

16 November 2018

Hon Justice Courtney
Chair, Rules Committee
Auckland

By email: daniel.mcgivern@justice.govt.nz

Dear Justice Courtney

Time allocations for trial preparation: Rules Committee review

Thank you for the Rules Committee's letter of 15 October 2018 inviting feedback on the updated proposal to amend the time allocations for trial preparation in Schedule 3 to the High Court Rules. The New Zealand Law Society's Civil Litigation and Tribunals Committee has considered the updated proposal (which now provides separately for witness hearings and affidavit hearings) and draft schedules, and the Committee's comments are set out below.

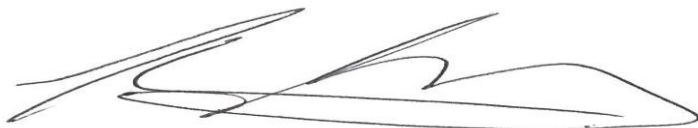
1. As a general observation, it is apparent that the scale has become out of step, in different ways, for both shorter and longer trials. The Law Society welcomes efforts to make it more reflective of the legal costs actually borne by litigants.
2. Tying the preparation of evidence and general preparation to the actual length of the hearing is appropriate. It is accepted that the current fixed allocations yield unreasonable results for trials of a longer duration.
3. The time allocation for trial preparation is insufficient, particularly for trials of shorter duration. In particular:
 - 3.1 The time afforded should reflect a reasonable estimate of the actual time required. (The "discount" under the Rules applies to the daily recovery rate per r 14.2(d); not the time allocation.)
 - 3.2 Under the proposal, two days is afforded for a one-day trial to prepare briefs, a list of issues, a bundle of authorities, an opening, agree the common bundle, an opening, and plan cross-examination. This is not a realistic estimate for a High Court trial. Indeed, it is less preparation than is allowed for a band B interlocutory hearing, which might only last a quarter of a day. It is also less than the corresponding allocation for an originating application.
 - 3.3 The District Court Rules allow two days preparation per hearing day (excluding briefs / affidavits / common bundle / list of issues / authorities). That is twice the amount proposed under the proposed High Court Rules amendment for hearings of 1 – 5 days and more than twice the amount for hearings of longer duration. It is incongruous that half as much preparation time would be allocated to a High Court hearing than a District Court trial, when the High Court hearing will ordinarily be more significant in monetary terms.
4. It is suggested that the Rules Committee proposal be modified by:

- 4.1 adding a further day for affidavit preparation to the first hearing day across all time bands (proposed item 30);
 - 4.2 adding a further day for brief of evidence preparation to the first hearing day (proposed item 33); and
 - 4.3 adding a further two days for preparation to the first hearing day (proposed items 32 and 33B).
5. The effect of this proposal is set out in the **attached** table (assuming it is taken from the plaintiff's perspective and on a band B basis). The Rules Committee proposal is highlighted red and the suggested revision highlighted green. Existing allocations are also included for comparison purposes and highlighted yellow. It will be noted that the proposed time is, proportionately, much higher for a one- and two-day trial than that proposed by the Rules Committee. However, it is still within the existing High Court Rules allocation.
6. It should also be noted that one of the tables in the draft schedules attached to the 15 October 2018 letter appears to contain an error. The proposed band B allocation for preparation of affidavits (proposed item 30) increases to 7 days on the sixth day, yet the draft rule says that there is no increase from the fifth day. This has been addressed in the attached table. Accordingly, the total allocations for affidavit trials as proposed by the Rules Committee set out in the attached table do not quite match the table in the Rules Committee letter.
7. The Rules Committee has also proposed to allow half a day for preparing the common bundle for any hearing of any duration (other than a band C affidavit hearing which is afforded a one-day allocation). This is inadequate for hearings of longer duration, where the common bundle can be expected to run to thousands of pages and multiple volumes. Attending to paginated indexing is no small feat and the time increases further if there is an electronic bundle. It is suggested that a more reasonable allocation for any hearing (i.e. affidavit or witness and regardless of band) would be as follows:

Trial Length	Allocation
1-3 days	0.5
4-6	1
7-9	1.5
10+	2

8. The Civil Litigation and Tribunals Committee acknowledges that it is never possible to get these estimates exact, but it is important to ensure that the work required of practitioners to bring a case on to a full High Court hearing is not understated.

Yours sincerely



Kathryn Beck
President

Encl: table

Hearing Duration (Days)	Preparation of Affidavits, List of Issues, Agreeing Common Bundle						Preparation for Hearing						Totals					
	District Court (16.1 & 16.2)	High Court Current (30 & 31)	Rules Committee Proposal - Affidavit Hearing	Rules Committee Proposal - Witness Hearing	Revised Proposal - Affidavit Hearing	Revised Proposal - Witness Hearing	District Court (17.1)	High Court Current (33)	Rules Committee Proposal - Affidavit Hearing	Rules Committee Proposal - Witness Hearing	Revised Proposal - Affidavit Hearing	Revised Proposal - Witness Hearing	District Court	High Court Current	Rules Committee Proposal - Affidavit Hearing	Rules Committee Proposal - Witness Hearing	Revised Proposal - Affidavit Hearing	Revised Proposal - Witness Hearing
1	4.5	5	2	1	3	2	2	3	1	1	3	3	6.5	8	3	2	6	5
2	4.5	5	3	2	4	3	4	3	2	2	4	4	8.5	8	5	4	8	7
3	4.5	5	4	3	5	4	6	3	3	3	5	5	10.5	8	7	6	10	9
4	4.5	5	5	4	6	5	8	3	4	4	6	6	12.5	8	9	8	12	11
5	4.5	5	6	5	7	6	10	3	5	5	7	7	14.5	8	11	10	14	13
6	4.5	5	6	5.75	7	6.75	12	3	5.75	5.75	7.75	7.75	16.5	8	11.75	11.5	14.75	14.50
7	4.5	5	6	6.5	7	7.5	14	3	6.5	6.5	8.5	8.5	18.5	8	12.5	13	15.5	16.0
8	4.5	5	6	7.25	7	8.25	16	3	7.25	7.25	9.25	9.25	20.5	8	13.25	14.5	16.25	17.50
9	4.5	5	6	8	7	9	18	3	8	8	10	10	22.5	8	14	16	17	19
10	4.5	5	6	8.75	7	9.75	20	3	8.75	8.75	10.75	10.75	24.5	8	14.75	17.5	17.75	20.50