



DISTRICT COURT OF WESTERN AUSTRALIA

20 COVID-19 CRIMINAL PROCEDURE GUIDELINES

This Circular replaces the COVID-19 Criminal Procedure Guidelines Circular published on 26 March 2020.

20.1 Background

- 20.1.1 The governments of Australia are rapidly shutting down all but the provision of essential services in response to the COVID-19 pandemic. The District Court provides an essential service by upholding the rule of law within its jurisdiction. That service must be balanced against concern amongst persons required to attend court (accused and witnesses), legal practitioners, court staff and members of the public about travelling to and attending court for hearings.
- 20.1.2 The District Court has already taken significant steps to reduce these concerns. Both the Chief Justice and I announced on 16 March 2020 the suspension of all jury trials. Since that date the District Court has introduced a number of other initiatives to reduce the risk to persons required to attend the court. These changes are set out in publications on the court's website. They include allowing persons to appear at most hearings before the court via a video link or telephone link. They also include a provision that all documents (other than a few limited exceptions) are to be filed electronically.
- 20.1.3 As COVID-19 spreads, the number of judicial officers, staff and court users available to conduct the business of the court will decline. It is important to take at this point of time further steps to reduce the number of court hearings and give priority to those proceedings which are viewed as essential services provided by the court. The court has decided that it should give priority to those proceedings affecting the liberty of the individual, or personal safety and well-being, or are proceedings that are time critical.
- 20.1.4 **From 6 April 2020 until further notice, subject to any order made by a judge in exceptional circumstances, the following procedures will apply.**

Current listings

20.2 Circuit sittings

- 20.2.1 The court will vacate all circuit trials listed up to 3 July 2020. Those matters will be adjourned to a callover hearing on 1 July 2020 for mention only. Accused on bail will have their bail administratively extended to that date.
- 20.2.2 The court will not generally conduct judge alone trials in substitution for vacated jury trials other than on application by accused in custody. The length of time the accused

has been in custody and the likely delay before a jury trial can be listed are matters to be taken into account. Applications for judge alone trials may be made if there are exceptional circumstances. Judge alone trials will be conducted in Perth only.

- 20.2.3 Sentencing hearings for accused in custody awaiting sentence shall proceed on the currently listed date, or on another date as the court directs. The accused shall appear from custody by video link. Counsel may appear in person or by video or audio link by prior arrangement with the judge's associate.
- 20.2.4 Sentencing hearings for accused on bail will be adjourned to a sentence mention list hearing on or before 3 July 2020, unless the court otherwise directs. Bail will be extended administratively.
- 20.2.5 Currently listed pre-recordings of evidence will be vacated. On application the hearing may be relisted in Perth if the court is satisfied that there are exceptional circumstances including potential harm to the witness if the pre-recording is delayed. Bail will be extended administratively to a callover hearing on 1 July 2020.
- 20.2.6 If the callover hearing date is changed the accused will be notified and bail amended administratively.

20.3 Perth sittings

- 20.3.1 The court will vacate all trials listed in Perth up to 3 July 2020. Those matters will be adjourned to a callover hearing on 1 July 2020 for mention only. Accused on bail will have their bail administratively extended to that date.
- 20.3.2 The court will not conduct judge alone trials in substitution for vacated jury trials other than on application by accused in custody. The length of time an accused has been in custody and the likely delay before a jury trial can be listed will be taken into account. Applications for judge alone trials by accused on bail may be made if there are exceptional circumstances. This does not affect orders made for a judge alone trial before 16 March 2020.
- 20.3.3 Currently listed directions hearings under section 98 of the *Criminal Procedure Act 2004* will proceed, provided satisfactory arrangements can be made that comply with COVID-19 public health requirements.
- 20.3.4 Sentencing hearings for accused in custody awaiting sentence shall proceed on the currently listed date, or on another date as the court directs. The accused shall appear from custody by video link. Counsel may appear in person or by video or audio link by prior arrangement with the judge's associate.
- 20.3.5 Sentencing hearings for accused on bail will proceed on the currently listed date, or on another date as the court directs, provided satisfactory arrangements can be made that comply with COVID-19 public health requirements. Otherwise, the matter will be adjourned to a sentence mention list hearing. Bail will be extended administratively. Counsel must communicate with the associate to the sentencing judge no later than 2 clear days prior to the sentencing date.

20.3.6 Currently listed pre-recordings of evidence will proceed, provided satisfactory arrangements can be made that comply with COVID-19 public health requirements.

General hearing procedures

20.4 Sentence mention hearings

20.4.1 Sentence mention hearings will be conducted by audio link.

20.4.2 The list will be staggered at 'not before' times in accordance with paragraph 20.6.4 of this circular.

20.4.3 An accurate notice of acting must be filed by email not less than two clear days before the hearing.

20.4.4 The defence lawyer will be called on the telephone number provided in the notice of acting. The defence lawyer must ensure that the audio appearance takes place in a quiet location. The defence lawyer must be available to receive the audio call in the allocated time period.

20.4.5 The prosecution must inform the court by email no later than 24 hours prior to the hearing of its telephone number. The prosecution must also ensure that it is available in the allocated time period.

20.4.6 An accused in custody will not be brought up, or video or audio linked, unless unrepresented.

20.4.7 Subject to any order made by the registrar, an accused on bail may answer their bail by attending court, or by attending at their lawyer's office in person or by telephone to their lawyer at a designated time, in which case the lawyer will be required to confirm, as an officer of the court that the offender has attended.

20.4.8 At the hearing the defence lawyer must be able to answer the following questions:

- (a) Has the defence received the brief for prosecution?
- (b) Have instructions been taken on the brief for prosecution?
- (c) Are there any factual issues that may require a trial of issues?
- (d) Has defence received all court-ordered reports and taken instructions on their contents?
- (e) How many sentencing time slots are required for sentence (taking into account the complexity of the matter, any need for an interpreter, or any other issues)?
- (f) What are the defence lawyer's unavailable dates for sentence?

20.5 Sentencing hearings

20.5.1 The prosecution and defence counsel may appear by video link at a sentencing hearing.

- 20.5.2 Counsel appearing by video link are not required to robe, but must wear business attire.
- 20.5.3 No bring up order will be made for accused in custody unless the court otherwise orders. Any application for a bring up order should be made to the sentencing judge. If a hearing is necessary to determine the issue it will be in chambers by audio link with both parties.
- 20.5.4 Accused who are bailed to appear must attend court unless the sentencing judge has ordered otherwise. The accused is not required to report to detention.
- 20.5.5 Social distancing of 2 metres will be maintained in the courtroom as much as it is reasonably practicable to do so. This may require co-accused to be separated or to be called separately as directed by the court. The court may limit the number of persons who are admitted to the gallery. Where practicable the court will admit representatives of established news-media organisations and supporters of an accused or a victim. Other persons may be admitted with the approval of the judge's associate. At the court's discretion a transcript may be supplied to any person with an interest in a matter who has been excluded from the court for public health reasons
- 20.5.6 Where there is a list of sentencing hearings, the list will be staggered as the sentencing judge directs. Lawyers, accused and any other persons will not be permitted to enter the court until the preceding matter is finished and all persons involved in that hearing have left the courtroom.
- 20.5.7 Documents are not to be handed up at the sentencing hearing. All sentencing materials must be lodged electronically not less than two clear days prior to the sentencing hearing. Any documents, such as references, that have not been lodged electronically can be read aloud to the court.
- 20.5.8 If an interpreter is required a social distance of 2 metres between the interpreter and the accused must be maintained. The preferred position is the use of a hearing loop or attendance by the interpreter in the remote room.
- 20.5.9 Sentencing orders (and bail papers where applicable) are to be signed after the court has risen. The accused (if on bail) will be required to sit at the bar table while the order is explained by the clerk of arraigns. The order will be handed by the usher to the offender for signature. The usher will retain a signed copy. Hygiene should be observed. (For example, the usher should have a break after each offender is dealt with and address hand hygiene before dealing with the next matter.)
- 20.5.10 If an accused appearing from custody is to be released on an order then the judge, before rising, should direct the dock guard that the accused is to remain in the dock until the order has been issued and signed. Hygiene should be observed.
- 20.5.11 Counsel shall undertake to place the court reports into a secure bin after the sentencing hearing. If counsel cannot undertake to do this, court reports should be left on the bar table to be removed by the usher after the sentencing hearing for that accused. Hygiene should be observed.

20.6 Duty judge hearings

- 20.6.1 The prosecution may appear by video or audio link.
- 20.6.2 Defence lawyers may appear by video or audio link, provided that they have informed the duty judge's associate by email of their telephone number and are able to be contacted on that number.
- 20.6.3 Accused on bail may answer their bail by attending at court, or by attending at their lawyer's office, or through their lawyer by telephone, in which case the lawyer will be required to confirm, as an officer of the court, that the accused has attended.
- 20.6.4 The list will be staggered. Hearings will be allocated a 'not before' time. Lawyers and accused should not enter the court until the preceding hearing is finished and the persons involved in that hearing have left the court.
- 20.6.5 All documents relating to the hearing must be filed electronically not less than two business days before the listing. No documents are to be handed up in court.

20.7 Section 98 hearings

- 20.7.1 The same procedure for duty judge hearings will apply to s 98 hearings.

20.8 Signing bail undertakings

- 20.8.1 Where bail undertakings (personal and surety) have to be signed this should be done after the court has risen. The accused (and surety, if applicable) should sit at the bar table while the bail is explained. The usher should hand the papers to the accused/surety for signature hygienically.

20.9 Trial listing hearings (TLH)

- 20.9.1 The prosecution may appear by video or audio link.
- 20.9.2 Defence lawyers may appear by video or audio link, provided that they have advised the judge's associate by email of their telephone number not less than two clear days prior to the hearing and are able to be contacted on that number.
- 20.9.3 Subject to any order, an offender on bail may answer their bail by attending court, or by attending at their lawyer's office in person or by telephone to their lawyer at a designated time, in which case the lawyer will be required to confirm, as an officer of the court that the offender has attended.

20.10 Callovers of listed trials

- 20.10.1 As a consequence of the announcement on 16 March 2020 to suspend jury trials, all matters currently listed for trial will be listed for a callover hearing.

- 20.10.2 The purpose of the callover hearing is to formally vacate the listed jury trial. Trials that are vacated at the callover will be identified in ICMS as being vacated due to COVID-19 issues.
- 20.10.3 At the callover hearing, the court will hear applications for judge alone trials in substitution for vacated jury trials. If an order is made for a judge alone trial, the trial will be listed on the same dates as the previously listed trial, if practicable.
- 20.10.4 The court will also hear applications for pre-recording of evidence for the vacated jury trial. If such an order is made the pre-recording of evidence will generally be conducted within the dates of the vacated trial.
- 20.10.5 All matters that are vacated will be listed for a compulsory case conference (CCC) unless the accused is unrepresented, in which case it will be adjourned to a TLH. Accused will be bailed or remanded to a TLH.

20.11 Compulsory Case Conferences

- 20.11.1 A CCC will be conducted pursuant to s 137(3)(a)(i) of the *Criminal Procedure Act 2004* in matters where the trial has been vacated due to COVID-19 and a further trial date has not been allocated.
- 20.11.2 The purpose of a CCC is to encourage the defence and prosecution to resolve issues so that a trial is not required; alternatively, to reduce the length of the trial by reaching agreement on the matters in issue and the witnesses required to be called.
- 20.11.3 The CCC will be conducted by a judge, or a person appointed by the court, as a mediator. Once the CCC is concluded, the mediator will have no further involvement in the matter.
- 20.11.4 The CCC does not form part of the trial process. No transcript or other record of the CCC will be made, unless orders by consent are made.
- 20.11.5 An accused is not to attend a CCC.
- 20.11.6 The CCC may be conducted in person or, by audio or video link if both parties agree. If the CCC is conducted in person, it will be convened in a secure courtroom around the bar table. Counsel are not required to robe.
- 20.11.7 No less than two clear days before the CCC:
- (a) the defence shall lodge and serve a notice of the factual elements of the offence that the accused may contend cannot be proved (similar to the requirement by s 96(3)(c) of the *Criminal Procedure Act 2004*);
 - (b) the prosecution shall lodge and serve on the accused a list of facts that it expects will not be in issue; and
 - (c) the accused shall lodge and serve on the prosecution a list of any formal admissions that he or she may be prepared to make.

20.11.8 A CCC may include discussion about:

- (a) the strength of the prosecution case;
- (b) whether the evidence in the prosecution brief supports the count(s) as pleaded;
- (c) the real matters in issue;
- (d) whether agreement may be reached on matters that are not in issue;
- (e) whether the defence is prepared to make any formal admission(s);
- (f) the benefit to the State and the witnesses of a plea of guilty; and
- (g) any matters relevant to case management.

20.11.9 To facilitate meaningful discussion of the issues the following rules apply:

- (a) Any agreement or indication on behalf of an accused to plead guilty will not deprive the accused of their right to plead not guilty should they change their mind after the CCC and before entering a plea. In that event, the prosecution would not be bound by any agreement made in reliance on a plea of guilty being entered.
- (b) Nothing said on behalf of an accused during a CCC may be used against them in proceedings to which the CCC relates, or in any related criminal proceedings (other than in a trial for a criminal offence which is allegedly committed during a CCC).
- (c) If an accused does not wish the prosecution to know their defence, or to investigate their defence before trial, defence counsel should ensure that it is not disclosed during the course of the CCC.
- (d) There is no obligation on a party to disclose privileged or confidential information at a CCC.

20.11.10 A mediator may adjourn a CCC where:

- (a) defence counsel requires further instructions from the accused; or
 - (b) counsel for the prosecution needs to confer with the investigating officer; or
 - (c) counsel for the prosecution requires time to consult a complainant, or a senior prosecutor,
- or for any other reason.

20.11.11 Three conferences will be listed each Monday, Wednesday and Friday, at 9.00 am, 11.00 pm and 2.00 pm respectively.

20.11.12 If a plea of guilty is indicated the matter will be listed for sentence as soon as practicable.

20.12 Trials by judge alone

20.12.1 The accused is to surrender into custody no later than 9.00 am on the morning of trial.

- 20.12.2 The judge must ensure social distance guidelines of a minimum of 2 metres for all persons in the courtroom and ensure that strict hygiene protocols are followed.
- 20.12.3 The judge will apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury pursuant to s 119(1) of the *Criminal Procedure Act 2004*.
- 20.12.4 The conduct of the trial is a matter for the judge's discretion. The judge may determine where the parties sit, which witnesses appear by video link or audio link and how bail matters will be dealt during the course of the trial.

20.13 Remote room/pre-recording of evidence

- 20.13.1 The District Court Building remote rooms are a minimum of 12 square metres. This is sufficient to accommodate a child witness, support person and a court officer in accordance with the social distancing guidelines of 4 square metres per person.
- 20.13.2 Child Witness Service staff will explain to the child what a distance indicated to be approximately 2 metres is and the distance that must be kept between the child and any other person entering the room or present in the room in order to comply with COVID-19 public health requirements.
- 20.13.3 The judge will ensure a social distancing space of a minimum of 4 square metres for all persons in the remote room.
- 20.13.4 The document camera should be used to show a document to a child or special witness. Any party seeking to use an original document or to have an original document passed around a courtroom must make an application to the presiding judge prior to the commencement of the hearing.
- 20.13.5 Any document to be shown to the child or special witness must be scanned and emailed to the court and printed by the court.

Dated 3 April 2020



His Honour Judge Kevin Sleight
Chief Judge of the District Court of Western Australia