MANAGING TRIAL COURT DELAY: AN ANALYSIS OF TRIAL CASE PROCESSING IN THE NSW DISTRICT CRIMINAL COURT

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PREFACE

Criminal trial delay has been a problem for more than a decade in NSW. Recent figures indicate that the delay in bringing matters to trial in NSW is longer than in any other comparable jurisdiction and, unfortunately, getting worse. Somewhat surprisingly, little empirical research has been conducted in Australia which could be used to inform the development of strategies for dealing with trial court delay. The leading empirical work conducted in the area of criminal trial court management principally concerns the problem of long and complex criminal trials.

Thus while Australian lawyers and policy makers have often speculated on the causes of and remedies for trial court delay, unlike their colleagues in the United States and Britain, their speculations for the most part have been grounded in personal experience rather than objective empirical evidence. This report represents an attempt to remedy this problem. It presents and discusses the results of research conducted by the Bureau on the reasons for trial delay in the NSW District Criminal Court. While the NSW District Court is the focus of our attention the results should be of interest to those involved in trial court administration in other Australian States and Territories.

The impetus for the report was the creation of a Strategic Quality Team by the Director General of the NSW Attorney General's Department, Mr Laurie Glanfield. The team, which consisted of senior representatives of all agencies closely associated with the work of the NSW District Criminal Court, was asked to analyse and propose ways of streamlining the flow of trial cases through the District Court. The authors were invited to participate in the team and it provided a unique opportunity to conduct research into court delay informed at every step by the experience of those directly involved in trial case processing.

We hope the research contained in this report lays the foundation for significant improvements in trial case processing within the NSW District Criminal Court. It should be noted, however, that the problems confronting the Court are not of a kind which additional resources, on their own, can be expected to solve. Nor are they of a kind resolvable by Government fiat. For reasons explained in the body of the report, progress in dealing with trial court delay is going to depend critically on good will, careful planning and effective cooperation between judges, defence representatives, prosecutors, court staff and police.

Dr Don Weatherburn

Director

May 2000

TABLE OF CONTENTS

Acknowledgments iii

Preface iv

Executive Summary vi

Section 1: Background to trial court delay 1

Section 2: Demand for criminal court time and criminal court capacity . . 8

Trends in court capacity and court workload 8

Current demand and current capacity 10

Section 3: The likelihood of proceeding when listed 14

The number of times matters are listed for trial 14

The listing process for matters which do not proceed 17

The listing process for custody and sex matters 18

The need for a closer look at the listing process 19

Section 4: The causes of failure to proceed 21

Survey aims and methods 21

The outcome of matters listed for trial 22

Factors associated with the failure to proceed 23

The timing of guilty pleas 24

Reasons for late changes of plea 25

Reasons for adjournments 29

Section 5: Policy implications 32

The need for change 32

Reducing the not-reached rate 33

Encouraging earlier guilty pleas 35

Reducing the number of adjournments 38

Court and case monitoring data 40

Conclusion 41

Notes 42

References 45

Appendix 1: Calculation of criminal court capacity and demand . . 47

Appendix 2: Background and methodology for the special surveys . . 49

Appendix 3: The questionnaires 53

Appendix 4: Calculation of savings due to hypothetical reforms . . . 63

EXECUTIVE SUMMARY

The NSW District Criminal Court has, since 1988, experienced problems bringing matters to trial expeditiously. While (for reasons which are not entirely clear) the level of criminal trial court delay decreased between 1991 and 1994, since 1996 delays have risen by about 23 per cent. The current level of delay substantially exceeds the Court's own time standards. Those standards require, inter alia, that 90 per cent of criminal trials should commence within 112 days of committal for trial 'or other event which gives rise to the need for a trial'. Currently only 5 per cent of matters where the accused is on bail and 25 per cent of matters where the accused is in custody meet this standard. Delays in bringing matters to trial in the NSW District Criminal Court are now higher than in any other comparable jurisdiction in Australia.

The analysis undertaken in this report demonstrates that the delay in bringing matters to trial is not the result of an increase in demand for criminal court time or the result of a reduction in criminal court capacity. The number of trial, sentence and appeal matters required to be dealt with by the NSW District Criminal Court has not risen significantly over the last few years. The average duration of trial hearings has risen only very slightly. While data on the average duration of sentence and appeal hearings are not routinely kept, there is no evidence that they have risen. The capacity of the NSW District Criminal Court to hear trial, sentence and appeal matters, on the other hand, has risen by approximately 92 per cent since 1995. The difference between the demand for criminal court time and criminal court capacity in the NSW District Court suggests it had a net capacity surplus in 1998 of some 7 per cent.

The delay in bringing criminal matters to trial is the result of inefficiencies in trial case processing. Less than 40 per cent of criminal matters proceeding to trial actually proceed to trial on the date they are first listed for trial. Many are listed for trial numerous times before actually proceeding to trial. The uncertainty surrounding which matters will proceed to trial is very disruptive to the listing process. The likelihood of proceeding to trial only increases by a small amount with each successive listing. Moreover certain kinds of matter, to which the Court endeavours to give priority (e.g. adult sexual assault matters), in some circumstances take longer to finalise than matters to which the Court assigns a lower priority.

A comprehensive survey of criminal trial matters indicates that matters most often fail to proceed to trial on the day they are listed either because the accused changes their plea to guilty (35 per cent of cases), an adjournment is granted (29 per cent of cases) or the matter itself is not reached (22 per cent of cases). These problems, though separate, are intertwined. To avoid the wastage of judge and court time produced by adjournments and late changes of plea, the Court has tended to 'over-list' matters. This practice has resulted in many matters not being reached. This in turn has lowered the readiness of Crown and Defence representatives to proceed when matters are reached, thereby further fuelling the problem of adjournments and late pleas.

Not surprisingly, where there is a change of plea in a matter committed for trial, only 34 per cent of guilty pleas are entered prior to setting a trial date. Sixty per cent of plea changes occur on the day of the trial. Defence representatives cite a late decision on the part of the Crown to accept a guilty plea, difficulties discussing a matter with the Crown at an early stage, problems in the instructions given by clients and the lack of a clear sentence benefit as the primary reasons for late guilty pleas. Separate investigation reveals that the perceived lack of a clear sentence benefit has a sound basis in fact.

Of the trial adjournments granted most (61%) were sought by Defence representatives but a third were sought by the Crown. The most commonly stated reasons for adjournment given to the Court by Defence representatives are problems with legal representation (mostly because the accused has no legal aid funding or cannot find suitable representation) and the fact that further preparation is required. The most commonly stated reason for adjournment given to the Court by Crown representatives is a problem with witness availability.

The current operation of the trial listing process results in a substantial waste of court, Defence, Prosecution and police time. By the same token, reform of trial case management in the NSW District Criminal Court could potentially produce substantial savings in court, Defence, Prosecution and police time. By way of example, if just half of all matters finalised on a guilty plea were 'weeded out' prior to being listed for trial and if each matter listed for trial were finalised on its second listing, the number of trial listings in the NSW District Criminal Court would decrease by one-third.

There are numerous ways in which the flow of trial matters through the Court could be expedited. These include:

- setting targets for the not-reached rate to ensure that the percentage of matters not reached is kept very low
- constant monitoring and adjustment of the listing rates across each court venue to ensure targets are met
- re-listing matters which are not reached or adjourned with a minimum of delay
- holding judges in reserve to deal with matters which are not reached or adjourned
- mechanisms to ensure early consultation between Defence and Crown on the scope for a guilty plea
- continuity of senior Defence and Crown representatives from case commencement to finalisation
- guarantee of legal aid at committal and use of seamless grants of aid from committal to case finalisation
- greater and consistent sentence discounts for early pleas of guilty
- more thorough checking by the Crown of witness availability
- more thorough checking by the Court of readiness to proceed to trial
- re-listing of adjourned matters before the judge who granted the adjournment
- closer monitoring of the age of the pending trial caseload by the Court
- accurate measurement of the duration of sentence and appeal hearings, and
- accurate measurement of the number of times matters are listed for trial.

SECTION 1: BACKGROUND TO TRIAL COURT DELAY

Trial court delay has been a persistent problem in the NSW District Criminal Court. Figures released by the NSW Bureau of Crime Statistics and Research (hereafter the 'Bureau') in 1988 reveal that, for courts attached to the Sydney Registry, where delays were highest, the median delay between committal and trial outcome (for matters proceeding to trial) was more than two years (749 days). Median delays in all other NSW District Court Registries exceeded 12 months. These delays were additional to those encountered in getting matters from arrest to the committal stage which, at the time, were also substantial (NSW Bureau of Crime Statistics and Research 1990, pp. 31-34).

The delay in bringing matters to trial in the late 1980s prompted widespread public criticism of the NSW court system (see, for example, Monaghan 1987; Coultan 1987). In response to this criticism, management consultants Coopers and Lybrand WD Scott were appointed to review the operation of the entire NSW court system. Their report (Coopers and Lybrand WD Scott 1989) recommended, amongst other things, the introduction of improved court management information systems, the abolition of committal proceedings, the introduction of audio or video-recording of confessional evidence, the establishment of a separate department of courts administration and the appointment of acting judges to help clear the criminal backlog (Coopers and Lybrand WD Scott 1989, pp. xv–xxxiv).

Many of these recommendations (e.g. audio-recording of confessional evidence, the appointment of acting judges) have since been adopted. Others (e.g. the separate Department of Courts Administration) were adopted but later abandoned. A large number of other initiatives have also since been undertaken to reduce criminal trial court delay. In 1990 additional judges were appointed (District Court of New South Wales 1990, p. 18), a statutory discount on sentencing for early guilty pleas was introduced (Crimes Legislation Amendment Act 1990), the requirement for summing up in short trials was removed (Crimes Act 1990, s. 405) and judge-alone trials (Criminal Procedure Act 1990, s. 32) were introduced.

In 1991 the NSW District Court introduced a scheme of early arraignment hearings (District Court of New South Wales 1991, p. 13) and the Director of Public Prosecutions assumed responsibility for prosecution in committal proceedings, at least partly in order to encourage earlier guilty pleas. In 1992 the sentence indication scheme (District Court of New South Wales 1992, p. 14) was introduced in a further bid to encourage earlier and more frequent guilty pleas. In 1993 a pilot system of allocating matters to individual judges was trialed to encourage greater 'date and judge' certainty (District Court of New South Wales 1993, p. 24). In 1994 the Court announced a 'strict adjournment policy' (District Court of New South Wales 1994, p. 23) designed to reduce the rate at which trial matters were being adjourned.

In 1995 a legislative requirement for audio-recording of confessional evidence was introduced (Criminal Procedure Act 1986, s. 108), partly in the hope that this would also reduce the average duration of trials. In 1995, again, the Court laid down explicit time standards governing the speed with which matters should be brought to trial. In 1996 the range of criminal matters triable summarily was increased to reduce the workload of the Court (District Court of New South Wales 1996, p. 35). In the same year the number of court sitting days allocated to criminal matters was also substantially increased (District Court of New South Wales 1995a, p. 52 and 1996, p. 44).

Most recently, in 1999, a List Judge has been assigned to the Sydney Registry to oversee criminal case progress. Part of this judge's role involves listing trial matters shortly before their trial date to confirm readiness to proceed with the intention of minimising the occurrence of late adjournments (Attorney General's Department of NSW 1999).

Figure 1 and Figures 2a to 2g show the trend in average delay between committal for trial and trial outcome (e.g. verdict) between 1990 and 1999, for matters proceeding to trial. Figure 1 shows the trend for all NSW District Criminal Court trial matters. Figures 2a to 2g show the trend for matters finalised at each of the Court's seven registries. Inspection of these figures indicates that, except for courts attached to the Newcastle Registry, the average delay between committal for trial and trial outcome for matters proceeding to trial in the NSW District Court declined substantially between 1991 and 1994.[1] It is impossible to tell whether the initiatives undertaken before 1994 were responsible for this general downward trend. They were not the only significant influences on the Court's workload. Between July 1990 and June 1995 the number of new trial registrations in the NSW District Criminal Court declined by 21.7 per cent (NSW Bureau of Crime Statistics and Research 1995, p. 33).

Figure 1: Average delay between committal and trial outcome (All Registries: 1990-1999)

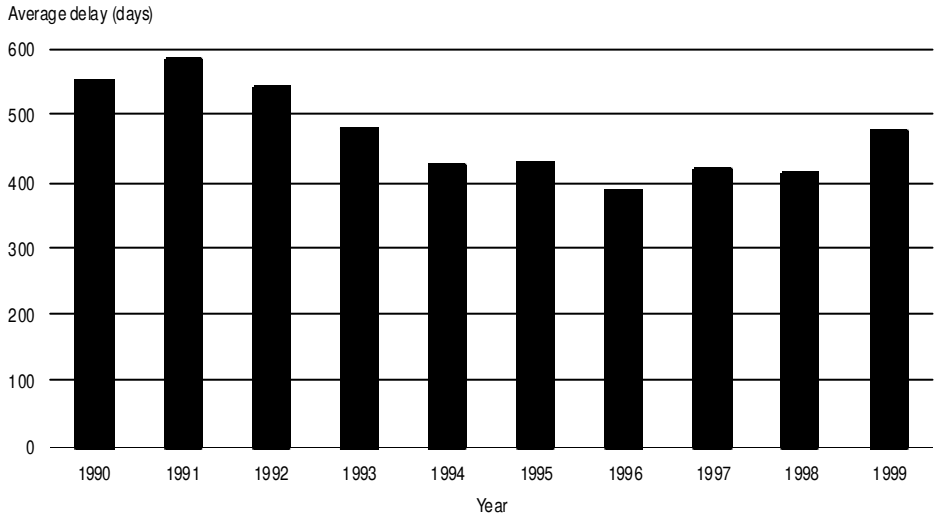


Figure 2a: Average delay between committal and trial outcome (Sydney Registry: 1990-1999)

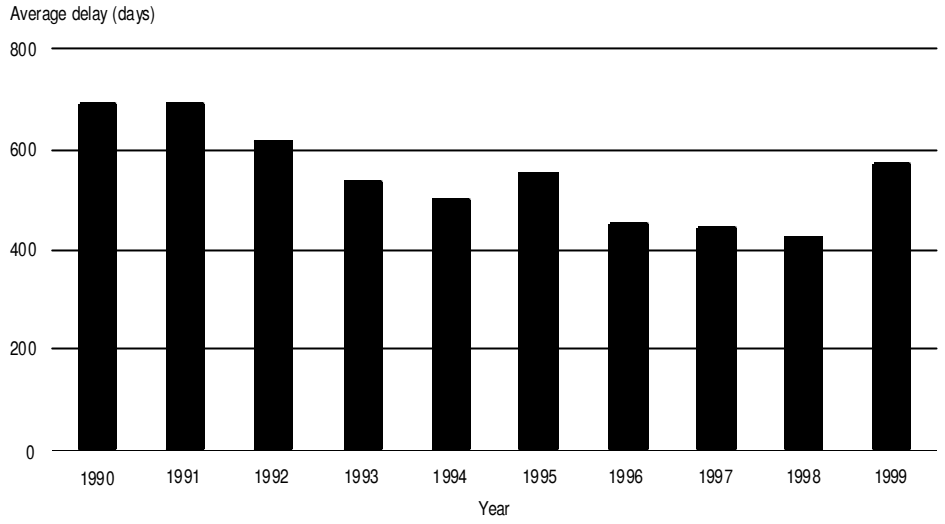


Figure 2b: Average delay between committal and trial outcome (Sydney West Registry: 1990-1999)

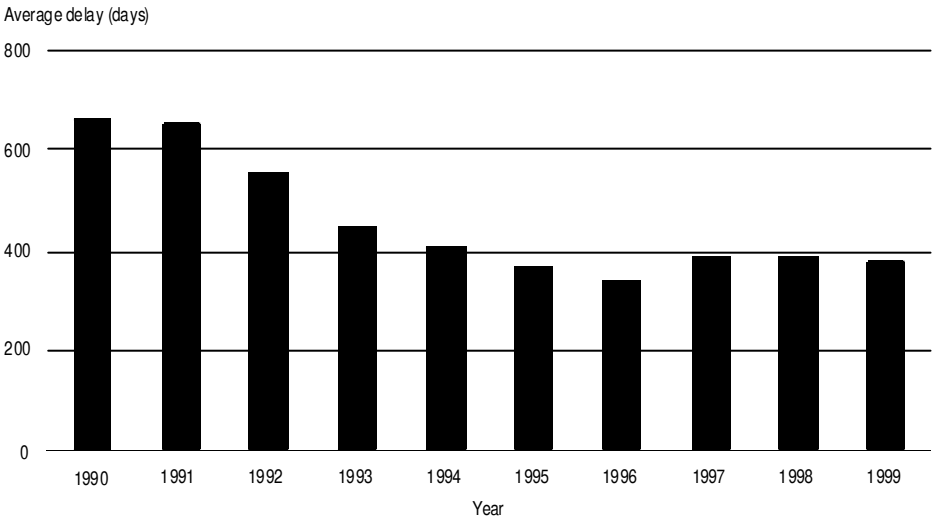


Figure 2c: Average delay between committal and trial outcome (Newcastle Registry: 1990-1999)

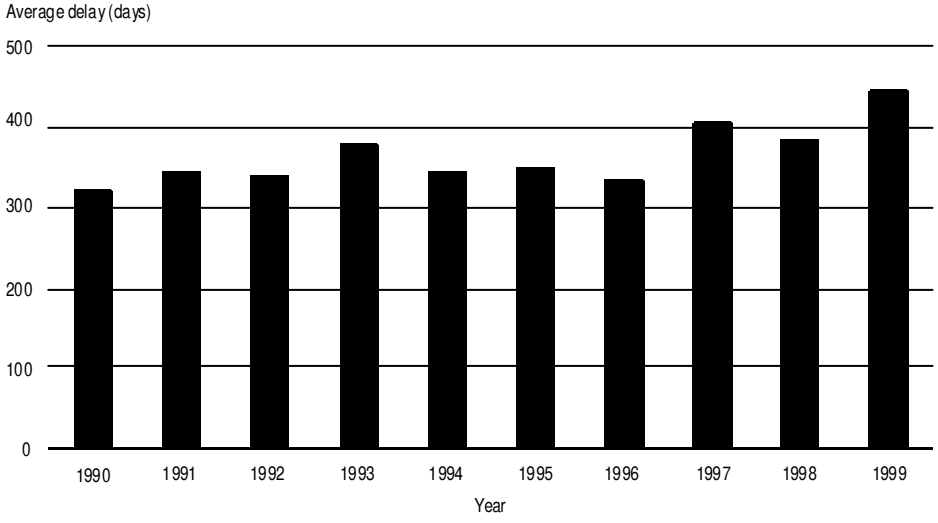


Figure 2d: Average delay between committal and trial outcome (Wollongong Registry: 1990-1999)

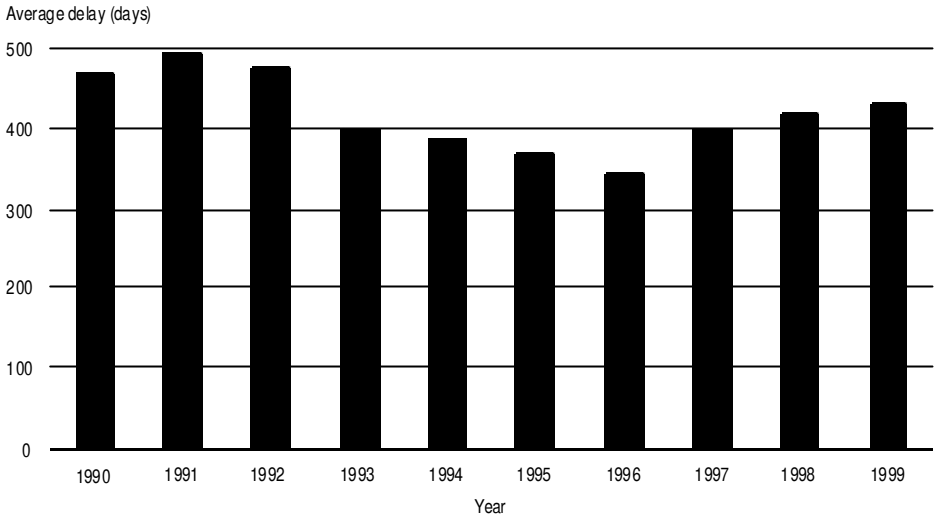


Figure 2e: Average delay between committal and trial outcome (Lismore Registry: 1990-1999)

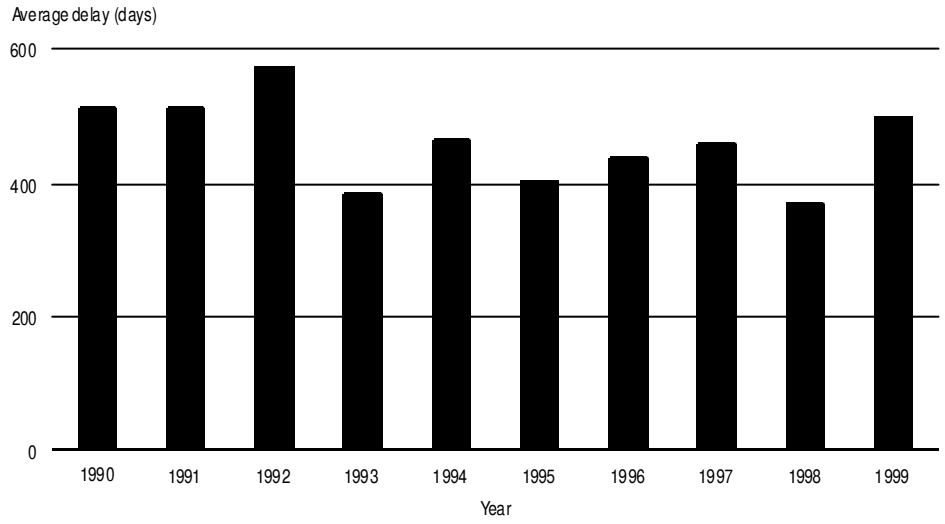


Figure 2f: Average delay between committal and trial outcome (Dubbo Registry: 1990-1999)

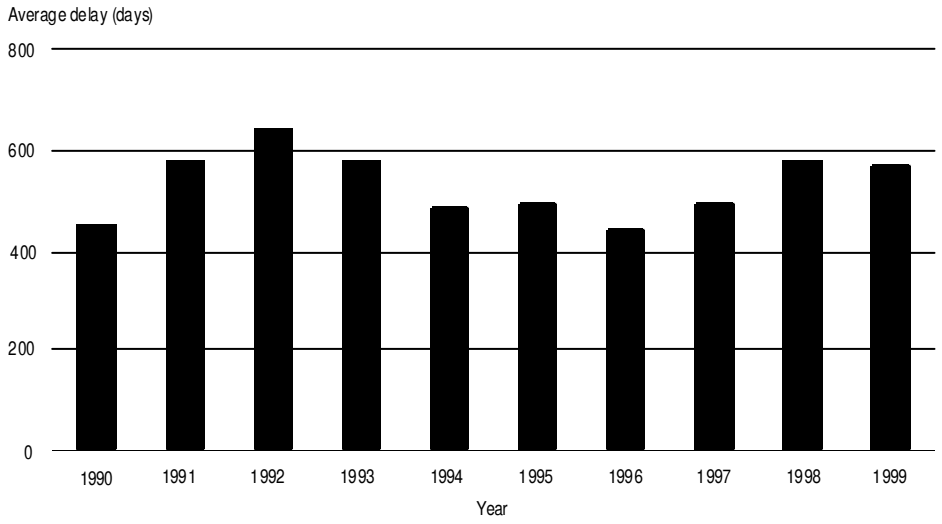
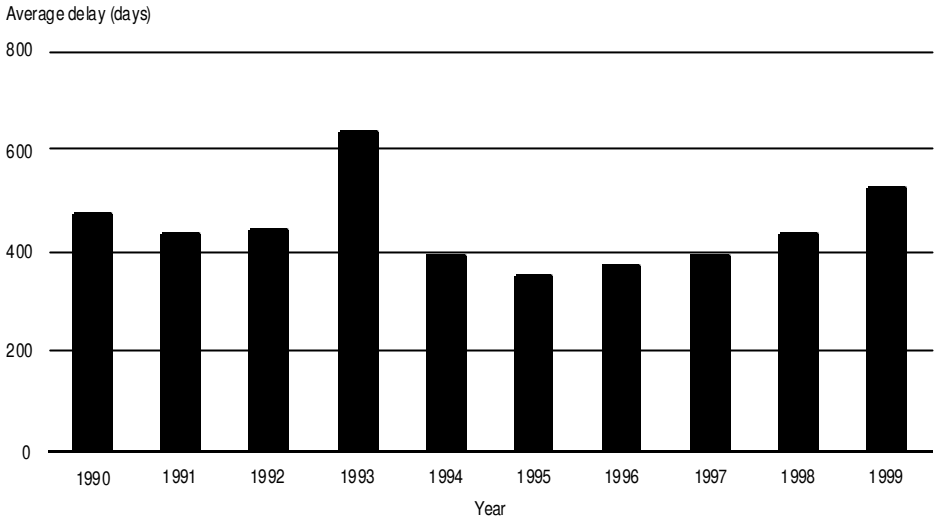


Figure 2g: Average delay between committal and trial outcome (Wagga Wagga Registry: 1990-1999)



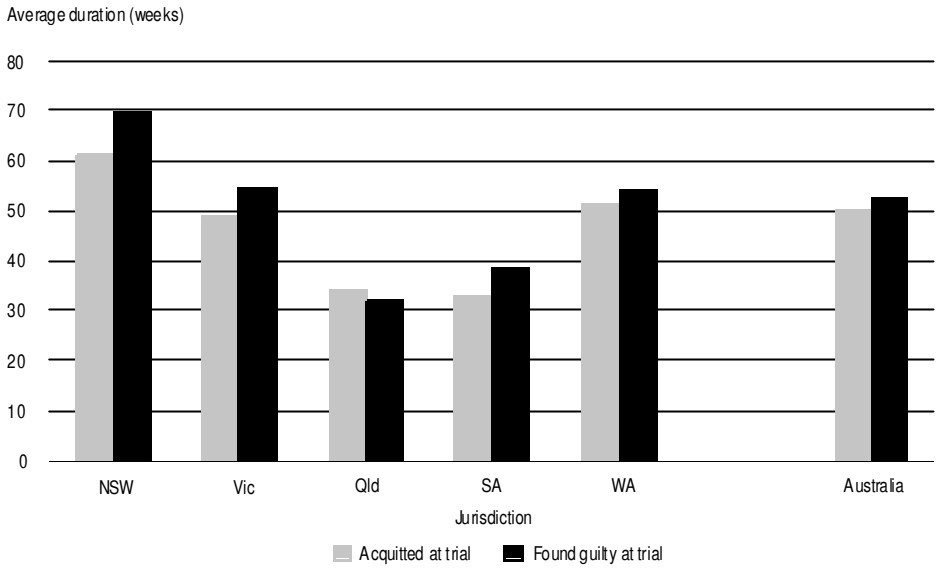
From 1996 trial court delay began to rise again. The increase between 1996 and 1999, (see Figure 1), was about 23 per cent. The current level of delay significantly exceeds the Court's own time standards for bringing matters to trial (District Court of New South Wales 1995b, p. 31) which require that:

> …90% of criminal trials should commence within 112 days (16 weeks) of committal for trial or other event which gives rise to the need for a trial [while]…
>
> …100% of criminal trials should commence within 1 year of committal for trial or other event which gives rise to the need for a trial…

According to the Court, in 1998 (District Court of New South Wales 1998, p. 52) only 5 per cent of matters where the accused was on bail and 25 per cent of matters where the accused was held in custody were brought to trial within 112 days. The corresponding figures at the 12 month mark were 40 per cent and 30 per cent, respectively. Looked at another way, using data on matters finalised in the 12 months to September 1999 drawn from the Bureau's own Higher Criminal Courts database, it took more than 12 months to dispose of 90 per cent of matters proceeding to trial where the accused was held in custody. Where the accused was granted bail it took nearly three years to dispose of 90 per cent of matters proceeding to trial.

These figures compare poorly with those in other States. Figure 3 shows the average time between initiation and finalisation for matters proceeding to trial in each State.[2] Following the Australian Bureau of Statistics (ABS) convention, separate figures are provided for matters in which the defendant is acquitted and matters in which he or she is convicted at trial of one or more offences. Figure 3 indicates that the NSW District Criminal Court is now in the unsatisfactory position of having longer delays in finalising trial matters than any other comparable Australian jurisdiction (Australian Bureau of Statistics 1999).[3]

Figure 3: Average duration between initiation and finalisation 1997-98



The problem of trial court delay might more easily be tackled, were there general consensus on its causes amongst those intimately involved in the administration and work of the court. Somewhat surprisingly, however, despite the plethora of initiatives designed to tackle trial court delay in the District Court offered during the 1990s, there has been no systematic attempt to analyse the factors which are responsible for that delay. As might be expected in circumstances where there is a dearth of hard evidence, there are sharp divisions of opinion as to the reason or reasons for the lack of progress in expediting the progress of criminal trial matters through the District Court. Various factors have at one time or another been identified as lying at the heart of the problem, including:

- over-listing of matters
- late changes of plea
- lack of preparation by the Defence
- late 'no-bills'
- lack of preparation by the Crown
- inadequate judicial and court resources
- inadequate judicial control over court proceedings, and
- inadequate resourcing of the Office of the Director of Public Prosecutions (DPP) and the Legal Aid Commission.

The importance of these factors has always been the subject of debate. Each party to the debate has tended only to see the problems generated by the actions of other parties. The result has been lack of agreement over the most appropriate policies for dealing with the problem.

The purpose of this report is to bring together a range of empirical evidence bearing on the causes of criminal trial delay in the NSW District Court in the hope that it might lay a foundation for agreement on how best to reduce it. Some of the evidence in this report derives from the Bureau's own database on Higher Criminal Court activity. Some

of it derives from two special surveys undertaken in cooperation with a Strategic Quality Team, comprising representatives from the key agencies involved in the criminal trial process. This team was established by the Director General of the NSW Attorney General's Department to provide advice on ways of more expeditiously bringing matters to trial in the NSW District Criminal Court. The issues raised by the Strategic Quality Team in connection with these surveys also form the basis of the policy discussion which concludes this report.

The structure of the report is as follows. Section 2 assesses whether recent trends in trial court delay could be the result of an increase in demand for criminal court time or a reduction in capacity. It also addresses the more general question of whether the Court has enough capacity to dispose of its incoming criminal work. Section 3 highlights some major sources of inefficiency in trial case processing in the Court. Section 4 presents data from two special surveys designed to identify factors responsible for this inefficiency. Section 5 discusses the policy implications of the results revealed in earlier sections.

SECTION 2: DEMAND FOR CRIMINAL COURT TIME AND CRIMINAL COURT CAPACITY

Trends in court capacity and court workload

In this section we begin by assessing whether the recent growth in trial court delay is a consequence of a growth in demand for criminal court time and then turn our attention to the question of whether the NSW District Criminal Court has enough capacity to deal with the criminal matters which come before it.

All court systems have a finite capacity to hear and dispose of trial matters. One possible explanation for the growth of delay in the NSW District Criminal Court since 1996 is a growth in demand for criminal court time. The Court hears three main classes of case: trials, sentences and appeals. A growth in demand for criminal court time can come about because either (a) the numbers of criminal trial matters, sentence matters and/or appeal matters have increased or (b) the average time required to hear criminal trials, sentences and/or appeals has increased.

First it should be noted that the capacity of the Court has increased since 1996. In 1995 the Court devoted 4531 days to criminal matters (District Court of New South Wales 1995a, p. 52). In 1996 this figure rose to 7829 days (District Court of New South Wales 1996, p. 44).[4] In 1997 it rose again to 8177 days (District Court of New South Wales 1997, p. 45). In 1998 the Court devoted a total of 8706 days to criminal matters (District Court of New South Wales 1998, p. 44).[5] In other words, since 1995, the capacity of the NSW District Criminal Court to deal with criminal matters has increased by approximately 92 per cent. We turn, then, to the question of whether the demand for criminal court time has increased.

As noted earlier, one key determinant of the demand for criminal court time is the number of trial matters registered. Figure 4 shows the monthly number of criminal trial matters registered between 1996 and 1999. While there is no general upward trend over the period in question, trial registrations during 1997 and the early part of 1998 appear to have been approximately 50 per month (i.e. approximately 20 per cent) higher than in 1996 or after June 1998.

Ordinarily this would portend an increase in the workload of the Court but the proportion of matters registered for trial which actually proceed to trial in the Court has been in more or less continuous decline since 1996. In the period July 1996 – June 1997, 34 per cent of matters registered for trial in the NSW District Criminal Court actually proceeded to trial. The corresponding figure for the 12 months to June 1998 was 32 per cent while that for the 12 months to June 1999 was 29 per cent (NSW Bureau of Crime Statistics and Research, unpub.). When applied to the corresponding annual trial registration data, these percentages indicate a net decrease of 19 per cent in the actual number of criminal matters requiring a trial between 1996 and 1999.

The NSW District Criminal Court also hears sentence and appeal matters. Unfortunately, it is not possible to obtain data on monthly trends in sentence and appeal registrations over the same period as that for trial registrations. Figure 5, however, shows the annual trend in sentence registrations between 1996 and 1998. It is evident that there has been a general downward trend over this period, with sentence registrations being about 10 per cent lower in 1998 than they were in 1996.

Figure 6 shows the annual trend in appeal registrations between 1996 and 1998. There is very little change in appeal registrations between 1996 and 1997 but there is a slight upward trend between 1997 and 1998.

Figure 4: Monthly trial registrations: Jan. 1996 - Jun. 1999

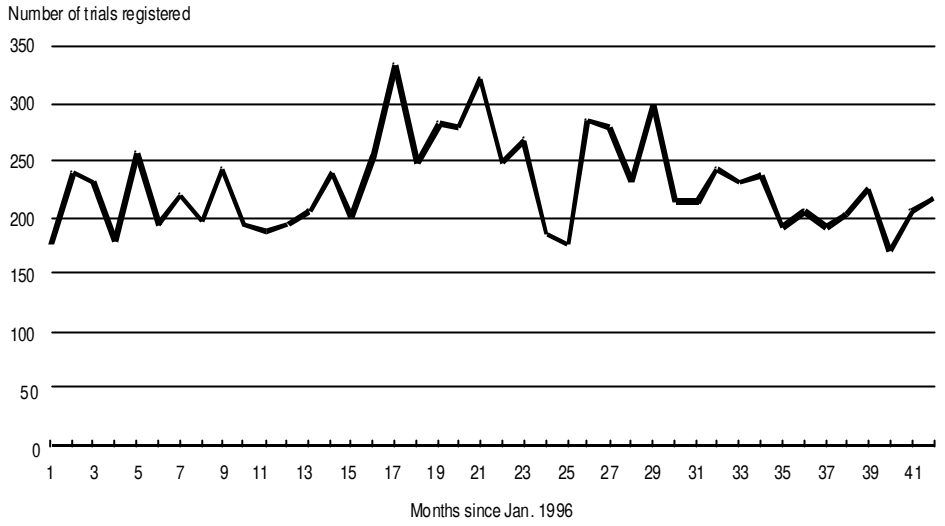


Figure 5: Annual sentence registrations (1996-1998)

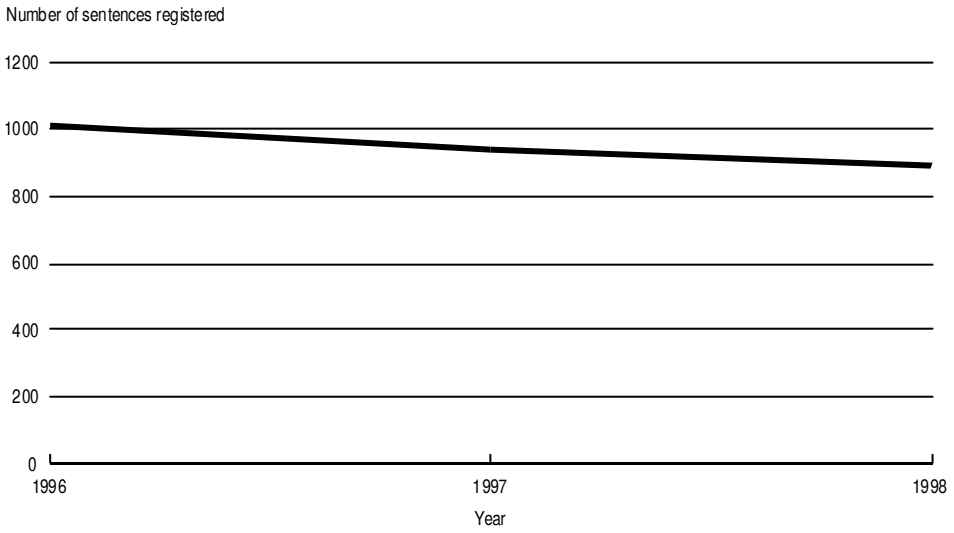
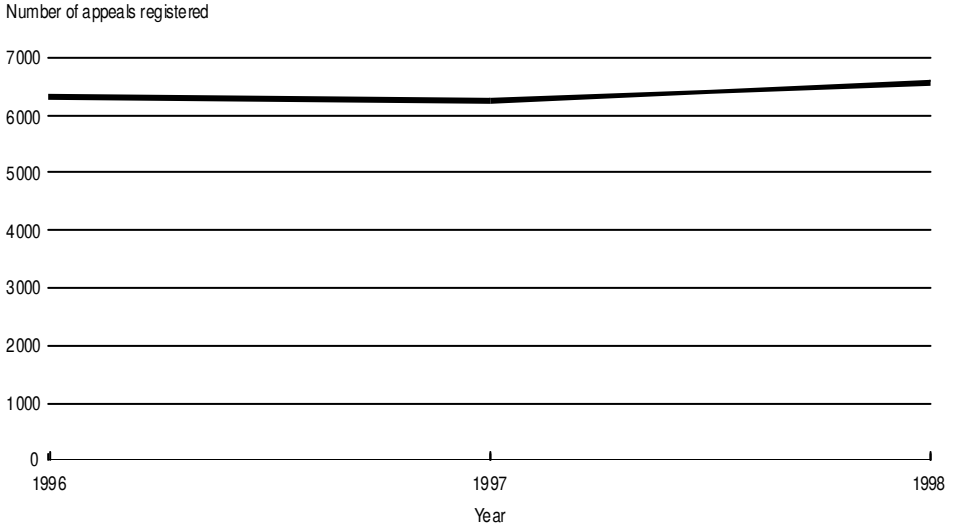


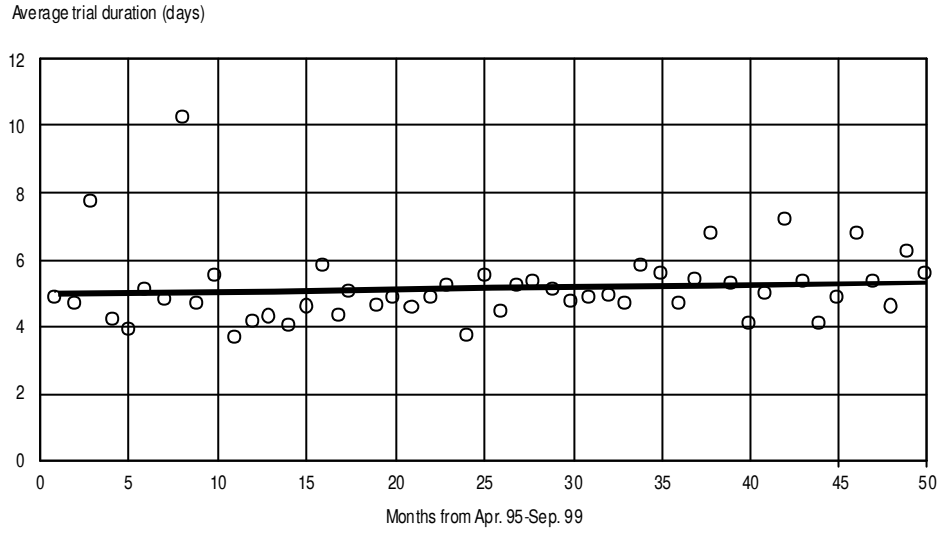
Figure 6: Annual appeal registrations (1996-1998)



Another potential source of increase in criminal workload is an increase in the average time required by the Court to hear criminal matters. Since data on the duration of sentence and appeal hearings are not routinely collected it is not possible to say whether the average time required to deal with these sorts of hearings has increased. Because trial hearings are generally much longer than sentence or appeal hearings, however, a potentially more important source of increase in demand for criminal court time is an increase in the average duration of trial hearings.

The Court has kept data on the monthly average duration of trial hearings since April 1995. Figure 7 shows the average duration for trial hearings across the State from April 1995 to September 1999.[6] The best-fitting linear trend through the data is also shown to assist in gauging whether there is any upward or downward trend in the duration of trial hearings. There is a very slight upward trend but it is far too small to account for the 20 per cent increase in trial court delay which has occurred over the same period.

Figure 7: Average trial duration (All District Court Registries)



On balance, the existing evidence provides little reason for believing that the growth in trial court delay in the NSW District Criminal Court since 1996 is the result of either a reduction in the capacity of the Court or an increase in the demand on its time. The numbers of trial and sentence matters required to be disposed of by the Court have fallen. The duration of trial hearings has increased only slightly. There has been a slight increase in the number of appeals registered but the demand on court time created by this increase is likely to have been more than offset by the smaller number of matters requiring trial. We cannot rule out the possibility of an increase in the duration of sentence or appeal hearings but, since the Court itself has not noted any such trend and there is no evidence suggesting it has occurred, this explanation for the growth in delay must be regarded as speculative.

Current demand and current capacity

The preceding analysis of trends in criminal court capacity and demand for criminal court time does not directly address the question of whether the Court has enough capacity in theory to dispose of its current criminal workload. It might be thought that, since the Court itself maintains that it is fully occupied 4.45 hours out of every 5-hour working day (District Court of New South Wales 1998 p. 44), it must be running at, or

at the very least, near its capacity. A fully occupied court, however, is not necessarily one whose capacity has been efficiently exploited. The critical question is not what quantity of judge time the Court currently uses in disposing of its criminal work but what quantity of judge time is actually required to efficiently dispose of its criminal work.

In principle, a determination of this kind is straightforward. We simply group the items of work performed by the Court into categories, count the number of items of work performed by the Court in each category, multiply the counts associated with each category by the average duration of that kind of work and sum the result. This was the approach adopted Coopers and Lybrand WD Scott (1989, p. E3). They divided the work of the District Criminal Court into trials, sentences and appeals and suggested that the demand for criminal court time in a given year (D) could be estimated using the equation:

$$D = aT + bS + cA$$

where T, S and A are the numbers of trial, sentence and appeal matters which must be disposed of in a given year, and a, b and c are the respective average durations of each. This equation simply states that the demand for criminal court time is equal to the sum of all the main types of work the District Court must perform, weighted by the average duration of each kind of work.

The trouble with this equation is that it makes no explicit provision for the court time required to place a matter on trial. Provision for such time should be made because it is necessary to list matters for mention before the court at least once to fix a trial date. It is also sensible practice to list matters for mention at least once prior to the trial date to ensure that the Defence and Prosecution are ready to proceed on the trial date.[7] Provision should also be made for a lag between successive trials in a court because it is not always possible to start a new trial in a court immediately upon completion of the preceding trial.[8] Trial matters that result in a hung jury or an aborted trial also consume court time (as these trial matters in effect proceed to trial twice). The durations of these additional trials should be taken into account. Thus to assess whether the NSW District Criminal Court has the minimum capacity required to dispose of its workload in a given year we need an estimate of:

1. the amount of court time the NSW District Court has available to hear criminal matters in a given year
2. the number of criminal trial hearings required in a given year
3. the average duration of a criminal trial hearing
4. the number of aborted trials in a given year
5. the number of trials resulting in a hung jury in a given year
6. the number of sentence hearings required in a given year
7. the average duration of a sentence hearing
8. the number of criminal appeal hearings required in a given year
9. the average duration of a criminal appeal hearing
10. the court time required to set/confirm a trial date, and
11. the lag between trial hearings.[9]

We have selected 1998 as the basis of our analysis as it is the most recent year for which data are available. Recent data on each of these parameters are not available from any one source, and hence were obtained from or calculated using a number of sources. These included the NSW District Court, the Bureau's Higher Criminal Courts database, and the sound record logs of the Recording Services Branch of the NSW Attorney General's Department (see Appendix 1 for full details of the data sources and the methods of calculation).

Since there are no readily available sources of data for the eighth and ninth parameters, we chose to rely on advice from a senior court administrator to obtain estimates of these parameters (Fornito, R. 1999, Manager, Case Management and Listing, NSW District Court, pers. comm., 2 Dec.). Based on this advice we used an estimate of one hour of court time (i.e. 0.2 of a 5-hour court day) for the minimum amount of court time required to set and confirm the trial date.

It is more difficult to determine the minimum lag time between trial hearings. Some trials commence before the jury from a previous trial has delivered its verdict. Others, such as those which would have to start near the close of court business for the day (or the week), obviously do not. Based on the advice we received and for the purposes of assessing the capacity of the Court we assume an average lag of 1.5 hours (0.3 of a court day) between trial hearings.

Table 1 shows the criminal court capacity and estimated demand on criminal court time in 1998. Note that the second column of the table shows the capacity of courts attached to each Registry (measured in days sat hearing criminal matters) in 1998. The third column shows the estimated demand for criminal court time (in days) in that year. The fourth column shows the absolute value of the difference between the two. The final column shows the difference between capacity and demand expressed as a percentage of capacity.[10]

Table 1: Criminal court capacity and estimated demand for criminal court time, 1998

Registry	*Capacity (days)*	*Demand (days)*	*Absolute difference (days)*	*Percentage difference (%)*
Sydney	3910	3533	377	10
Sydney West	2386	2275	111	5
Newcastle	1012	886	126	12
Wollongong	358	381	-23	-6
Lismore	456	345	111	24
Dubbo	351	498	-147	-42
Wagga Wagga	233	179	54	23
Net	8706	8097	609	7

It can be seen from Table 1 that, judged in terms of the minimum time required to dispose of the District Criminal Court's work in 1998, all Registries except Dubbo and Wollongong actually had surplus capacity. Overall, there was a net potential capacity surplus of some 7 per cent. Given the difficulty in determining the lag time necessary between trials we tested the sensitivity of the results to our assumptions concerning the lag time, by calculating the effect again, assuming either no lag or a half day lag

(i.e. 2.5 hours of court time) between trials.[11] The results are not sensitive to assumptions about the lag between successive trials. If the lag is assumed to be zero the surplus capacity rises to about 10 per cent. On the assumption that there is a half day lag between successive trials the estimated surplus capacity falls to 5 per cent.

It must be emphasised that this does not mean that judges were idle for 7 per cent of the time allocated to criminal matters in 1998. It simply means that, operating at peak efficiency, the Court would need up to 7 per cent less judge time to deal with its criminal workload than it currently uses. We therefore conclude that shortage of capacity is not an adequate explanation for problems of delay in the processing of trial matters in the NSW District Criminal Court. Even if we discount the possibility of expanding criminal court capacity by reducing the amount of time allocated to civil matters, the Court has enough capacity, in principle, to dispose of all its incoming trial, sentence and appeal matters and make some inroads into its pending trial caseload. The question we must now turn to, then, is what factors in practice make it difficult for the NSW District Court to make the most efficient use of the time available to it to hear and dispose of criminal trials.

SECTION 3: THE LIKELIHOOD OF PROCEEDING WHEN LISTED

The number of times matters are listed for trial

Placing an accused person on trial requires a great deal of preparation, not only on the part of the Court, the Defence and the Prosecution, but also on the part of associated agencies, such as the police, who often play a significant role as prosecution witnesses.

When matters fail to proceed to trial on the day they are listed a great deal of extra work is created for all parties concerned, in terms of the need to refresh preparation for the next occasion the matter is brought to trial. Furthermore, valuable court time will be lost when matters fail to proceed because of the need to set up and confirm a new trial date. Court time will also be lost if it proves impossible to start another trial in the slot left vacant by the trial failing to proceed.

From the vantage point of efficient court utilisation (as well as that of efficient resource utilisation of the other agencies involved) it is therefore essential to ensure that matters proceed to trial on the date on which they are first listed for trial, or at least no later than their second listing for trial. In this section of the report we explore the extent to which this occurs using data drawn from the Bureau's own Higher Criminal Courts database and data collected by Bureau staff from the Court's Case Tracking System. Details of the data collection procedures used to count trial listings can be found in Appendix 4.

Figure 8 shows the distribution of the number of times matters are listed for trial in the NSW District Criminal Court. Only those matters which actually proceeded to trial are shown. Figures 9a to 9g show the same distribution for courts attached to each of the seven main District Court Registries.

Figure 8: Number of times listed for trial (All Registries: July 1998-June 1999)

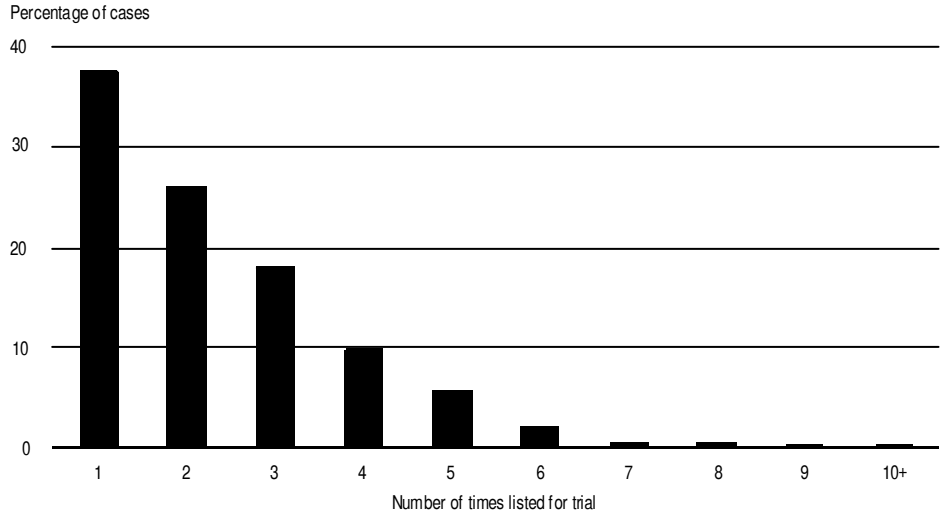


Figure 9a: Number of times listed for trial (Sydney Registry: July 1998-June 1999)

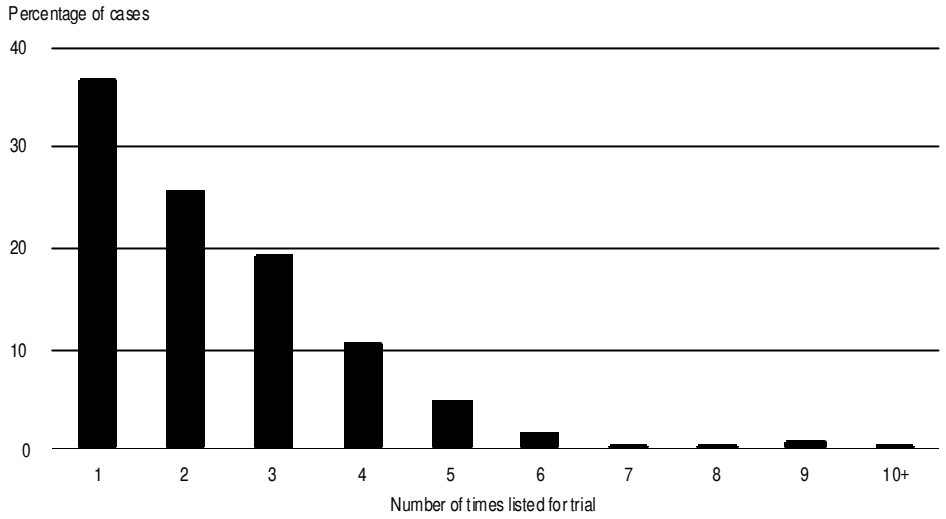


Figure 9b: Number of times listed for trial (Sydney West Registry: July 1998-June 1999)

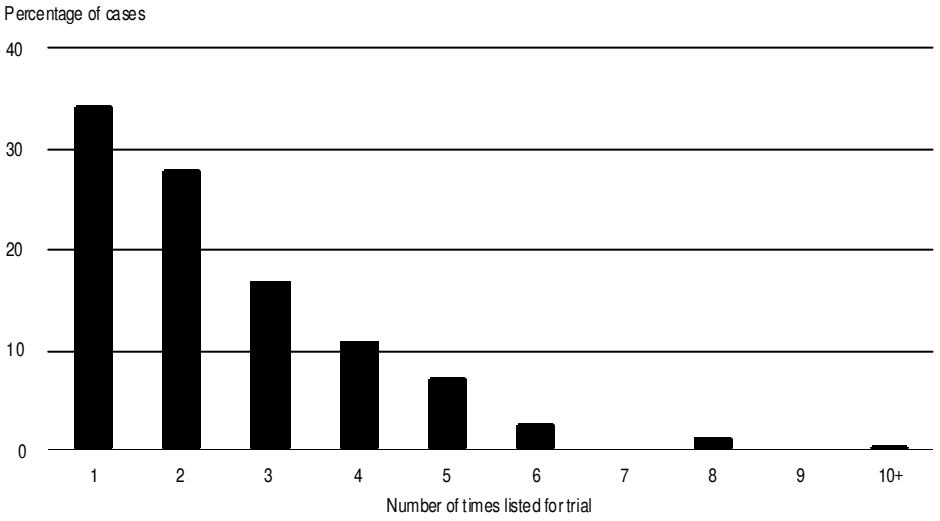


Figure 9c: Number of times listed for trial (Wollongong Registry: July 1998-June 1999)

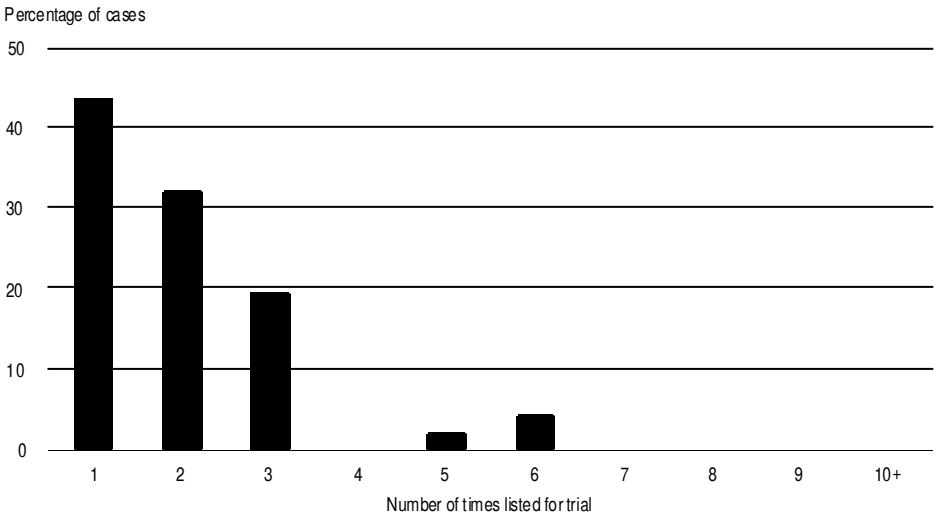


Figure 9d: Number of times listed for trial (Newcastle Registry: July 1998-June 1999)

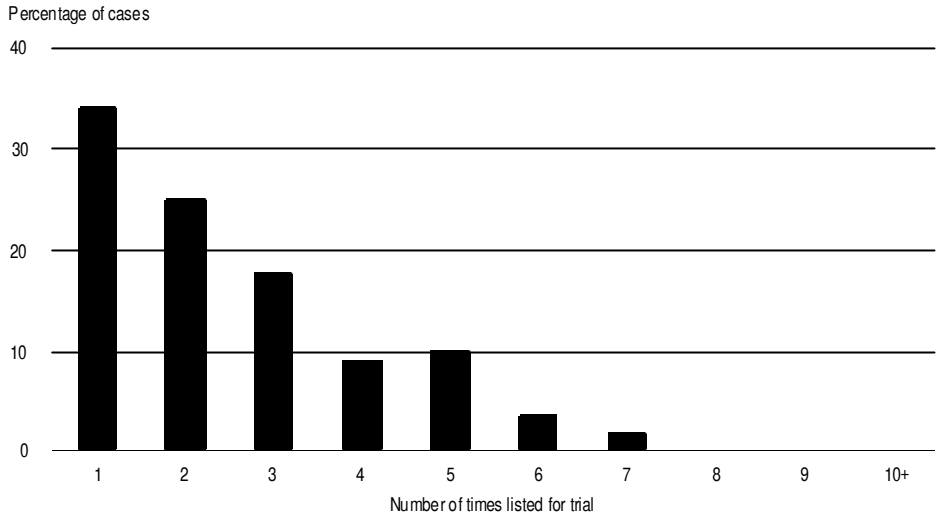


Figure 9e: Number of times listed for trial (Lismore Registry: July 1998-June 1999)

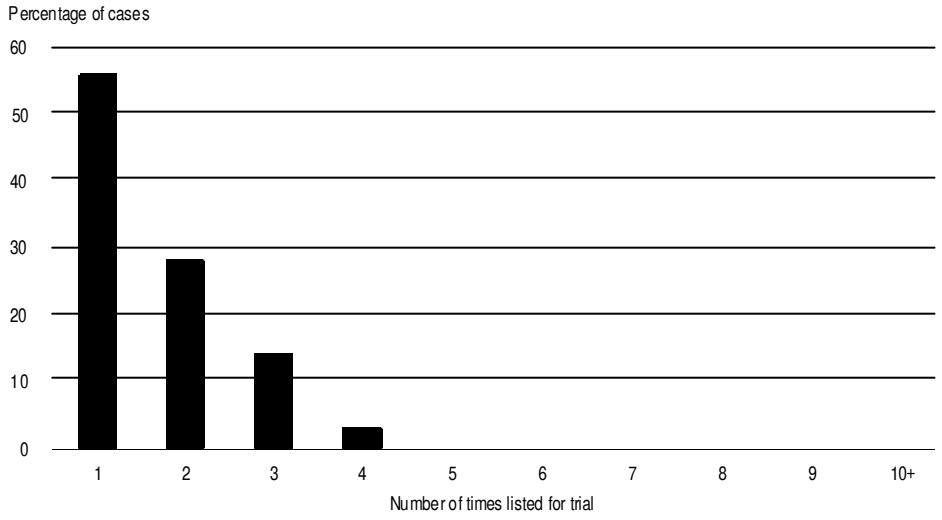


Figure 9f: Number of times listed for trial (Dubbo Registry: July 1998-June 1999)

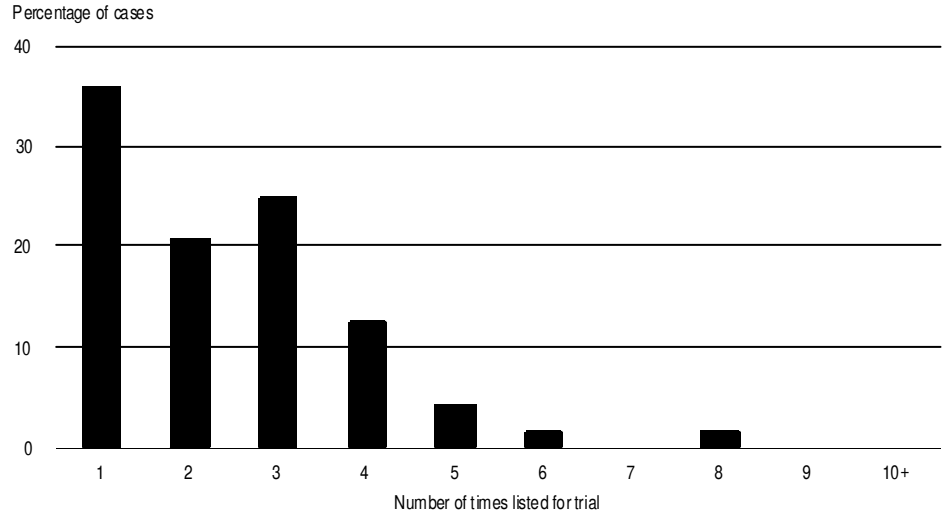
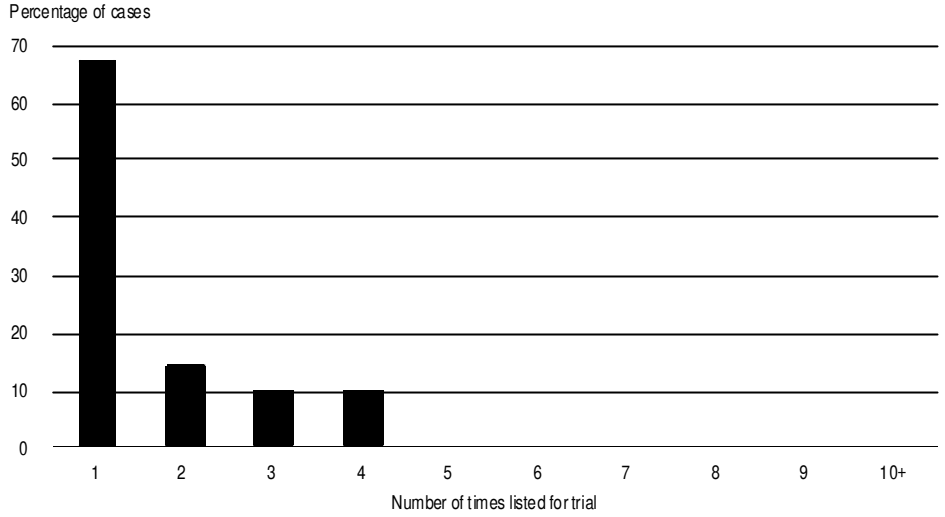


Figure 9g: Number of times listed for trial (Wagga Wagga Registry: July 1998-June 1999)



Clearly matters proceeding to trial across the State do not always proceed on the date they are first listed for trial. In fact many require several listings for trial before being finalised. In courts attached to the Sydney, Sydney West, Newcastle and Dubbo Registries, for example, only about one-third of matters proceed on the date they are first listed for trial. These same Registries also have more acute problems, with a substantial proportion of matters requiring four or more listings to be finalised. A somewhat higher proportion of matters listed for trial in the other Registries (i.e. Lismore, Wagga Wagga and Wollongong) proceed on the date they are first set down for trial but even in these courts it is not uncommon for matters to be listed several times before being finalised.

The listing process for matters which do not proceed

The fact that trial matters appear to be listed several times before being finalised is not the only feature of case processing in the NSW District Criminal Court which gives cause for concern. One of the basic strategies in delay management is to make a special effort to finalise matters which, for whatever reason, do not proceed to trial on the day they are listed. If such efforts are successful one would expect the likelihood of matters proceeding to trial to increase with each successive listing.

Figure 10 shows the conditional probability of a matter proceeding to trial on its nth listing, given that it failed to proceed on any of the n-1 occasions on which it had been listed for trial before.[12] The figure provides reassuring evidence that the current listing system does operate to ensure that the likelihood of proceeding to trial increases with each successive listing. The increments in the probability of a matter proceeding to trial on each successive listing, however, are only small. At the first listing the probability of a matter proceeding to trial is less than 0.4. By the fifth listing for trial the probability of a matter proceeding to trial has increased to only a little over 0.6. These data do not suggest a process in which every effort is made to bring to trial matters which fail to get to trial on their first or second listing.

What makes this fact especially troubling is that each time a matter fails to proceed on the date it is listed for trial, substantial delays are added to the time it takes to dispose of the matter. These can be seen in Figure 11 which shows the average time between committal and finalisation for matters proceeding to trial at their first, second, third or higher listings.

Figure 10: Conditional probability of trial finalisation (July 1998-June 1999)

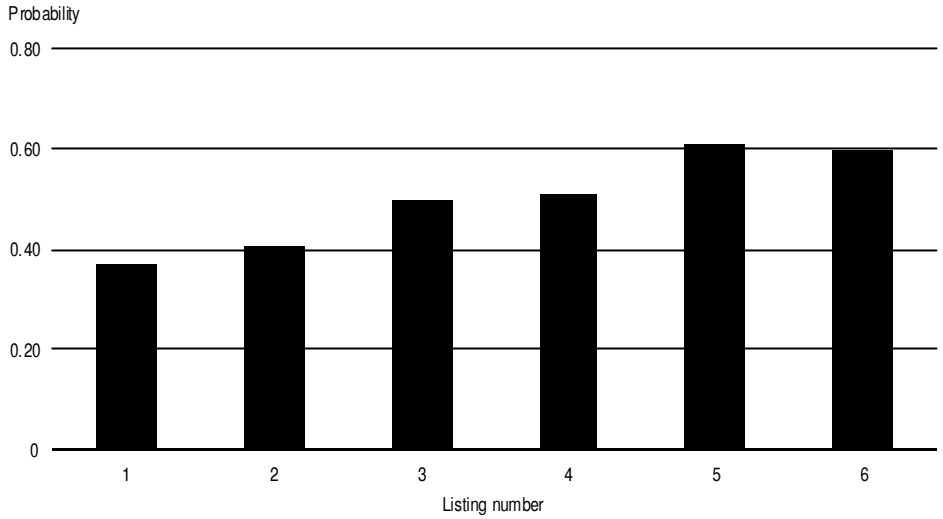
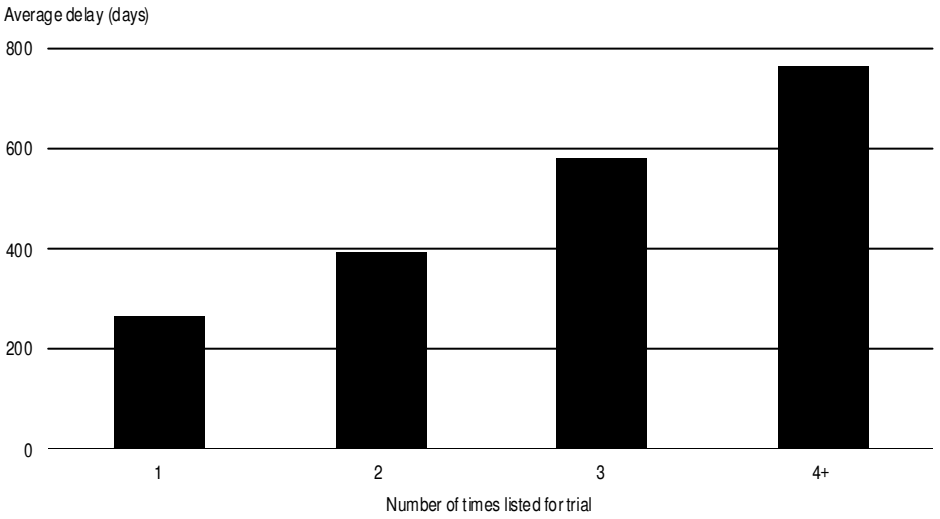


Figure 11: Average delay between committal and trial outcome by number of times listed for trial (July 1998-June 1999)



As indicated in Figure 11, matters which have to be listed for trial three times take over twice as long to finalise as those which are finalised on their first listing. By their third listing matters are taking an average of nearly 600 days (or over a year and a half) to finalise from their date of committal. The effect of this is to increase significantly the average age of all matters which proceed to trial.

The listing process for custody and sex matters

Matters which have previously failed to proceed to trial are not the only kinds of matter which deserve a priority listing in the NSW District Criminal Court. To protect the interests of accused persons the Court assigns the highest priority to matters in which the accused is in custody solely for charges relating to that matter (i.e. not in custody for other pending matters or serving a sentence for a prior conviction). To protect the interests of alleged victims in sexual offences, matters involving sexual assault against a child and matters involving sexual assault against an adult are also given high priority (in that order).[13] It is of interest to inquire, then, whether the Court is able to finalise these types of matters more quickly than others.

Table 2 shows (solely for matters proceeding to trial) the average time between committal and finalisation for accused persons on bail and accused persons in custody according to whether they were defending child sex, adult sex or other types of charges.

Table 2: Average delay to finalisation by bail status and offence type, 1998*

	Bail		*Custody*		*Overall*
Type of offence	*n*	*Mean delay (months)*	*n*	*Mean delay (months)*	*Mean delay (months)*
Child sex	153	12.9	20	8.1	12.3
Adult sex	142	12.4	29	11.9	12.3
Other	409	16.6	158	8.7	14.4
Total		14.9		9.1	

* Note that 'custody' covers custody for any reason, *n* refers to the number of persons whose trial matter was finalised in 1998 (as cases can involve more than one accused person). As persons can be charged with more than one offence the type of offence was determined according to a hierarchy, the hierarchical order of selection being 'child sex', 'adult sex', 'other'.

Table 2 shows that the Court is successful in being able to deal with accused persons in custody faster than those on bail, in terms of the average delay to finalisation. Matters where the accused is in custody require an average of 9 months to finalise, compared with matters where the accused is on bail which take almost 15 months to finalise.

The Court is somewhat less successful in dealing with sex matters expeditiously. The table shows that where the accused is on bail, sex matters are finalised more quickly (i.e. by approximately four months) than other types of matters. However, where the accused is in custody, sex matters are not finalised more quickly than other types of matters. Indeed, child sex matters were dealt with less than a month more quickly than other matters and adult sex matters were actually dealt with three months more slowly than other matters.

Thus, while the delay in processing different kinds of trial case to some extent reflects the Court's listing priorities there are still some significant areas of concern. The early hearing advantage for child sex matters where the accused is in custody is relatively small, while adult sex matters where the accused is in custody actually take longer than other kinds of custody matters.

The need for a closer look at the listing process

The data presented earlier indicate that there are significant problems with the listing process in the NSW District Court but provide no information about why matters fail to proceed on the date they are listed for trial, why their likelihood of proceeding does not improve with each listing or how to fix these problems.

While responsibility for listing trials resides with the NSW District Criminal Court, it should not be assumed that the Court itself is solely responsible for the problems we have identified. There are any number of reasons why matters might not proceed to trial on the day listed. Some are the Court's responsibility, while others are outside the Court's control. Some are unavoidable, while others may be entirely avoidable. Either one of the parties may seek an adjournment because they are unable to proceed (for whatever reason). The defendant may decide to plead guilty or even abscond on the

day of the trial. The Prosecution may decide to no-bill the charges against the defendant on the day of the trial. Alternatively, the Court may not reach the matter because there are not sufficient judges or court rooms available to hear matters on the day.

It is impossible to determine, from the data on case processing routinely collected by the Bureau or the Court, how frequently these outcomes occur or why they occur. In order to develop useful strategies for improving the flow of criminal trial matters through the NSW District Court we need to resolve these issues. In the next section of this report we report on the results of two special surveys conducted by the Bureau at the request of the Strategic Quality Team to address these issues.

SECTION 4: THE CAUSES OF FAILURE TO PROCEED

We begin this section with a brief outline of the background to the surveys and their methodology. Full details of the survey methodology can be found in Appendix 2, and copies of the questionnaires can be found in Appendix 3.

The surveys were undertaken with the assistance of the Strategic Quality Team, members of which provided invaluable advice on possible explanations for delays in trial case processing. As noted earlier, this team was established by the Director General of the NSW Attorney General's Department to identify ways of bringing matters to trial in the NSW District Criminal Court more expeditiously.

Having determined that trial matters frequently fail to proceed to trial on the day they are listed, but with little information about the reasons for this state of affairs, the Strategic Quality Team resolved to gather objective information on this issue. The Bureau, with the assistance of the team, developed two special surveys to collect information on why matters fail to proceed to trial. Preliminary work, based on information routinely collected by the Court, revealed that late entry of guilty pleas, adjournments and the Court's failure to reach matters were likely to be important causes of matters failing to proceed to trial. The surveys therefore focussed on these causes in more depth.

Survey aims and methods

The aim of the first survey (hereafter referred to as the 'court survey') was to determine the outcome of every trial matter which appeared before the NSW District Criminal Court over a two-month period. Outcomes of interest included proceeding to trial, adjourned, not being reached and guilty plea etc. The survey was also designed to collect information on factors (such as the court location, the nature of the offences involved and the bail status of the accused) which might have influenced that outcome. The Judge's Associate (with assistance from Court or Bureau staff) completed the court survey on each occasion that a matter committed for trial appeared before the NSW District Criminal Court (regardless of the type of appearance, whether it be for trial, for mention or for some other reason) during the survey period (2 August to 1 October 1999).[14]

In total, 2014 completed and useable court survey forms were returned which represents a response rate to this survey of approximately 68 per cent. Note that, because many matters appeared more than once during the survey period, the 2014 responses are based on approximately 1399 different matters. The 2014 responses were comprised of 26 per cent trial appearances and 74 per cent 'other' types of appearances. Of the 'other' types of appearances, 6 per cent resulted in a guilty plea and 5 per cent resulted in the trial date being changed or vacated.

The aim of the second survey (hereafter referred to as the 'Defence representative survey') was to determine the reasons for the late entry of guilty pleas. It was carried out over the same period using the class of matters covered in the court survey. That is, the survey targeted all matters committed for trial in the NSW District Court on each occasion they appeared before the Court (whether for trial, mention or some other purpose) during the survey period.

As the legal representative for the Defence is in the best position to shed light on the reasons for the change in plea, this survey was completed by Defence legal representatives. The survey form was conveyed by the Judge's Associate (with assistance from Court or Bureau staff) to the legal representative for the Defence on each occasion a guilty plea was entered during the survey period in a matter targeted by the survey.

The survey asked Defence representatives to rate the importance of a series of possible reasons for the late plea, and to describe any other reasons for the late plea.

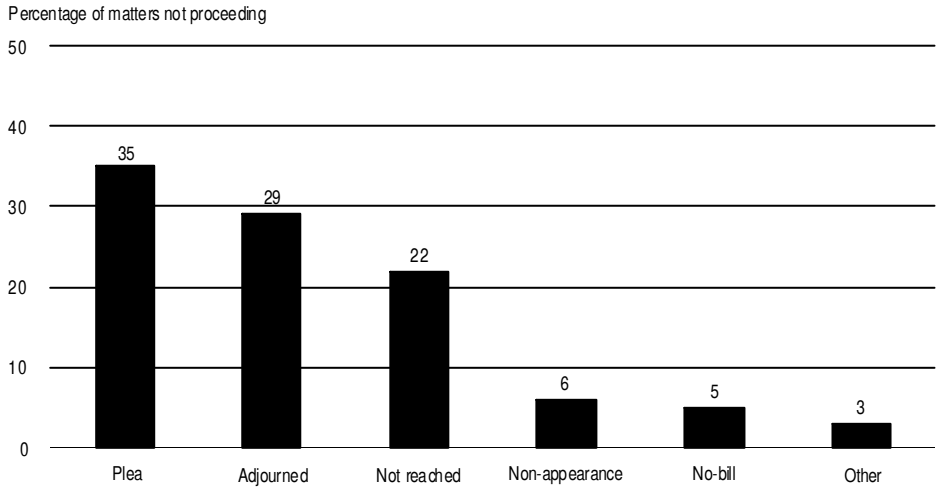
In total 132 completed and useable survey forms were returned. The court survey identified that 191 Defence representative surveys were handed out. The response rate to this survey is therefore 69 per cent. Note, however, that the court survey also highlighted a further 25 occasions in which Defence representative surveys were not handed out despite a change of plea to guilty. Taking this into account as well as the fact that the response rate to the court survey was 68 per cent, we estimate that a Defence representative survey was completed on 42 per cent of the occasions in which a guilty plea was entered during the survey period in a matter targeted by the survey.

The outcome of matters listed for trial

The results of the court survey confirm data shown in the previous section indicating that a large proportion of matters fail to proceed to trial on the day they are listed. Of the 519 (26%) matters that were listed to commence trial, 71 per cent failed to proceed. Figure 12 shows the relative frequency of different reasons for matters failing to proceed to trial.[15] It can be seen that the most common reasons, in order of relative frequency, are that the accused changed their plea to guilty on the day of the trial (35%), the Judge granted an adjournment at the request of the Defence and/or the Crown (29%), and the Court failed to reach the matter (22%).[16]

Late pleas, adjournments and matters not reached clearly remain significant problems despite the policies and procedures (early arraignment scheme, statutory sentencing discounts designed to encourage early pleas and the adoption of a strict adjournment policy) introduced in the 1990s to reduce their incidence.

Figure 12: Main reasons why matters fail to proceed to trial on the day they are listed



*Based on 368 matters that did not proceed to trial on the day listed, where the relevant information was available.

When matters fail to proceed they are rarely re-listed without delay. Only 39 per cent of those matters requiring a new listing for trial actually received that listing on the same day, and on average, that listing was 2.5 months after the last trial date. This time was relatively constant across Sydney, Sydney West and the Country.[17] The remaining 61 per cent of matters requiring new trial listings had to appear again at a later date for allocation of a new trial date. The failure to set new dates immediately for trial matters when they do not proceed helps explain the significant additional delays (see Figure 11) incurred by matters each time they fail to proceed.

Factors associated with the failure to proceed

The relative frequency of reasons for failing to proceed to trial varied across region, offence type and bail status.

Table 3 shows the reasons for failing to proceed by region. In the Country being not reached was the most common reason for failing to proceed, in contrast to the other regions where a guilty plea was the most common reason. One-third of matters failing to proceed in the Country were not reached, compared with 23 per cent in Sydney and 10 per cent in Sydney West.

Sydney West had a particularly high rate of late guilty pleas, with 42 per cent of matters failing to proceed because of a guilty plea, compared with 34 per cent in Sydney and 29 per cent in the Country. The adjournment rate was relatively constant across the three regions.

Table 3: Reasons for failing to proceed to trial by region[a]

Reason	*Sydney %*	*Sydney West %*	*Country %*	*Total %*
Guilty plea	34	42	29	35
Adjournment	31	31	27	29
Not reached	23	10	33	22
Other	12	17	10	13

[a]Based on 74 matters in Sydney, 147 matters in Sydney West and 147 matters in the Country.

Table 4 shows the reasons for failing to proceed by offence type.[18] The most common reason for not proceeding in drug and 'other' types of matters was a guilty plea. In fraud matters, guilty pleas and adjournments were equally the most common reasons for not proceeding. By contrast, the reasons for not proceeding in child sex and adult sex matters were quite different. In child sex matters the most common reason for not proceeding was an adjournment. The most common reason for not proceeding in adult sex matters was being not reached. These last two findings probably reflect the fact that guilty pleas are much less common in sex matters generally (see, for example, Baker 1999). They also highlight, once again, the limited success the Court has in expeditiously disposing of these matters.

Table 4: Reasons for failing to proceed to trial by offence type [a]

Reason	*Adult sex %*	*Child sex %*	*Fraud %*	*Drug %*	*Other %*	*Total %*
Guilty plea	15	21	32	38	44	35
Adjournment	34	38	32	32	25	29
Not reached	39	22	21	21	19	22
Other	12	19	16	9	13	13

[a]Based on 41 adult sex matters, 58 child sex matters, 19 fraud matters, 56 drug matters and 194 other types of matter.

It is difficult to ascertain precisely why certain reasons for not proceeding are more frequent in different regions or for different offences. The high not-reached rate in the Country may reflect the greater difficulties involved in balancing the listing process

where there are generally only short periods within which to list matters and less flexibility in switching matters between judges or nearby regions. It is noteworthy, however, that the Country has a higher proportion of sex matters than Sydney or Sydney West (36% compared with 26% in Sydney West and 15% in Sydney). Sex offences attract a relatively low rate of guilty pleas on the day of the trial, in comparison with other types of matter.[19] It is therefore possible that the differences in reasons for failing to proceed between the regions reflect, in part, differences in their case mixes.

Table 5 shows the reasons for not proceeding by bail status. There is a very high late guilty plea rate for accused who were in custody solely for the matter which brought them within the scope of the survey. Almost two-thirds of these matters failed to proceed because of a guilty plea, compared with 40 per cent where the accused was in custody for other matters and 31 per cent for matters where the accused was on bail.

Table 5: Reasons for failing to proceed to trial by bail status

Reason	*On bail* %	*Custody, this matter* %	*Custody, other matters* %	*Total* %
Guilty plea	31	64	40	36
Adjournment	32	16	31	30
Not reached	24	18	13	22
Other	13	2	16	12

[a]Based on 274 matters where the accused was on bail, 44 matters where the accused was in custody for that matter only and 45 matters where the accused was in custody for other matters, where the relevant information was available.

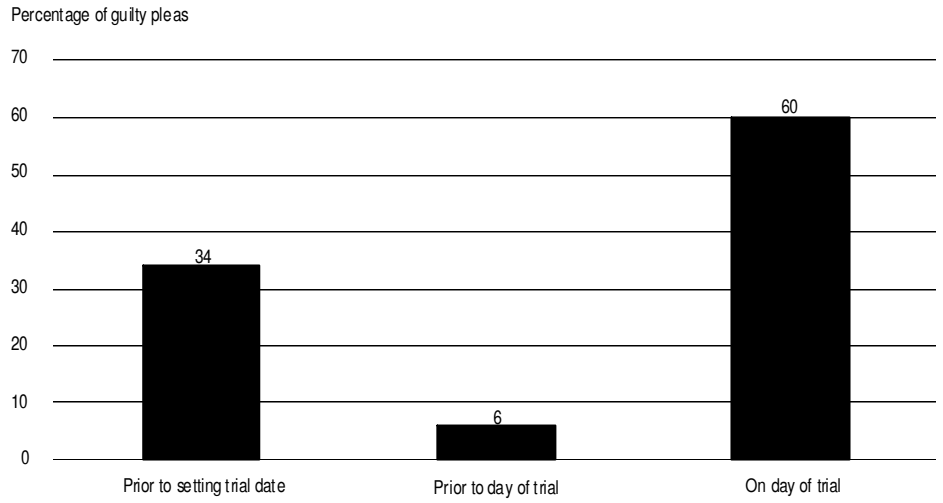
The low plea rate among those on bail may simply reflect the fact that they are less likely to plead guilty anyway (NSW Bureau of Crime Statistics and Research 1999). Their low plea rate may also reflect their desire to put the inevitable off for as long as possible, coupled with their knowledge that they are not likely to be reached (having a lower priority than those in custody). The higher rates of guilty pleas for accused in custody (especially those solely in custody for the present matter), on the other hand, may result from the fact that they are more likely to plead guilty in any event, or because they receive the highest priority and therefore are likely to be reached. Unlike those on bail, they stand to gain little or no advantage in further delaying proceedings through an adjournment.

The timing of guilty pleas

Guilty pleas are most disruptive to the listing process when they occur on the day the trial is due to commence. Figure 13 shows the stage at which guilty pleas are entered, as identified from the court survey. Most guilty pleas are not entered until the day of the trial (60%). However, in a substantial proportion of matters (40%) a guilty plea is entered prior to the trial date. Most of these pleas occur in the arraignment period (i.e. prior to the allocation of a trial date). Very few pleas (6%) are entered between the time a trial date is set and the day of the trial. It would appear, therefore, that once a trial date has been set, little or no negotiation between Defence and Crown occurs on the scope for a change of plea until on or near the trial date.

The likelihood of an early or late guilty plea did not vary according to whether the accused was on bail or in custody. However, there were some noteworthy variations in the stage at which guilty pleas are entered in matters committed for trial, according to the region where the matter was listed and the offences involved.

Figure 13: The timing of guilty pleas*



*Based on 216 matters in which a guilty plea was entered

Early guilty pleas (i.e. before the day of the trial) are more frequent in Sydney, where 63 per cent of pleas are early, and relatively infrequent in Sydney West, where only 17 per cent of pleas are early. Early guilty pleas are also more frequent in drug-related matters than in other kinds of matter. Among pleas entered in drug-related matters, 56 per cent were entered early, compared with 25 per cent in adult sex matters and only 8 per cent in child sex matters. For other types of matters, pleas were entered at an early stage 38 per cent of the time. These 'other' matters may ultimately prove to be a fruitful area to target to increase the number of early guilty pleas. Sex offences, on the other hand, may prove a more difficult area in which to encourage early guilty pleas due to the low rate of guilty pleas and the low conviction rates in these matters in general (see Baker 1999).

The large proportion of early guilty pleas in Sydney may be partly attributable to the case-mix in Sydney. Its case-mix comprises relatively more drug matters (23% compared with approximately 10% in Sydney West and the Country) and these matters would appear to be more conducive to early pleas. The early guilty pleas may also be partly attributable to the involvement of a senior Crown lawyer (whose role is explicitly to negotiate guilty pleas) in the early hearings held in the Sydney Registry.

Reasons for late changes of plea

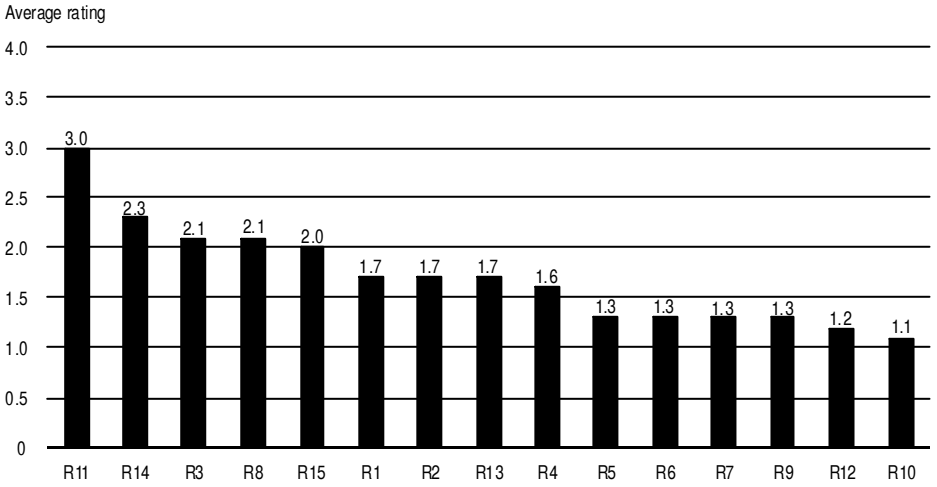
To understand the reasons for the late entry of guilty pleas we turn to the results of the Defence representative survey. This survey asked Defence representatives to rate the importance of 15 different reasons in their client's decision to change their plea to guilty on a scale of 1 to 4, where 1 represented 'Not important at all' and 4 represented 'Very important'. The reasons presented were as follows:

1. Counsel or advocate was not instructed in this matter until late in the process
2. Counsel or advocate did not get a chance to work up this brief until just before trial
3. Counsel or advocate had difficulties in getting firm instructions from the client until late in the process
4. Counsel or advocate had difficulties getting in contact with the client in this matter

5. Whether the client would receive a legal aid grant was not sorted out until a late stage
6. A co-accused was convicted or sentenced during the course of this matter
7. The client was convicted for another offence since being charged with the present matter
8. The client changed their instructions just before trial
9. The identity of the judge only became known at a late stage
10. A pre-trial application was resolved in favour of the Crown at a late stage
11. There was a late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of indictment
12. The Crown disclosed incriminating evidence at a late stage
13. A late change in the Crown representative brought a new perspective to the case
14. Counsel or advocate was not able to discuss the matter with the Crown until late in the process
15. There was no clear sentence benefit to the client in pleading any earlier.

The average rating Defence representatives gave to each of the reasons is shown in Figure 14. The horizontal axis labels refer to these reasons (e.g. R11 is reason 11 in the list above).

Figure 14: Defence representatives' average rating of reasons for plea changes*



* Based on 132 responses to the Defence representative survey

It can be seen from Figure 14 that the two most highly rated reasons for late guilty pleas, with average ratings of 3.0 and 2.3, respectively, were —

- there was a late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of the indictment (i.e. reason 11)
- counsel or advocate was not able to discuss the matter with the Crown until late in the process (i.e. reason 14).

Many general comments from the respondents to the survey suggested a belief that early negotiation with the Crown is difficult because Senior Crown are not briefed until the week before the trial.[20] The result, according to survey respondents, is that there is no-one with authority on the Prosecution side with whom to negotiate an early plea. To what extent Prosecution lawyers are actually responsible for the lack of early discussion or negotiation remains unclear. Although Defence representatives claim that the Crown is unwilling or unable to negotiate, the survey did not investigate the extent to which the Defence attempted to initiate any discussion or negotiation with the Crown. A few survey respondents did comment that they had made an early offer to the Crown, which was rejected. The important point, however, remains the fact that, for whatever reason, there is a lack of early discussion or negotiation between Crown and Defence on the circumstances in which a defendant might plead guilty.

It should be borne in mind here that the matters included in the surveys were overwhelmingly State (96%), rather than Commonwealth (4%) matters. The average ratings and comments therefore are not necessarily reflective of Commonwealth matters. The Commonwealth DPP practice is to allocate a senior Crown to a matter at an early stage who will have carriage of the matter through to completion. While there were too few Commonwealth matters to provide reliable data, indications are that there is a relatively high proportion of early guilty pleas in these matters. Defence representatives in Commonwealth matters also tended to rate other reasons (e.g. 3 and 8) more highly than the reasons just described (i.e. 11 and 14).

The third and fourth most highly rated reasons for late guilty pleas, each with average ratings of 2.1, were —

- counsel or advocate had difficulties in getting firm instructions from the client until late in the process (i.e. reason 3)
- the client changed their instructions just before trial (i.e. reason 8).

It is unclear from the survey exactly why clients do not give instructions till late, or why they make late changes to their instructions. However, comments made by some respondents suggested that late instructions sometimes arise because the accused either does not arrange legal representation until late or changes their legal representative at a late stage. Comments from other respondents attributed the problems of late or changed instructions to the fact that the defendant was 'on the run', drug affected and/or unable to take an objective view of the case.

The fifth most highly rated reason for late pleas (with an average rating of 2.0) was that —

- there is no clear sentence benefit to the client in pleading any earlier (i.e. reason 15).

In addition to the 15 reasons listed earlier, Defence representatives were also asked to describe whether there were any other reasons for the late guilty plea. Most of the additional reasons given tended to resemble one or other of the 15 reasons already provided, most commonly, the eleventh reason — a late change in the Crown position. Difficulties with legal representation, particularly a lack of legal representation and late legal aid involvement were also frequently mentioned.

The reasons for late guilty pleas were compared across region, offence type and bail status. A number of other factors were also available for comparison in relation to the reasons for late guilty pleas. These were — whether a co-accused was involved, whether the accused was convicted of another offence during the course of the matter, and the stage the plea was entered. The Defence representative's average rating of each of the 15 reasons was examined across each of these factors.

There were some minor variations in the average rating of some of the reasons across some of these factors. As might be expected, the sixth reason (a co-accused was convicted or sentenced during the course of this matter) was rated more highly, on average, in matters that involved co-accused than in matters that did not. Again, as might be expected, the seventh reason (the client was convicted of another offence since being charged with the present matter) was rated more highly, on average, in matters where the accused had been convicted of another offence than in those where the accused had not.

Despite these minor variations, however, the top five reasons identified earlier (i.e. 11, 14, 3, 8, and 15) tended to remain the most important regardless of the characteristics of the matter. This is illustrated in Table 6, which shows the top five most highly rated reasons for late pleas, across each factor. Note that the cell entries are the numbered reasons. The first column shows the reason with the highest average rating, the second column shows the reason with the second highest average rating and so on.

Table 6: The five most important reasons for late guilty pleas, as rated by Defence representatives, by different case factors

		Ranking				
		1st	2nd	3rd	4th	5th
Court location	Sydney	11	14	13	3	15
	Sydney West	11	8	14	3	15
	Country	11	14	3	8	15
Offence type	Sex	11	8	3	14	4
	Fraud	3	8	11	15	14
	Drug	3	1	8	2	14
	Other	11	14	15	3	13
Bail	Bail	11	14	8	3	15
	Custody this	11	14	8	3	4
	Custody other	11	3	15	14	8
Co-accused	Yes	11	14	15	3	8
	No	11	14	3	8	15
Convicted	Yes	11	14	3	15	8
	No	11	14	8	3	15
Stage of plea	Before trial	11	14	15	3	13
	On/after trial day	11	14	8	3	15

The eleventh reason was ranked first in every case, except where the case involved a fraud or drug offence. In this instance, client-related reasons (i.e. reasons 3 and 8) ranked more highly than Crown-related reasons (i.e. reasons 11 and 14).[21] In the case of drug-related offences, late preparation (i.e. reason 2) and late briefing (i.e. reason 1) also outranked Crown-related reasons.

By and large, however, the top five reasons for late changes of plea tended to remain the top five regardless of region, bail status or other characteristics. Overall from the Defence perspective, the crucial issues remain the lack of early discussion or negotiation with the Crown, late or changed instructions from the accused and the perceived lack of a significant sentence benefit for pleading early. As we will see later on in the discussion this perception has a clear basis in fact.

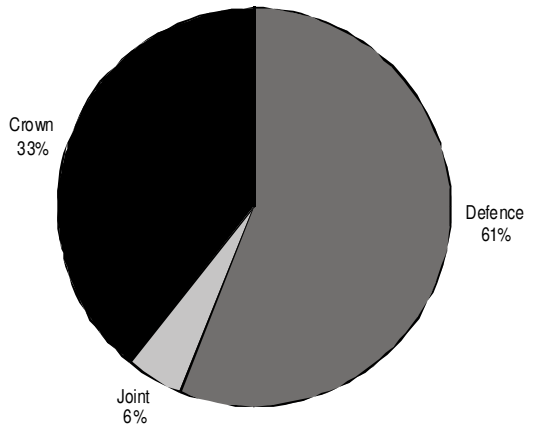
Having examined the reasons for late guilty pleas, we now turn back to the court survey to examine the reasons for adjournments. Adjournments were the second most frequent cause of matters failing to proceed to trial on the day listed, after guilty pleas.

Reasons for adjournments

An adjournment may be granted, on application of one or both parties, on the day the trial is due to commence or at any stage in the lead-up to the trial day. A total of 185 adjournments were identified by the court survey. Most of these adjournments were not granted until the day of the trial, where (like late changes of plea) they cause most disruption to the listing process. In fact less than half (42%) of all adjournments identified in the survey were granted prior to the day of the trial. On average, adjournments granted prior to the day of trial were granted only 16 days prior to the trial date. This does not always leave sufficient time to organise a replacement trial. Thus, even where adjournments are granted prior to the trial date, they are still capable of causing considerable disruption to the listing process.

Figure 15 shows that the Defence are responsible for seeking 61 per cent of trial adjournments but the Crown are also responsible for a sizeable proportion (33%). The study did not record information on whether adjournments sought by Crown or Defence were consented to by the other party. It is possible that in many cases they were.

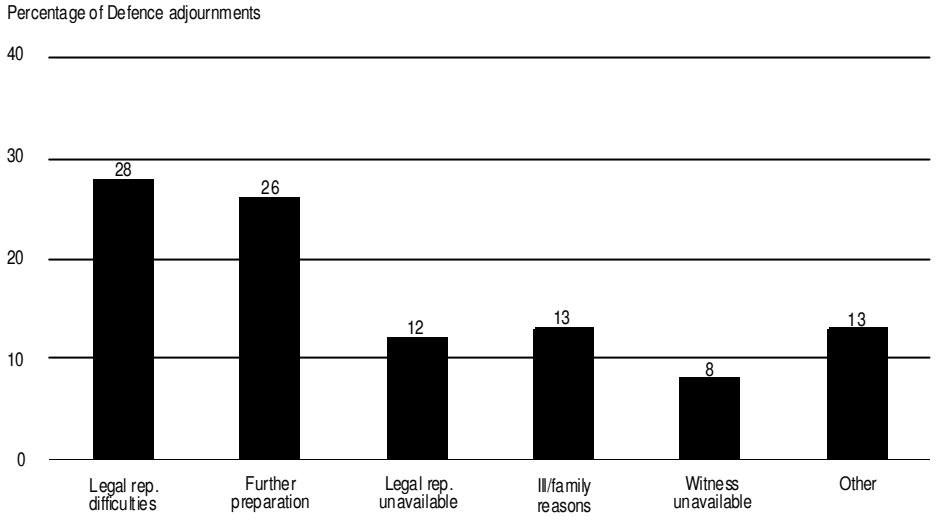
Figure 15: Main party seeking adjournment*



*Based on 179 matters that were adjourned or vacated, where the relevant information was available.

Figure 16 shows the main reason given by the Defence when seeking an adjournment is quite varied. The most frequent reasons given are difficulties with legal representation (mostly because the accused has no legal aid funding or cannot find suitable representation) and the fact that further preparation is required. Note that the category 'other' includes reasons such as a 'late application for a judge-alone trial', 'a change in venue', 'a change in plea' and 'an appeal pending in an interlocutory matter'.

Figure 16: Main reason for Defence adjournment*

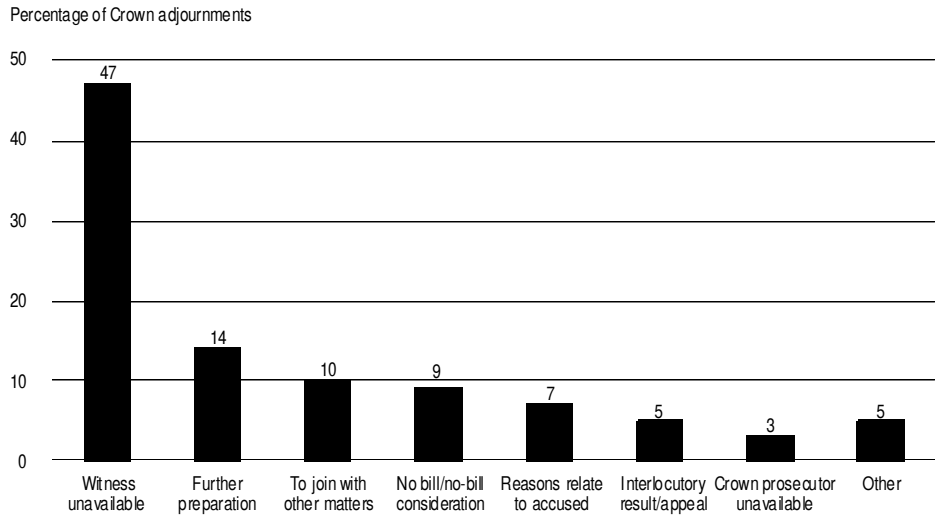


*Based on 106 matters adjourned/vacated on Defence application, where the relevant information was available.

Although the survey did not probe any further into why further preparation was required, comments provided by some respondents indicated that factors such as late disclosure by the Crown, late finalisation of legal representation, problems with evidence (such as audio and video tapes) or developments relating to a co-accused were part of the problem.

Figure 17 shows the main reason given by the Crown for seeking an adjournment. As with Defence adjournments, reasons for Crown adjournments were varied, although by far the most frequent reason given is a problem with witness availability. Almost half of the Crown adjournments were granted for this reason. The next most frequent reason given was 'further preparation required', which accounted for 14 per cent of Crown adjournments.

Figure 17: Main reason for Crown adjournment*



*Based on 59 matters adjourned/vacated on Crown application

As with matters which failed to proceed because of a guilty plea, we examined whether the main party seeking the adjournment and whether the reasons for seeking adjournment varied across region, offence type and bail status.

The main party seeking the adjournment varied by offence type but not by region or bail status. The Defence were responsible for nearly all adjournments in child sex (89%) and fraud (75%) matters. They were still responsible for most adjournments in drug, adult sex and other types of matters, but not to the same degree. The Defence were responsible for 62 per cent of adjournments in drug matters, 57 per cent in adult sex matters and 58 per cent in 'other' matters.

Reasons for Defence adjournment showed no variation at all across region, offence type or bail status. Crown reasons for adjournment only varied across region. Witness availability was more of a problem in the Country with 75 per cent of Crown adjournments in the Country due to problems with witness availability, compared with 43 per cent in Sydney West and 26 per cent in Sydney. 'Further preparation' was a more common reason for Crown adjournments in Sydney.

SECTION 5: POLICY IMPLICATIONS

The need for change

We have already observed that the delay in bringing criminal matters to trial in the NSW District Court is longer than for any other comparable Australian jurisdiction. The existing system, however, not only creates delay, it also creates significant inefficiency, with the Court having to list matters for trial perhaps many thousands more times than is really necessary.

Table 7 provides an illustration of the potential savings in trial listings during 1998 if half of all matters which were finalised as a guilty plea were 'weeded out' prior to being listed for trial and if each matter proceeding to trial were finalised, on average, on its second listing.[22] Full details of the methods and data sources used to calculate these savings can be found in Appendix 4.[23]

Table 7: Potential savings in trial listings

Registry	*Current load*	*Potential load*	*Absolutee difference*	*Percentage difference*
Sydney	2424	1544	880	36
Sydney West	2513	1624	889	35
Newcastle	905	635	270	30
Wollongong	486	357	129	27
Lismore	326	274	52	16
Dubbo	427	320	108	25
Wagga Wagga	140	114	26	19
Total	7222	4869	2354	33

For the State as a whole, the savings in the number of matters listed for trial produced by these hypothetical reforms would amount to 33 per cent. This is a remarkable saving considering that it is generated by a shift from 2.3 to 2.0 in the average number of times matters have to be listed for trial and a shift from 34 per cent to 50 per cent in the percentage of trial cases finalised on a plea of guilty prior to being listed for trial. Thus even if we view such changes as the maximum obtainable it is clear that there are substantial savings to be had from any set of initiatives which result in more people committed for trial pleading guilty prior to being listed for trial and/or more trials proceeding to trial, on average, no later than their second listing. It is important to remember that these savings accrue not just to those responsible for listing trial matters. Because each matter listed for trial forces both Defence and Prosecution to begin preparation on the matter, any reduction in the number of matters which have to be listed for trial will benefit these agencies as well as police, who play a significant role as Crown witnesses in criminal proceedings.

Reducing the not-reached rate

Guilty pleas, adjournments and the failure to reach matters are the principal reasons why matters fail to proceed to trial when listed. While these outcomes are separate, they are by no means mutually independent. Before considering what initiatives might be effective in encouraging more accused persons to enter guilty pleas before they are listed for trial and in ensuring matters proceed to trial on no later than their second listing, the reasons for this lack of independence need to be made clear.

Like many other courts naturally concerned to maximise the use of scarce court and judicial resources, the NSW District Criminal Court has historically responded to the problem of late guilty pleas and adjournments by over-listing matters for trial. The inherent week to week variability in the proportion of trial matters which proceed, however, makes it impossible to choose an over-listing quota which precisely and reliably offsets the attrition due to plea changes, adjournments and other reasons.

Traditionally, in choosing its over-listing quota, the Court has tended to maximise the use of court and judge time, rather than minimise the rate at which matters are not reached. Unfortunately, this has resulted in a frequent failure to reach matters, which has exacerbated the problem to which over-listing was a response. When matters are regularly not reached, the parties, who already have heavy workloads, are less likely to fully prepare matters for trial. Uncertainty in the listing process also reduces the readiness and/or availability of key witnesses frequently involved in trials, such as police. The result is that when matters are reached, an adjournment (whether due to avoidable or unavoidable circumstances) is more likely.

As long as a significant proportion of matters continue to be not reached the Court can do little to combat this problem. It cannot refuse all requests for adjournment without jeopardising the rights of accused persons or victims. In any event, a strict adjournment policy would be of limited help so long as many trials fail to proceed, not because of an adjournment, but because the defendant changes his or her plea to guilty on the day of the trial.

The starting point for delay reduction then, involves recognising that, when dealing with congested courts, efficiency in case processing is more easily achieved by increasing trial date certainty than by maximising the utilisation of court time. Ernest Friesen (1984, p. 52) put this point forcefully more than a decade ago when discussing problems of congestion in the United States Federal Court:

> The prevailing wisdom has been that cases should be scheduled in such a way as to guarantee that judge time on the bench is fully utilized…The long-run consequences of adhering to this procedure are, however, disastrous…Nothing will change if the goal remains keeping the judges fully occupied. Attorneys will see that nothing has changed, that cases won't be reached, and that they don't have to prepare. If their case by chance should come up, then they are prepared to ask for a postponement.

Since Friesen made these observations, research has shown that date certainty is a key ingredient in managing delays in criminal trial courts (Mahoney et al. 1988). Increasing trial date certainty does not necessarily require abandonment of the policy of over-listing.[24] It does require, however, that over-listing quotas be set so as to reduce the likelihood of a matter not being reached to a very low level. This is the practice currently pursued in both the Queensland (Lang, A. 1999, Listing and Statistical Manager, Qld Higher Courts, pers. comm., 6 Dec.) and South Australian (Washington, J. 1999, Acting Registrar, SA Criminal Courts Registry, pers. comm., 10 Dec.) District Courts. Both of these jurisdictions have very much smaller criminal trial court delays than New South Wales.

Adjusting the over-listing quota so that only a very small proportion of trial matters are not reached, without needlessly wasting court time, is not easy. In any one week, the proportion of matters listed which don't actually proceed to trial varies over a wide range.[25] If the Court wanted to be sure of reaching (say) 95 per cent of trial matters every week, it would have to lower over-listing quotas to the point where courts may often be idle. Considerable improvements in trial date certainty can be achieved, however, without necessarily requiring courts to reach 95 per cent of trial matters every week. The variation in the proportion of trial matters not reached is much less marked when looked at over periods of a month or more.[26] A more reasonable goal would be to reach 95 per cent of trial matters each month or each quarter. We emphasise here that to choose a not-reached rate that will maximise trial date certainty, the not-reached rate should, ideally, be given as a proportion of matters due to commence trial.[27]

To achieve such a goal requires constant monitoring of the outcome of matters listed for trial at each of the venues where trials are held. Moreover, because the proportion of matters proceeding to trial can be expected to vary over time, it also requires regular adjustment of the over-listing quota. The importance of this cannot be over-emphasised. The fine-tuning required to ensure that matters listed for trial have a very high probability of being reached must be regarded as the central precondition of delay reduction in the NSW District Criminal Court. The required adjustment does not have to be determined by trial and error. It can be determined on the basis of past observation using methods described by Solomon and Somerlot (1987, pp. 26-27) more than a decade ago.

Of course, if the problems highlighted in Figures 10 and 11 are to be avoided, where matters are unable to be reached it is important to ensure that they are given a new trial date as soon as possible. At present, as noted earlier, most matters requiring a new trial date do not get one on the day they fail to proceed. Where a date is given, on average, it is 2.5 months after the first trial date. These practices are at variance with accepted principles of caseflow management (Solomon and Somerlot 1987). Failure to set a new trial date immediately after a matter fails to proceed unnecessarily prolongs the time it takes to finalise that matter and increases the average time required to finalise all matters. This puts the Court's time standards for bringing matters to trial at risk.

Setting a distant trial date needlessly increases the workload of the parties since it places them in a position where they have to refresh their preparation so as to be ready to proceed on the next occasion. If it is inevitable that some matters will not be reached it is prudent to make provision for dealing with these matters as expeditiously as possible. There are several ways in which this might be accomplished. Matters which are not reached can be listed for trial before judges kept in reserve for the purpose. Alternatively, they can be kept in the trial list on a day to day or week to week basis until the opportunity arrives to list them. In Country venues, where opportunities to re-list matters in the same court often do not arise very quickly, another option is to transfer not-reached matters to other Country or urban venues. There are costs and inefficiencies associated with such transfers. However they have to be weighed against the in-built delay and inefficiency created when matters are not reached in courts which sit only irregularly.

There is little point setting quotas designed to ensure a low not-reached rate if the Chief Judge of the District Court lacks the information required to set accurate quotas or the authority to enforce them. This is a salient issue for the NSW District Court because in Registries other than Sydney staff under the control of the Director of Local Courts presently perform registry functions on behalf of the District Court. If there are efficiency gains which warrant preservation of this arrangement, there is a need for an explicit agreement between Local and District Courts governing (a) the collection of accurate and timely information on the outcome of District Court trial matters and (b) the trial listing quotas (or procedures involved in setting such quotas) to be applied by Local Court staff when listing District Court trial matters.

Encouraging earlier guilty pleas

Reducing the not-reached rate should, by itself, encourage earlier guilty pleas if it forces Defence and Prosecution into earlier and thorough preparation of the matter. But the results of the special surveys suggest that there are also likely to be other effective ways to increase the number of early guilty pleas.

The single most important reason for late changes of plea, at least from the perspective of Defence representatives, is that 'there was a late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of the indictment'. This reason received the top ranking in every region and regardless of whether the accused was on bail or in custody.

Whether the late decision by the Crown to accept a plea arises from late involvement by senior Crown in the prosecution of a case or a failure on the part of Defence representatives to contact the Crown remains unclear. The NSW DPP maintains that it has made arrangements to brief a Crown quickly to consider any plea offer made by the Defence (Smith, C. 2000, Deputy Solicitor for Public Prosecutions, NSW DPP, pers. comm., 15 Feb.). Whether knowledge of this facility is widespread among Defence representatives is unclear. At all events the absence of senior Crown in the period leading up to and immediately after arraignment means that, from the perspective of the Defence, there is no-one on the Crown side with the authority to indicate in what circumstances the Crown would accept a plea of guilty.

The problem of late involvement by senior Crown is compounded by problems on the Defence side. Respondents to the Defence representative survey indicated that in many cases the accused person does not give firm instructions until late or changes their instructions just before the trial. It is probable that difficulties with legal representation, particularly a lack of legal representation and late legal aid involvement are contributing factors to this problem.

Such findings suggest that early involvement by senior representatives for both Defence and Prosecution would be an effective way of increasing the number of early guilty pleas entered. Early legal representation for accused persons could be achieved, partly, through guaranteeing legal aid funding at committal (for those accused who are eligible). Legal aid has progressively been made available for accused at committal through the introduction of a pilot committal scheme. The survey results suggest that this pilot scheme should be extended to enable accused persons to continue to receive aid at committal. Of course, the extension of legal aid involves increased resources. The present results suggest, however, that such investment will in the long term also save resources. It is noteworthy, in this connection, that the current system of legal aid grants positively discriminates against Defence representatives seeking an early plea of guilty. At present, Defence representatives earn a higher fee if an accused person committed for trial changes their plea to guilty on the day of the trial than if the person pleads guilty at committal, or at an earlier stage of proceedings in the District Court.

The benefits of early legal aid representation, could be further enhanced by ensuring the legal representative at committal continues representation in that matter through to finalisation in the District Court. In the past, accused eligible for legal aid, proceeding to trial in the District Court, have had to lodge two applications for legal aid, once at committal, and then again following committal to the District Court. In many cases the accused does not reapply for aid without delay (often waiting for many months, or until the trial is imminent) and is therefore unrepresented for much of the trial process.

This process has often meant that accused are represented by different legal representatives at committal and in the District Court, so the benefits of early representation are lost. A system of seamless legal aid grants from committal through to finalisation in the District Court would alleviate many of these problems.

It would also be ideal for a senior Crown representative to be allocated to all matters at an early stage and to have the Crown representative carry each matter assigned to them through to finalisation. This would avoid the inefficiency associated with having several prosecutors ending up preparing the same matter. The Commonwealth DPP already operates under this arrangement. If resource constraints prevent the NSW DPP from operating under a similar arrangement, an alternative strategy for achieving early senior Crown involvement would be to dedicate a senior Crown representative to conducting all early hearings and negotiation in a particular region.[28] This is currently the practice in the Sydney Registry. While this approach does not ensure continuity of representation, it appears to be a successful means of eliciting some early guilty pleas. The survey results showed that Sydney Registry had the highest rate of early guilty pleas.

The early involvement of senior representatives for Crown and Defence could also be facilitated by two other strategies. One is the introduction of a system in which key early hearings (such as arraignments) for a particular region take place in a single central venue, rather than being spread across the different court rooms within that region. The regular contact between the senior representatives for the Crown and the Defence which would occur at these early hearings may also help encourage early discussion to take place. This centralised system could be combined with a system of early conferences in which the Crown and Defence are required to canvas all possibilities for a plea and discuss other pre-trial issues, and formally report back to the Court on the outcome of the conference, before a trial date is fixed in the matter.[29]

It is worth observing that the advantages of an early conference between Prosecution and Defence and the attractions of an early guilty plea to defendants (and their legal representatives) at such a conference would be further enhanced through early disclosure of the evidence against an accused person. Where it is possible to do so, early disclosure of evidence against an accused person would reduce the temptation to maintain a plea of not guilty in ignorance of the strength of the Crown case. The need for more complete prosecution disclosure has recently been highlighted in the Standing Committee of Attorneys General recent Report on Criminal Trial Procedure (1999).

The lack of a clear sentence benefit for an early guilty plea was also identified in the Defence representative survey as an important reason for the late entry of guilty pleas. This is a perception, unfortunately, which appears to be soundly based in fact. The following tables show that sentencing discounts are not applied in a consistent manner. Accused who plead guilty enjoy considerable sentence benefits over accused who leave it to the court to decide on their guilt. However, accused who plead guilty early receive very modest sentence benefits, and in many cases appear to be actually penalised, over accused who plead guilty at a late stage. Sentence benefits are also applied somewhat inconsistently across different types of offences.

Table 8 shows the seriousness of the penalty, in terms of imprisonment rate and median prison sentence, by the method of conviction for the accused (i.e. whether by verdict or plea), for a range of offences dealt with by the NSW Higher Courts. Table 9 shows the seriousness of the penalty by the stage the accused entered the guilty plea for a range of offences dealt with by the NSW District Court. Note that in each table the percentage differences (or the discounts) in the penalties between the two groups of accused persons are shown.[30] In Table 8 a negative sign indicates the penalty for an accused convicted by guilty plea is lower while a positive sign indicates the penalty is higher (in Table 9 the negative sign indicates the penalty for an accused pleading guilty early is lower).

Table 8: Severity of penalty by method of conviction

	Convicted by plea		*Convicted by verdict*		*Difference (%)**	
	Imprisonment rate (%)	*Median prison sentence (months)*	*Imprisonment rate (%)*	*Median prison sentence (months)*	*Imprisonment rate*	*Median prison sentence*
Sex	63	24	76	27	-17	-11
Drugs	59	28	76	53	-22	-47
Fraud	39	24	46	32	-15	-25
Robbery	78	21	92	36	-15	-42
Assault	42	15	60	21	-30	-29
Break and enter	72	15	67	18	+7	-17

*The difference is calculated by subtracting the verdict value from the plea value and dividing by the verdict value.

Table 8 reveals that the discount given to accused who plead guilty (over those who receive a guilty verdict), in terms of the imprisonment rate and the median prison sentence, generally exceeds 15 per cent. There is, however, considerable variation in the penalty discount between offences, particularly where the quantum of imprisonment is concerned. The quantum discount for a guilty plea ranges from almost 50 per cent for drug offences, to a modest 11 per cent for sex offences.

Table 9: Severity of penalty by stage of plea

	Plea at committal		*Plea after committal*		*Difference (%)**	
	Imprisonment rate (%)	*Median prison sentence (months)*	*Imprisonment rate (%)*	*Median prison sentence (months)*	*Imprisonment rate*	*Median prison sentence*
Sex	59	18	65	24	-9	-25
Drugs	68	30	55	25	+24	+20
Fraud	41	24	36	18	+14	+33
Robbery	74	22	80	21	-8	+5
Assault	55	24	38	14	+45	+71
Break and enter	72	12	73	16	-1	-25

*The difference is calculated by subtracting the plea after committal value from the plea at committal value and dividing by the plea after committal value.

Table 9 is even more revealing. It shows that, while there were some modest discounts given to accused who pleaded early over those pleading late, in most cases the penalties, in terms of the imprisonment rate and the median prison sentence, were a great deal harsher for accused pleading early than for accused pleading later. In the case of assault, the imprisonment rate was 45 per cent higher and the median prison sentence was 71 per cent higher for accused entering early pleas than for those entering late pleas. Again considerable variation in the discount was evident between offences.

The absence of any clear sentence benefit for an early guilty plea may be one reason why the sentence indication scheme failed to influence the timing or proportion of guilty pleas (Weatherburn, Matka & Lind 1995). It is worth noting in this connection that Weatherburn (1994) found that NSW District Court defendants are less likely to proceed to trial if listed before judges whose sentencing practices are 'tough' relative to those of their peers. During the period in which the sentence indication scheme was in operation, Weatherburn, Matka & Lind (1995) also observed marked variations in the willingness of defendants to accept the sentence indications (i.e. plead guilty) given by different judges. The present findings reinforce these observations in suggesting that the statutory sentence discount for early pleas (Crimes (Sentencing Procedure) Act 1999, s. 22) is not having its intended effect.

This, then, is an area of law which would clearly benefit from reform. The statutory sentence discounts for guilty pleas obviously have an important role to play in encouraging early guilty pleas. However, there needs to be a significant discount for early guilty pleas and this needs to be applied consistently across different kinds of offences. The need for a significant discount for early pleas of guilty has also recently been highlighted in the Standing Committee of Attorneys General recent Report on Criminal Trial Procedure (1999). Note, however, that the benefits of an early guilty plea need to be clearly communicated to accused persons at an early stage (in terms which do not place the accused under undue pressure to plead guilty) if they are to achieve their intended purpose.

Reducing the number of adjournments

It is sometimes argued that the practice of over-listing trial matters prevents adjournments causing any increase in trial court delay. The rationale behind this argument is that any delay in processing caused by a trial which is adjourned is offset by an earlier hearing date for the 'back-up' trial. It can be shown, however, that this argument is valid only when the additional court time made available as a result of an adjournment is fully consumed in the hearing of other trials (Weatherburn 1993, p. 3). In practice, court time vacated as a result of adjournments is highly unlikely to be entirely consumed by the hearing of other trials. Adjournment requests themselves consume court time. Also, because adjournments are frequently granted so late, (mostly on the day of the trial, but also in the immediate lead up to the trial), there is not always sufficient time to organize a suitable 'back-up' trial. It is of crucial importance then, in managing criminal trial court delay, to reduce the number of adjournments.

Courts sometimes attempt to curb adjournments by announcing a 'strict' adjournment policy. While judges can and should be encouraged to critically assess the stated reasons for adjournments (say by demanding that all adjournment requests be supported by documentary evidence) it is difficult in advance to list all of the conditions under which adjournment requests can or should be rejected. It is inevitable that unforeseeable situations will arise which render some matters unable to proceed. If the requirements for the granting of adjournments are made too strict they will jeopardize the rights of accused persons and victims. If they are made too loose they will exert no material guidance. Rather than relying solely on a strict adjournment policy to reduce adjournments it is worth combining such a strategy with efforts to remove the circumstances which give rise to adjournments.

The high rate at which matters are not reached is a likely cause of many adjournments as we have already seen, as it tends to reduce the overall state of readiness of the parties to proceed. Any reduction in over-listing, or increase in trial date certainty should therefore help to reduce the number of adjournments.

The unavailability of Crown witnesses was identified by the court survey as the most common reason for Crown adjournments. But this problem is likely to stem directly from the high not-reached rate. With so much uncertainty about whether trials will proceed and so many matters to prepare for trial which ultimately will not go to trial, the Crown may not check (or keep up-to-date with) witness availability as thoroughly as they should. It is also possible that the same problem results in a failure on the part of police witnesses to reliably inform the Crown of their availability. These problems may be compounded by the fact that trial dates are often set too far in advance for witnesses to accurately inform the Crown of their likely availability. Any increase in trial date certainty should therefore also help to reduce this problem. However, the Crown also clearly need to thoroughly check and regularly confirm the availability of their witnesses.

While the lack of trial date certainty almost certainly contributed to some Defence adjournments as well, the court survey identified another factor as lying at the heart of many Defence adjournments. The need for Defence adjournments most commonly arose because the accused was experiencing difficulties in obtaining legal representation (or getting legal aid funding) or because they needed to undertake further preparation.

The surveys did not explicitly investigate why further preparation was needed on the day the matter was due to commence trial. However, it was clear from comments provided on the surveys that at least part of the problem was due to the Defence representative not becoming involved in the matter until a fairly late stage and having little time to thoroughly prepare the matter. As we noted in connection with our earlier discussion of late guilty pleas, the way in which grants of legal aid are structured means that many Defence representatives do not become involved in a matter until a fairly late stage. Some of the strategies suggested earlier to encourage earlier guilty pleas (e.g. ensuring early and continuous legal representation for accused persons, legal aid funding at committal and use of seamless legal aid grants) should therefore also help to reduce the number of adjournments.

Another potential cause of adjournments is the fact that there is no necessity, at present, for trial matters which are adjourned to be re-listed before the judge who granted the adjournment. This may encourage 'judge-shopping' and reduce the incentive for judges to critically evaluate the stated reasons for an adjournment. Indeed, without a close reading of the court file, a judge may grant an adjournment, not knowing how many times an adjournment had been granted previously. Re-listing adjourned matters before the judge who last adjourned them, wherever possible, would help reduce these problems. Such re-listing might seem more difficult where the Court sits on circuit, but this problem could be dealt with by allocating groups of judges to particular country regions for specified periods.

In addition to reducing the frequency of adjournments the Court can also reduce any adverse impact of adjournments on case processing times by re-listing adjourned matters for trial as soon as possible (taking into consideration the circumstances that led to the adjournment being requested). This should reduce the need to refresh preparation thereby easing the burden on the Defence and Prosecution. The methods described earlier for re-listing not-reached matters (i.e. use of reserve judges and holding matters in the trial list on a day to day or week to week basis) may be of some use here.[31]

Another way of reducing the adverse impact of adjournments is for the Court to ensure that requests for adjournments are heard and dealt with before they result in any loss of court time. This can be achieved by ensuring that judges thoroughly check 'readiness to proceed' before the point has been reached where an adjournment would make it difficult to bring on any 'back-up' trial.

This point is particularly salient for the Country Registries. While every Registry has its own procedures for checking trial readiness, trial readiness is unlikely to be checked until immediately prior to the trial in the Country due to the circuit system (which means that no judges are present in some regions well before the trial period to check readiness). The surveys revealed that, in the Country Registries, adjournments granted prior to the trial were granted on average only one week prior to the trial date, leaving very little opportunity to organise a 'back-up' trial. By comparison, in Sydney and Sydney West adjournments granted prior to the trial were granted on average more than two weeks prior to the trial date. The use of a centralised system in the country for ensuring trial readiness, similar to that described earlier for early hearings to encourage earlier guilty pleas may benefit the situation in the country.

Court and case monitoring data

Although the immediate focus of reform should be upon initiatives designed to encourage greater trial date certainty, earlier guilty pleas and fewer adjournments, there are a small number of items of information which, if routinely collected, would greatly assist the Court in the overall management of criminal trial matters. We have already alluded to the importance of close monitoring of the outcomes of matters listed for trial at each separate District Court Registry, in order to ensure that the listing process produces a high level of trial date certainty at each District Court Registry. It should be emphasised, if it is not already clear, that the outcomes monitored should include those which were the subject of the court survey conducted for the purpose of this report (i.e. proceeded to trial, not reached, adjourned by Defence, adjourned by Crown, change of plea).

In the short term it may not be easy to capture these sorts of data within existing systems. However it is possible within existing systems to keep track of the number of times matters must be listed for trial before being finalised. The Case Tracking System includes a notation (Notation 67) which is intended to signify the number of times cases are listed for trial. At present, however, there are inconsistencies in its use by court staff. Some use it only to record each new listing of a matter for trial. Others also use it on each successive day of the trial hearing itself. If the former practice were adhered to it would be possible to reliably and easily compute the percentage of cases proceeding to trial at each successive listing. Such information would be invaluable for trial case management.

Other data, not routinely collected or monitored, are also required for good case-flow management. Perhaps the most important of these are two closely related items of data: the age of each matter being listed for trial and the age of the pending trial caseload. The first of these items of information is of critical importance in ensuring that matters which have exceeded or are at risk of exceeding the Court's own time standards are given an appropriate level of priority in the listing process. Ideally, the age of each matter and the time standards which govern its disposition should be plainly evident to all those associated with the Court, including judicial officers, Defence representatives and Prosecutors. By this means the Court can focus the attention of all parties on matters which require urgent resolution.

The District Court's progress in managing its trial work has traditionally been assessed mainly by reference to the size of the pending trial caseload. This is potentially misleading as an indicator of delay reduction for reasons explained by Weatherburn (1993). The size of the pending trial caseload gives no direct information on whether the Court is moving towards or away from achievement of its time standards. Courts can and do keep track of the length of time it takes to bring matters to trial or finalise them. But discovering, after the fact, that the Court has breached its own time standards is much less useful than discovering that the Court is at risk of a breach which may be preventable. The average age of the pending trial caseload is a much more sensitive instrument for this purpose than the size of the pending trial caseload.

There are other items of information which are not required for individual case management but which would help the Court identify its required capacity. At present, although the Court keeps records on the average duration of each criminal trial hearing and on the numbers of trials, sentences and appeals which it processes, no record is kept of the duration of sentence or appeal hearings. Nor is any record kept of the duration of the various kinds of civil matter heard by the District Court. It would be appropriate to do so because the District Court allocates time to both civil and criminal matters. Without information of this kind, it is impossible to properly determine the number of court days required to deal with the work which comes before the Court or to make a convincing argument for additional capacity when the need arises (see: Lind, Weatherburn & Packer 1990). High quality data on the duration of various kinds of criminal hearing can be extracted without too much difficulty from the records kept by the Recording Services Branch of the NSW Attorney General's Department.

Conclusion

The purpose of this report has been to provide accurate and objective information on the causes of trial court delay in the NSW District Criminal Court and to foster consensus on a set of strategies for reducing it. The data presented reveal that criminal trial case processing in the Court is slow by comparison with other States and getting worse. The delays in criminal trial case processing do not appear to arise through any lack of capacity in the Court, but through the inefficiency generated by the way in which different players in the trial process respond to each other's practices.

Late guilty pleas, adjournments (sought by both the Crown and the Defence) and the failure to reach matters were identified as the primary causes of matters failing to proceed to trial. These three problems do not have their origin in any one source. In responding to the twin problems of late pleas and requests for adjournment, and in being concerned to make maximum use of available court time, the Court has engaged in a policy of over-listing. The over-listing has been such that many matters fail to be reached. Because of the high not-reached rate, the Defence and Prosecution are generally less prepared for trial than they should be on the day of trial. This has further exacerbated the twin problems of late pleas and adjournments.

These problems have been compounded by lack of early and continuous legal representation for the Defence, lack of early involvement of a senior representative for the Crown, difficulties with Crown witness availability and the lack of a perceived benefit for an early guilty plea.

The vicious circle just described cannot be broken by changing just one or some of the above conditions. If court administrators reduce the over-listing quota to provide greater trial date certainty but nothing is done about the conditions leading to late guilty pleas and adjournments, the result will be a substantial waste of trial court time. If the Defence and the Crown put resources into ensuring early and continuous representation to reduce late pleas and adjournments, and thoroughly prepare those matters still requiring a trial, but the Court continues over-listing, the result will be a vast increase in inefficiency for Defence and Prosecution. As Solomon and Somerlot (1987, p. 24) point out, all parties to the trial process have to change their practices for each to reap any reward.

For the Court, this means, above all, setting listing targets which guarantee a high degree of trial date certainty and re-listing matters (where this is absolutely necessary) without delay. For the Defence and Prosecution, it means, above all, the provision of early, continuous and senior legal representation, serious and early discussion of the scope for a guilty plea and thorough case preparation well before trial.

NOTES

1 Note that the delay figure for 1999 is based on the first nine months of that year.

2 According to the ABS 'initiation' is the date on which a defendant is regarded as having started within the Higher Courts as a 'new item of work'. For defendants committed for trial from a summary jurisdiction the date of initiation is the date of committal. 'Finalisation' is defined by the ABS as the date on which all charges laid against a defendant are regarded as formally completed by the Higher Courts.

3 Note that there is no intermediate court (District Court) in Tasmania, ACT or NT.

4 The significant increase between 1995 and 1996 occurred because the Court reduced the mid-year vacation and a program of acting judges was introduced.

5 Note that this ignores a small number of hours spent by the Court hearing both civil and criminal matters.

6 Note that average duration of trial hearings for January and July (when the Court hears very few trials) have been excluded from the graph due to their unreliability.

7 Note that no similar provision has been made for sentence and appeal hearings. While sentence and appeal matters are certainly listed for mention, they are not typically listed to confirm readiness to proceed. In any event mentions in these types of matters would typically be very short and likely to consume minimal court time.

8 These problems are largely inconsequential for appeal and sentence matters which are generally listed and dealt with en bloc.

9 Note that no provision has been made here for including non-judicial resources (e.g. court registry staff) in measuring capacity, nor has provision been made for certain other types of court hearings. These hearings include bail applications, returns of subpoenae, breaches of recognizance, mentions (other than those listed for the purpose of setting/confirming trial dates), legal arguments, voire dires, stay applications, separate trial applications and fitness to plead hearings. These types of hearings are likely to consume minimal court time, however, because either such hearings are typically very short or the court has very few of such hearings to deal with. Most voire dire hearings occur during a trial and are taken into account in our measurement of the duration of the trial.

10 The method for calculating the required capacity is presented in Appendix 1.

11 We noted earlier that we made no provision for mentions to fix hearing dates in appeal and sentence matters. Even when we made provision for these by adding 20 minutes to each appeal and sentence hearing the capacity was still sufficient to meet demand. This was calculated holding the lag time constant at 1.5 hours.

12 Note that the figure includes only those matters which actually proceeded to trial. Note also that the conditional probabilities are only shown to the sixth listing because the number of cases listed for trial more than six times is too small to compute reliable estimates of the relevant conditional probabilities.

13 NSW District Court internal listing guidelines.

14 Note that other reasons include mentions and applications for adjournments etc.

15 Note that other reasons for not proceeding include 'for transfer to another court', 'the fitness of the accused was in question', 'to be joined with other matters', 'to be dealt with separately from other matters', 'there was no jury available' and 'there was no appearance by Defence counsel'.

16 Note the not-reached rate reported here is based on the proportion of matters failing to proceed to trial. The not-reached rate according to the proportion of matters due to commence trial was 16 per cent. Note that neither of these rates is comparable with the NSW District Court's not-reached rate which is based on the proportion of trials which are listed. The way our data were collected did not permit the not-reached rate to be calculated in a comparable way.

17 Note that 'Sydney West' region includes Parramatta, Liverpool, Penrith and Campbelltown Registries and 'Country' region includes Newcastle, Wollongong, Dubbo, Lismore and Wagga Wagga Registries.

18 Note that while the survey allowed for matters to involve more than one offence type, no matters fell under more than one of the offence categories.

19 Bureau Higher Criminal Courts database.

20 The survey provided Defence representatives with an open-ended question in which they could provide more general comments on the timeliness of guilty pleas.

21 Note that while the survey allowed for matters to involve more than one offence type, no matters fell under more than one of the offence categories.

22 The method of calculation for savings in this table is shown in Appendix 4.

23 Note, however, that the savings calculations also assume that cases which are listed for trial and where the accused changes plea (to guilty) can also be finalised in two listings for trial.

24 Unless the vast majority of matters listed for trial actually proceeded to trial, abandonment of over-listing altogether would result in an unacceptable waste of trial court time.

25 The court survey revealed, for example, that the proportion of matters 'dropping out' due to guilty pleas, adjournments, no-bills, non-appearances by the accused and 'other reasons' in any one week across the 8 court locations that ran continuously over the survey period ranged between 0 per cent and 100 per cent for 4 of the 9 weeks of the survey. In the other 5 weeks the range was at least 50 per cent.

26 In circuit courts it may be necessary to look at the variation in the proportion not reached over the period of a full sittings.

27 Note that this is not the definition currently employed by the NSW District Court, nor is it the definition employed to describe the fate of trial matters in Section 4 of this report (for the reasons noted earlier).

28 The importance of early involvement by senior Crown prosecutors in reducing prosecutorial workload has recently been highlighted by the US National Centre for State Courts (Mahoney et al. 1988, pp. 149-150).

29 Some of these steps may temporarily increase the burden on Defence and Prosecution staff but, over the medium to long term, they should result in earlier, if not more frequent guilty pleas. Over the medium to long term both outcomes should reduce the burden on Defence and Prosecution because they should reduce the number of matters which are needlessly prepared for trial.

30 In Table 8 the percentage difference is the difference between the penalty for a guilty plea and the penalty for a verdict, expressed as a percentage of the penalty for a verdict. In Table 9 the percentage is the difference between the penalty for pleading guilty early and the penalty for pleading guilty late expressed as a percentage of the penalty for pleading late.

31 We acknowledge that these methods may mean compromising the capacity to be able to re-list that matter before the same judge.

32 Note that we used 1997 trial matter registrations to reflect the fact that most matters do not proceed to trial until 12 months or more after registration.

33 Note that information on the proportion of hung juries and aborted trials was not available for country Registries. We therefore apportioned hung juries and aborted trials among country Registries according to the number of matters actually proceeding to trial in each of the relevant Registries.

34 Note that we do not need to discount sentence registrations by any amount, as we did with trials, because virtually all sentence matters proceed to a hearing.

35 Note that we do not need to discount appeal registrations by any amount, as we did with trials, because virtually all appeal matters proceed to a hearing.

36 Note that we used 1997 appeal matter registrations to reflect the fact that most matters do not proceed to hearing until 12 months or more after registration.

37 The logs are organised alphabetically according to the name of the defendant. The first 30 sound-recorded sentence hearings and appeal hearings were selected for analysis.

38 For matters appearing more than once during the survey period registry staff were instructed to place one of each of the survey forms on the file for each appearance. In the case of matters that were due to commence trial but were not reached and stood-over to the next day or shortly after, however, registry staff were instructed to place only one of each survey form on the file. They were instructed to only place a second set of survey forms on these matters if they were stood-over to the next week. This is in line with court practice which treats trial matters as reached, if the trial is dealt with within the same week as it was listed.

39 Note that there were two other situations where the Defence representative survey form was not required to be handed out, but left incomplete on the file for return to the registry. These were — where there was no legal representative for the defendant (i.e. the defendant was self-represented), where the defendant had multiple charges and pleaded guilty to only some of the charges, such that other charges were still outstanding in the matter. In the situation where multiple defendants in a matter entered guilty pleas during the same appearance the Defence representative survey form was required to be handed to the legal representative for the defendant who first entered a plea of guilty.

40 Note that the Judges' Associates were required to record the identity of the Defence legal representative and their contact details in the court survey where a guilty plea was entered. Where the contact details were incomplete they were supplemented, where possible, with information obtained from the Law Society of NSW directory of solicitors (www.lawsocnsw.asn.au/directory/members) and the NSW Law Almanac 1999.

41 This response rate is calculated based on the number of appearances for matters falling under the scope of the study identified in the court lists provided by the registries.

42 The response rate was calculated based on the number of Defence representative survey forms handed out, as identified by the court survey. The response rate as a percentage of all pleas entered during the survey period was calculated taking into account the fact that survey forms were not handed out on every occasion a plea was entered (e.g. because the Defence legal representative left the court room before the Judge's Associate had the opportunity to hand the survey out etc.). According to the court survey there were a further 25 guilty pleas entered in the survey period in which Defence representative surveys were not handed out. In addition it takes into account that the response rate to the court survey was only 68 per cent.

43 Note that matters could appear more than once during the survey period.

44 Note that the surveys provided for matters to involve multiple offences. The only instances where matters were recorded as involving multiple offences were two matters that involved both State and Commonwealth drug offences, and one matter that involved both State and Commonwealth fraud offences. In each case the Commonwealth offence took precedence and the matter was classified under the Commonwealth offence.

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APPENDIX 1: CALCULATION OF CRIMINAL COURT CAPACITY AND DEMAND

Method of calculation

Let:

D = the demand for criminal court time in a given year

T = the number of criminal trial hearings required in a given year

B = the number of aborted criminal trial hearings in a given year

H = the number of criminal trial hearings where the jury is hung in a given year

a = the average duration of a criminal trial hearing

S = the number of sentence hearings required in a given year

b = the average duration of a sentence hearing

A = the number of criminal appeal hearings required in a given year

c = the average duration of an appeal hearing

d = the average court time required to set/confirm a trial date

e = the average lag time between successive trials

C = the capacity of the Court to deal with criminal matters measured in days of sitting time allocated to such matters.

Then:

$$D = ([a+d+e]T) + a(B+H) + (bS) + (cA)$$

The difference between capacity and demand is then

$$C-D$$

Data sources and methods of calculation for parameter estimates

Note that in each case parameter estimates were based on 1998 data unless otherwise specified. Parameter estimates were obtained separately for each registry of the NSW District Court unless otherwise specified. Total demand and capacity for the State were obtained by summing across each registry.

T was calculated by discounting the number of trial matters registered in 1997 by an amount which reflects the low proportion of matters registered for trial which actually proceed to trial.[32] The number of trial matters registered in 1997 and the proportion of matters proceeding to trial were both obtained from the Bureau's Higher Criminal Courts database.

T = (no. of trial matters registered)*(% of trial matters proceeding to trial)

B and H were obtained from the Registries.[33]

a was provided by the NSW District Court.

S was calculated by taking into account that, in addition to those matters registered as sentence matters, sentence hearings also take place in matters registered as trial matters,

but finalised as guilty pleas, and in matters registered as trial matters that proceed to trial and result in a conviction.[34] The number of sentence matters registered is published by the NSW District Court (District Court of New South Wales 1998). The proportion of trial matters finalised as a guilty plea was obtained from the Bureau's Higher Criminal Courts database. The proportion of trials resulting in a conviction is published by the Bureau (NSW Bureau of Crime Statistics and Research 1999).

S = (no. of sentence matters registered)+{(no. of trial matters registered)*(% of trial matters finalised as guilty pleas)}+{T*(% of trials resulting in a conviction)}

A is published by the NSW District Court (District Court of New South Wales 1998).[35] Note that 1997 appeal registrations were used.[36]

b and c were obtained using the Recording Services Branch of the NSW Attorney General's Department log of sound recorded hearings. The Branch now keeps a log of the duration (in minutes) of all sound-recorded appeal and sentence hearings. To obtain estimates of the duration of sentence and appeal hearings the Bureau drew a sample of 30 appeal hearings and 30 sentence hearings heard in 1999 from these logs.[37] The average duration of the 30 sentence hearings was found to be 63.9 minutes. The corresponding figure for appeal hearings was 42.9 minutes. A further five minutes was added to the average duration of both sentence hearings and appeal hearings to allow for listing preparation. These estimates (0.23 of a court day for sentence hearings, 0.16 of a court day for appeal hearings) were used for each of the Registries.

d and e were estimated based on advice provided by a senior court administrator, as there was no other available source for this type of information. We used estimates of 1.0 hours (0.2 of a 5-hour court day) for d and 1.5 hours (0.3 of a court day) for e in each of the Registries. Note that we also recalculated demand substituting 0 hours and 2.5 hours for e to examine what the effect would be.

C is based on the amount of time the Court actually sat hearing criminal matters. This figure is published by the NSW District Court (District Court of New South Wales 1998).

As mentioned in the main body of the report, note that no provision has been made in this equation for non-judicial resources (e.g. court registry staff) in measuring capacity. No provision has been made for certain other types of court hearings in measuring demand. These hearings include bail applications, returns of subpoenae, breaches of recognizance, mentions in trial, sentence and appeal matters (other than those listed for the purpose of setting/confirming trial dates), legal arguments, voire dires and fitness to plead hearings. These types of hearings are likely to consume minimal court time, however, because either such hearings are typically very short or the Court has very few of such hearings to deal with.

So for example in the Sydney Registry

$$D = ([8.4 + 0.2 + 0.3] * 288) + 8.4\ (35 + 34) + (0.23 * 780) + (0.16 * 1294)$$

where

$$T = 0.34 * 847 = 288$$

$$S = 269 + (0.43 * 847) + (0.51 * 288) = 780$$

therefore:

$$D = 3533 \text{ days}$$

$$C = 3910 \text{ days}$$

So

$$C - D = 377 \text{ days.}$$

APPENDIX 2: BACKGROUND AND METHODOLOGY FOR THE SPECIAL SURVEYS

The main data source for Section 4 of this report was two special surveys undertaken at the request of a Strategic Quality Team. This team was established by the Director General of the NSW Attorney General's Department to identify ways of improving the listing system in the NSW District Criminal Court where court delay was a significant problem. The team comprised representatives from the Commonwealth and State Offices of the Director of Public Prosecutions, the NSW Legal Aid Commission, and from within the NSW Attorney General's Department, representatives from the District Criminal Court Registry, Reporting Services Branch, Criminal Law Review Division, Public Defender's Office and the NSW Bureau of Crime Statistics and Research.

In order to assist their deliberations, the team resolved to gather objective information on the major causes of NSW District Court criminal matters failing to proceed to trial on the day they are listed. Two special surveys were developed by the Bureau, under the guidance of the Strategic Quality Team, to collect such information. Preliminary work carried out by the team, based on information routinely collected by the Court, revealed that late entry of guilty pleas, adjournments and matters not reached were likely to be important reasons why matters fail to proceed. The surveys therefore focussed on these issues in more detail.

The surveys

The first survey was designed to determine the outcome of all criminal matters committed for trial in the NSW District Court which appeared in court before a judge for any purpose (trial or otherwise) during a two-month period. A survey form was completed in court by the Judge's Associate (with assistance from Court or Bureau staff) on each occasion a matter appeared before the court during the survey period (2 August to 1 October 1999).

This survey sought details on the outcome of a matter. Possible outcomes were whether the matter was listed for trial, whether the matter proceeded to trial, the reason for not proceeding to trial (for example, due to a guilty plea, an adjournment, failure to be reached, or another reason). In the case of adjournments, further details were sought on when the adjournment occurred in relation to the trial date, the party requesting the adjournment and their stated reason for requesting the adjournment. In the case of guilty pleas further details were sought on when the plea was entered in relation to the trial date and contact details for the Defence legal representative (for the purpose of follow-up to encourage response to the survey). Background details of the matter were also sought, including the nature of the offences involved, the bail status of the accused person and the court location, in order to establish whether these factors affected the outcome.

The second survey was designed to investigate the reasons for late entry of guilty pleas. It was carried out over the same period and using the same set of matters as the first survey. As the legal representative for the Defence is in the best position to shed light on the reasons for the late change in plea, this survey was completed by Defence legal representatives. The Judge's Associate (with assistance from Court or Bureau staff) handed the survey form to the Defence legal representative each time a guilty plea was entered during the survey period in a criminal matter committed for trial in the NSW District Court.

Fifteen possible reasons for the late entry of a guilty plea were provided in the survey. Defence representatives were asked to rate the importance of each of these 15 reasons in their client's decision to change their plea to guilty on a scale of 1 to 4, where 1 represented 'Not important at all' and 4 represented 'Very important'. Defence representatives were also asked to describe any other reasons for late pleas and were provided with the opportunity to make general comments. As with the court survey background details of the matter were also sought, including the nature of the offences involved, the bail status of the accused person, whether any co-accused were involved, and whether their client had recently been convicted of any other offences. This survey form had been pre-coded to identify court location.

It should be noted that the development of both surveys was assisted by discussions held with key NSW District Criminal Court Registry personnel, NSW District Court Judges and their Associates, and through a pilot test conducted with the assistance of two Judges' Associates within the Sydney District Court Registry and two solicitors from the NSW Legal Aid Commission.

Survey procedures

The Bureau held meetings with key NSW District Criminal Court Registry personnel and the NSW District Court Judges and their Associates prior to the survey period to explain the purpose of the surveys and the survey procedures.

Distribution of surveys

The Bureau provided survey forms to each of the 10 major regional District Court Registry centres. Registry staff were responsible for placing a court survey form and a Defence representative survey form on the court file of each matter that fell under the scope of the survey (i.e. every matter committed for trial in the NSW District Criminal Court that was listed to appear during the survey period 2 August to 1 October 1999). Registry staff were also responsible for completing some identifying details and background information on both survey forms, before distributing the file to the relevant court room.[38]

On each occasion a judge dealt with a matter that fell under the scope of the survey the Judge's Associate was required to complete the court survey form provided on the court file and place it back on the file for return to the registry. In addition, if the defendant entered a guilty plea in the matter, the Judge's Associate was required to hand the Defence representative survey form to the Defence legal representative for completion. If no guilty plea was entered the Judge's Associate was required to simply leave the (essentially) blank Defence representative survey form on the file for return to the registry.[39]

Return of surveys

Once the matter had been dealt with and the file was returned to the registry, the registry staff were responsible for removing the completed court survey forms and (essentially) blank Defence representative survey forms from the files for return to the Bureau. Forms were returned to the Bureau on a regular basis (approximately weekly) so that compliance with the survey procedures could be monitored.

The Defence representative survey form was accompanied by a covering letter which explained the purpose of the study and contained identifying details of the matter (completed by registry staff and the Judge's Associate). Defence representatives were asked to remove the covering letter containing their identifying details prior to returning the survey forms to maintain the confidentiality of the survey. Completed surveys could be returned to the Bureau either in the reply-paid envelope provided with the survey form or in ballot-style boxes that were placed in the court rooms.

Follow-up procedures

The Bureau maintained regular contact with the registry staff to ensure the study was running smoothly. In addition, where any problems were identified through the return of survey forms to the Bureau from the Registries (for example, a low response rate), registry staff were contacted to try and rectify the situation.

In order to encourage responses to the Defence representative survey, the Bureau mailed a reminder notice and a further copy of the survey form to all Defence representatives who were identified through the court survey as having received a survey form due to their client pleading guilty.[40]

Responses to the survey

Response rates

In total, 2174 court surveys were returned. Of these 2014 were included in the analysis. The remaining 160 were removed for the following reasons: 128 were not completed sufficiently, 18 were outside the scope of the survey (e.g. sentence matters, appeals and matters appearing outside the survey period), 14 were duplicates (e.g multiple forms covering co-accused in the same matter and matters listed for trial held over for one to two days).

Overall there was a response rate to the survey of approximately 68 per cent.[41] There was considerable variation in the response rate across the 10 major regional District Court registry centres, however. This variation is illustrated in Table A1 which shows the response rate by registry.

In total 143 Defence representative surveys were returned. Of these 132 were included in the analysis. The remaining 11 were excluded for the following reasons — 6 were identified as being duplicates (the reminder survey form was completed and returned in addition to the original survey form), 3 were received more than a month after the survey period and were too late to be included, 1 was incomplete, and 1 was for a matter where no guilty plea had been entered.

The response rate to the survey was 69 per cent, or approximately 42 per cent of all guilty pleas entered in matters committed for trial in the survey period.[42]

Testing for response bias

While the response rates for both surveys were reasonably high at almost 70 per cent, it is still important to determine whether any bias exists in the responses to the surveys.

For the court survey the only information available for testing response bias was region. Table A1 shows the response rate for each Registry, including the four major registry centres for Sydney West Registry. As can be seen from Table A1 the response rate varied enormously between Registries. This may signal response bias in the court survey although the mere existence of different response rates across Registries does not prove that such bias exists.

For the Defence representative survey, in addition to region, a number of other characteristics were available with which to test response bias, including offence type, bail status of the accused, and the stage the plea was entered. Very little difference was found between these characteristics for the guilty pleas to which a response to the survey was received and all guilty pleas identified in the court survey. Thus there is no evidence of response bias, in terms of the characteristics just described, for the Defence representative survey. However, it is important to note that this evidence does not preclude the possibility that other differences might exist between characteristics not measured by the surveys, or

Table A1: Response to the court survey by Registry

Registry	*No. of completed surveys returned*	*No. of appearances listed during the survey period*	*Response rate (%)*
Sydney	842	1120	75
Sydney West:			
Parramatta	65	255	25
Penrith	156	277	56
Liverpool	238	244	98
Campbelltown	55	187	29
Newcastle	265	392	68
Wollongong	151	165	92
Dubbo	84	112	75
Lismore	146	174	84
Wagga	12	31	39
Total	2014	2957	68

that differences may exist between those pleas captured by the court survey and any missed by the court survey.

Sample characteristics

The sample of 2014 responses to the court survey represented 1399 different matters.[43] The sample was distributed across region as follows — 42 per cent were from Sydney, 25 per cent were from Sydney West and 33 per cent were from the Country. A trial date had been allocated in approximately half of the sample (51%).

Other characteristics were only recorded in matters which had an outcome relevant to trial (i.e. the matter was due to commence trial or the trial date was vacated, either at the request of the parties, or due to the entry of a guilty plea). An outcome relevant to trial occurred in 34 per cent of the sample. These matters were comprised of 11 per cent adult sex offences, 16 per cent child sex offences, 4 per cent State fraud offences, 2 per cent Commonwealth fraud offences, 16 per cent State drug offences, 2 per cent Commonwealth drug offences and 49 per cent 'other' offences.[44] In most (74%) of these matters the accused was on bail. The remainder were in custody — 12 per cent were in custody solely for the present matter, 9 per cent were in custody for other matters and 5 per cent were in custody, but it was unknown whether it was for the present matter or other matters.

The sample of 132 responses to the Defence representative survey was fairly evenly distributed across region with 28 per cent from Sydney, 37 per cent from Sydney West and 35 per cent from the Country.

A trial date had been allocated in 35 per cent of the sample. Offence type was distributed as follows — adult sex offences (5%), child sex offences (5%), State fraud offences (5%), Commonwealth fraud offences (2%), State drug offences (15%), Commonwealth drug offences (2%) and 'other' offences (66%). Just over half the sample (52%) involved accused on bail, while 29 per cent involved accused in custody solely for the present matter, and 19 per cent involved accused in custody for other matters.

APPENDIX 3: THE QUESTIONNAIRES

COURT SURVEY OF CRIMINAL TRIAL MATTERS

THIS SURVEY IS **ONLY** FOR MATTERS

- COMMITTED FOR TRIAL IN THE NSW DISTRICT COURT, **AND**
- WHICH APPEAR BEFORE A JUDGE FOR ANY REASON IN THE PERIOD **2** AUGUST TO **1** OCTOBER **1999** INCLUSIVE

Registry use only

Accused: ..... Matter No. .....

Court location: ..... Trial date allocated in this matter: ____/____/____ (D M Y)

(IF NO TRIAL DATE ALLOCATED, PLEASE TICK ☐)

SECTION A: BACKGROUND DETAILS

Today's date: ____/____/____ (D M Y)

Judge: ..... Associate: .....

Did any of the following apply to today's appearance?

- **the matter was listed to commence trial today**
- **the trial date was changed or vacated at today's appearance**
- **the accused entered a plea of guilty at today's appearance such that they had no other outstanding charges in this matter**

Yes ☐ 1 ☛ *go to* ***Section B***

No ☐ 2 STOP *end of survey*

SECTION B: TYPE OF MATTER

1 Which of the following types of charges, if any, does this matter involve?
(Tick all that apply)

Sexual offences against adults ☐ 1
Sexual offences against children ☐ 2
State fraud type offences ☐ 3
Commonwealth fraud type offences ☐ 4
State drug offences ☐ 5
Commonwealth drug offences ☐ 6
None of the above types of charges ☐ 7

2 What was the bail status of the accused immediately prior to the appearance today?

On bail ☐ 1
In custody, solely in relation to this matter ☐ 2
In custody, but not solely in relation to this matter ☐ 3

3 Was this matter listed to commence trial today?

Yes ☐ 1 ☛ *go to* ***Section D***
No ☐ 2 ☛ *go to* ***Section C***

SECTION C: COMPLETE THIS SECTION ONLY IF THE MATTER WAS NOT LISTED TO COMMENCE TRIAL TODAY

4 Did the accused enter a guilty plea at today's appearance such that they had no other charges outstanding in this matter?

Yes ☐ 1 ☛ *go to* ***Section G***

No ☐ 2 ☛ *go to* ***next question***

5 Was the trial date changed or vacated at today's appearance?

Yes ☐ 1 ☛ *go to* ***Section F***

No ☐ 2 STOP *end of survey*

SECTION D: COMPLETE THIS SECTION ONLY IF THE MATTER WAS LISTED TO COMMENCE TRIAL TODAY

6 Did this matter proceed to trial today?

Yes ☐ 1 STOP *end of survey*

No ☐ 2 ☛ *go to* ***next question***

7 If this matter didn't proceed to trial today, what was the main reason it did not proceed?
(Tick one box only)

Not reached ☐ 1 ☛ *go to* ***Section E***

Adjourned ☐ 2 ☛ *go to* ***Section F***

Non-appearance by accused ☐ 3 ☛ *go to* ***Section H***

No-bill ☐ 4 ☛ *go to* ***Section H***

Plea ☐ 5 ☛ *go to* ***Section G***

Other (please specify) ☐ 6

.....

☛ *go to* ***Section H***

SECTION E: COMPLETE THIS SECTION ONLY IF THE MATTER WAS LISTED FOR TRIAL TODAY AND IT WAS NOT REACHED

8 What was the main reason this matter was not reached today?
(Tick one box only)

Too many matters were listed ☐ 1

Another matter ran longer than expected ☐ 2

No judge was available to hear this matter ☐ 3

Trial estimate for this matter inaccurate ☐ 4

Other (please specify) ☐ 5

.....

☛ *go to* ***Section H***

SECTION F: COMPLETE THIS SECTION ONLY IF THE TRIAL IN THIS MATTER WAS ADJOURNED, VACATED OR CHANGED ON APPLICATION BY THE PARTIES

9 Who was the <u>main</u> party applying for the adjournment, or the change or vacation of the trial date, today?

Defence ☐ 1 ☛ *go to* ***next question***

Crown ☐ 2 ☛ *go to* ***Q.11***

10 If the Defence was the main party who applied for the adjournment (or change or vaction of trial date) what was the <u>main</u> reason given by the Defence?
(Tick one box only)

Accused cannot find suitable legal representation ☐ 1

Accused has no legal aid funding ☐ 2

Defence counsel jammed in another matter ☐ 3

Defence witness unavailable ☐ 4

Co-accused to be dealt with before trial ☐ 5

Change to indictment by Crown ☐ 6

Change to evidence in Crown case ☐ 7

Appeal pending from interlocutory matter ☐ 8

Late disclosure by Crown requiring further inquiries ☐ 9

Further investigations or preparation required by Defence ☐ 10

Illness of accused or the family of the accused ☐ 11

Defence initiates late no-bill consideration ☐ 12

Other (please specify) ☐ 13

.....

☛ *go to* ***Section H***

11 If the Crown was the main party who applied for the adjournment (or change or vacation of the trial date) what was the <u>main</u> reason given by the Crown?
(Tick one box only)

Crown Prosecutor jammed in another matter ☐ 1

Crown witness unavailable ☐ 2

Further police investigations required ☐ 3

Appeal pending from interlocutory matter ☐ 4

Further preparation required by Crown ☐ 5

Late disclosure by the Defence ☐ 6

Crown initiates late no-bill consideration ☐ 7

Other (please specify) ☐ 8

.....

☛ *go to* ***Section H***

SECTION G: COMPLETE THIS SECTION ONLY IF THERE WAS A GUILTY PLEA ENTERED TODAY

12 Has the green survey (plea change survey) been given to the legal representative for the accused?

Yes ☐ 1 ☛ *go to* ***next question***
No ☐ 2 ☛ *go to* ***Q.15***

13 Name of legal representative for accused: .....

14 Contact details for above: .....
☛ *go to* ***Section I***

15 Reason why the survey was not given to the legal representative for the accused

.....

.....

.....

☛ *go to* ***Section I***

SECTION H: THIS SECTION SHOULD BE COMPLETED FOR ALL MATTERS (EXCEPT PLEAS)

16 Has a new trial date been allocated for this matter?

Yes ☐ 1 ☛ *go to* ***next question***
No ☐ 2 ☛ *go to* ***Section I***

17 What is the new trial date allocated to this matter? ____/____/____ (D M Y)
☛ *go to* ***Section I***

SECTION I: OTHER COMMENTS

18 Would you like to make any other comments in relation to this matter or in general about matters that do not proceed to trial when listed?

.....

.....

.....

.....

.....

THANK YOU FOR PARTICIPATING IN THIS SURVEY.
PLEASE PLACE THIS QUESTIONNAIRE BACK ON THE FILE AND RETURN IT TO THE REGISTRY.

SURVEY OF DEFENCE REPRESENTATIVES ON PLEA CHANGES

THIS IS AN ANONYMOUS AND VOLUNTARY SURVEY.

PLEASE REMOVE THIS PAGE FROM THE QUESTIONNAIRE PRIOR TO RETURNING IT.

THIS SURVEY IS ONLY FOR MATTERS

- COMMITTED FOR TRIAL IN THE NSW DISTRICT COURT, AND
- WHERE THE ACCUSED ENTERS A GUILTY PLEA, AND
- THERE ARE NO OTHER CHARGES OUTSTANDING FOR THE ACCUSED IN THIS MATTER.

Registry use only

Matter number: .....

Name of accused: .....

Court location: .....

Associate use only Today's date: ____/____/____ D M Y

WHAT IS THIS SURVEY ABOUT?

This survey is being conducted to find out why people listed for trial change their plea to guilty before the trial. It is being conducted by the NSW Bureau of Crime Statistics and Research and is supported by the Chief Judge of the NSW District Court, the Law Society of NSW and the NSW Bar Association. This survey will enable better planning and targeting of resources, with resultant benefit to the courts, public and profession in seeking strategies to avoid delay.

WHY WAS I APPROACHED?

We are approaching a sample of Defence legal representatives, whose clients have entered guilty pleas in matters committed for trial, to take part in this survey. The survey is voluntary. However, your response is very important to us as it will help assure our results are accurate and unbiased.

HOW DO I COMPLETE THIS QUESTIONNAIRE?

Please complete this questionnaire in relation to the matter with the above details. Your client should have no other charges outstanding in relation to this matter.

WILL THE INFORMATION I GIVE BE CONFIDENTIAL?

All answers will be treated in strict confidence and only aggregate results will be reported. No information that would identify individual cases, defendants or practitioners is required. Note that you should **remove this page** prior to returning the questionnaire to eliminate any identifying information.

WHAT SHOULD I DO WITH THE COMPLETED QUESTIONNAIRE?

Please complete and return this questionnaire to the NSW Bureau of Crime Statistics and Research (using the reply paid envelope) in the next two weeks.

If you have any questions about the survey please call Joanne Baker at the Bureau on 9231 9190.

THANK YOU FOR TAKING PART IN THIS STUDY.

SURVEY OF DEFENCE REPRESENTATIVES ON PLEA CHANGES

PART A: BACKGROUND INFORMATION ABOUT THE MATTER

1 When was this matter committed for trial? ____/____/____ D M Y

2 When did your client enter a plea of guilty? ____/____/____ D M Y

3 Has a trial date been allocated in this matter?

Yes ☐ 1 ☛ *go to* ***Q.4***

No ☐ 2 ☛ *go to* ***Q.5***

4 What is the trial date allocated in this matter? ____/____/____ D M Y

5 Which of the following types of charges, if any, does this matter involve?
(Tick all that apply)

Sexual offences against adults ☐ 1

Sexual offences against children ☐ 2

State fraud type offences ☐ 3

Commonwealth fraud type offences ☐ 4

State drug offences ☐ 5

Commonwealth drug offences ☐ 6

None of the above types of charges ☐ 7

6 What was the bail status of your client when he/she entered a plea of guilty?

On bail ☐ 1

In custody, solely in relation to this matter ☐ 2

In custody, but not solely in relation to this matter ☐ 3

7 Were there any co-accused involved in this matter?

Yes ☐ 1

No ☐ 2

8 Has your client been convicted of another offence since being charged with the present matter?

Yes ☐ 1

No ☐ 2

PART B: REASONS WHY YOUR CLIENT ENTERED A GUILTY PLEA AFTER THE MATTER HAD BEEN COMMITTED FOR TRIAL

Please indicate how important do you believe each of the following reasons were in your client's decision to plead guilty after the matter had been committed for trial. Use the scale of 1 to 4 where '1' means Not important at all and '4' means Very important. If you believe any of the reasons are not applicable then please rate them as '1' i.e. Not important at all.

1 Counsel or advocate was not instructed in this matter until late in the process

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

2 Counsel or advocate did not get a chance to work this brief up until just before trial

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

3 Counsel or advocate had difficulties in getting firm instructions from the client until late in the process

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

4 Counsel or advocate had difficulties getting in contact with the client in this matter

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

5 Whether the client would receive a legal aid grant was not sorted out until a late stage

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

6 A co-accused was convicted or sentenced during the course of this matter

☐ 1 Not important at all ☐ 2 Slightly important ☐ 3 Moderately important ☐ 4 Very important

7 The client was convicted for another offence since being charged with the present matter

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

8 The client changed their instructions just before the trial

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

9 The identity of the judge only became known at a late stage

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

10 A pre-trial application was resolved in favour of the Crown at a late stage

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

11 There was a late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of indictment

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

12 The Crown disclosed incriminating evidence at a late stage

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

13 A late change in the Crown representative brought a new perspective to the case

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

14 Counsel or advocate was not able to discuss the matter with the Crown until late in the process

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

15 There was no clear sentence benefit to the client in pleading any earlier

☐ 1	☐ 2	☐ 3	☐ 4
Not important at all	Slightly important	Moderately important	Very important

16 Were there any other reasons why your client did not plead guilty any earlier?

Yes ☐ 1 ☛ *describe **below***

No ☐ 2 ☛ *go to **Q.17***

Please describe those reasons

.....

.....

.....

.....

17 Would you like to make any other comments in relation to the timely and appropriate entry of guilty pleas?

.....

.....

.....

.....

THANK YOU FOR TAKING PART IN THIS STUDY.

PLEASE ENSURE YOU HAVE REMOVED THE WHITE COVERING PAGE BEFORE RETURNING THIS QUESTIONNAIRE TO THE BUREAU IN THE REPLY PAID ENVELOPE ENCLOSED.

NSW BUREAU OF CRIME STATISTICS AND RESEARCH · GPO BOX 6, SYDNEY NSW 2001 · PH: 02) 9231 9190

APPENDIX 4: CALCULATION OF SAVINGS DUE TO HYPOTHETICAL REFORMS

The potential savings in trial listings due to the hypothetical reforms are calculated using the following equation:

$$S = CL - PL$$

Where

S = savings

CL = current load of trial listings

PL = potential load of trial listings

CL was calculated by dividing matters registered for trial into three classes —

- those that proceed to trial
- those that are finalised as a guilty plea
- those that are finalised by other means.

The Bureau's Higher Criminal Court's database contains information on the number of times a matter is listed for trial, and whether a matter proceeds to trial, or is finalised by a guilty plea or other means for each Registry. However, the information on the number of trial listings cannot be considered reliable for those matters that proceed to trial, as separate trial listings are sometimes (but not always) recorded for each consecutive day of a trial hearing. The information on trial listings can be considered reliable for other matters (i.e. those matters not proceeding to trial) as the problem just described does not generally occur in these matters as they, by definition, do not tend to have trial hearings.

To obtain information on the number of trial listings in matters proceeding to trial, Bureau staff went through each matter on the database and manually counted each 'genuine' trial listing.

To do this a list of all District Criminal Court matters that proceeded to trial and that were finalised between 1 July 1998 and 30 June 1999 was extracted from the database. A total of 840 such matters were identified. Bureau staff examined the 'Record of Processing' in the Case Tracking System for each of these matters. Where matters involved multiple accused trial listings were counted for the first accused only.

Trial listings are recorded in the Record of Processing under 'Notation 67'. Each trial listing recorded under Notation 67 was generally counted. However, trial listings recorded under Notation 67 on separate occasions for the same date, for consecutive days or for a date within 7 days of a prior trial listing were counted once only, unless it was clear from the Record of Processing that a new trial was involved (for example if the trial was aborted, the trial date was vacated or a bench warrant was issued). Other trial listings recorded under Notation 67 were also only counted once if it was clear that it was the same trial continuing (for example, if the trial was stood over to another date part heard).

In addition there were several other occasions where a trial listing was counted that was not recorded under Notation 67. Matters with no trial listings recorded under

Notation 67 were counted as having one trial listing (as these matters proceeded to trial, and so by definition must have had at least one trial). For matters that were recorded as finalised (recorded under Notation 19) but had no apparent trial listing in the vicinity of the finalisation date an additional trial listing was counted. For matters recorded as having had the trial date confirmed (recorded under Notation 90) or as stood over for trial (recorded under Notation 19), but which had no corresponding trial listing under Notation 67, an additional trial listing was also counted.

Using this information we can calculate CL as follows

$$CL = (a * T) + (b * P) + (b * O)$$

where

T = the number of matters registered for trial that proceed to trial

P = the number of matters registered for trial that are finalised as guilty pleas

O = the number of matters registered for trial that are finalised by other means

a = the average number of times matters registered for trial and that proceed to trial are listed for trial

b = the average number of times matters registered for trial and that are finalised by guilty plea or other means are listed for trial

Note that we used 1997 trial matter registrations to reflect the fact that most matters do not proceed to trial until 12 months or more after registration.

PL is calculated by assuming firstly that it is possible to reduce the average number of trial listings in matters registered for trial that proceeded to trial to two. The court survey identified that 66 per cent of guilty pleas entered in matters registered for trial are entered after the trial date is set. In calculating PL we also assume that the percentage of matters in which a guilty plea is entered prior to being listed for trial can be reduced to 50 per cent. We further assume that it is also possible to reduce the average number of trial listings to two in the group of matters in which a guilty plea is entered after a trial listing. We do not make any assumptions regarding the average number of trial listings for matters finalised by other means.

So

$$PL = (2 * T) + (0.5 * 2 * P) + (b * O)$$

Note however, that in some Registries the average number of trial listings for matters proceeding to trial was already less than two. In these Registries PL was calculated using the actual number of trial listings (i.e. a) rather than two.

So, for example, in the Sydney Registry:

There were 847 trial registrations in 1997. Of these 34 per cent proceeded to trial, 43 per cent were finalised as guilty pleas and 23 per cent were finalised by other means.

$$CL = (2.4 * 288) + (3.1 * 364) + (3.1 * 195) = 2424 \text{ trial listings}$$

$$PL = (2 * 288) + (0.5 * 2 * 364) + (3.1 * 195) = 1544 \text{ trial listings}$$

Savings therefore amount to CL - PL = 880 trial listings.