



Judicial Conference of Australia

Legal reforms relevant to the Australian judiciary approved in order to cope with the COVID-19 pandemic

Contents

| | | |
|----------|---|----------|
| 1 | Summary | 1 |
| 1.1 | Key legislative changes | 1 |
| 1.2 | Directions..... | 1 |
| 2 | Commonwealth | 1 |
| 2.1 | Media Statements from the Prime Minister’s office..... | 1 |
| 3 | Australian Capital Territory | 2 |
| 3.1 | Legislation..... | 2 |
| 3.1.1 | COVID-19 Emergency Response Act 2020 (ACT) | 2 |
| 3.2 | Public health directions made under the Public Health (Emergency) Declaration 2020 (No 1) | 3 |
| 3.2.1 | Public Health (Non-Essential Gatherings) Emergency Direction (No 2) 2020 | 3 |
| 4 | New South Wales | 4 |
| 4.1 | Legislation..... | 4 |
| 4.1.1 | COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)..... | 4 |
| 4.2 | Subordinate legislation..... | 6 |
| 4.2.1 | Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020 (NSW) . | 6 |
| 4.3 | Public health orders made under section 7 of the <i>Public Health Act 2010</i> (NSW) | 7 |
| 4.3.1 | Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020..... | 7 |
| 5 | Northern Territory | 7 |
| 5.1 | Directions made under the Public and Environmental Health Act 2011 (NT)..... | 7 |
| 5.1.1 | COVID-19 Directions (No. 29) 2020 – Directions for Physical Distancing..... | 7 |

| | | |
|-----------|---|-----------|
| 6 | Queensland | 7 |
| 6.1 | Legislation..... | 7 |
| 6.1.1 | COVID-19 Emergency Response Act 2020 (Qld) | 7 |
| 6.2 | Subordinate legislation..... | 8 |
| 6.2.1 | Supreme Court (Admission) Amendment Rule 2020..... | 8 |
| 6.3 | Health directives made under section 326B of the <i>Public Health Act</i> 2005 (Qld)..... | 9 |
| 6.3.1 | Home Confinement, Movement and Gathering Direction (No. 2) | 9 |
| 7 | South Australia | 9 |
| 7.1 | Directions under s 25 of the <i>Emergency Management Act</i> 2004 (SA)..... | 9 |
| 7.1.1 | Emergency Management (Gatherings No 2) (COVID-19) Direction 2020 | 9 |
| 8 | Tasmania | 9 |
| 8.1 | Legislation..... | 9 |
| 8.1.1 | COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas)..... | 9 |
| 8.2 | Directions under the <i>Public Health Act</i> 1997 (Tas)..... | 10 |
| 8.2.1 | Gatherings – No 7 | 10 |
| 8.2.2 | Stay at home requirements –No 3..... | 10 |
| 9 | Victoria | 11 |
| 9.1 | Legislation..... | 11 |
| 9.1.1 | COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)..... | 11 |
| 9.2 | Directions issued by the Chief Health Officer under sections 199 and 200 of the <i>Public Health and Wellbeing Act</i> 2008 (Vic) | 15 |
| 9.2.1 | Stay at home directions (No 4) | 15 |
| 10 | Western Australia | 15 |
| 10.1 | Legislation..... | 15 |
| 10.1.1 | Family Violence Legislation Reform (COVID-19 Response) Act 2020 (WA)..... | 15 |
| 10.2 | Directions under the <i>Emergency Management Act</i> 2005 (WA)..... | 16 |
| 10.2.1 | Closure and Restriction (Limit the Spread) Directions (No 2)..... | 16 |

This report was prepared in the Chambers of the Honourable Justice Glenn Martin AM of the Supreme Court of Queensland. The work was undertaken by Ms Jane Hall, Associate to Justice Martin.

1 Summary

1.1 Key legislative changes

1. The ACT, New South Wales and Victoria have amended criminal procedure rules to provide for trials by judge alone.
2. The ACT, New South Wales and Victoria have also all amended evidence rules to allow for pre-recorded evidence in certain cases.
3. New South Wales and Queensland have provided for certain statutory time limits to be extended.
4. Victoria and Western Australia have amended certain statutes to allow for offenders to be ordered to wear electronic monitoring devices.
5. Victoria and Western Australia have also altered service requirements in certain circumstances.
6. New South Wales and Victoria have amended rules of evidence to allow for appearances to be by telephone and/or video-link.
7. The ACT has altered its sentencing administration practices to change reporting requirements.
8. New South Wales has amended its parole rules to allow the Commissioner for Corrections to grant parole to ‘classes’ of offenders.
9. Victoria has altered its bail requirements. Victoria has also provided for oral pre-sentence custody certificates in certain cases and for certain hearings to be conducted via written submissions only.

1.2 Directions

10. Most States and Territories have adopted social distancing practices modelled on those at the Commonwealth level. Social distancing is variously described as remaining more than 1.5 metres away from other persons and/or ensuring that the total number of persons present in any single undivided space, at the same time, does not exceed the number calculated by dividing the total area of the space used, as measured in square metres, by 4.
11. Most States and Territories have also imposed a ‘stay at home requirement’. Each jurisdiction, other than Tasmania, has listed attending a court or tribunal as a permitted reason to leave a person’s primary residence. Tasmania did not specifically list attending a court or tribunal, but did include an exception for attending work where it cannot be performed at a person’s primary residence.

2 Commonwealth

2.1 Media Statements from the Prime Minister’s office

12. In a media statement on 18 March 2020, the National Cabinet adopted the Australian Health Protection Principal Committee advice that non-essential indoor gatherings of greater than 100 people will no longer be permitted.¹

¹ Scott Morrison, Prime Minister, ‘Media Statement’ *Prime Minister of Australia* (18 March 2020) <<https://www.pm.gov.au/media/update-coronavirus-measures>>.

13. Correctional facilities, youth justice centres or other places of custody, courts and tribunals were made exempt from this requirement, however the statement notes that ‘other social distancing and hygiene practices may be required in these settings’.
14. The general social distancing practices involve being able to maintain a distance of 1.5 metres between persons. All States and Territories have adopted similar social distancing practices.²
15. Notwithstanding the exemptions for courts and tribunals, measures can be put in place to allow most court and tribunal hearings to be conducted in compliance with the social distancing requirements (ie with appearances via telephone or video-link or through physical distancing in courtrooms). However, ordinary jury trials cannot be conducted in compliance with the requirements. As such, all jurisdictions have suspended jury trials until further notice.

3 Australian Capital Territory

3.1 Legislation

3.1.1 *COVID-19 Emergency Response Act 2020 (ACT)*

16. Part 1.3 of Schedule 1 amends the *Crimes (Sentence Administration) Act 2005 (ACT)*.
 - a. Section 47A alters reporting requirements for community service work under intensive correction orders.
 - b. Section 92A alters reporting requirements for community service work under good behaviour orders.
 - c. Sections 126(2A), (2B) and 127(2A) alter requirements for inquiries and notice periods relating to the parole board.
 - d. Section 182(2A) alters the constitution requirements for the sentence administration board to allow one judicial member to sit on the board if it is not reasonably practicable for more than one member to be assigned.
17. Part 1.5 of Schedule 1 amends the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*.
 - a. Section 164 provides for a regulation making power in relation to the recording of evidence for court procedures.
18. Part 1.19 of Schedule 1 amends the *Supreme Court Act 1933 (ACT)*.
 - a. Section 68BA provides for trial by judge alone in criminal proceedings.

² See:

- Australian Capital Territory: Public Health (Non-Essential Gatherings) Emergency Direction 2020
- New South Wales: Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020
- Northern Territory: COVID-19 Directions (No. 29) 2020 – Directions for Physical Distancing,
- Queensland: Home Confinement, Movement and Gathering Direction (No. 2) - 26 April 2020,
- South Australia: Emergency Management (Gatherings No 2) (COVID-19) Direction 2020; Emergency Management (Non-Essential Business and Other Activities No 4) (COVID-19) Direction 202,
- Victoria: Restricted activity directions (No 5); Stay at home directions (No 4),
- Tasmania: Gatherings – No 7,
- Western Australia: Closure and Restriction (Limit the Spread) Directions (No 2).

- i. The court may order that the proceeding be tried judge alone if satisfied that the order:
 1. will ensure the orderly and expeditious discharge of the business of the court, and
 2. is otherwise in the interests of justice.
- ii. Before making an order for trial by judge alone, the court must:
 1. give the parties to the proceeding written notice of the proposed order, and
 2. in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice.
- b. Section 68BA differs from equivalent provisions in Queensland,³ Victoria,⁴ Western Australia⁵ and New South Wales,⁶ in that it does not require the accused to consent to the order.
- c. The equivalent provision in South Australia,⁷ allows the court to make an order for a trial by judge alone, on the application of the prosecution without the consent of the accused, where an information is presented to the District Court or the Supreme Court under s 103 of the *Criminal Procedure Act 1921* and the information includes a charge of a serious and organised crime offence (within the meaning of the *Criminal Law Consolidation Act 1935*), if it is in the interests of justice to do so⁸ or if the court considers that there is a real possibility that acts that may constitute an offence under ss 245 or 248 of the *Criminal Law Consolidation Act 1935* would be committed in relation to a member of a jury.⁹

3.2 Public health directions made under the Public Health (Emergency) Declaration 2020 (No 1)

3.2.1 *Public Health (Non-Essential Gatherings) Emergency Direction (No 2) 2020*¹⁰

19. The Risk Mitigation Guidance recommends that there be a density of no more than one person per four square metres of floor space.
20. This is suggested guidance to be applied to non-essential gatherings of 2 people or more. The direction specifies that a 'gathering' does not include a gathering for the purpose of law enforcement, at a correctional centre or at a court or tribunal. However, ordinary jury trial procedures would tend to conflict with the aims of such guidance.

³ *Criminal Code* (Qld), ss 614, 615.

⁴ *Criminal Procedure Act 2009* (Vic), ch 9, pt 9.2.

⁵ *Criminal Procedure Act 2004* (WA), s 118.

⁶ *Criminal Procedure Act 1986* (NSW), s 365.

⁷ *Juries Act 1927* (SA), s 7.

⁸ *Juries Act 1927* (SA), s 7(3b).

⁹ *Juries Act 1927* (SA), s 7(3c).

¹⁰ Kerryn Coleman, Chief Health Officer, *Public Health (Non-Essential Gatherings) Emergency Direction 2020 (No 2)* (NI2020, 1 May 2020) <https://www.covid19.act.gov.au/_data/assets/pdf_file/0006/1542570/Public-Health-Non-Essential-Gatherings-Emergency-Direction-2020-No-2.pdf>.

4 New South Wales

4.1 Legislation

4.1.1 COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)

21. Schedule 1 amends the *Criminal Procedure Act 1986* (NSW) by inserting a new Part 5 into Chapter 7.
- a. Division 2 provides for pre-recorded evidence hearings in the absence of a jury.
 - i. Section 355 states that this division only applies to proceedings in the District Court or Supreme Court.
 - ii. Section 356 states that the court, on its own motion, may order that the evidence of a relevant witness in a trial be given at a hearing in the absence of the jury.
 1. A relevant witness includes:
 - a. a complainant in prescribed sexual offence proceedings,
 - b. a complainant in proceedings for a domestic violence offence within the meaning of section 11 of the *Crimes (Domestic and Personal Violence) Act 2007*,
 - c. a complainant in proceedings for a serious indictable offence that is an offence of violence, or
 - d. a complainant or witness whom the court considers is at a significantly greater risk from the COVID-19 pandemic than the risk to members of the community generally, including because of the age or health of the complainant or witness.
 2. The order can only be made if:
 - a. the accused person has sought and received advice from an Australian legal practitioner,
 - b. both parties have been heard on the order,
 - c. all pre-trial disclosure and case management requirements under Division 3 of Part 3 of Chapter 3 have been complied with, and
 - d. the court is satisfied it is in the interests of justice to do so.
 3. In proceedings in which evidence given at a pre-recorded evidence hearing is viewed or heard, the court must warn the jury not to draw any adverse inference against the accused person or give the evidence any greater or lesser weight because it was recorded.¹¹
 - iii. Section 357 regulates access to the recorded evidence.
 - iv. Section 358 states that a witness whose evidence is pre-recorded at a pre-recorded evidence hearing cannot give further evidence in the trial without the leave of the court.
 - b. Division 3 provides for the use of pre-recorded evidence in subsequent proceedings.
 - i. Where a new trial is listed, the pre-recorded evidence is admissible as the original evidence of a witness, unless the court declines to admit

¹¹ This requirement is very similar to the existing provision in Queensland in relation to videorecording the evidence of special witnesses (see *Evidence Act 1977* (Qld), s 21A).

- the evidence because it is of the opinion that the accused would be unfairly disadvantaged by the admission of the record.
- c. Division 4 provides for judge alone trials.
 - i. Section 365(1) provides that a court may, on its own motion, order that an accused person be tried by a Judge alone.
 - ii. Section 365(2) states that an order under s 365(1) can only be made if:
 - 1. the accused person consents to be tried by a Judge alone or, for a joint trial, all the accused persons consent to be tried by a Judge alone,
 - 2. if the prosecutor does not agree to the accused person being tried by a Judge alone, the court considers it is in the interests of justice for the accused person to be tried by a Judge alone, and
 - 3. the court is satisfied the accused person has sought and received advice from an Australian legal practitioner in relation to the effect of an order that the person be tried by a Judge alone.
 - d. Division 5 sets out regulation-making powers for the purpose responding to the public health emergency caused by the COVID-19 pandemic, including altered arrangements for criminal proceedings, matters relating to bail and sentencing, and matters relating to the administration of sentences.
22. Clause 2.5 of schedule 2 amends the *Crimes (Administration of Sentences) Act 1999* (NSW) by inserting a new Part 15.
- a. Section 276 provides for the Commissioner of Prisons to make an order granting parole to certain classes of inmates, as prescribed by regulations, if the Commissioner is satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.
 - b. A class of inmates can be prescribed according to any of the following:
 - i. the offence committed by an inmate,
 - ii. the period remaining before the expiry of an inmate's sentence or non-parole period,
 - iii. an inmate's age,
 - iv. an inmate's health or vulnerability,
 - v. any other matter.
 - c. The following inmates are exempt:
 - i. an inmate serving a sentence of imprisonment for any of the following offences—
 - 1. murder,
 - 2. a serious sex offence or an offence of a sexual nature (within the meaning of the *Crimes (High Risk Offenders) Act 2006*),
 - 3. a terrorism offence (within the meaning of Division 3A of Part 6 of the *Crimes (Administration of Sentences) Act 1999*),
 - ii. an inmate serving a sentence of imprisonment for life,
 - iii. a serious offender,
 - iv. an inmate kept in custody in relation to an offence against a law of the Commonwealth,

- v. a Commonwealth post sentence terrorism inmate,
 - vi. a NSW post sentence inmate.
 - d. The Commissioner must consider the following before making an order granting parole:
 - i. the risks to community safety of releasing the inmate,
 - ii. the impact of the release of the inmate on any victim whose name is recorded in the Victims Register in relation to the inmate,
 - iii. in the case of an inmate who has previously been convicted of a domestic violence offence (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*)—the protection of the victim of the domestic violence offence and any person with whom the inmate is likely to reside if released,
 - iv. the availability of suitable accommodation for the inmate if released,
 - v. any other matter the Commissioner considers relevant.
- 23. Clause 2.9 of schedule 2 amends the *Evidence (Audio and Audio Visual Links) Act 1998*.
 - a. Section 22C provides for appearances to be via audio visual link in certain circumstances.
- 24. Clause 2.13 of schedule 2 amends the *Mental Health Act 2007*.
 - a. Section 202 provides for appearances by telephone and for changing time requirements under the Act.

4.2 Subordinate legislation

4.2.1 *Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020 (NSW)*

- 25. This Regulation was created under s 276 of the *Crimes (Administration of Sentences) Act 1999* (NSW) to amend the *Crimes (Administration of Sentences) Regulation 2014* (NSW) by inserting a new Part 23.
 - a. Section 330 prescribes the following classes of inmates:
 - i. an inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability, other than an excluded inmate,
 - ii. an inmate whose earliest possible release date is within 12 months, other than an excluded inmate.
 - b. An ‘excluded inmate’ means:
 - i. a national security interest inmate,
 - ii. a male inmate classified as Category AA, A1, A2 or E1,
 - iii. a female inmate classified as Category 5 or 4 or E1.

4.3 Public health orders made under section 7 of the *Public Health Act 2010* (NSW)

4.3.1 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*¹²

26. This Order directs persons not to leave their place of residence without reasonable excuse.
27. 'Undertaking any legal obligations' is included in the list of reasonable excuses. This would presumably extend to court appearances and may also extend to jury service.
28. The Order further directs that a person must not participate in a gathering in a public place of more than 2 persons.
29. An exception is made for 'a gathering necessary for the person to fulfil a legal obligation (including attending a court or tribunal, satisfying bail requirements or participating in legal proceedings)' as well as 'a gathering at a court or tribunal'. These exceptions would appear to cover appearing in court and undertaking jury service.

5 Northern Territory

5.1 Directions made under the *Public and Environmental Health Act 2011* (NT)

5.1.1 *COVID-19 Directions (No. 29) 2020 – Directions for Physical Distancing*¹³

30. This Direction requires persons to comply with physical distancing principles published by the Northern Territory Government. The current principles state that a minimum space of 1.5 metres must be maintained between people who are not part of the same household. Where a person must face another person and be closer than 1.5 metres, the contact time should be minimised to less than 15 minutes.

6 Queensland

6.1 Legislation

6.1.1 *COVID-19 Emergency Response Act 2020 (Qld)*

31. Part 5 provides for the modification of statutory time limits relating to proceedings.

¹² Brad Hazzard, Minister for Health and Medical Research, 'Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020' *NSW Legislation* <[https://www.legislation.nsw.gov.au/emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020_as%20amended.pdf](https://www.legislation.nsw.gov.au/emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020_as%20amended.pdf)>.

¹³ Hugh Heggie, Chief Health Officer, 'COVID-19 Directions (No. 29) 2020 – Directions for Physical Distancing' *Northern Territory Government* <https://coronavirus.nt.gov.au/data/assets/pdf_file/0011/819560/cho-directions-no-29-directions-for-physical-distancing.pdf>.

32. Section 15(2) allows for a statutory time limit to be modified on the ground that the modification is necessary for a purpose of the Act. The purposes of the Act are set out at s 2 as follows:
 - a. to protect the health, safety and welfare of persons affected by the COVID-19 emergency, and
 - b. to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements and establishing an office of small business commissioner, and
 - c. to provide for matters related to residential, retail and prescribed leases affected by the COVID-19 emergency, and
 - d. to support the Queensland rental sector during the COVID-19 emergency period.
33. Section 15(3)(b) states that the power to modify can be exercised by a court having jurisdiction relating to the proceeding giving each party to the proceeding a notice stating the modification and the reasons for the modification.
34. Section 15(5) states that the power to modify can be exercised on the court's own initiative or on the application of a party to the proceeding.
35. Section 15(8) clarifies that the provision applies to the following:
 - a. the *Criminal Code*, sections 590 and 671,
 - b. the *Dangerous Prisoners (Sexual Offenders) Act 2003*, part 4,
 - c. the *Justices Act 1886*, section 222,
 - d. the *Limitation of Actions Act 1974*, parts 2 and 3.

6.2 Subordinate legislation

6.2.1 *Supreme Court (Admission) Amendment Rule 2020*

36. New rule 27A allows the Chief Justice to make a practice direction providing for an alternative process for admission to the legal profession because of exceptional circumstances, including a public health emergency.
37. Practice Direction Number 9 of 2020 amends the requirements to admission. The amendments vary from region to region.
 - a. In Brisbane, the amendments allow for admissions to be completed on the papers, with applicants making an individual appointment with the Registrar to sign the roll of practitioners of the Supreme Court.
 - b. In Townsville, applicants must appear without any legal representatives or other persons.
 - c. In Cairns, applicants appear with their legal representatives by audio visual link or audio link.
 - d. In Rockhampton, the only changes are that applicants are to attend only with their legal representative, and must bring their own Bible if taking an oath.

6.3 Health directives made under section 326B of the *Public Health Act 2005* (Qld)

6.3.1 *Home Confinement, Movement and Gathering Direction (No. 2)*¹⁴

38. This Direction requires a person leaving their principal place of residence to practice ‘social distancing’ to the extent reasonably practicable. ‘Social distancing’ is defined as including ‘remaining at least 1.5 metres away from other persons, regular washing of hands and avoiding handshaking’.
39. An exception is made for persons attending a court or tribunal, or complying with or giving effect to orders of the court or tribunal.
40. Notwithstanding the exception, parties and legal representatives have been able to comply with this requirement by appearing via telephone or video-link, or by physically distancing in courtrooms. However, the Direction makes jury trials a practical impossibility.

7 South Australia

7.1 Directions under s 25 of the *Emergency Management Act 2004* (SA)

7.1.1 *Emergency Management (Gatherings No 2) (COVID-19) Direction 2020*¹⁵

41. This Direction prohibits gatherings of more than 10 people, and gatherings of fewer than 10 people that do not comply with the density requirement. The density requirement is described as the requirement that the total number of persons present in a gathering must not exceed one person per 4 square metres.
42. An exception is made for attendance at a court, tribunal, prison, correctional facility, training centre or other place of custody.

8 Tasmania

8.1 Legislation

8.1.1 *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas)

43. This Act makes provision for, *inter alia*, the effective performance and exercise of judicial functions and powers in relation to the State.
44. Section 12 provides that the Attorney-General may declare by notice that any proceedings conducted, by a court, a Tribunal, or another entity that is specified in the notice, may be held in the approved manner in relation to such proceedings.

¹⁴ Jeanette Young, Chief Health Officer, ‘Home Confinement, Movement and Gathering Direction (No.2)’ *Queensland Health* (26 April 2020) <<https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/home-confinement-movement-gathering-direction>>.

¹⁵ Grantley Stevens, State Co-Ordinator for the State of South Australia, ‘Emergency Management (Gatherings No 2) (COVID-19) Direction 2020’ *Government of South Australia* <https://www.covid-19.sa.gov.au/data/assets/pdf_file/0003/170724/EMA-Gatherings-No-2-COVID-19-Direction-2020.pdf>.

- a. Such a notice may provide that the proceedings are not required to be held in public.
 - b. This provision has effect despite any provision of a relevant legislative instrument.
 - c. The 'approved manner' means the manner determined from time to time by the head of jurisdiction.
 - d. The notice may only be issued by the Attorney-General if the relevant head of jurisdiction requests such a notice.
45. At 5 May 2020, no such notice has been issued.

8.2 Directions under the *Public Health Act 1997 (Tas)*

*8.2.1 Gatherings – No 7*¹⁶

46. This Direction prohibits any gathering of more than 3 persons in a single space at the same time.
47. An exception is made for attending a court, tribunal, prison, correctional facility, youth justice centre or other place of custody.
48. The Direction further requires that 'where safe and practicable' each person must maintain a distance of no less than 1.5 metres between themselves and any other person. Additionally, the total number of persons present in any single undivided space, at the same time, must not exceed the number calculated by dividing the total area of the space used, as measured in square metres, by 4.
49. These requirements appear to apply to court and tribunal proceedings. While compliance could be achieved in proceedings without a jury, ordinary jury trials could not be held in compliance with the requirements.

*8.2.2 Stay at home requirements – No 3*¹⁷

50. Under this Direction, a person must remain in their primary residence unless leaving for a purpose listed in the Direction.
51. Unlike similar directions, there is no specific exception for attending a court or tribunal. However, there is an exception for attending work if it is unable to be performed at the person's primary residence. This would appear to allow legal practitioners to continue to attend court hearings, however suggests that practitioners should appear via telephone or video-link where possible to prevent them from leaving their homes.

¹⁶ Scott McKeown, Acting Director of Public Health, 'Direction under Section 16 (Gatherings No. 7)' *Coronavirus disease (COVID-19)* <https://coronavirus.tas.gov.au/data/assets/pdf_file/0035/87659/Direction-under-Section-16-Gatherings.pdf>.

¹⁷ Scott McKeown, Acting Director of Public Health, 'Direction under Section 16 (Stay at home requirements – No. 3)' *Coronavirus disease (COVID-19)* <https://coronavirus.tas.gov.au/data/assets/pdf_file/0027/87282/Direction-under-Section-16-Stay-at-home-requirements.pdf>.

9 Victoria

9.1 Legislation

9.1.1 *COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)*

52. The purpose of this Act is to temporarily amend certain statutes, and temporarily empower the making of regulations, to modify the application of the law of Victoria in order to respond to the COVID-19 pandemic.
53. Chapter 2 sets out temporary modifications of the law by regulation.
54. Part 2.1 makes provision for regulations to temporarily modify the Justice Acts and laws.
- a. Section 4 provides for the Governor in Council to make regulations that disapply, or modify the application of, a Justice Act provision, a provision of a subordinate instrument made under a Justice Act provision, a relevant applied law or a subordinate instrument made under a relevant applied law (other than a temporary emergency provision) that provides for or regulates a number of listed matters, including, among other things:
- arrangements for or with respect to any proceeding in a court or tribunal, including a pre-trial proceeding: s 4(1)(a)
 - the conduct of a proceeding in a court or tribunal: s 4(1)(b)
 - the process applying to applications for bail: s 4(1)(e)
 - the method or processes by which conditions of bail are monitored or enforced: s 4(1)(f)
 - the method or processes by which a specified order or instrument is administered, monitored or enforced: s 4(1)(g)
 - the process by which orders, judgments, rulings, reasons, determinations, decisions or findings of a court or tribunal are issued (including their certification and transmission): s 4(1)(h)
 - the process by which a warrant is issued (including its certification and transmission): s 4(1)(i)
 - the method or processes by which a warrant is enforced: s 4(1)(j)
 - the process by which family violence intervention orders (including family violence interim orders) or family violence safety notices are issued (including their certification and transmission), and the method or processes by which they are monitored or enforced: s 4(1)(k)
 - the witnessing, execution or signing of legal documents such as affidavits, statutory declarations, deeds, powers of attorney, contracts or agreements, undertakings and wills: s 4(1)(l)
 - the process by which a document is given or issued: s 4(1)(m)
 - the service of documents: s 4(1)(n)
 - the certification of documents: s 4(1)(o)
 - the lodgement, submission or filing, or inspection, of documents: s 4(1)(p)
- b. Section 5 clarifies that regulations made under s 4 are subject to the *Constitution Act 1975 (Vic)* and the *Charter of Human Rights and Responsibilities*.

- c. Section 8 states that any regulation proposed to be made under s 4 which relates to the regulation of courts and tribunals must not be made without the consent of the relevant head of the court or tribunal.
55. Chapter 3 sets out temporary amendments to Justice legislation.
56. Part 3.2 amends the *Bail Act 1977* by inserting a new Part 6.
- a. Section 34C provides that a person may appear before a court personally, by a legal practitioner representing the person, or by another person empowered by law to appear for the person. Section 34C(3) clarifies that such an appearance may be by audio visual link or audio link.
57. Part 3.3 amends the *Children, Youth and Families Act 2005* (Vic) by inserting a new Part 8.5A, which provides for the following:
- a. changes to the constitution and quorum requirements of the Youth Parole Board,¹⁸
 - b. issuing an oral pre-sentence report in certain circumstances,¹⁹
 - c. isolation measures in remand centres, youth residential centres and youth justice centres,²⁰
 - d. holding hearings of the Children’s Court at an appropriate place,²¹
 - e. additional methods of service.²²
58. Part 3.4 amends the *Corrections Act 1986* (Vic) by inserting a new Part 10B.
- a. Section 112I restricts visits by lawyers and their assistants to situations where the Governor has permitted the visit to be conducted using physical barriers that prevent touching or physical modifications to create distancing.
 - b. Division 3 provides for mandatory protective isolation quarantine for a period of up to 14 days for prisoners entering prison.
59. Part 3.5 amends the *County Court Act 1958* (Vic) by inserting a new Part VIIA.
- a. Section 79C allows a court to decide any issue, other than a prescribed issue, on the basis of written submissions if it is in the interests of justice to do so, even if the parties do not consent to the court doing so.
 - b. This does not apply to criminal proceedings or issues in criminal proceedings.²³
 - c. When determining whether it is in the interests of justice to decide a matter on the basis of written submissions, the court must have regard to:
 - i. The nature of the issue or proceeding,
 - ii. The right to a fair hearing,
 - iii. Whether the parties have had the opportunity to obtain legal advice, and
 - iv. Whether the parties consent to the court doing so.²⁴
60. Part 3.6 amends the *Court Security Act 1980* (Vic) by inserting a new s 7A.
- a. Section 7A states that a reference to ‘the security, good order or management of the court premises’ also includes the health of all

¹⁸ See *Children, Youth and Families Act 2005* (Vic), ss 600B-600E.

¹⁹ See *Children, Youth and Families Act 2005* (Vic), ss 600H-600L.

²⁰ See *Children, Youth and Families Act 2005* (Vic), ss 600M-600O.

²¹ See *Children, Youth and Families Act 2005* (Vic), s 600W.

²² See *Children, Youth and Families Act 2005* (Vic), ss 600X-600Z.

²³ See *County Court Act 1958* (Vic), s 79C(2).

²⁴ See *County Court Act 1958* (Vic), s 79C(3).

persons who work at, attend or are in custody at the court premises during the COVID-19 pandemic and the following of any relevant directions made by an authorised officer under Part 10 of the *Public Health and Wellbeing Act 2008* in relation to the COVID-19 pandemic at the court premises.

61. Part 3.7 amends the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) by inserting a new Part 11.
 - a. Division 2 provides that the determination of a person's fitness to stand trial is to be determined by judge alone, overriding s 7(3)(b) which provides that the question is to be determined by a jury.
 - b. Division 3 provides for a special hearing to be conducted by judge alone, on the motion of the court or on an application by either party, if it is in the interests of justice.
 - c. Division 6 lists different matters that can be determined by a court without a hearing.
62. Part 3.8 amends the *Criminal Procedure Act 2009* (Vic) by inserting a new Chapter 9.
 - a. Part 9.2 provides for trial by judge alone where an accused is committed for trial under Chapter 4 or a direct indictment is filed against an accused.
 - i. Division 2 provides that the order can be made, on the court's own motion or on application from the prosecution or accused, if:
 1. Each charge is for an offence under the law of Victoria,
 2. Each accused consents to the making of the order,
 3. The court is satisfied that each accused has obtained legal advice, and
 4. The court considers it is in the interest of justice to make the order.²⁵
 - ii. Division 3 provides that the judge can make any decision that a jury could have made.
 - iii. Division 4 sets out provisions for an appeal from a decision regarding trial by judge alone.
 - iv. Division 5 sets out the costs regime for an appeal from a decision regarding trial by judge alone, including provisions for an accused to apply for an indemnity certificate.
 - v. Divisions 6 and 7 set out how the *Criminal Procedure Act* and other Acts apply to trials by judge alone.
 - b. Part 9.3 sets out procedural measures, including altering the definition of 'attend' to include appearing via audio or audio visual link and including a power to decide certain issues without hearing if the court is satisfied that it is in the interests of justice to do so.
63. Part 3.9 amends the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).
 - a. Most of the amendments pertain to appearances by audio link or audio visual link.

²⁵ See *Criminal Procedure Act 2009* (Vic), s 420D. Note, there does not seem to be an equivalent provision to *Criminal Code* (Qld), s 614(3), which provides that if the identity of the trial judge is known to the parties when the application is decided, a no jury order may be made only if the court is satisfied there are special reasons for making it.

64. Part 3.10 amends the *Family Violence Protection Act 2008* (Vic) by inserting a new Part 12A.
 - a. Section 207B extends the duration of interim extension orders made under s 107 to be 3 months, rather than 28 days.
65. Part 3.11 amends the *Fines Reform Act 2014* (Vic) by inserting a new Part 15A.
 - a. Division 2 introduces temporary measures relating to applications for time served orders.
66. Part 3.12 amends the *Magistrates' Court Act 1989* (Vic) by inserting a new Part 9.
 - a. Section 152 gives registrars additional powers to abridge or extend bail, either on the application of a party or on its own initiative.
 - b. Section 153(2) provides that a court must not remand an accused in custody for more than 8 days unless both the accused and the informant consent. If the accused does not consent, the court may remand the accused in custody for more than 8 days only if:
 - i. the accused is not a child or an Aboriginal person within the meaning of the *Bail Act 1977*,
 - ii. the Court does not consider that the person is a vulnerable adult within the meaning of the *Bail Act 1977*,
 - iii. the Court is satisfied that it is not reasonably practicable to have the matter return to the Court within 8 days, and
 - iv. the Court is satisfied that the longer period of remand is consistent with the interests of justice.
 - c. Section 152(4) provides that where an accused has been granted bail and the proceeding has been adjourned for a period of more than 8 days but the accused has not yet been released on bail, the remand warrant must direct the person into whose custody the accused is transferred to bring the accused before the court at the end of 8 days.
67. Part 3.14 amends the *Open Courts Act 2013* (Vic) by inserting a new Part 6A.
 - a. Division 2 provides for the making of a modified access and procedure (**MAP**) order to be made by a head of jurisdiction in a proceeding or hearing. A MAP order may do any of the following:
 - i. require that the proceeding or hearing must be held—
 1. with or without the appearance of the parties, or
 2. by audio visual link or audio link,
 - ii. permit a specified person, or a person of a specified class, to be present (whether in person, or by audio visual link or audio link) for the whole or part of the proceeding or hearing,
 - iii. prohibit a specified person, or a person of a specified class, from being present (whether in person, or by audio visual link or audio link) for the whole or part of the proceeding or hearing,
 - iv. confer on the presiding judicial officer or member discretion regarding the matters described in paragraph (i), (ii) or (iii),
 - v. specify the conditions applying to a discretion described in paragraph (iv) (including by specifying the circumstances in which the discretion may be exercised).
68. Part 3.16 amends the *Sentencing Act 1991* (Vic) by inserting a new Part 13.
 - a. Division 2 provides for a Magistrates' Court to attach electronic monitoring requirements to community correction orders.

- b. Division 3 provides for oral pre-sentence reports to be produced in certain circumstances.
69. Part 3.17 amends the *Supreme Court Act 1986* (Vic) by inserting a new Part 7A.
- a. Section 129B provides for allows a court to decide any issue, other than a prescribed issue, on the basis of written submissions if it is in the interests of justice to do so, even if the parties do not consent to the court doing so. When determining whether it is in the interests of justice to decide a matter on the basis of written submissions, the court must have regard to:
 - i. The nature of the issue or proceeding,
 - ii. The right to a fair hearing,
 - iii. Whether the parties have had the opportunity to obtain legal advice, and
 - iv. Whether the parties consent to the court doing so.
 - b. Section 129C provides for new Rules of Court to be made if a majority of the Judges of the Court agree to the proposed rules.

9.2 Directions issued by the Chief Health Officer under sections 199 and 200 of the *Public Health and Wellbeing Act 2008* (Vic)

9.2.1 Stay at home directions (No 4)

- 70. Under this direction, all persons in Victoria during the ‘stay at home period’ (13 April 2020 - 11 May 2020) must not leave the premises where the person ordinarily resides.
- 71. An exception is made under clause 8 for persons leaving their premises to attend work.
- 72. A further exception is made under clause 10 for persons leaving their premises to ‘as required by law’, which includes, but is not limited to, attending a court or other premises for purposes relating to the justice or law enforcement system.
- 73. The exceptions would appear therefore to cover legal practitioners attending court, parties appearing in court and juries undertaking jury duty.

10 Western Australia

10.1 Legislation

10.1.1 Family Violence Legislation Reform (COVID-19 Response) Act 2020 (WA)

- 74. This Act amends the *Sentencing Act 1995* (WA), *Sentence Administration Act 2003* (WA), *Bail Act 1982* (WA) and *Restraining Orders Act 1997* (WA).
- 75. Most of the amendments are related to permitting the use of approved electronic monitoring devices.
- 76. The amendments to the *Restraining Orders Act 1997* (WA) also make provision for substituted service of family violence restraining orders and for the making of court rules with respect to hearings.

10.2 Directions under the *Emergency Management Act 2005 (WA)*

10.2.1 *Closure and Restriction (Limit the Spread) Directions (No 2)*²⁶

77. This Direction prohibits a gathering of more than 10 persons in a single undivided public space, as well as a gathering of 2 or more persons in a single undivided space where there is not at least 4 square metres of space for each person.
78. An exception is made for attendance at a court, tribunal, prison, detention centre, lock up or other place of custody.

²⁶ Christopher Dawson, State Emergency Coordinator and Commissioner of Police, 'Closure and Restriction (Limit the Spread) Directions (No 2)' *Government of Western Australia* <https://www.wa.gov.au/sites/default/files/2020-04/Closure%20and%20Restriction%20%28Limit%20the%20Spread%29%20Directions%20%28No%20%29_2.pdf>.