

5. THE LEGAL PROFESSION

28.1 As noted above,¹⁶³ there are some jurisdictions where lawyers are not permitted to appear as such in small claims courts,¹⁶⁴ and others where lawyers may appear but where no order may be made for costs.¹⁶⁵ Apart from these, no report has been received of any step taken to change the practices or procedures concerning members of the legal profession, or their privileges, nor has any recommendation been reported for any such change.

28.2 It must be said, however, that the legal profession is frequently blamed for delays. In England, the Senate of the Inns of Court and the Bar, when giving evidence to the Royal Commission on Legal Services¹⁶⁶ accepted that unjustifiable delays may occur on the part of counsel or solicitors that are not attributable to processes of law or court procedure. They divided such delays into two categories: those arising through inexperience, incompetence or inefficiency on the part of the individual practitioner and those arising through pressure of work. The Senate did not believe that inexperience or incompetence was a widespread cause of complaint. Where inefficiency was concerned, it was acknowledged that conferences with counsel sometimes have to be put off and that delays sometimes occur in the return of papers, but it was not thought that this often led to substantial delay in the overall period of litigation. On the second count, it was conceded that pressure of work upon the most able and experienced counsel inevitably leads to some delays, particularly in heavy cases.

28.3 The Law Society, after conceding that some members of the public believe that litigation is unduly protracted, expressed the opinion that such a belief is unfair in relation to litigation as a whole, although fair in relation to some full-scale trials.¹⁶⁷ They thought that the vast majority of contested cases are dealt with reasonably quickly.

28.4 Where Scotland is concerned, the only comment received is that there are indications that the legal professional training in the more complicated civil procedures is not as thorough as it was formerly.

28.5 In New Zealand, there appears to be little criticism of the legal profession, although it is reported that there are occasions when time is available for hearings but cases cannot proceed because counsel are not available. This occurs most often in circuit areas where out of town counsel are involved in courts in other areas.

28.6 Shortage of advocates has been a temporary problem in the Isle of Man, as a result of prosperity and consequently of litigation, but new recruits are coming forward.

28.7 On the other hand, the Bar Association of New South Wales is refreshingly frank in accepting that the profession has to take its share of the blame for delay, particularly in not taking interlocutory steps within the time required by the rules of court.

28.8 The Queensland Law Society expressed the opinion that the fault sometimes lies with lawyers who take on too much business, and sometimes with lawyers who do not strictly abide by the rules governing the filing and service of documents and such matters. They also suggested that the English legal system tends to encourage prolixity.

28.9 Similar admissions come from Western Australia, where it is said that lawyers sometimes take on too much work. Adjournments are frequently sought because lawyers are listed in more than one court, and sometimes because they have not had time to do the necessary preparation for trial.

28.10 The Law Reform Commission of Ontario, in their Report on the Administration of Ontario Courts,¹⁶⁸ examined at length the whole range of professional behaviour but made only a few, minor, suggestions for reform.

28.11 In Québec, the de Grandpré committee were highly critical of the conduct of advocates who place their authorities before the court "en bloc", without having analysed them and extracted what is relevant, and those who blandly declare that they are sure the court is familiar with the current state of the law on the subject in issue.

28.12 The Law Commission of India recorded that there was a tendency in that country to "overprove" allegations and that a great deal of time was wasted in examinations, and particularly cross-examinations, that are unduly prolix.

28.13 In Swaziland, much of the blame for delay, both in the High Court and in the magistrates' courts, is attributed to dilatoriness on the part of the legal practitioners, their reluctance to penalise fellow practitioners for failure to comply with time limits and their tendency to apply for last-minute adjournments, although incompetence on the part of officials and difficulties of communication also contribute to the delays. On occasion, practitioners have been deprived of their fees as a mark of the court's disapproval of their conduct.

28.14 In the Northwest Territories of Canada, a rule has been introduced requiring the statement of documents to be signed by the solicitor and not by the party. This is intended to prevent solicitors putting the blame for any delay on their clients, at what is a critical stage.

28.15 This is comparable with the recommendation in the Oliver report that a court sanctioning an extension of time or granting an adjournment should be entitled to satisfy itself that the application was expressly authorised by the client:¹⁶⁹ this would protect lay clients from lawyers who might accommodate one another in the matter of adjournment, incidentally inflating the bill of costs.

28.16 The courts have power to impose penalties in the form of orders for costs where the conduct of a proceeding has caused prejudice, but such penalties fall on the parties and not on their lawyers. Orders can be made for solicitors to pay costs personally, but in practice such orders are rarely made.

28.17 Courts have power to make separate orders for costs in relation to separate issues but this power is rarely exercised in trial courts; it is arguable that it should be exercised more often, as it is unfair that an unsuccessful party should have to bear the cost of arguments that he did not initiate and that have contributed nothing to the result. In appellate courts, a successful appellant is almost invariably awarded at least part of his costs, although a percentage may be deducted representing the time wasted on unmeritorious grounds of appeal.

28.18 No comment has been made by any correspondent as to the effect of a fused profession on the expeditious disposal of cases, although in answer to a question, a correspondent in Western Australia expressed the opinion that a fused profession does not aggravate delay.

28.19 The question was considered by the Benson Commission, who remarked¹⁷⁰ that -
"the causes of delay are many and complex. It has not been established that fusion is necessary, or would be sufficient to overcome them."

After very full consideration of the arguments for and against, the Commission concluded, for reasons concerned with efficiency rather than expedition, that it was desirable that the profession should continue to be organised in two branches, barristers and solicitors.

28.20 The Ontario Law Commission in 1973 considered the question from the opposite point of view. Having a fused profession, they considered whether division would lead to greater efficiency but concluded that they saw no good reason for change.¹⁷¹ They did favour specialisation.

28.21 With a fused profession, some of the time that would have been spent preparing and reading briefs is saved; the delays in the return of papers are avoided and it may be that it is easier for the court to instil some sense of urgency into proceedings that are too long drawn out. On the other hand, the advocate in a fused profession, at least in a small jurisdiction, is less ready to hand over a brief when he has too many engagements because he has a personal relationship with his client that does not ordinarily exist between a barrister and the lay client, so that to hand over a brief may be to lose a client.