

Hon Aupito William Sio, Associate Minister of Justice and Courts

High Court (COVID-19 Preparedness) Amendment Rules 2020

Date	3 April 2020	File reference	CRT-10-04-22-08 CRT-42-01
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Action sought	Timeframe
Agree to undertake Ministerial and party consultation on the attached Cabinet paper and legislative instrument	3 - 6 April 2020
Subject to the outcome of Ministerial and party consultation, approve the attached Cabinet paper and legislative instrument being lodged for consideration at the Cabinet Business Committee or COVID-19 Group of Ministers meeting to ensure consideration at the Cabinet meeting of 13 April 2020	TBC

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Megan Noyce	Acting General Manager, Courts and Justice Services Policy	04 913 9172	s9(2)(a)	
Matthew Mitchell	Policy Manager, Courts and Tribunals Policy	04 496 6161	s9(2)(a)	✓
s9(2)(a)	Secretary to the Rules Committee	s9(2)(a)	n/a	

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events
☐ Referred to: _____
☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

In Confidence

Purpose

1. This briefing seeks your agreement to:
 - 1.1. undertake Ministerial and party consultation on the attached Cabinet paper and legislative instrument; and
 - 1.2. lodge the attached Cabinet paper and legislative instrument for consideration at the Cabinet Business Committee (CBC) or COVID-19 Group of Ministers (CVD) meeting to ensure consideration at the Cabinet meeting of 13 April 2020.
2. This briefing provides information about the Rules Committee (the Committee) the process for making changes to court rules and the proposed amendments to the High Court Rules 2016 that have been agreed to by the Committee.

The Rules Committee

3. It is part of your delegation as the Associate Minister of Justice and Courts to progress Rules Committee proposals through the Cabinet process. If you agree with the changes developed by the Committee, you may seek Cabinet agreement to submit the proposals to the Executive Council.
4. It is standard for minor Committee proposals to be taken directly to the Cabinet Legislation Committee (LEG) where no policy decisions are required. Parliamentary Counsel Office assists the Committee in drafting the amendment rules.
5. Further information about the powers, process and membership of the Committee is contained in Appendix 1.

Progression of amendments approved by the Rules Committee

6. The Committee has considered and approved the High Court (COVID-19 Preparedness) Amendment Rules 2020 (the Amendment Rules) which are ready to be progressed to promulgation.
7. Usually Committee proposals are taken directly to LEG. However, during the period of the COVID-19 Alert Level 4 lockdown all normal Cabinet committee meetings have been cancelled.
8. These meetings have been replaced by a weekly meeting of the CBC which will deal with all Cabinet committee business. Further, CVD is meeting as required to consider COVID-19 specific matters. The priority of all Cabinet business over this period is on the COVID-19 response.
9. The Chief Justice has written to you (letter dated 2 April 2020, attached) to request that you consider progressing the Amendment Rules to CBC under urgency, so they may be considered at the CBC meeting of 8 April 2020.

10. Further, the attached Cabinet paper contains a recommendation that CBC authorise a waiver of the 28-day rule on the grounds that the instrument is made in an emergency.
11. Delays in progressing the Amendment Rules will lead to uncertainty among the legal profession and the High Court regarding proper practice and procedure during this time.
12. The prompt commencement of the Amendment Rules will ensure that the legal profession, and High Court, has the assurance and guidance it needs to operate efficiently and on clear legal footing during the ongoing period of emergency.
13. We are currently working with your office and the Cabinet office to determine whether CBC or CVD is the most appropriate committee to consider the Amendment Rules. While the paper is currently addressed to CBC, we will adjust this if it is decided that CVD is the better choice.

Proposals

14. The attached Cabinet paper seeks approval for the Amendment Rules, which:
 - 14.1. ensure consistent use of the word "emergency" in the High Court Rules;
 - 14.2. ensure that hearings can proceed with remote participation;
 - 14.3. allow for the filing of electronic documents;
 - 14.4. allow electronic service of documents;
 - 14.5. removing the requirement for signature of witness briefs; and
 - 14.6. provide for reliance on unsworn affidavits.
15. These changes will only apply in situations of emergency as defined in the High Court Rules and will not apply outside of this context.
16. The continuing need for these amendments will be reviewed by the Committee on a decision by the Government that the pandemic is at an end.

Consistent use of the word "emergency" in the High Court Rules

17. Rule 5 of the Amendment Rules revokes and replaces rule 3.4 of the High Court Rules. The amended rule 3.4 permits the Chief High Court Judge to order that the court or one or more of its registries may be closed for consecutive one-week periods if an emergency exists.
18. An emergency, for the purposes of these rules includes the existence of a state of danger in a place in respect of which either: an epidemic notice has been given, a state of national emergency has been declared, or a state of local emergency has been declared.

Remote participation in proceedings

19. Rule 5 of the Amendment Rules inserts new rule 3.4A in the High Court Rules. This rule provides that, where a state of emergency exists, a judge may dispense with any requirement for in-person attendance and instead direct remote participation by telephone or audio-visual link by counsel, parties, witnesses or other persons at any hearing or trial.
20. This direction must be no more than is reasonably necessary to protect the health and wellbeing of those required or compelled to attend or participate in the hearing or trial.

Filing of electronic documents

21. Rule 6 of the Amendment Rules inserts new rule 5.1A and rule 5.1B in the High Court Rules. Rule 5.1A allows a Judge or Associate Judge to require that documents be filed electronically, including provision for electronic signatures. An electronic address, for the purposes of electronic filing, includes email addresses, fax numbers, and remotely accessible locations in file directories.
22. Rule 5.1B provides direction as to when an electronically filed document is to be considered filed, including for the payment of any relevant filing fees by credit card or electronic bank transfer. Rule 5.1B(2)(c) allows for a document to be filed without the prescribed fee where the registrar accepts it is impractical for the person presenting the document to effect the payment of the fee by other means.
23. Such filing would require the solicitor on the record to provide an unconditional undertaking to the court to make the payment of the fee within three working days from the day on which the document has been filed. Further, rule 5.1B(2)(d) permits a Registrar to treat a document as filed despite non-payment of the prescribed fee if it is determined that doing so is in the interests of justice.

Electronic service

24. Rule 9 of the Amendment Rules inserts new rule 6.1A in the High Court Rules. This rule provides that a Judge or Associate Judge may, if an emergency means that the service of documents by any means other than electronic is appropriate, require any party to specify an electronic address for service or to require that any document be served electronically.

Requirement for signature on witness briefs

25. Rules 7, 12, 13 and 14 of the Amendment Rules make changes to remove the requirement that witness briefs be signed by deleting references to signing or signed briefs.
26. The suspension of this requirement will be reversed on a decision by the Government that the pandemic is at an end.

Reliance on unsworn affidavits

27. Rule 17 of the Amendment Rules amends rule 9.73 of the High Court Rules (Swearing of affidavits) to insert new subclauses 9.73(4) - 9.73(5). These subclauses provide that a Judge or Registrar may accept an unsworn affidavit,

provided it is presented for filing together with a memorandum of counsel confirming that the unsworn affidavit would be a sworn affidavit were it not for the emergency.

Timing and Next Steps

28. In addition to consulting with the Minister of Justice on the attached Cabinet paper and legislative instrument, you will need to undertake Ministerial and party consultation. The draft Cabinet paper and the legislative instrument are attached to support this consultation.
29. As mentioned above (at [13]), officials are currently working with your office and the Cabinet office to determine whether CBC or CVD is the most appropriate committee to consider the Amendment Rules.
30. If you agree to the proposed amendments, the Ministry recommends that the Cabinet paper and legislative instrument be lodged for consideration at CBC or CVD to ensure Cabinet consideration on 13 April 2020.
31. As you are not a member of CBC or CVD, you may wish to:
 - 31.1. ask the Committee Chair, Rt Hon Jacinda Ardern, to give permission for you to attend for this item, or
 - 31.2. ask another Minister to take the package on your behalf.
32. We will also notify relevant stakeholders of the changes being made by this instrument and of the commencement date once Cabinet has approved them.

Recommendations

33. It is recommended that you:
 1. **Note** that rules of the Senior Courts are made by Order in Council by the Governor-General with the concurrence of the Rules Committee;
 2. **Note** that it is part of your delegation as the Associate Minister for Courts to progress Rules Committee proposals through the Cabinet process;
 3. **Agree** to progress the High Court (COVID-19 Preparedness) Amendment Rules 2020 to Cabinet; YES / NO
 4. **Note** that the Ministry has provided the draft CBC paper and legislative instrument for Ministerial and cross-party consultation; and
 5. Subject to the outcome of Ministerial and party consultation, **approve** the lodging of the attached Cabinet paper and YES / NO

legislative instrument for consideration at CBC or CVD to ensure Cabinet consideration on 13 April 2020.



Matthew Mitchell
Manager
Courts and Tribunals Policy

APPROVED SEEN NOT AGREED

Hon Aupito William Sio
Associate Minister of Justice and Courts

Date / /

Attachments:

- CBC paper: *High Court (COVID-19 Preparedness) Amendment Rules 2020*
- High Court (COVID-19 Preparedness) Amendment Rules 2020
- Letter from Chief Justice Dame Helen Winkelmann

Appendix 1: The Rules Committee

1. Court rules regulate the process and procedures for how matters are commenced and dealt with by the courts. Court rules address a wide range of matters including the filing and service of documents, case management procedure, and orders for costs. Rules are intended to assist the just, efficient and inexpensive determination of proceedings.
2. Senior Courts and District Court Rules are made by the Governor-General in council, with the concurrence of the Rules Committee. The Committee is a statutory body established under section 155 of the Senior Courts Act 2016. Members include the Chief Justice, the Chief High Court Judge, the Chief District Court Judge, the Attorney-General, the Solicitor-General, the Chief Executive of the Ministry of Justice, and selected judges and lawyers.
3. Section 148 of the Senior Courts Act 2016 gives the Committee the power to “make rules regulating the practice and procedure of” the High Court, Court of Appeal and Supreme Court. Section 228 of the District Court Act 2016 gives the Committee the power to “make rules regulating the practice and procedure” of the District Court.
4. The Committee has a prominent role in the making of court rules because of the judiciary's role as an independent branch of government responsible for regulating its own practice and procedure. The Executive's perspective is represented on the Committee by the Attorney-General, the Solicitor-General and the Chief Executive of the Ministry of Justice.
5. Rule changes are usually initiated in one of two ways: a department will approach the Committee to develop rules in response to a policy initiative agreed by Cabinet, or the Committee will initiate rules changes where it identifies a need.