminal matters where the accused is in custody. This may mean that no, or limited, access is available for those not directly concerned in the litigation, for example, one member of the media nominated to act as the 'in court' hub for others and similarly for family members or support persons.
19. Practitioners are reminded that members of the media or public who attend a remote hearing separately need to comply with all directions by the court to ensure they are not audible and their presence is not distracting (eg using the mute function and turning off their video).

Procedural Fairness

20. Issues of procedural fairness can arise in all hearings and remote hearings are no different. However, the ability to perceive and manage fairness issues in a remote hearing may not always be possible. One reason for this is the loss of the traditional physical proximity of parties and the limited way in which all parties might participate in a remote hearing.
21. Appropriate arrangements should be in place for practitioners to take instructions, and to convey instructions and comments to counsel. This is likely to require both a separate online method of communicating (eg virtual private rooms, Whatsapp or email) and sufficient breaks in proceedings to allow counsel to confirm instructions. Particular considerations arise in relation to taking instructions from an accused in custody, and persons with limited technological access.
22. Appropriate arrangements should also be in place for each participant (in particular the parties, their legal representatives and the witnesses), to have access to reliable internet access and appropriate technology (eg computer and/or tablet to access the remote hearing), and (without limiting this requirement), access to documents.
23. Practitioners should make inquiries as to whether their clients and witnesses have appropriate facilities available to enable them to participate remotely in the hearing and provide instructions. If a party or a witness does not have sufficient technical (or cognitive), ability to fully participate using the appropriate technology, and alternate arrangements/assistance cannot be achieved, the case may not be able to proceed as a remote hearing.

Witnesses

24. Particular difficulties may obtain to the taking of evidence from lay witnesses who may be unfamiliar with the court environment and may not appreciate the need for formality, respect to the court and court procedure. Many of these issues can be overcome when a witness is required to appear in-person. Furthermore, when a witness appears

in-person the court can exercise its authority to require the attendance of the witness and protect the integrity of the witness's evidence while in the witness box.

25. Practitioners need to be aware of the risks that attend remote hearings using online technology, in particular involving assessment of witness evidence, such as evaluating witness credit and perception of their demeanour. Matters of concern in that regard may include a decreased ability to detect non-verbal cues during video-conferencing; the difficulty of picking up nuances and emotions; and the potential for eye contact to feel artificial across technology (which can make a witness appear evasive or dishonest).
26. Having regard to the limitations with remote hearings, in a case which turns on the evidence of a critical witness (eg the plaintiff in a common law dispute giving oral evidence in chief), this may be a strong factor against that part (or all) of the hearing being conducted as a remote hearing. An AVL link may not capture the subtlety of human discourse and will always carry the risk of misunderstanding or a failure by a participant to be able to communicate normally. That will be particularly so for parties who are not familiar with technology.
27. When a witness is to appear in a remote hearing from their home or other external premises, a number of challenges may arise. For example, the witness:
 - a. may have difficulties with the technology;
 - b. may not appreciate or follow the relevant procedure;
 - c. may struggle with managing electronic documents;
 - d. may be influenced by others who are present (affecting the integrity of their evidence);
 - e. may present poorly on camera, for example not looking at the camera, or being poorly placed on the screen etc., if adequate training is not provided to them.

Accordingly, practitioners should, as far as possible, ensure that the witness

- f. is familiar and capable with the technology;
 - g. is informed about and will follow the procedure;
 - h. gives his or her evidence from a location that is quiet and not subject to interruptions;
 - i. does not give his or her evidence in the presence of persons who may unduly influence the witness;
 - j. is provided with access to appropriate support persons, eg, a parent, guardian or support person who is not also a witness in the proceedings; an interpreter; and where feasible a person to assist handling documents; and
 - k. is given an opportunity to test the online platform in conference beforehand.
28. It may be appropriate for a practitioner to request the court to seek confirmation from the witness as to who else is present in the room with them, and to remind witnesses that even though they are appearing remotely:

- a. they are required to comply with the court's directions, answer questions unless there is a proper basis for them not to do so and not leave unless and until they are permitted to do so;
- b. they may not speak with any person about their evidence while court is adjourned and they remain under cross-examination;
- c. they understand the provisions of sections 9 and 9A of the *Court Security Act 2005*.

29. In this context, it is noted that:

- a. when a witness is giving evidence, no communication is to occur between the witness and persons external to the proceedings (unless it is with an approved support person or witness intermediary); and
- b. no person (including witnesses, party, media or members of the public) is to record the evidence by capturing an audio or video recording of proceedings - ss 9 and 9A of the *Court Security Act 2005* (NSW), respectively refer to the 'Use of recording devices in court premises' and the 'Prohibition on unauthorised transmission of court proceedings from courtroom'.

Conduct

30. Court etiquette and procedure must be adhered to as far as reasonably practicable, at all times. This is necessary for ensuring that the authority and gravitas of the court is preserved, and includes:

- a. bowing to the judicial officer at the commencement and conclusion of proceedings (whether standing or seated, as the Court may direct);
- b. addressing the court and court staff with the same level of professionalism and courtesy as if appearing in-person;
- c. not interrupting the judicial officer or opponent;
- d. signalling an objection to evidence appropriately (this may also include non-verbal means, eg the word 'OBJECTION' on a white piece of paper).

31. Experience suggests that remote hearings can often take longer and be more taxing than in-person hearings because of technical connectivity problems, difficulties communicating with an instructing solicitor, leading or junior counsel, taking instructions from clients, all the while appearing remotely and with interruptions that would not otherwise be experienced if the matter were being heard in-person. These difficulties are exacerbated when the client is remote from his/her/their legal representatives and even further exacerbated when an accused is appearing by AVL from custody.

32. Practitioners should be prepared for these eventualities, consider those issues when matters are listed for hearing, and raise them with the court as necessary. As a general matter, flexibility will be required to accommodate the interest of justice and the needs of those involved. Participants (including counsel), may be grappling with competing priorities as a result of social-distancing restrictions (eg home schooling).
33. Prior to the commencement of the hearing, and having regard to any applicable court procedure or practice direction, practitioners should consider preparing a summary of the relevant arrangements, which is reduced to writing and provided to the court as a joint document, suggesting:
- a. the technical platform to be utilised;
 - b. the method to be used for handling documents electronically;
 - c. the identity and location of:
 - i. all legal practitioners;
 - ii. parties; and
 - iii. witnesses;
 - d. arrangements to protect integrity of witness evidence (eg ensuring that they have access to relevant documents, ensuring no other person is present while they give their evidence remotely); and
 - e. a proposed hearing schedule (opening, witness schedule, closing submissions).

Practical observations

34. The chosen technical platform to conduct the online hearing ought to be tested to ensure it has sufficient functionality, is functioning smoothly, and that all participants can access, and develop familiarity with its functionality (in particular the 'mute' button, see below).
35. The parties should, in conjunction with the court's own procedures, identify the appropriate method to be adopted for handling documents:
- a. if an online document portal is to be utilised, this should be appropriately arranged into folders, eg court documents (ie pleadings and motions), submissions, and evidence (ie affidavits, exhibits), and 'access' permission managed appropriately (ie limiting the access provided to witnesses).
 - b. if documents are to be made available through more ad hoc means (eg email) there ought to be appropriate adherence to protocol regarding court communications.
36. The legal representatives and witnesses should ensure that for the duration of the hearing, they utilise a quiet, well-illuminated space.

37. If counsel are concerned about interruptions when appearing from home, they should consider appearing from chambers. If this is not possible, it would be prudent to advise the court and the other participants about the potential for interruptions.
38. In chambers, counsel should put in place arrangements to ensure no interruptions (eg telephone diverted, closed door with a sign indicating hearing in progress).
39. Participants should ensure that when not speaking, their microphone is muted – this prevents background noise which is distracting and renders it harder for all participants to hear the person speaking.
40. All participants with a 'speaking role' ought have their video 'on' and be visible at all times, ie:
- a. the court;
 - b. counsel;
 - c. witness.
41. Parties should liaise with the court as to whether participants without a speaking role ought have their video 'off' such that they are not visible. The court's position may differ depending on the participant eg:
- a. parties;
 - b. solicitors;
 - c. transcript providers;
 - d. members of the public;
 - e. members of the media.

Technical

42. Technology must adapt to and serve the interests of justice rather than the interests of justice be limited by the functionality of technology. The variety of technological solutions cannot be used to trump the basic requirements of a hearing, which recognise the expectation of participants in relation to:
- a. consistency and appropriateness of the technology;
 - b. continuous improvement of the use of technology;
 - c. feedback by all participants.
43. As far as possible, hearings should be held by way of audio-visual facility rather than telephone. This is because the limitations of audio-visual hearings which are set out in this document are exacerbated when visual cues are not present.

Practical observations

44. Participants attending a remote hearing using an audio-visual facility will require a computer/laptop which is connected to the internet with a working internal camera and microphone. Other mechanisms which may be helpful, albeit not essential, include:
- a. a second screen set up to look at documents etc.;
 - b. a portable tablet or other device which can be held while looking at the camera; and
 - c. a second device linked to the mobile network and not connected by Wi-Fi can assist when a connection disappears.
45. Participants should expect that connectivity will not always be available and plans should be made to protect against that possibility. Participants should also make contingencies as to the means by which to communicate with the relevant court or tribunal, with their clients and with their opponents in the event of technical or other failures.
46. The *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) enables the giving of evidence by audio and audio visual links (including, for instance, that the oath or affirmation be administered by means of audio-visual link: s 5D(1)(a)). Where a witness is located overseas, it is necessary to confirm that the laws of the witnesses' own jurisdiction do not prevent an oath or affirmation being administered.
47. Witnesses ought not be able to view the evidence given by other witnesses before they give their evidence.
48. If the court does not have a pre-existing protocol as to how documents should be shown to witnesses, then the parties should liaise with the court about an appropriate mechanism which ensures the integrity of cross examination is not undermined, and appropriate confidentiality in documents is maintained.
49. Notwithstanding test run(s) and the best of intentions, technical issues during the course of a remote hearing are almost inevitable. In those instances, the court may need to adjourn so that the issue can be attended to. The sensible cooperation of all participants is necessary.