



# Grappling with Court Delay

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## INTRODUCTION

Criminal court delay has been a matter of some concern in NSW for a number of years. In recent times there have been substantial reductions in delays for defended cases in the Local Courts of NSW. Cases involving those who are committed for trial to the District or Supreme Court but who change their plea to guilty are also now being finalized more quickly. Delays between arrest and case finalization for matters requiring a trial in the Higher Criminal Courts, however, have only recently begun to show signs of improvement. Since 1988 (the first year in which records were kept) the median time between arrest and finalization, for cases going to trial in which the accused person was ultimately acquitted of all charges, has never fallen below two years.

This trend has occurred despite a number of Government initiatives directed at reducing trial court delay, including the building of new trial courts and the appointment of additional judges. As part of the Government's program of streamlining the court system, in late 1990 the Office of the NSW Director of Public Prosecutions (DPP) began assuming prosecutorial responsibility for committal proceedings in NSW. Full responsibility for these proceedings in all criminal registries had been assumed by the DPP by March 1991. This initiative was expected to lead to a reduction in the number of new cases committed for trial to the Higher Criminal Courts. The period between March 1991 and June 1992 did indeed see a significant drop in both the

number of new cases registered for trial in the NSW District Criminal Court and the size of the backlog of cases ostensibly waiting for trial. Despite these changes, however, the median trial court delay from committal to case finalization has decreased only by about fifty days.

A number of possible explanations for this fact have been put forward. They include suggestions that (a) it is too soon to see any reduction in trial court delay (b) trials have become longer and therefore consume more court time and (c) the reduction in new trial registrations has involved cases which never would have ended up going to trial anyway.<sup>2</sup> The question of which, if any, of these explanations might be correct is a matter of obvious importance to the administration of justice in NSW. The purpose of this bulletin is to provide some insight into the problem through a detailed analysis of the information routinely collected by the Bureau on Higher Criminal Court proceedings. It is also hoped through the analysis to highlight some residual but important deficiencies in the range of management information we have about the operation of the NSW Higher Criminal Courts.

The discussion proceeds in three parts. The first part provides a background understanding of the factors which shape the time it takes to get a case to trial and the number of cases awaiting trial. The second part analyzes the trends in these two quantities between January 1990 and June 1992. The third part outlines in general terms some options for bringing about lasting reductions in trial court delay.

## SOURCES OF TRIAL COURT DELAY

Once committed for trial a case must be registered by the District Criminal Court or Supreme Court Registry. Following this, the DPP must issue a notice of readiness to proceed with the prosecution. The case must then be listed for trial. Not all cases, however, are finalized by way of trial. A large number of them are finalized as sentence matters because the accused person changes plea from not guilty to guilty. Some are finalized when the DPP issues a 'no bill', while a small number of others are regarded as 'finalized' because the accused person absconds or dies or because the case is remitted to a Local Court. Even for cases which are finalized by way of a trial the path to trial is not always simple or straightforward. In many instances, particularly in the District Criminal Court, matters listed for trial fail to go on either because they are 'not reached' or because the defence or the prosecution is granted an adjournment. In this situation the case must be relisted for trial at a later date. It is possible for cases to be adjourned several times before they eventually get to a hearing.

Disregarding the time actually spent hearing a trial, there are three different (but not independent) sources of delay between committal for trial and trial finalization in this process. Firstly, there are what might be called *administrative delays* associated with the preparation of a case for hearing. These delays include the time taken by a case from committal to registration and the time taken by the DPP to issue a notice of readiness.

Secondly, there are *queuing delays* associated with the fact that new cases coming into the system, even when ready for trial, cannot generally be listed for hearing immediately. Usually, they have to be listed after those cases which entered the system before them. These delays, as we shall see later, tend to grow when the number of cases arriving for disposal exceeds the capacity of the system to dispose of them. Lastly, there are *adjournment delays*, that is, delays encountered by cases which, because they are adjourned, must then wait behind other cases in the queue for their next chance at a hearing.

### ADMINISTRATIVE DELAYS

Among these delays, administrative delays are in practice perhaps the least important direct contributor to the time it takes to get a case from committal for trial to trial finalization. This is because there are a range of statutory provisions in NSW requiring trial cases to be brought before a court within a specified period of time following committal for trial. To say that administrative delays are the least important contributor to the overall period between committal for trial and case finalization, however, is not to say that the level of case preparation by the defence and the Crown is itself unimportant as a contributor to this period. Lack of readiness to proceed is often cited as a major cause of adjournments. As we shall see shortly, adjournments exacerbate trial court delays if they result in wasted court time.

### QUEUING DELAYS

What determines the size of the queuing delay among a set of cases? To answer this question we must first introduce a distinction between demand for trial court time and trial court capacity. The amount of trial court time consumed by a group of trial court cases depends on the length of each of those trials and the number of them which must be disposed of. In general terms, the demand for trial court time will increase with the number of trials which must be disposed of or with the duration of these trials. The *underlying demand for trial court time* ( $D$ ) in a given

period is simply the amount of trial court time required to dispose of all those matters registered for trial in that period and which will sooner or later actually require a trial. Thus if 200 matters arrive for disposal in the month of March, 100 of which will eventually require a trial, and each trial requires 3 days, then  $D$  for the month of March is 300 days. If we let  $n$  denote the number of matters registered for trial in a given period which will eventually be disposed of as a trial, and  $t_1, t_2, t_3 \dots t_n$  be the amount of time required to dispose of each of these trials 1 through  $n$ , then  $D$  may be precisely defined in the following terms:

$$D = t_1 + t_2 + t_3 + \dots + t_n = \sum t_i$$

The expected demand for trial time  $E(D)$  in a particular period can then be defined as the product of the  $n$  trials which have to be conducted and the average duration of a trial,  $a$ . That is:

$$E(D) = na \tag{1}$$

Having defined  $D$  it is a straightforward matter to define trial *court capacity* ( $C$ ).  $C$  is simply the amount of trial court time *actually* set aside in a given period for the hearing and disposition of trials. Suppose there are ten courts operating five days a week but that for two weeks of each month they hear trials while for the other two weeks they hear civil cases or sentence matters. Then the value of  $C$  for each month is  $10 \times 5 \times 2 = 100$  days. Earlier we noted that queuing delay will tend to occur whenever the number of cases coming into the court system exceeds the capacity of the system to dispose of cases. As a rough approximation this statement is acceptable. A more precise way of stating the same point would be to say that queuing delay tends to grow whenever the underlying demand for trial court time exceeds trial court capacity, that is, whenever  $D$  is greater than  $C$ .

Suppose, for example, that 30 new trials, each requiring two days hearing time are registered for trial each week in an eight trial court complex which operates five days a week. By our definition the complex has a trial capacity of 40 days hearing time or 20 trials per week. The value of  $D$  is 60 days per week. A backlog

of cases waiting for trial will therefore grow at the rate of at least 10 per week. Within a year there will be a backlog of at least 520 trials, although, on our definition of  $D$ , its value has not changed at all. This example highlights a simple but important point about our earlier definition of  $D$ . We have called it the 'underlying' demand for trial court time because it deliberately ignores consideration of matters registered for trial in earlier periods which have not yet been finalised.<sup>3</sup> It follows that, if there is an existing backlog, even when the underlying demand for trial court time falls below capacity (that is, when  $D < C$ ), the courts will be occupied in the hearing and disposition of trials until the backlog of cases requiring a trial is cleared.

Determining the underlying demand for trial court time is of crucial importance to judgements about whether we need to create additional court capacity. To measure  $D$ , however, we have to find some way to estimate the values for  $n$  and  $a$  in equation (1). Obviously we cannot estimate  $n$  simply by counting the number,  $N$ , of matters *committed* for trial. As we have noted already, many of the matters registered for trial will end up not being disposed of as trials. On the other hand, we cannot estimate  $n$  by counting the number of trials which were actually held over that period. The number of trials actually held is limited by the available capacity. If there were too little trial court capacity relative to demand we would find ourselves underestimating demand. Clearly the exact value of  $n$  represented by a particular group of  $N$  cases committed for trial is something which cannot be determined in advance. We have to monitor the outcome of cases registered as trials and determine what proportion,  $p$ , of matters registered as a trial sooner or later end up being disposed of as a trial. An estimate of  $n$  can then be obtained from the product  $Np$ .

This leaves us with the problem of how to determine  $a$ , the average trial duration. In principle, obtaining an estimate of  $a$  is not too difficult. One can obtain a reasonably close approximation by dividing the amount of court time *allocated* to the hearing of trials by the number of trials actually held. The trouble with this approach is that the court time allocated to the hearing of trials may not be fully utilized. To determine an average trial

duration we really need the amount of court hearing time *consumed* by trials. An important deficiency in the available management information for trial court planning in NSW and many other States is the absence of independent measures of the amount of hearing time available for the hearing and disposition of trials and the amount of hearing time actually consumed by them. Without this information it is impossible to state with any certainty whether the existing trial court capacity is being efficiently utilized or to make reliable judgements about whether and when additional capacity may be required.

### THE EFFECT OF ADJOURNMENTS

Having explained administrative and queuing delays we may now turn our attention to the third source of delay, namely that which is caused by adjournments. Whereas administrative and queuing delays tend to affect all cases, adjournment delays in some circumstances may only affect those cases which are adjourned. To illustrate this point, suppose there are five cases awaiting trial at any given time and each case consumes a day of court time (for the sake of simplicity we assume there is only one court operating). Let us number the cases from 1 to 5, in the order in which, we suppose, they have been registered and listed for trial. Case number 1, due to go to trial, is, instead, adjourned and goes to the back of the queue. Since each case takes a day to dispose of and there are now four cases in front of it, case number 1 must now wait four days for a hearing. On the other hand, if cases 2, 3, 4 and 5 can take advantage of the hearing date vacated by case 1, each one of them will be heard a day earlier.

With five cases in the queue at any one time, case 1 will have to wait for four working days to get back to its pre-adjournment position at the head of the queue. The adjournment, however, allows case 2 to go on immediately. Cases 3, 4 and 5, respectively, take one, two and three days to reach disposition. Summing the delay for each of the five cases and dividing by five gives a figure of two days as the average time between committal and finalization when there is an adjournment. Notice, though, that the

result would have been the same even if there had been no adjournment. The average delay then would have been made up of: no delay for case 1 and delays of one, two, three and four days for cases 2, 3, 4 and 5, respectively. Dividing the sum of these delays by five also gives a figure of two days as the average delay between committal and finalization for the five cases. This is despite the fact that an adjournment imposes an additional delay in the hearing of any case which is adjourned.

As a general rule it can be said that adjournments will have no impact on the average time between committal for trial and trial finalization for a group of cases as long as the hearing time made available by an adjourned trial is able to be dedicated to the hearing of other cases within the group. If, however, either (a) adjournment hearings themselves consume large amounts of court time which could otherwise be spent hearing trials or (b) time set aside for trials which are adjourned is unable to be devoted to other trials, then the effect of adjournments is to lengthen the average period between committal for trial and trial finalization for all trials. This last point can easily be seen in the example above. If case 2 had not been able to be heard at the time previously allocated for the hearing of case 1, the respective delays for each case would have been five days (case 1), one day (case 2), two days (case 3), three days (case 4) and four days (case 5). Dividing the sum of these delays by five gives a waiting time for trial in this situation of three days instead of two days.

### TRIAL COURT DELAY AND THE NUMBER OF REMANETS

Despite the fact that matters registered for trial do not have to eventuate in trials it is conventional to refer to all such finalized matters as 'trial disposals'. A case which has been registered for trial but which has not yet been disposed of is sometimes called a 'remanet'. The number of remanets is of particular interest to court administrators because it gives them some idea of whether the court system is keeping up with the incoming flow of work.

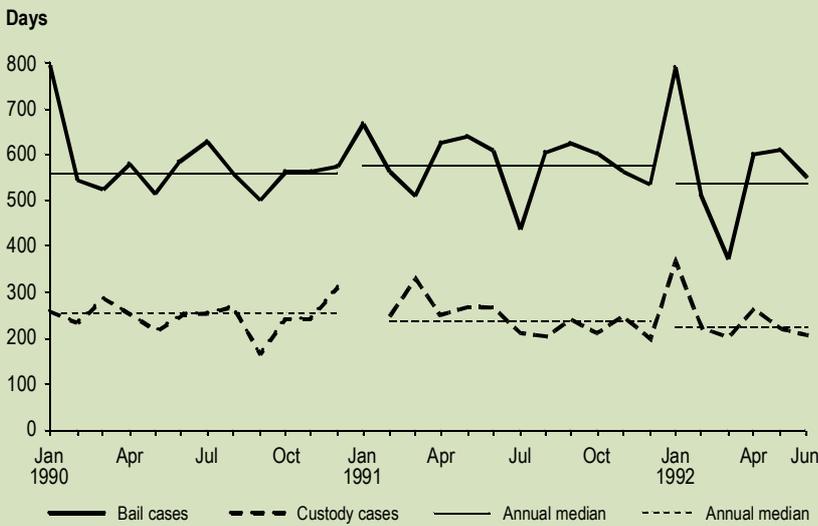
What determines the number of remanets? When the number of matters registered for trial exceeds the number of trial disposals, the number of remanets will obviously increase. The only way to reduce the number of remanets, then, is to ensure that the number of trial disposals in a given period exceeds the number of matters registered for trial in that period. A decline in the number of matters registered for trial below the number of trial disposals will always reduce the number of remanets. Notice, however, that the number of remanets may decline even when there are more trials coming into the system than it is able to cope with. This would occur if, for example, a general excess of trial disposals over trial registrations were created by the fact that a large proportion of those registering for trial are being dealt with in sentence hearings on a plea of guilty.

If the number of remanets can decline without any change to the balance between demand for trial court time and trial court capacity, it follows that a decline in the number of remanets cannot necessarily be taken as a basis for expecting a decline in trial court delay. The number of remanets may decline without any change to the number of matters actually competing for trial hearing time. Since the queuing delay for trials is determined only by the balance between *D* and *C*, anything which fails to alter these factors will have no impact on queuing delay. Even if *D* does fall below *C*, trial court delay will decline only if the additional capacity is assigned to hearing trials in the backlog rather than left unutilized or devoted to dealing with other kinds of case such as sentence hearings or bail applications.

### TRENDS IN DISTRICT CRIMINAL COURT DELAYS

We are now in a position to review the key trends in trial court statistics over the period January 1990 to June 1992. Figure 1 shows the trend in median delay between committal and case finalization for matters finalized as trials in the District Criminal Courts. The solid

**Figure 1: Median delay for cases where a trial was held  
Committal to case finalization in days, NSW District Court**



line shows the trend in median delay for cases where the accused was on bail. The dashed line shows the trend in median delay for cases where the accused was held in custody awaiting trial.

There is no consistent upward or downward trend in median delay for bail cases. The very small increase in median delay between 1990 and 1991 is followed by a slightly larger decrease in median delay in the first half of 1992. The trend in median delay for custody cases is consistently down but the net change between 1990 and the first half of 1992 is less than 50 days.

Figure 2 shows the trend in the total number of District Criminal Court remanets.

The number of remanets fell away from January 1990 onward and the downward trend accelerated between October 1991 and June 1992.

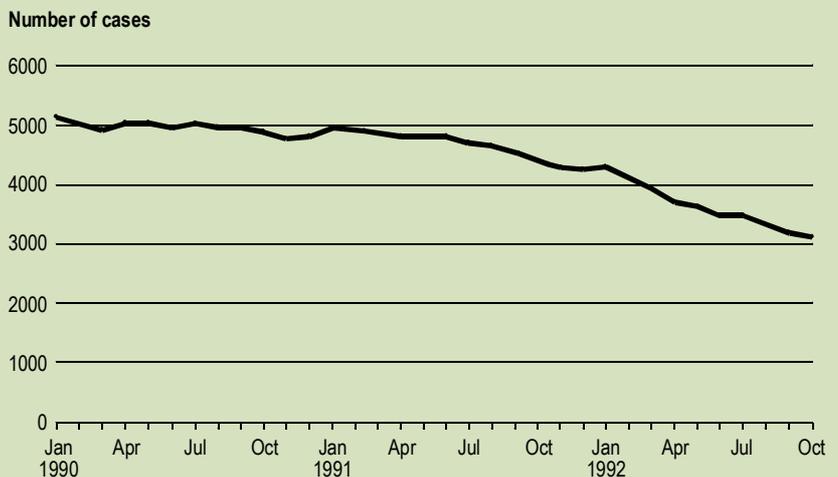
Figure 3 shows the trend in monthly trial case registrations and disposals over the same period. The dashed horizontal line shows the annual average number of trial cases registered. The solid horizontal line shows the annual average number of cases registered for trial which were finalized (either through a trial or in any other way).

Figure 2 suggests that trial disposals in the District Criminal Court generally exceeded trial registrations over the period January 1990 to June 1992 but that the difference between the two accelerated in the period June 1991 to June 1992. Figure 3 confirms this expectation. The average monthly number of trial disposals generally exceeded the number of trial registrations. There was also a

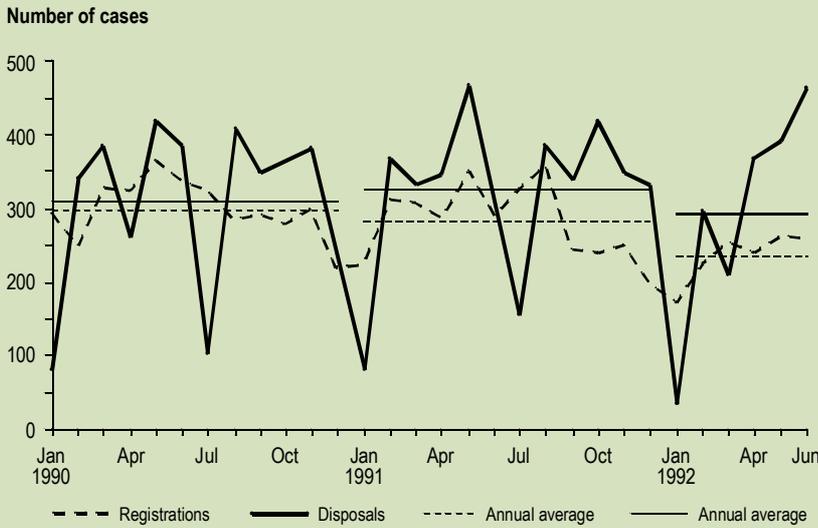
progressive widening of the gap between registrations and disposals between January 1990 and June 1992, a trend which resulted, in the main, from falling trial registration rates rather than rising trial disposal rates. These results are consistent with recent claims by the DPP that its assumption of responsibility for committal proceedings has reduced the number of matters committed for trial in the District Court. The question we must now address is why the number of remanets is falling but there is little sign of any reduction in trial court delay.

There are three main explanations which might be given for such a result. Firstly, it is possible that the fall in trial registrations shown in Figure 3 signifies a fall in the underlying demand for trial time but one whose effects on trial court delay are yet to show up. Secondly, it is possible that despite the fall in trial registrations, the number of matters actually proceeding to trial (and, hence, the underlying demand for trial court time) has remained unchanged. This would happen if, for example, the effect of a fall in trial registrations was concentrated on those categories of case in which the accused typically changed plea from 'not guilty' to 'guilty'. Thirdly, it is possible that the impact on the underlying demand for trial court time of a fall in the number of trials which must be held has been offset by an increase in the average duration of trials.

**Figure 2: Remanets (backlog of cases which have been registered for trial but have not been finalized)**



**Figure 3: Trial case registrations and disposals  
NSW District Court**



underlying demand for trial time but that we are yet to see the benefits of this reduction in terms of a drop in trial court delay.

By the same token, though, we cannot yet dismiss the possibility that, despite the drop in trial registrations, there may not be any change in the number of trials which must be held. To be sure, if the fall in trial registrations is concentrated in those categories of case (for example, pleas, no bills) which never would have gone to trial anyway, sooner or later we should expect to see an increase in the proportion of matters registered for trial which actually proceed to trial. However, just as the effect of a drop in trial registrations on trial court delays will take some time to show up, so too will the effect of a drop in registrations on the proportion of matters finalized as a trial. At this stage, therefore, there is no way of knowing with certainty whether the underlying demand for trial court time has been reduced.

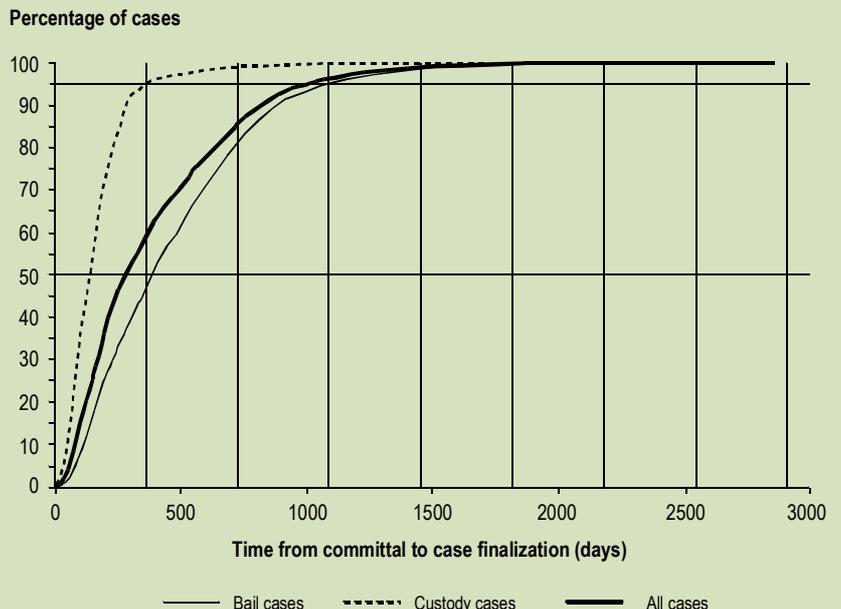
How long should one expect to wait to see a reduction in the number of trials which have to be held to produce a reduction in the time between committal and trial finalization? Inspection of Figure 2 shows that most of the drop in remanets occurred in the twelve month period from June 1991 to June 1992. The downward trend in remanets before June 1991 is only very slight. Clearly a drop in trial registrations will not have much impact on delays until all or most of the cases which were registered for trial before the drop occurred have passed out of the court system. Figure 4 shows the cumulative frequency distribution of the time between committal and finalization for matters ending in a trial. The vertical lines are spaced one year apart. The three curves show, respectively, the cumulative frequencies of time to finalization for custody cases (left curve), all cases (middle curve) and bail cases (right curve).

have been registered for trial during or before the first half of 1991, when the reduction in remanets which had occurred was still only very slight. It is quite possible, then, that the reduction in District Court remanets signifies a real reduction in the

This brings us to the question of whether the fall in the number of trials which must be held might have been offset by an increase in the average duration of trials. Unfortunately, as noted earlier, the District Criminal Court does not maintain records which would allow one

While nearly 95% of the custody cases ending in a trial are finalized within one year, less than 50% of the bail cases have been finalized by this time. If we consider matters regardless of their bail status, less than 60% of matters ending in a trial are finalized within a year. On the evidence of Figure 4, the majority of trial cases being finalized in the first half of 1992 would

**Figure 4: Cumulative frequency distribution of time between committal and trial case finalization, NSW District Court, 1991**



directly to determine the average amount of hearing time consumed by trials.<sup>4</sup> It does, however, publish annual statistics on the amount of court time consumed in criminal matters at each court. About eighty per cent of this time is known to be spent dealing with criminal trials.<sup>5</sup> An estimate of average trial duration at each registry can therefore be obtained by dividing the annual amount of court time assumed to be spent dealing with trials by the annual number of trials which are conducted. The results of this calculation are shown in Table 1.

There is very little evidence in Table 1 which would allow one to reach the conclusion that trial durations had significantly increased.

### TRIAL COURT DELAY REDUCTION OPTIONS

The fall in numbers of trial registrations may yet bring about substantial reductions in trial court delay. It would nonetheless seem desirable in the circumstances to formulate additional trial court delay reduction strategies. A consideration of the issues raised in the first part of this paper suggests that trial court delay reduction strategies can be divided into three groups. In the first group are strategies designed to reduce the underlying demand for trial court time. In the second group are those designed to make fuller use of existing trial court capacity. In the third group are those designed to expand existing trial court capacity. The final section of this paper canvasses some options under each of these headings. No attempt is made to compile a comprehensive list of the alternatives.<sup>7</sup> Neither is any attempt made to weigh their relative political, jurisprudential or administrative merits. They are put forward simply as a means of stimulating further discussion.

### DEMAND REDUCTION STRATEGIES

Equation (1) indicates that the underlying demand for trial court time can be reduced either (a) by reducing

Table 1: Estimated average trial durations<sup>6</sup>

Registry	1990			1991		
	Estimated T	N	Estimated a	Estimated T	N	Estimated a
Sydney	1,831	329	5.6	2,399	458	5.2
Sydney West	1,279	317	4.0	1,318	355	3.7
Newcastle	671	215	3.1	694	191	3.6
Wollongong	336	117	2.9	333	108	3.1
Lismore	254	75	3.4	227	64	3.5
Dubbo	237	100	2.4	298	110	2.7
Wagga Wagga	173	59	2.9	223	69	3.2
<b>Total</b>	<b>4,781</b>	<b>1,212</b>	<b>3.9</b>	<b>5,482</b>	<b>1,355</b>	<b>4.0</b>

T - amount of court time spent on trials (days)

N - number of trials actually held

a - average trial duration (days)

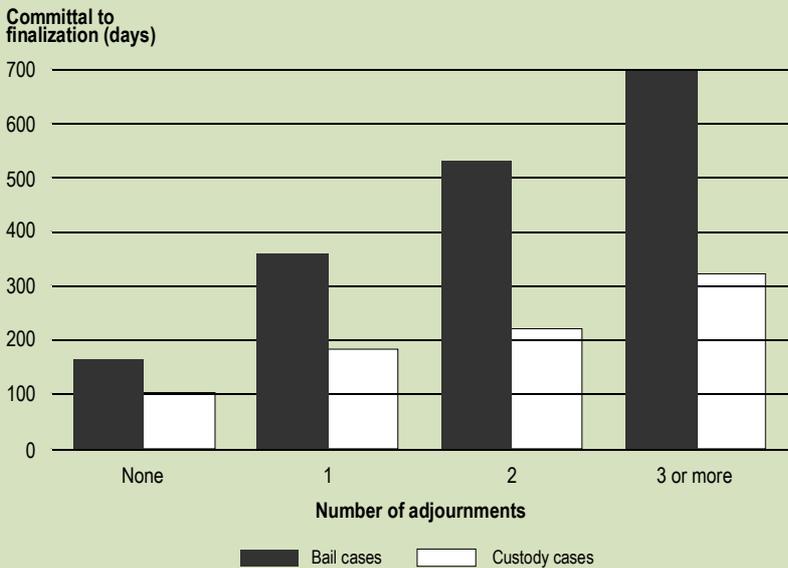
the number of matters requiring a trial or (b) the average duration of trials. One option in category (a) would be to redefine the distinction between summary and indictable offences so that a wider range of offences are able to be dealt with in Local Courts. Magistrates are restricted in the range of penalties they can impose. A major constraint on the effectiveness of this type of initiative, therefore, is the need to ensure that persons committing serious offences do not receive excessively lenient sentences. In a recent bulletin on demand for trial court time<sup>8</sup> the Bureau of Crime Statistics and Research identified six broad classes of offence which consume significant amounts of District Court time but which often attract penalties in the District Court which fall within the sentencing discretion of the Local Court. These include assault; sexual assault; robbery; break, enter and steal; fraud; and supply/traffic drugs.

Options for reducing the number of trials which have to be held need not involve alterations to the range of offences able to be dealt with summarily. The guilty plea rate following committal is another important determinant of the number of trials which have to be held. It is obviously determined in a large part by the expectations of the defendant as to the likely difference in penalty following conviction if he or she changes plea to guilty. At present, defendants who plead guilty can expect to receive a discount on penalty.<sup>9</sup> Without any indication from

the judge as to the scope of the penalty discount, the prospect of a discount may not be enough to persuade some defendants to plead guilty. Another option for reducing the number of trials which must be held would be to ensure that defendants are made aware by the judge of the scale of the reduction in penalty which might be expected if he or she is convicted following a plea of guilty. A trial scheme of this sort at Parramatta District Court is to be commenced in 1993.

Obviously any reduction in the duration of trials would also be expected to reduce the underlying demand for trial hearing time. There are no easy ways to reduce the duration of trials without compromising the integrity of the trial process itself. Recent indirect initiatives aimed at reducing trial duration have included creating a facility for trials to be held in front of a judge alone<sup>10</sup> and abolishing the requirement for a 'summing-up' at the end of a trial.<sup>11</sup> A primary determinant of trial duration is likely to be the amount of evidence which it will elicit. Fraud cases have been shown by the Bureau to consume disproportionate amounts of District Criminal Court time.<sup>12</sup> An earlier study by the NSW Bureau of Crime Statistics and Research highlighted ways in which the law of evidence in fraud trials might be simplified.<sup>13</sup> A recent report by Mark Aronson at the University of NSW has also considered this issue.<sup>14</sup> This suggests that reform of the law of evidence might help reduce the duration of trials.

**Figure 5: Median delay between committal and finalization for cases where a trial was held, NSW District and Supreme Courts, 1991**



suggested, however, that defendants and their counsel frequently preserve a plea of not guilty and make requests for adjournments in order to ‘judge shop’. The incentive behind ‘judge shopping’ is to secure a hearing before a judge who is known to sentence leniently. This sort of problem could be avoided by the simple expedient of ensuring that defendants are allocated to a particular judge soon after committal and have their case finalized by that judge regardless of whether the case is adjourned or not. This is a somewhat procrustean strategy inasmuch as it ignores the problem of sentence disparity which underpins the practice of judge shopping. Efforts to curb sentence disparity might be regarded as a more fundamental solution to the problem of late changes of plea. Unfortunately efforts to reduce sentencing disparity through restrictions on judicial sentencing discretion sometimes present their own complications.<sup>16</sup>

**CAPACITY UTILIZATION OPTIONS**

Figure 5 shows the impact of successive adjournments on the delay between committal for trial and trial finalization.

The impact of adjournments on cases adjourned, whether the accused is in custody on remand or on bail, is quite marked. The effect of just one adjournment for bail cases is to more than double the period between committal for trial and trial finalization. It is possible that these delays are offset by earlier hearings for cases which are not adjourned, in other words that sitting time made available when trials are adjourned or vacated is always consumed by other trials. In 1991, however, less than a third of the cases dealt with in the NSW Higher Criminal Courts reached finalization without an adjournment. If, as seems likely, the effect of these adjournments is to cause court time set aside for trials to be lost or to be devoted to other classes of case, any reduction in the adjournment rate may be expected to increase the utilization rate of trial court capacity.

Three common causes of a high rate of adjournments are overlisting of trials,<sup>15</sup> a lenient approach on the part of judges to requests for adjournments and late

changes of plea. Overlisting of trials is itself a common response on the part of court administrators to high rates of adjournments and late changes of plea. It has often been argued, however, that overlisting leads to a lowered state of readiness on the part of counsel to proceed, thereby exacerbating rather than alleviating the problem of adjournments and the losses of trial court time they produce. It is difficult for the courts to resist requests for adjournments under any listing regime which creates considerable uncertainty as to whether a case will go on when listed for hearing. Counsel guaranteed a hearing date reached in consultation with them would find it harder to make a case for an adjournment. This suggests that trial court time losses might be lower under a scheme in which the listing quota is smaller but the likelihood of a listed case reaching a hearing is proportionally higher. A new listingscheme designed to achieve this objective is to be trialled in the Sydney District Court in 1993.

The solution to the problem of late changes of plea depends on what one considers to be its underlying cause. Late changes to the bill of indictment are an obvious and easily avoided cause of late changes of plea. It is sometimes

**EXPANDING TRIAL COURT CAPACITY**

Suggestions that court capacity be expanded are usually among the first suggestions put forward to a problem of court congestion. Expanding trial court capacity is often understood to mean building more courtrooms and appointing more judges. The cost of doing this is the main reason why governments are reluctant to consider expanding court capacity. From the vantage point of case flow management, however, trial court capacity may be regarded as expanded whenever the number of hearing days set aside for hearing cases is increased, regardless of how this is achieved. One way of increasing trial court capacity without increasing the number of courts or judges is to reduce the amount of court time set aside for other classes of case, such as civil matters. This option is only feasible when the reallocation of court time does not materially exacerbate delays for those other classes of case.

Another alternative in NSW would be to eliminate one or both of the judicial vacations in July and January. This is an attractive option because it would make more effective use of the public investment in courts and courtroom facilities. It need not involve reducing

the vacation entitlements of individual judges, though it might mean a slight increase in judicial resources. Under the current arrangement the Higher Criminal Courts sit for 42 weeks of the year. Trials and most other matters are not listed for hearing for a four week period in the middle and a six week period at the end of the year. Although judicial officers are not generally available to conduct trials during this period, the court support staff remain on duty. If judicial vacations were rostered and courts kept open continuously, the available trial court capacity could be expanded by up to 20 per cent.

Even if capacity were not permanently expanded in this way, a temporary expansion would have the potential to produce lasting reductions in trial court delay. A notable feature of these delays is the fact that although they are unacceptably high, they are not getting any worse. This indicates that the existing trial court capacity is adequate to meet the underlying demand for trial court time. It is just that it is insufficient to meet the pent-up demand for trial court time present in the backlog of unfinalized trial cases. If trial court capacity were expanded for long enough to remove the backlog of matters awaiting trial, trial court delay could be substantially reduced. Assuming there was no further growth in the underlying demand for trial court time, trial court capacity could then be returned to its original level without any consequent increase in trial court delay.

## SUMMARY AND CONCLUSION

Despite the building of new courts and the appointment of additional judges, there has been little improvement in the delay between registration and finalization for cases requiring a trial in the District Criminal Court. The number of matters registered for trial has decreased substantially since the NSW Office of the Director of Public Prosecutions assumed responsibility for conduct of the prosecution case in committal proceedings. It remains unclear at this stage, however, whether and to what extent the decrease in trial registrations will produce a drop in trial court delay.

Moreover if crime rates or police clear-up rates increase, the downward trend in trial registrations may be reversed. This makes it desirable to consider additional options for dealing with trial court delay.

There are three broad classes of strategy which may be deployed to tackle trial court delay. In the first class are those strategies designed to reduce the underlying demand for trial court time, either by reducing the number of trials which must be held or reducing the average duration of trials. In the second class are those strategies designed to make more effective use of existing trial court capacity. In the third class are strategies designed to expand trial court capacity. Options in the first class include (1) increasing the range of offences able to be dealt with summarily (2) increasing the proportion of District Court cases where the accused person pleads guilty and (3) reforming the law of evidence. Options in the second class include (4) introducing greater certainty into the listing process and (5) obtaining earlier pleas of guilty. Options in the third class include (6) reducing the number of sitting days allocated to other classes of case and (7) eliminating the court vacation.

Option (7) is a particularly attractive option, firstly, because it offers the promise of relatively quick effects and, secondly, because it would not need to be implemented on a permanent basis in order to bring about lasting reductions in trial court delay. Because trial court delay is stable (even if excessive) one may infer that the existing court capacity is sufficient to meet the underlying demand for trial court time. A one-off expansion of capacity of suitable magnitude could eliminate the backlog of cases and produce substantial reductions in trial court delay. Trial court capacity could then be returned to its original level without any consequent rise in trial court delay.

## NOTES

- 1 Director, NSW Bureau of Crime Statistics and Research. Thanks are due to Bronwyn Lind, who read and commented on an early draft, and to Ian Crettenden and Theo Groenestein who compiled the data and prepared the graphs.
- 2 That is, they would have involved a change of plea or would have been 'no billed'.
- 3 In effect, the underlying demand for trial court capacity is the demand which must be met in order to prevent a backlog of trials growing.
- 4 This deficiency is to be remedied from 1993 onwards.
- 5 The remainder is spent dealing with sentence matters, appeals and other kinds of criminal case. Source: Personal communication, Registrar, NSW District Criminal Court.
- 6 Values for  $T$ , the estimated amount of court time spent hearing trials, were derived from data in Annexures C and D of *The District Court of New South Wales Annual Review 1990* and *The District Court of New South Wales Annual Review 1991*. These data show the number of court hours used for criminal matters in each court. Estimates for  $T$  were obtained for each registry by summing the court hours used on criminal matters in each of the courts in the registry area, dividing the total by 5 to convert court hours to court days, and multiplying by 0.8 (assuming that 80% of criminal sitting time is devoted to hearing trials). Values for  $N$ , the number of trials actually held, were obtained from the Higher Criminal Courts database maintained by the Bureau of Crime Statistics and Research.
- 7 In particular, no consideration is given to reform of the committal process, which accounts for a significant portion of the time between arrest and finalization of Higher Criminal Court cases.
- 8 Weatherburn, D. & Nguyen da Huong, M. T. 1992, *Aspects of Demand for District Criminal Court Time*, Crime and Justice Bulletin No.15, NSW Bureau of Crime Statistics and Research, Sydney.
- 9 See section 439, *Crimes Act 1900*. (Proclaimed 1 February 1992.)
- 10 See section 32, *Criminal Procedure Act 1986*.
- 11 See section 405AA, *Crimes Act 1900*. (Proclaimed 17 March 1991.)
- 12 Weatherburn, D. & Nguyen da Huong, M. T., op. cit.
- 13 Langdale, R. 1990, *Case Studies in Corporate Crime*, NSW Bureau of Crime Statistics and Research, Sydney.
- 14 Aronson, M. 1992, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration.
- 15 Overlisting of trials involves listing more trials for hearing in a given period than could possibly be heard in that period. This is often done to counter the loss of court time which results from a high rate of adjournments. Some authorities, however, maintain that it exacerbates the problem. By generating a high level of uncertainty among counsel about whether or not a trial will go on it induces a lowered state of readiness on their part to proceed on any particular occasion that a case is listed. This then increases the likelihood of their seeking adjournments.
- 16 See Coffee, J. C. Jr. and Tonry, M. 1983, 'Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform Through Guidelines', in *Reform and Punishment: Essays on Criminal Sentencing*, eds Tonry, M. and Zimring, F., University of Chicago Press.