

In confidence

Office of the Associate Minister for Courts

Chair
Cabinet COVID-19 Ministerial Group

High Court (COVID-19 Preparedness) Amendment Rules 2020

Proposal

1. I seek Cabinet's authorisation for submission to the Executive Council of the High Court (COVID-19 Preparedness) Amendment Rules 2020.

Background

2. This paper seeks approval for changes to the High Court Rules 2016, prepared in circumstances of urgency to facilitate the continuation of civil proceedings in the High Court during the course of the outbreak of COVID-19. These changes are proposed by the Rules Committee (the Committee).
3. The Committee is a statutory body established under section 155 of the Senior Courts Act 2016. Rules of the Senior Courts and District Court are made by Order in Council, with the concurrence of the Committee. 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.
4. The proposed changes do not require any new policy decisions. The amendments have been considered and agreed to by the Committee, a statutory committee with authority under section 148 of the Senior Courts Act 2016 to make, amend and repeal rules of the Senior Courts and District Court.

High Court (COVID-19 Preparedness) Amendment Rules 2020

5. The changes contained in the High Court (COVID-19 Preparedness) Amendment Rules 2020 (the Amendment Rules):
 - 5.1. ensure consistent use of the word "emergency" in the High Court Rules;
 - 5.2. ensure that hearings can proceed with remote participation;
 - 5.3. allow for the filing of electronic documents;
 - 5.4. allow electronic service of documents;
 - 5.5. remove the requirement for signature of witness briefs; and
 - 5.6. provide for reliance on unsworn affidavits.

6. These changes will only apply in situations of emergency as defined in the High Court Rules and will not apply outside of this context.
7. 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

8. 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.
9. 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

10. 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.
11. 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

12. 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.
13. 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.
14. 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

15. 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 not 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

16. 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.
17. 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

18. Rule 17 of the Amendment Rules amends rule 9.73 of the High Court Rules 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 28-day rule

19. I seek approval of a waiver of the 28-day rule on the grounds that the instrument is made in response to an emergency
20. The High Court (COVID-19 Preparedness) Amendment Rules 2020 will come into force immediately upon their notification in the Gazette.

Compliance

21. The regulatory changes comply with each of the following:
 - 21.1. the principles of the Treaty of Waitangi;
 - 21.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 21.3. the principles and guidelines set out in the Privacy Act 1993;
 - 21.4. relevant international standards and obligations; and
 - 21.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Statutory requirements

22. Section 148 of the Senior Courts Act 2016 requires the concurrence of the Chief Justice and two or more members of the Committee (at least one of whom must be a High Court Judge) to rules regulating the practice and procedure of the High Court.

23. I confirm that these requirements have been met.

Regulations Review Committee

24. There do not appear to be grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

25. The Parliamentary Counsel Office has certified that the legislative instrument is in order for submission to Cabinet.

Impact analysis

26. The Treasury has determined that this is a direct COVID-19 response and has suspended the RIA requirements in accordance with (CAB-20-MIN-0138).
27. The Ministry for the Environment has been consulted and confirms that the Climate Implications of Policy Assessment requirements do not apply to this proposal as the threshold for significance is not met.

Financial implications

28. There are no financial implications arising directly from this paper. If any additional costs arise it is expected that these can be met within baseline funding.

Publicity

29. The Ministry of Justice and the Committee will publicise the rule changes to the legal profession.

Proactive release

30. I propose to proactively release this paper, with appropriate redactions, within 30 business days of the decision.

Consultation

31. The High Court (COVID-19 Preparedness) Amendment Rules 2020 were developed by the Committee in accordance with its consultation processes. The New Zealand Law Society, New Zealand Bar Association, Crown Law Office, Parliamentary Counsel Office and Ministry of Justice are represented on the Committee, as well as senior members of the judiciary and selected judges and lawyers.
32. The Minister for Courts has been consulted and has agreed to the submission of this paper and the legislative instrument.
33. Parliamentary Counsel Office, Crown Law Office and Inland Revenue were consulted on this paper.

Recommendations

34. I recommend that the COVID-19 Ministerial Group:

1. **note** that the Rules Committee has resolved to make changes to the High Court Rules 2016 to facilitate the continuation of civil proceedings in the High Court during the outbreak of COVID-19;
2. **note** that section 148 of the Senior Courts Act 2016 requires that concurrence of the Chief Justice and two or more members of the Committee (at least one of whom must be a High Court Judge) to rules regulating the practice and procedure of the High Court;
3. **note** the advice of the Associate Minister for Courts that this requirement has been met;
4. **authorise** the submission of the High Court (COVID-19 Preparedness) Amendment Rules 2020 to the Executive Council;
5. **authorise** a waiver of the 28-day rule on the grounds that the High Court (COVID-19 Preparedness) Amendment Rules 2020 were prepared in response to an emergency; and
6. **note** that the High Court (COVID-19 Preparedness) Amendment Rules 2020 will come into force immediately on their notification in the Gazette.

Authorised for lodgement

Hon Aupito William Sio
Associate Minister for Courts