

## 6. CONCLUSION

29.1 The last decade has seen much enquiry into the causes of delay and many reforms have been effected, and enquiries are continuing. At Appendix II are listed the reports of commissions and other bodies to which correspondents have referred.

29.2 A comment on commissions generally may not be out of place. Commissions with wide terms of reference to review the civil procedure serve a valuable purpose, particularly in putting all the relevant considerations into perspective, but they do not always yield results. A wide-ranging report with constructive recommendations is bound to contain controversial proposals. It will probably call for the expenditure of public funds. It may include recommendations of principle that need detailed working out before they can be implemented. These and other factors lead to delay and the longer a report remains unimplemented, the less likely it is to be given effect.

29.3 Individual reforms of a minor nature have a much better chance of being implemented, provided they do not require legislative time. For this reason, the creation in England of the Supreme Court Procedure Committee is particularly to be welcomed. Its role is to deal with the particular and the immediate.

29.4 For the future, the Victoria Law Foundation, having decided in principle to set up a Civil Justice Project Committee, appointed two of its research officers to prepare a Preliminary Study. This has now been completed but has not yet been published.

29.5 Secondly, a new body called the Australian Institute of Judicial Administration Incorporated has been formed. This is a pan-Australian organisation independent of the Government but with powerful support from the judiciary, the profession and the law schools of the universities. Its governing body will include representatives from all the States and from the Australian Capital Territory. Its first project under the direction of Dr Ross Cranston is to be a detailed investigation to discover what actually causes delays and inefficiency in the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory. This is expected to take about two years.

29.6 It is clear that the problem of delay in civil proceedings is much graver in some jurisdictions than in others. An optimistic note comes from New Zealand, where the Bar Association see no cause for alarm and no need for drastic remedies. They said -

"The causes of delay are not attributable to the system, the rules or the facilities. What is needed is an adequate number of judges and the co-operation of an able and energetic Bar."

A gloomier note is sounded by the de Grandpré committee who put the very grave delays in the High Court of Québec down in large measure to the disinclination to work in our decadent society.

29.7 It is clear also that there are many causes of delay, some with their roots in the past and some the results of modern developments.

29.8 In almost all the countries of the Commonwealth there appears to have been a great increase in the volume of court work, both civil and criminal. The principal increase has probably been in criminal work but at the High Court level, and sometimes at subordinate levels, courts deal both with civil and criminal matters. In those circumstances, the practice used to be to give absolute priority to the criminal work: today courts tend to accord only a qualified priority, so that the civil work may be kept moving. Even with a qualified priority, however, the effect of a material increase in criminal work may disastrously affect the conduct of civil business. In New Zealand, the Speight committee gave this as a major cause of delay.

29.9 The main reason for the increase in civil litigation is probably a greater awareness by the public of their rights, an awareness brought about largely by legal assistance schemes, citizens advice centres, social workers, trade unions and other organisations, and the press. Legal aid and assistance have also made the courts more accessible to the poor and so contributed to the build up of cases, particularly in matrimonial affairs. Growth in population has led to more litigation in Hong Kong.

The standard of living has been rising in many countries of the Commonwealth, in spite of inflation and recession, and prosperity always brings litigation. This applies particularly to Alberta, Hong Kong, the Isle of Man and Singapore.

29.10 Growth in litigation has strained the resources of courts that were formerly adequately staffed and has brought crises in places where the number of judges was previously too small or barely sufficient.

29.11 There have been substantial increases in the number of judges in most countries but that is not a process that can continue indefinitely. Such increases necessitate employing more masters, registrars and clerks and building and maintaining court rooms, chambers and offices. It is also difficult to find all the judges desirable without unduly draining the Bar of talent.

29.12 Inflation itself has contributed to delay. The financial limits on the jurisdiction of subordinate courts has been increased but until recently, usually by less than the figure of inflation and usually only after a time lag. This has meant a heavier burden on the superior courts, where backlogs have built up. Not only were the superior courts less able to cope with an increased work load, because of their smaller manpower, but also cases take longer in the superior courts than in the subordinate. Now, this imbalance has largely been rectified but there is a continuing need to watch the levels of jurisdiction.

29.13 There is a general impression that trials take longer than they used, although no-one seems able to offer a satisfactory explanation. Verbatim reporting probably tends to protract hearings. It has been suggested that education is not as good as it was where the more technical aspects of civil procedure are concerned. It has also been suggested that inexperienced counsel tend to argue at length every conceivable point, instead of relying on the best and abandoning the others, and to call more evidence than is necessary - what the Law Commission of India described as a tendency to "overprove" allegations. There is no apparent reason why this should be worse today than in the past.

29.14 Legal aid and assistance contribute to delay in another respect, because time is taken up before litigation is even instituted by administrative work determining eligibility for assistance. In England an attempt is being made to reduce these delays: a pilot scheme will test the possibility of dealing by post with the question of means, while the merits will generally be decided by a single officer, without reference to a committee as at present.

29.15 A cause of delay which goes back into the past is failure to make the best use of judicial time. One aspect of this that has recently been highlighted is the extent to which the time of the judges is taken up with work of an administrative rather than a judicial nature. The modern trend is to employ full-time administrators, with countries only differing as to the extent that such administrators should be responsible to the judiciary or to the executive. The experience of British Columbia has shown that it is possible to have a joint control over the administration of the courts, shared between the Chief Justice, as head of the judiciary, and a Minister or the Attorney General, as head of a ministry, which, with good faith on both sides, can work successfully.

29.16 A substantial saving of judges' time has also been achieved by enlarging the powers of masters and registrars. While the advantages of such delegation for much formal interlocutory work are clear, there are also advantages in the judge having complete control of the proceedings. This is especially apparent in the commercial courts, where the judges take the summonses for directions. This applies also to Administration and Defamation proceedings in New South Wales.

29.17 The third important sphere where action can be taken to make the best use of the judge's time is in the process of listing cases, so as to ensure that when cases drop out of the list, the judge is not left idle. Changes in listing arrangements have been made in many countries, and experiments are proceeding.

29.18 Judicial time is also being saved in the Court of Appeal in England by the use of smaller Benches.

29.19 Making the best use of judges' time does not mean, even if it were possible, so arranging the lists that the judges were constantly sitting in court or in chambers. Apart from the writing of judgments, judges, particularly those of the superior courts, must have time for reading and for thinking.

29.20 It must be realised also that there is always a conflict between the best use of judicial time and the convenience of barristers, solicitors, parties and their witnesses. The emphasis should be on the judicial time but not to the entire disregard of the other parties.

29.21 Judges' time is also lost when they are appointed to chair commissions in non-judicial enquiries or to perform other public duties of an executive or administrative nature. Such appointments are sometimes proper and necessary, but they do disrupt the work of the courts.

29.22 The reports that have been sent in have been concerned mainly with systems and procedures but the importance of people should not be forgotten. No system, however well designed, will be free from delay unless Bench and Bar co-operate to make it work.

29.23 Judges themselves can do much to expedite proceedings, not merely by their personal punctuality and prompt disposal of business, but even more by giving to the proceedings themselves a sense of urgency. A judge can be business-like without sacrificing any of the dignity that should attach to his office and without renouncing the infinite patience that is expected of him.

29.24 Sometimes lawyers are dilatory or neglectful, but it has not been suggested that such cases are common. What is much more common is delay caused by lawyers taking on more business than they can handle effectively. Sometimes, too, lawyers may be responsible for delay through no fault of their own, because ordinary day to day work has to give way to matters of real urgency.

29.25 Lawyers have been criticised also for accommodating each other regarding extensions of time and adjournments. Within reason, such accommodation is no bad thing: it would not serve the interests of justice if lawyers were always alert to take advantage of the difficulties of the other side.

29.26 Another criticism that may be levied at solicitors is that they appear to leave so many matters to the last moment. It has been suggested that applications for extension of time are often due to time limits that are unreasonably short. It would be useless to enlarge those limits unless solicitors are prepared to act as soon as they can, not on the last day.

29.27 Lastly, there are the parties themselves who are often responsible for delay, sometimes inadvertently and sometimes deliberately. It often pays a debtor to procrastinate if he can make more use of the money he owes than he will have to pay in interest. To combat this, legislation has been passed in the Northwest Territories of Canada which will enable a plaintiff to recover interest on a judgment debt at approximately the prime bank rate from the time the cause of action arose until the debt is satisfied.<sup>172</sup>

29.28 The main achievements of the decade are probably the restructuring of courts and the reform of the administration of the courts. So far as procedure is concerned, it has nowhere been suggested that the common law approach to the conduct of trials should be abandoned or that the adversarial system should be replaced by the inquisitorial. Within the framework of the system, however, much consideration has been given to procedural reform, mainly in respect of the interlocutory stage, with attempts to improve the process of discovery and development of the pre-trial conference. The remarkable success of the pre-trial conference in Ontario and British Columbia, both in expediting trials and in encouraging settlements at a comparatively early stage, calls for consideration in any country that is contemplating reform, at least as a procedure to be available for appropriate cases.

29.29 A new approach to judicial administration is to be seen in the institution in several countries of pilot schemes. Such schemes, with judges, lawyers and administrators working together on a basis of trial and error, are more likely to lead to new and better practices than abstract planning, even by people of great ability and experience.

29.30 There does seem to be a real need to simplify bills of costs and the process of taxation. There is need also for consideration to be given to the process of execution, either by the substitution of some different system or by making the present system more efficient.

29.31 It is not easy to assess how much of the blame for delay should be attributed to any particular cause. Delays may have a cumulative effect. A small delay at one stage

of a proceeding may be the cause of a greater delay at a later stage. The delay that the public see is usually the aggregate of several delays.

29.32 It is reasonable to suppose that in any given jurisdiction there will at any time be various causes of delay and therefore several remedies to be sought. The problems of one country will not necessarily be similar to those of another. If delays become a reason for disquiet, it is essential to diagnose their causes. At Appendix V is a set of questions intended to suggest lines which a diagnosis might take. Once the causes have been located, it should not be difficult to devise remedies.

29.33 When considering ways of reducing delays, a reservation is usually added that the quality of justice should not suffer. That is irrational. There is no standard quality of justice. In all countries and under all systems the quality of justice varies and it is hard to see how it could be otherwise. No society can afford, in terms of money or talent, the judiciary that would be necessary for the perfect administration of justice. Each country must do the best it can with the resources available to it. At one end there will be a superior court with a relatively small bench of the quality to make the decisions that shape the law and the strength to protect the citizen against abuses by the government of the day. At the other end, there must be provision for those whose claims are small and call for quick and cheap remedies. For claims below a certain figure, it would seem that the judicial process ceases to be appropriate. At each level, it is necessary to weigh needs and means, with a price to be paid in the quality of justice for each concession to expedition.

29.34 One final remark. There is no question of eliminating delays. The most that can be done is to contain them within the bounds of the tolerable.