

INTRODUCTION

Terms of reference

1.1 The Commonwealth Law Ministers in August 1977

"expressed their grave concern about increasing delays in the administration of justice - a problem faced by almost all Commonwealth jurisdictions. They agreed that it was one which called for positive and urgent action; and pledged themselves to providing remedies which in no way jeopardised the quality of justice and which respected the fundamental rights of all persons under the law."

1.2 After initiating action regarding criminal procedure, the Director of the Legal Division of the Commonwealth Secretariat wrote to correspondents around the Commonwealth, inviting them to report on any action that had been taken in their countries in recent years to expedite civil court business. In September 1981, he wrote on similar lines to Bar Councils and Law Societies, in the hope that they would not only add information but also present it from a different angle.

1.3 This paper is a collation of the information that has been sent in, with some additional information and some comments: it is not the result of original research.

1.4 Correspondents were asked about action that has been taken. Some confined themselves to giving that information and it has been incorporated here. Others described the systems in use in their countries and some reported the recommendations of commissions and other advisory bodies. The major recommendations have been mentioned in this paper but not, generally, descriptions of systems that have been in use for any considerable time.

1.5 It follows from the nature of the inquiry that some countries have reported as innovations or experiments practices that have been in use in other countries for a long time and which were therefore not mentioned by the correspondents in those countries. The space devoted to any particular subject tends to be determined by the number of correspondents who referred to it, rather than to its importance in the overall scheme of procedure. The result is a collection of notes rather than a systematic study.

1.6 Matters of detail and matters that are likely to be significant only in the country where they arise have not been included. In particular, no mention is made of procedure under French or Roman-Dutch law.

1.7 No mention is made of procedure in jury trials, as there are today so few in civil cases.

1.8 Although the cost of litigation is closely related to the expeditious disposal of business, it is outside the scope of the present exercise.

1.9 The terms of reference are limited to the administration of justice by the established courts and no attempt has been made to deal with subjects such as conciliation, arbitration (except as a function of the courts) or the use of extra-judicial tribunals.

1.10 This paper parallels a similar survey of measures taken to expedite criminal proceedings, prepared by Ms Judith A. Osborne of the Centre of Criminology, University of Toronto and published by the Commonwealth Secretariat under the title, "Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience".

The meaning of delay

2.1 References to delays in the administration of justice mean, of course, excessive or unreasonable delays. No-one could reasonably expect to be able to walk into a court and have a grievance righted immediately, even in the most trivial matter. At the very least, the other party must be given notice and must have the opportunity to present his case. Court time is expensive and must be carefully scheduled. A lawyer has more than one client

but can only attend to one matter at a time. There are uncontrollable factors, such as sickness, which may afflict judges, counsel, solicitors and witnesses.

2.2 The litigant, whether his claim be large or small, feels aggrieved if, having taken all appropriate steps, he fails to obtain a remedy within what he considers a reasonable time.

2.3 It is impossible to prescribe what is a reasonable time. Cases, even within the same general categories, vary in the time they need for preparation and hearing. It is possible, and necessary, to fix time limits within which the steps of a proceeding are to be taken but the system must be sufficiently flexible to allow those limits to be extended. Courts are usually reluctant to extend time but will nearly always allow more time rather than risk a possible injustice.

2.4 In extreme cases, as in India today, it is obvious that the delay in the courts is excessive. A heavy backlog of cases indicates that something is wrong if, but only if, they are cases in which the parties are ready and desirous of going to trial. The mere fact that the number of cases instituted is greater than the number of cases decided does not of itself mean that the work of the courts is in arrear. General public dissatisfaction is probably the clearest indication.

The extent of delay

3.1 There is a widespread belief in the Commonwealth that civil litigation takes too long and a consciousness on the part of all those concerned of the need to make the processes of civil litigation more acceptable to the public by reducing delays and cost.

3.2 From the comments that have been received, it would seem that the position may not be quite as serious as is generally supposed. Excessive delay is not universal: some countries report that they have no unreasonable delay and in others complaints relate only to particular courts or particular jurisdictions.

3.3 In England, neither the Bar nor the Law Society in answer to a questionnaire from the Royal Commission on Legal Services accepted that delays in litigation are as bad as is popularly supposed. The Bar argued that litigation is more drawn out, lengthy and expensive in other countries and they drew attention to the difficulty of striking a ¹ balance between the speed and cheapness of the process and the quality of the ² result. This comparison with other countries was accepted by the Commission, who said² that there was -

"no evidence that proceedings here take longer than abroad."

3.4 The Law Society in their reply had stated that they were endeavouring to obtain statistics and other information relating to the speed and cost of litigation in other countries. They maintained³ that the vast majority of contested cases are dealt with reasonably quickly, although they accepted that criticism is justified in relation to some full scale trials.

3.5 The Commission summed this up by saying that, while speed is sometimes difficult to achieve and is not always desirable,

"it is generally agreed, both within the legal profession and outside it, that legal proceedings of all kinds generally take longer than they should."⁴

3.6 In London, according to the Bar,⁵ the average time in the High Court from the issue of a writ to trial was about 26 months in 1975: a case for which a fixed date was not required might be tried within five or six weeks of being set down; if a fixed date was required, the interval was not likely to be less than nine months, and outside London it would normally be more than a year. Short cases in the Chancery Division could usually be heard within four months, but longer cases were unlikely to come on within 18 months. It was, however, stressed that really urgent cases could be brought on and disposed of very quickly.

3.7 The Review Body on the Chancery Division of the High Court reporting in 1981 (the Oliver Report)⁶ considered what should be the target period within which the Chancery Division ought to be able to offer a fixed date for hearing. They observed that counsel, solicitors and witnesses often prefer a date well ahead and will sometimes decline an earlier date. They regarded the current waiting period of 13 or 14 months from setting down to hearing as wholly unacceptable, but they thought anything less than four or five

months would probably cause difficulties for one or other party. They thought a date should normally be offered within six, or at most eight months. This is in relation to the heaviest cases.

3.8 There are no delays in the High Court of Australia and a reform of procedure in the Federal Court appears to have achieved its purpose. Under the former system, based on the issue of writs, cases rarely came on for hearing within 12 months. Now, with a system based on a simple form of application, followed by an early listing for directions, cases are usually disposed of within six or eight months.

3.9 Manitoba has no backlog of cases and it is reported that "there is no delay problem in connection with civil cases, insofar as the systems are concerned. Parties and lawyers do occasion delay in specific cases, for one reason or another, but this is not a great problem."

3.10 Similarly from Ontario it is reported that, while they cannot afford to be complacent, the impression given by Bench and Bar is that the situation is reasonably satisfactory, with the one exception of the family law caseload. There appears to have been a marked improvement since 1971, when delays were very serious and when the rules of procedure were amended. The Law Reform Commission, reporting in 1973, thought that a reasonable target for the disposal of a case was one year from the issue and service of the writ⁷ and that the maximum time between setting down and disposal should be six months.⁸

3.11 In South Australia, the Law Society commissioned a market research report to ascertain the knowledge of and attitudes to the legal profession of persons living in Adelaide. One proposition on which opinions were sought was that lawyers "take too long to do things". Of the persons interviewed, 16% were strongly in agreement, 51% agreed, 15% disagreed, 1% strongly disagreed and 17% were not sure. These opinions, of course, related to all activities of the profession, including criminal work and non-contentious business.

3.12 The Law Society commented that "whilst those charged with the administration of justice.... should be alert to the unsatisfactory state resulting from a severe backlog of cases,.... often the problem is overstated."

3.13 The waiting period of trials as at May 1982 has been given as three months for small claims, 10 to 11 months in the District Court and seven months in the Supreme Court. These figures were taken at a time when adjustments of jurisdiction had been made but before their full impact had been felt. The position is regarded neither as grave nor wholly satisfactory.

3.14 From Zimbabwe comes the comment that the country "does not suffer from unusual delays compared with other countries." There are no delays in the court of appeal. According to the Bar Council, the average High Court case might be expected to take between 4 to 10 months from the issue of the summons to completion.

3.15 The enormous increase in the population of Hong Kong and its economic prosperity has resulted in a big increase in civil litigation but the structure of courts has been adapted and the number of judges increased to meet the need. In 1981, the time taken in the High Court from setting down to hearing was four to six weeks or, in the special list (cases involving witnesses from abroad, etc.) three months. The corresponding periods in the district court were two months and four months.

3.16 In New South Wales, cases in the Common Law Division are usually fixed for trial three to six months ahead, and if they are not reached a fresh date has to be arranged, again three to six months ahead. Personal injury cases are exceptional and it is usually over two years before any attempt is made to bring them to trial. Commercial list cases are dealt with more promptly than other litigation. In the Equity Division, short cases can be brought on in a month or two, but the longer cases require about a year. There are said to be many causes of delay and New South Wales is described as "the most litigious State in the Commonwealth."

3.17 The Isle of Man is another territory that has recently experienced prosperity, and this has created problems that are regarded as only temporary.

3.18 Tasmania, too, has suffered from temporary factors making for delay and the increasing volume of legally aided criminal matters has imposed a strain on the system and raised doubts as to the ultimate answer. No figures are available for the time a case

normally takes in the Supreme Court before it is ready for trial, but from that point until the hearing may be anything from 6 to 12 months or even more.

3.19 From Alberta come references to "a continuing problem."

3.20 In New Zealand, the Royal Commission on the Courts⁹ recorded that they had heard complaints that the civil business of the Supreme Court was badly in arrears. Criticism had particularly been directed towards the Administrative Division. The Law Society are on record as saying that in some parts of New Zealand the delay in obtaining fixtures was unacceptable, although they added that it was generally possible to obtain a hearing for a case of real urgency.¹⁰

3.21 The statistics produced by the Royal Commission show that a very great improvement followed the introduction of the accident compensation legislation.¹¹ This was largely because it resulted in fewer proceedings being begun, but not entirely so as there was an increase in other kinds of action. It is everywhere accepted that personal injury cases by their very nature take longer to come to trial than other actions and their elimination, therefore, improved the average.

3.22 By 1976, 75% of cases were being set down within six months of the issue of the writ, and almost all within a year, and nearly 80% of these were heard within three months of setting down. This represents an enormous improvement on the figures of two years previously. The Royal Commission gave much of the credit for these figures to the long hours worked by the judges.

3.23 A recent comment is "We have been by no means free of problems.... and we cannot pretend to have found all the answers."

3.24 In Malawi, complaints appear to be limited to delays in the processes of execution. The position is satisfactory in Fiji except for matrimonial matters and there are no complaints from the small jurisdictions of Guernsey, Kiribati or Tuvalu. In the Solomon Islands a restructuring of the courts system is under consideration; this is likely to slow down proceedings, but that is regarded as an acceptable price for involving local laymen in the judicial process.

3.25 There is dissatisfaction in Kenya, where delays in the High Court have been aggravated by numerous election petitions; in Switzerland, where much of the blame is laid on the practitioners; and in Guyana, where administrative weakness in the judiciary and the magistracy is considered the main, but not the only, cause of delay.

3.26 Delays are very serious in Québec. It is said that even an urgent one day case may be pending for seven months between the certificate of readiness and the hearing, while a two day case may have to wait as long as 68 months.

3.27 Worst of all seems to be India, where, according to press reports, arrears have reached "alarming proportions", with cases in the Supreme Court coming up for hearing ten years after they were filed. It is said that over a quarter of a million cases are pending in the High Courts. The Law Commission of India in their 77th Report¹² thought there should be a target of one year for the disposal of cases but by the time they issued their 79th Report¹³ they had decided that two years would be a more realistic period as regards original civil suits in the High Courts and they recognised that even that would be difficult to achieve.

3.28 British Columbia is attempting to co-ordinate the various interested bodies throughout Canada in establishing a uniform statistical procedure under the auspices of the Canadian Judicial Council.

3.29 It is difficult to access the value of statistics. Many people would share the opinion of the Law Society of Manitoba that they "are usually misleading." In small jurisdictions they are of little or no value, because they are so liable to be distorted by a few extraordinary cases. In larger jurisdictions, periods of delay tend to average out but to be of any real value, they should be broken down by categories of case and by stages in the proceedings.

3.30 Statistics will certainly expose a particularly bad state of affairs but that should be obvious without the need for statistics. They cannot prove that cases are taking too long to complete, because how long a case should take will always depend on its own particular facts. It is suggested that the value of statistics lies in showing trends, whether cases generally are coming to trial and being decided more quickly or more slowly.