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**Dealing with Court Delay in
New South Wales**

by

Honor Figgis

Briefing Paper No 31/96

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ISSN 1325-5142

ISBN 0 7310 5973 5

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November 1996

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EXECUTIVE SUMMARY

- The courts in New South Wales have experienced considerable problems with **court delay**. In some civil matters, delays of 10 or 15 years from the original event to determination of the case were not unknown. Delay has decreased in most New South Wales courts in recent years, as a result of a range of measures undertaken by the Judiciary, Parliament and the Executive (pages 5-9) .
- Excessive court delay causes many **problems**: it imposes financial hardship on the parties and on accused persons; important evidence may be lost, as witnesses forget events or become unavailable; the cost of litigation is increased by delay; the quality of justice diminishes as unreasonable time pressures are placed on judges; accused persons, who are presumed innocent until proven guilty, may be deprived of liberty for unnecessarily long periods; delay in a criminal case may be so excessive as to result in an unfair trial for the accused; and it causes the erosion of public confidence in the judicial system (pages 3-4).
- The **causes** of unnecessary delay are complex and interrelated, and may be different in the civil and criminal jurisdictions. Some of the matters which have been identified as causing delays are: slowness by one or more of the parties in preparing for trial; deliberate delays and pre-trial manoeuvres by litigants; failure by the parties to clarify the issues in dispute at an early stage, or to discuss options for settlement or guilty pleas; inefficient court listing practices; unnecessary adjournments; reluctance or lack of power of judges to actively manage cases; delays in the legal aid system; the method of funding cases; the availability of legal representation; too few judges for the workload; overlong trials; lawyers who are too verbose, or take poor points, or call inessential evidence; overly complex rules of evidence; the use of jury trials, especially in civil matters; any increase in the number of cases (due to factors such as increases in population, in the crime rate, in the amount and complexity of legislation); and a lack of incentives for settlement of civil cases, or guilty pleas in criminal cases (pages 9-17).
- Many **measures to reduce delay** have been proposed, from the very general (such as modifying the adversarial legal system to introduce more inquisitorial procedures) to the very specific (such as allowing oral evidence to be given by telephone or video-link). Proposals include: more use of alternative dispute resolution in civil matters; altering the structure and management responsibility of the courts; enacting an obligation on the courts to hear matters expeditiously, and encouraging judges through judicial education to use their powers and discretions for this end; expanding the powers of the courts to manage cases, particularly in the criminal jurisdiction; restricting time-consuming pre-trial procedures such as discovery and interrogatories; modifying committal proceedings; setting mandatory time limits for the disposal of cases; restricting or modifying trial by jury; increasing court fees; reducing the number of criminal offences and causes of action; simplifying and clarifying legislation; encouraging early settlement and guilty pleas; appointing more judges; improving computer facilities and information technology in the courts; extending the sitting hours of judges and reducing judicial vacations; and modifying the method of charging legal costs, to discourage over-servicing by lawyers (pages 17-42).

1. INTRODUCTION

Excessive delays in civil and criminal cases have caused a great deal of public concern in New South Wales in the last few decades.¹ The problem is not confined to New South Wales; other States and countries have experienced serious court delays and the problems that arise from them.

The delivery of justice, due to its very nature, is time-consuming. Some delay between initiation of proceedings and resolution is inevitable. The delay that needs to be addressed is 'the amount of time between the commencement and the conclusion of court proceedings which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of its final outcome'.² This paper canvasses the causes of these unnecessary delays and proposals (particularly for legislative action) that have been adopted or put forward to deal with them. The paper does not discuss the merits of particular proposals.

A number of terms used in this paper are defined in Appendix A.

2. THE PROBLEM OF COURT DELAY

The truism "justice delayed is justice denied" captures the essence of the problem of court delay. The harsh consequences of court delay for persons involved in civil and criminal matters were summarised in an article by then Justice Samuels:³

It is not difficult to appreciate why undue delay in our courts engenders such concern. Delay may impose unnecessary financial hardship on plaintiffs, particularly those awaiting compensation for personal injuries, and on accused persons. Important evidence may be lost because the memories of witnesses dim with the passage of time or, indeed, because crucial witnesses die. The cost of litigation is increased by delay, causing some litigants to abandon otherwise meritorious claims. Delay also has an economic cost in that litigants and accused persons caught up in the court system may be forced to forgo or postpone taking up opportunities they would otherwise have exploited. Delay implies court congestion, which in turn means that the quality of justice delivered in individual cases diminishes because of unreasonable time pressures on judges. The effect of delay in criminal cases can be

¹ For example, questions to the Attorney General, *NSWPD* 14/11/96.

² D Brebner and R Foster, "The Development of National objectives or Goals for the Disposition of Cases in the Higher Courts", (1994) 4 *Journal of Judicial Administration* 100 p 103.

³ Hon Justice G Samuels, "The Economics of Justice", (1991) 1 *Journal of Judicial Administration* 114 p 115.

especially serious. Delay exacerbates the mental, social and financial burdens already borne by accused persons who are, after all, presumed innocent until proved guilty. It also deeply offends community notions of justice that innocent people may be deprived of their liberty for unnecessarily long periods while held in custody awaiting trial because of delays in the court system. Finally, from the perspective of society as a whole, unreasonable delay in the court system causes the erosion of public confidence in the judicial system, and that encourages self-help as a remedy to redress perceived wrongs.

The obligation to provide justice within a reasonable time, particularly in criminal matters, has been recognised for centuries. The *Magna Carta* of 1297 declared that “To no one will we sell, to no one will we deny or delay right or justice”. A more modern obligation is imposed by the *International Covenant on Civil and Political Rights*, to which Australia is a party. Article 14(3)(c) of the *Covenant* provides that an accused person is entitled to be tried without undue delay.

A specific right of an accused to a speedy trial is recognised in the United States and Canada.⁴ In New South Wales there is no special right to a speedy trial of a criminal charge separate from the right to a fair trial.⁵ Unreasonable delay in a criminal case may produce such unfairness for an accused as to amount to an unfair trial, requiring a stay of the prosecution.

3. MEASURING COURT DELAY

Courts handle large numbers of very different kinds of matters, and administration of cases is a complex task. There are different procedures for different kinds of cases, and a case may be finalised in a number of ways. Most civil cases commenced do not proceed to a trial. Cases may settle, or be discontinued, or finalised by default judgment or summary judgment. Similarly, a large number of criminal cases are finalised as sentence matters because the accused person pleads not guilty. Some are finalised because the Director of Public Prosecutions decides not to proceed with a prosecution, or because the accused person absconds or dies.

The complexity of proceedings means that there are a number of ways of measuring the progress of cases through the courts. In relation to criminal cases, the Bureau of Crime Statistics and Research has identified several commonly used measures of trial court

⁴ The Sixth Amendment to the Constitution of the United States; the Canadian Charter of Rights and Freedoms s 11(b).

⁵ *Jago v District Court of New South Wales* (1989) 168 CLR 23.

proceedings.⁶ These include:

- the time between committal for trial and the date when the trial commences;
- the time between committal for trial and finalisation of the trial by decision of a judge or jury;
- the time between committal for trial and finalisation of a matter regardless of how it is finalised;
- the number of matters committed for trial which have not yet been finalised;
- the time between committal for trial and the earliest date on which a matter can be set down for trial; and
- the number of trial cases finalised within a given period.

Some criminal court statistics measure the time from the date of arrest, rather than the date of committal for trial. Civil cases use similar measurements, usually taking either the date of registration of a matter, or the date of a matter's readiness for trial, as the commencement point for measurement. Each court has its own method of collecting statistics. Criminal case statistics are analysed systematically by the Bureau of Crime Statistics and Research. Existing data collection and analysis procedures have been criticised as inadequate for court management purposes, mainly due to a lack of appropriate computer systems in the courts.⁷

It is worth noting that statistics which measure *median* delay are generally considered more useful than measurements of *average* delay, as a few exceptionally long or short delays can distort the average. The median delay is the middle figure, where 50% of figures are above it and 50% are below it.

4. OVERVIEW OF COURT DELAY IN NEW SOUTH WALES

In the last few decades the New South Wales courts have experienced some very serious delays. For example, in the District Court in some civil matters delays of 10 or 15, or even 20 years were not unknown.⁸ In recent years delays have decreased significantly. In June

⁶ D Weatherburn, *Measuring Court Performance: Indicators for Trial Case Processing*, Crime and Justice Bulletin No 30, June 1996, NSW Bureau of Crime Statistics and Research p 3.

⁷ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 45

⁸ His Honour Judge A Garling, *Litigation Reform: The New South Wales Experience*, Paper presented at the New South Wales Legal Convention Forum on Reinventing the Courts, 1/11/96.

1996, the Public Accounts Committee of the New South Wales Parliament Legislative Assembly in its *Report on Customer Service in Courts Administration* found that:

While some success has been achieved in reducing court backlog and delay, this has not been universal. Accordingly, the objective of reducing court backlog and delays is as important now as it was in the late 1980s.⁹

The Report stated that:

The Committee is pleased to observe that, in certain divisions and jurisdictions, court backlog and delay have fallen. This applies in particular to the Common Law Division of the Supreme Court; both the Civil and Criminal divisions of the District Court; and the Local Court. The Committee does note, however, that in regard to the District and Local Courts, the improvements in the last two years have been minimal. More importantly, however, in some jurisdictions, backlog and delay have increased. This is particularly true of the Court of Appeal and the Criminal Division of the Supreme Court.¹⁰

Some relevant statistics are set out below. See Appendix B for more detailed figures.

4.1 Criminal Jurisdiction

Supreme Court

The Bureau of Crime Statistics and Research found that between 1990 and 1995 there was no significant upward or downward trend in the median delay between committal for trial and trial finalisation in the Supreme Court.¹¹ Where the accused was eventually acquitted of all charges at a defended hearing, the median delay from committal to outcome was 401 days in 1995, decreasing from 405.5 days in 1994, and 506.5 days in 1993. In 1992 the median delay was 366.5 days.¹²

However, the Supreme Court recorded an increase in delay for criminal trials in its 1995 *Annual Review*. According to the *Annual Review*, the delay for trials where the accused was

⁹ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 22.

¹⁰ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 22.

¹¹ New South Wales Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice: New South Wales 1995* p 21.

¹² New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995*, Table 3.14a.

in custody increased from 6-8 months in 1994 to 10-12 months in 1995. The delay for trials where the accused was on bail increased from 11-13 months in 1994 to 13-16 months in 1995.¹³

District Court

The Bureau of Crime Statistics and Research found that between 1990 and 1995 there was a significant downward trend in the median delay between committal and finalisation for District Court matters where there was a defended hearing.¹⁴ The median delay from committal to outcome where the accused was eventually acquitted of all charges increased from 387 days in 1994 to 453.5 days in 1995. In 1992 the median delay was 568 days, and in 1993 it was 451 days.¹⁵

The District Court has developed time standards for disposal of cases.¹⁶ In the criminal jurisdiction, hearings should be commenced:

- for defended matters, within 112 days (4 months) of committal in 90% of cases, and within 1 year of committal in 100% of cases.
- for sentencing matters, within 2 months of the committal in 90% of cases, and within 6 months of committal in 100% of cases.

District Court defended matters statewide 1995 - compliance with time standards¹⁷

Accused status	112 days	6 months	12 months	> 12 months
Custody	47.5%	26.2%	20.1%	6.1%
Bail	23.9%	19.1%	31.4%	25.6%

¹³ Supreme Court of New South Wales, *Annual Review 1995* p 8.

¹⁴ New South Wales Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice: New South Wales 1995* p 19.

¹⁵ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995*, Table 3.14e.

¹⁶ District Court of New South Wales, *Annual Review 1995* pp 12-13

¹⁷ District Court of New South Wales, *Annual Review 1995* p 62.

Local Court

In 1994-1995, the Local Courts maintained a State-wide average time of 11 weeks for matters to proceed from first appearance to hearing. At the end of 1995, Statewide the average waiting time was 10 weeks.¹⁸ The median delay between first appearance and determination for defended cases decreased significantly between 1990 and 1995.¹⁹

Where all charges were dismissed at a defended hearing, the median duration of cases from first court appearance to determination of the charges has decreased over the last few years, from 97 days in 1992 to 94 days in 1993, 87 days in 1994 and 81.5 days in 1995.²⁰

The Local Court has set time standards for criminal cases. The standards set out the appropriate periods of time between steps in various types of criminal proceedings. For example, on a summary charge, the standard is 105 days from arrest to hearing. The standards are set out at Appendix E.

4.2 Civil Jurisdiction

Supreme Court

Delay in the Supreme Court varies between the different divisions. According to the 1995 *Annual Review* of the Supreme Court:

- in the Civil List, in 1995 the average time from status conference to hearing was 12 months;
- in the Equity Division, there is normally a delay of approximately 13 months between the date of placement of a case in the General List and the date of hearing;
- in the Court of Appeal, at the end of 1995 the time from notice of appeal to hearing for standard (no priority) appeal cases was about 43 months. At the end of 1994 it was about 31 months.

According to the 1994-95 *Annual Report* of the Attorney-General's Department:

- in the Commercial Division, the time from registration to finalisation in 1994-1995

¹⁸ *New South Wales Chief Magistrate's Review 1995* p 54.

¹⁹ New South Wales Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice: New South Wales 1995* p 17.

²⁰ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1995* p xi.

was 9 months;

- in the Equity Division General List , in 1994-95 the time from readiness for hearing to hearing was 15 months;
- in the Court of Appeal, the time from registration to finalisation in 1994/95 was 35 months.

The Common Law Division has developed time standards for various steps in civil proceedings as part of its case management scheme. The standards are set out in Supreme Court Practice Note No. 88. In Ontario, Canada, there is a time standard of 18 months for civil matters in the Supreme Court.²¹

District Court

In the District Court for all of New South Wales in 1995, the median disposal time from commencement to finalisation of proceedings was 14.2 months. In Sydney, the median was 15.1 months.²²

The District Court has developed time standards for the disposal of civil cases. Matters should be disposed of within 12 months of the initiation of proceedings in 90% of cases, and within 2 years of the initiation of proceedings in 100% of cases.²³

Local Court

Local Courts maintained a State-wide average time of 11 weeks for matters to proceed from first appearance to hearing.

In the Small Claims Division, at the end of 1995, the average listing time for pre-trial review was four weeks with a further four weeks to an assessment hearing.²⁴ In the Motor Accidents List an action can be finalised within 12 months of commencement, subject to the readiness of the parties.²⁵

²¹ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, Submission by the Audit Office of New South Wales, p 30.

²² District Court of New South Wales, *Annual Review 1995* p 20.

²³ District Court of New South Wales, *Annual Review 1995* p 13. Compliance figures for civil cases were not given in the *Annual Review*.

²⁴ *New South Wales Chief Magistrate's Review 1995* p 12.

²⁵ New South Wales Attorney General's Department, *Annual Report 1994/95* p 35.

5. CAUSES OF DELAY

A report by Coopers & Lybrand on the New South Wales court system concluded that:

There is no single cause, or even group of causes, that can be identified as representing the main problem. This complicates the task of remedying the present situation, because it requires coordinated and integrated action.²⁶

Two basic sources of court delay have been identified:

There are system delays - the inability of the court to provide an early date for every case as soon as it is ready for trial; and there are party delays - the failure by the parties to the litigation to get the case ready for trial as soon as reasonably possible.²⁷

System delay tends to occur whenever the demand for court time exceeds court capacity.²⁸ There are a great many matters that affect the demand for court time, and its availability. The Bureau of Crime Statistics and Research, in the context of criminal cases, has identified several broad factors which influence court delay. They include: (1) the preparation time to bring a matter to the point where it can be listed for trial; (2) the amount of court time available to hear trials; (3) the percentage of court time used in the hearing of trials; (4) the duration of trials; (5) the number of cases registered for trial; and (6) the proportion of matters registered for trial which proceed to trial.²⁹

This paper uses these broad factors as a framework to canvass the range of matters relating to the parties and the court system that have been identified as creating court delay. The following list of matters does not separate causes relevant to civil cases from those relevant to criminal cases; many causes are relevant to both jurisdictions.

5.1 Preparation time

Some of the matters which have been said to prolong the time between commencement of a case and readiness for hearing are:

²⁶ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶18.

²⁷ J Wood, "The Changing Face of Case Management: The New South Wales Experience" (1995) 4 *Journal of Judicial Administration* 121 pp 121-122.

²⁸ D Weatherburn, *Grappling With Court Delay*, Crime and Justice Bulletin No. 19, January 1993 p 2.

²⁹ D Weatherburn, *Measuring Court Performance: Indicators for Trial Case Processing*, Crime and Justice Bulletin No. 30, June 1996, NSW Bureau of Crime Statistics and Research p 4.

- Slowness by the parties in following pre-trial procedures and preparing for trial. For example, the prosecution may take a long time to draw up the indictment after the accused is committed for trial. Parties or their lawyers may deliberately delay preparation for their own purposes, in hope of failing memories in witnesses, or loss of witnesses through travel or death, or in order to place financial pressure on the other side by increasing the costs associated with delay.
- Extended interlocutory proceedings, and appeals from interlocutory orders. Final determination of a case may be substantially delayed while interlocutory applications (for example, an application to join other parties to the proceedings) are decided.
- Failure by the parties to narrow the issues in dispute as early as possible. It is said that failure to hold early and constructive discussions in civil or criminal matters to identify the real points of contention increases the time required to prepare for trial.
- Adjournments of cases. Cases which are adjourned must then be re-listed, and must wait behind other cases in the queue for their next chance at a hearing. Each case re-listed for trial keeps out of the list another case which would otherwise have been given a hearing date.
- Over-listing cases. To avoid court time being wasted as a result of late settlement or adjournment of cases, courts commonly list back-up cases for the same day. If these back-up cases are not reached on the day, they have to be re-listed, causing inconvenience to the parties and witnesses. Some authorities argue that over-listing adds to the problem of court delay: by generating a high level of uncertainty among counsel about whether or not a trial will go on, it induces a lowered state of readiness on their part to proceed on any particular occasion that a case is listed. This then increases the likelihood of their seeking adjournments.³⁰
- Under-estimate of length of trial. If a case takes more time than the amount estimated and allocated to it, it must be adjourned and re-listed.
- Judge-shopping. It has been suggested that accused persons sometimes plead not guilty and seek adjournments until their case is listed before a judge considered to sentence leniently.³¹
- Queues for pre-trial procedures and applications. Where a matter is required to queue for pre-trial procedures, more time is taken for it to be ready for trial.

³⁰ D Weatherburn, *Grappling With Court Delay*, Crime and Justice Bulletin No. 19, January 1993, NSW Bureau of Crime Statistics and Research p 7.

³¹ *Ibid* p 7.

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- Reluctance or lack of power of judges to supervise or control the pre-trial activities of the parties. The courts have been criticised for not taking a more active role to ensure that cases do not stagnate in waiting lists for lack of attention, or become bogged down in pre-trial manoeuvres by the parties.
 - Delays in the legal aid system in processing applications for aid. Delay in the provision of legal aid tends to prolong the time to prepare for trial.³² Privately funded appeals are commonly made ready for hearing a good deal more quickly than publicly funded ones.³³ The vast majority of accused persons depend on legal aid.
 - The absence or the late involvement of legal representation tends to delay preparation. Further, where an accused person cannot obtain legal representation, the trial should (in the absence of exceptional circumstances) be adjourned or stayed until legal representation is available.³⁴ In a time of decreased legal aid funding, the courts face the prospect of large numbers of criminal cases being postponed until legal aid is available. If legal aid funding for a case runs out before the trial is finished, the case may be postponed indefinitely.
 - Changes in legal representation tend to delay preparation, as a second lawyer needs to take instructions and become familiar with the matter.
 - Co-ordinating a diverse range of groups or individuals to appear for the hearing of a case. It can be difficult to arrange for all the necessary people - lawyers, witnesses, interpreters and so on - to be available for hearing.

5.2 Amount of court time available to hear cases

The main factor determining the amount of available court time is the number of judges. For example:

A clear example of the 'mismatch' between resources and workloads can be seen in the Court of Appeal. The workload of this appellate court increases in direct proportion to increases in the number of first instance Judges who make the decisions which are the subject of appeal. In 1966, when the Court of Appeal was established, there were 8 judges to hear appeals arising from the work of 48 first instance Judges. In 1995 the number of first instance Judges had grown to 117, while the number of Judges in the Court of Appeal had languished at 10.

³² Comment by Chief Justice Gleeson, recorded in the Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 20.

³³ Supreme Court of New South Wales, *Annual Review 1995* p 39.

³⁴ *Dietrich v R* (1992) 109 ALR 385.

Further, the use of judges for non-judicial functions, such as on Royal Commissions and inquiries, or dealing with administrative matters, decreases the amount of judge time.

5.3 Percentage of court time spent in hearing cases

Matters which tend to reduce the amount of available court time actually spent hearing matters include:

- Late settlement or adjournment of cases, and late changes of plea in criminal matters. Where it is not possible to arrange for another case to come on at short notice, the court time set aside is wasted. Replacement cases are often difficult to organise:

Although some of this time [resulting from late postponement of long trials] was utilised to hear other shorter trials, the majority of this period was lost to criminal cases due to the reluctance of parties to have criminal trials heard on short notice. Where the Court was unable to list a criminal trial, the available judge-time was used for civil cases.³⁵

- Under- listing of cases. If a court has time to hear more cases than were listed, and no replacement case can be found, the judge time is wasted.
- Over-estimate of length of trial. Cases that take less time than estimated leave a court with unused time, if no replacement case can be brought on.
- Trials that need to be reheard due to a mistrial, or a hung jury.³⁶ Rehearing trials reduces the court time available for hearing new matters.

5.4 Trial duration

Long trials occupy the courts and reduce the number of cases that can be handled. Although most criminal trials are relatively short,³⁷ it is said that the number of long trials is

³⁵ Supreme Court of New South Wales, *Annual Review 1995* p 9.

³⁶ For more information see G Griffith, *Majority Jury Verdicts*, Briefing Paper No 6/96.

³⁷ A study suggested that criminal trials of duration longer than 20 days represent a very small proportion of completed trials in each year: from less than 1 percent to 8 percent. The vast majority (over 90 percent in most jurisdictions) of criminal trials took ten days or less: J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p 19.

increasing.³⁸ Some of the matters which have been identified as lengthening trials are set out below.

- The failure or inability of the parties to define or narrow the issues before the trial, so that time is spent during the trial identifying the issues genuinely in contention.³⁹
- The ability of an accused person to refuse to clearly state the defence case until close of the prosecution case.⁴⁰ The prosecution may be forced to prove at trial all the elements of the offence, even those which the accused does not contest.
- Insufficient or inadequate preparation of cases.
- Insufficient or late service of statements of witnesses and exhibits.
- Legal aid funding. Trials in which the defence was funded solely from private sources tend to be shorter than those funded by legal aid alone or a combination of legal aid and private sources.⁴¹
- Lack of legal representation. Cases in which the accused or the litigants are unrepresented tend to be longer than cases involving legal representation. It has also been argued that a reduction in legal aid funding will encourage accused persons to spin out trials to exhaust their legal aid funds, in order to argue that the trial should be stayed because the accused is not legally represented.⁴²
- Complexity of the case. Trials tend to take longer where there are a large number of issues, or the law is complicated, or there is a great deal of evidence.

³⁸ Supreme Court of New South Wales, *Annual Review 1995* p 8; District Court of New South Wales *Annual Review 1995* p 47.

³⁹ J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p xi; J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 quoting G Santow, p 4.

⁴⁰ J Wood, "A Time for Change - But How Much?" in National Crime Authority, *National Complex White Collar Crime Conference*, AGPS, 1993.

⁴¹ J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p xi.

⁴² N Cowdery, Director of Public Prosecutions (NSW), quoted in B Lagan, 'Legal aid cuts: DPP warns of jury tampering' *Sydney Morning Herald* 12/11/96.

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- Number of parties. Criminal trials with multiple accused persons,⁴³ and civil trials with a number of plaintiffs and/or defendants,⁴⁴ are said to take longer.
 - Number of witnesses. Trials tend to take longer where there are a large number of witnesses.⁴⁵
 - Number of charges. The practice of over-charging accused persons (that is, laying the maximum number of the most serious charges possible, rather than laying selected charges that represent the criminality of the accused's conduct) is said to lengthen trials.⁴⁶
 - Nature of the charges. Criminal cases where the charges relate to drugs, fraud, or conspiracy tend to take longer than other cases.⁴⁷
 - Reluctance or lack of power of judges to control the course and manner of proceedings effectively.⁴⁸
 - Lawyers who are too verbose, or take poor points, or call inessential evidence, or undertake overlong or unfocused cross-examination,⁴⁹ or explore all possible issues at great length, however peripheral.
 - Reluctance by lawyers to make concessions or admissions 'for fear of their unknown

⁴³ J Wood, "A Time for Change - But How Much?" in National Crime Authority, *National Complex White Collar Crime Conference*, AGPS, 1993. However, a study of long trials found no linear relationship between the length of trial and number of defendants: J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p 28.

⁴⁴ R Cranston, P Haynes, J Pullen and I Scott, *Delays & Efficiency in Civil Litigation*, Australian Institute of Judicial Administration Inc, 1985 p 51.

⁴⁵ J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p 28.

⁴⁶ J Wood, "A Time for Change - But How Much?" in National Crime Authority, *National Complex White Collar Crime Conference*, AGPS, 1993. However, a study of long trials found no linear relationship between the length of trial and the number of charges laid: J Chan and L Barnes, *ibid*, p 28.

⁴⁷ J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p 23.

⁴⁸ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 pp 4-5.

⁴⁹ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 quoting G Santow, p 5.

consequences'.⁵⁰

- The complexity of many of the rules of evidence, and restrictions placed on the presentation of evidence;
- Interruptions of the trial due to the need for evidentiary rulings, and the holding of examinations on the voir dire.
- Jury trials. The use of juries is said to increase the length of trials, particularly complex fraud cases, due to difficulties in explaining complex commercial transactions or technical evidence; difficulties in keeping juries focussed on many issues; the need to explain and repeat matters which would require no explanation to a judge; and the need to remove the jury during a voir dire.

5.5 Number of trials registered

When a case is ready for hearing, it is placed in a queue of cases for a hearing date. The number of cases pending before the courts affects the time required for a case to obtain a hearing date.

The speed at which matters in court can be dealt with depends largely on the rate at which new cases enter the system. To this extent the courts can be described as 'demand driven'. Sudden and unpredictable increases in new cases will lead to delays, and this is always a significant factor with which the courts and court administrators have to contend. The court system has to contend with a variability not only in entry rates but also in the complexity and type of cases that come before the courts.⁵¹

There has generally been a decline in the number of new civil and criminal cases in New South Wales in the last few years (see Appendix B). Some of the factors which are said to affect the number of cases are:⁵²

- the population level;
- the number of police (affecting the number of prosecutions);

⁵⁰ *R v Higgins* (1994) 71 A Crim R 429 at 443.

⁵¹ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, ¶2.1.

⁵² J Dowd, "Delays in Criminal Trials" (1989) 21 *Australian Journal of Forensic Sciences* 91 p 93.

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- the crime rate;
 - the availability of legal aid;
 - the general litigiousness of the community;
 - the amount of regulatory legislation;
 - the clarity of the drafting of legislation.⁵³

5.6 Proportion of matters registered for trial which proceed to trial

Most civil matters, and a significant proportion of criminal matters, that are commenced do not ultimately proceed to a trial.⁵⁴ Plainly, the more cases that are disposed of without a trial, and the earlier such cases are disposed of, the more judge time is available to hear cases which do proceed to trial.

Factors which are said to affect the number or timing of cases finalised without trial include:

- The existence of incentives or sanctions for parties to discuss resolution at an early stage; for example, incentives to plead guilty, or sanctions for failure to accept a reasonable offer of compromise.
- The availability and use of alternative dispute resolution procedures.
- The availability of legal aid in criminal matters. It is argued that ‘because there is no consistent merit testing for legal aid in criminal matters, some habitual offenders may be pleading not guilty as a matter of course, when they have no real prospect of acquittal’.⁵⁵
- The rate of acquittals in criminal matters. It is argued that high acquittal rates at trial encourage accused persons to plead not guilty.

⁵³ Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform*, Report, February 1993 p 14.

⁵⁴ For example, in the civil jurisdiction of the District Court in 1995, 18% of cases were disposed of by judgment of the court, 22% by arbitration, and 60% by settlement, discontinuance or other means: District Court of New South Wales, *Annual Review 1995* p 18.

⁵⁵ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1021.

6. MEASURES TO REDUCE DELAY

Three basic approaches to overcome court delays have been identified: increasing the resources available to the courts; reducing the demand for the services of the courts; and using the existing resources of the court system more efficiently.⁵⁶ Most reform measures implemented have concentrated on the last two measures, as demand for limited public funds has restricted the government's ability to increase resources for the courts.

A preliminary issue in discussing reforms to reduce court delay is the role of Parliament and the importance of preserving judicial independence. Many reforms could be implemented either by legislation, or by the courts themselves incorporating changes into their rules and practices. Some take the view that delay-reducing requirements and standards should be effected by legislation. Others believe that Parliament should focus on increasing the powers of the court to allow judges to control cases as they see fit. For example:

In general, in relation to matters of case management, the persons with most understanding and experience are the judges themselves. I suggest therefore that, as a matter of policy, as much of the detail as possible be left to the rule making power of a court, where such power exists. This would not only take advantage of the experience of the judges, but it would allow them to fine-tune practice and procedure from time to time without involving the Parliament unnecessarily.⁵⁷

It is suggested, however that reforms which affect the rights of individuals should be enacted by Parliament:

If the right of immediate access to the courts is to be qualified, the appropriate forum in which the so-called reforms should be considered is the Parliament - not the Rules Committee of a court.⁵⁸

The following is a list of reforms that have been proposed or implemented to reduce delay.

6.1 Modifying the adversarial system

The traditional adversarial system in Australia gave the parties, not the courts, responsibility for the direction and pace of litigation. The role of judges was to hear and determine such

⁵⁶ G Samuels, "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114 p 118.

⁵⁷ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 p 34.

⁵⁸ Hon Sir Gerard Brennan, *Key Issues in Judicial Administration*, Paper presented at the 15th Annual Conference of the Australian Institute of Judicial Administration, 20-22 September 1996.

cases as the parties prepared, not to force the parties to make their cases ready. This system has been criticised in recent years as a fundamental cause of slowness in the courts. It is said to provide no incentive for the parties to conduct matters with expedition, and to encourage a 'win at all costs' attitude in lawyers that discourages reaching an agreed solution. The Australian Law Reform Commission is currently reviewing the adversarial system of litigation, following a reference to it by the former Labor Federal Government.

Many have commented that substantial reductions in court delay will require a change of attitude on the part of judges and lawyers, and a move to more inquisitorial practices and procedures that give the courts greater control over proceedings. A large number of the specific recommendations identified in this paper are in effect aimed at making the New South Wales legal system a more inquisitorial one - many of the proposals are aimed at increasing the power of judges or limiting the ability of parties to control proceedings.

Judges have mentioned the need to change the legal culture of suspicion, competitiveness, lengthy speeches and endless cross examination, and the adoption of a more cooperative and focused approach between the parties, or in criminal matters the Crown and the defence.⁵⁹ Commentators have recommended that judges should be encouraged by judicial education programs to use their existing powers and discretions to expedite matters (for example, the power to impose costs sanctions on lawyers who delay proceedings, or the power to appoint a neutral expert to report to the court).

Although criminal proceedings tend to be hostile and adversarial by nature, there are also proposals to require or encourage a degree of cooperation between defence and prosecution (see page 27).

6.2 Court structure and funding arrangements

The Public Accounts Committee found that the Treasury's funding strategy for the Attorney General's Department for the operation of courts is inappropriate to ensure a reduction in court delay. Under the current system of funding, the more cases come into court, the more money the Department gets. Money is also received from court filing fees. There is thus little incentive to reduce the number of cases coming into the courts. The Committee recommended that Treasury review the Attorney General's funding system as soon as possible with a view to identifying 'a less perverse arrangement'.⁶⁰

⁵⁹ J Chan and L Barnes, *The Price of Justice: Lengthy Criminal Trials in Australia*, Hawkins Press, 1995 p xi.

⁶⁰ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996 p 49. The Attorney General's Department is currently preparing a Discussion Paper on court funding.

In relation to court structure, merging the District and Supreme Courts to form a single court similar to the Crown Court in England and Wales has been proposed to improve the efficiency of the courts:

There is wasteful duplication, with separate lists and separate bureaucracies. They even use separate courtrooms, so that a collapsed trial in the Supreme Court can leave one criminal trial courtroom empty, while a criminal trial in the District Court list has to be adjourned because no courtroom is available.⁶¹

It has also been suggested that the courts should manage themselves, rather than being managed by the Attorney-General's Department:

As a general comment I might say that the absence of administrative independence for the courts is something which in my view impedes the efficient operation of the courts. Moreover, it is contrary to the doctrine of the separation of powers.⁶²

6.3 Procedural and evidentiary reforms

6.3.1 Case management

One way in which the courts in New South Wales are moving away from the adversarial system is the introduction of active judicial management of cases in civil matters in the last decade. New approaches to case management require parties to prepare their cases for trial according to a number of events controlled by the court, such as pre-trial conferences, directions hearing and call overs. At each point, the progress of the case is assessed and opportunities are taken to explore possibilities for settlement or referral to alternative dispute resolution schemes to encourage timely disposal. Case management is aimed at increasing the number of early settlements, encouraging the parties to prepare thoroughly and identify the contentious issues at an early stage, bringing cases that cannot settle to trial in the shortest possible time, and reducing the costs of litigation.

Case management is also being introduced for criminal matters, although the courts have fewer powers to control the parties. Justice Wood has commented that although the Supreme Court is working towards criminal case management, without legislative support it has only limited capacity to achieve its objective: 'What is lacking is a power of

⁶¹ A Roden, "Delays in Criminal Trials" (1988) 21 *Australian Journal of Forensic Sciences* 104 p 111.

⁶² Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, Submission by Hon Justice R O Blanch, Chief Judge of the District Court of New South Wales.

compulsion, or sanction for non-compliance.’⁶³

There are a number of different kinds of case management schemes, as each court develops and fine-tunes systems that best suit its requirements. Legislative proposals to promote case management include:

- Impose a positive requirement on judges to handle matters expeditiously.
- Empower judges to require parties to civil litigation to undertake mediation as a precondition to a judicial hearing.
- Expressly empower judges to limit the number of expert witnesses in a particular field in any individual case.
- Empower judges in the criminal jurisdiction to determine before trial questions of law that are likely to arise, and any question of fact that may be determined by a judge alone.⁶⁴
- Empower judges in the criminal jurisdiction to hold pre-trial hearings, give such directions as they think fit regarding issues or matters which must or should be resolved before trial, and expand the power of judges to impose sanctions on parties and lawyers, for example in relation to costs.⁶⁵
- Expand the ambit of summary judgment in civil matters to allow judgment to be given for either party, not only the plaintiff.⁶⁶
- Enlarge the court’s jurisdiction to give summary judgment on the application of either a claimant or defendant or on the court’s own initiative, on the grounds that

⁶³ J Wood, ‘The Changing Face of Case Management: The New South Wales Experience’ (1995) 4 *Journal of Judicial Administration* 121 p 140.

⁶⁴ For example, WA *Criminal Code* s 611A confers a discretionary power on the court to determine before the trial any question of law or procedure that arises or may arise in the trial, and any question of fact that can lawfully be determined by a judge alone without a jury.

Currently the District Court in criminal proceedings may determine questions of admissibility of evidence before trial: District Court Rules Pt 53 r 11.

⁶⁵ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992 p 62. These powers exist in civil matters: *Supreme Court Act* 1970 s 76A.

⁶⁶ G Davies, ‘A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale’, (1996) 5 *Journal of Judicial Administration* 201 p 212.

a case or part of a case has no realistic prospect of success.⁶⁷

- Empower the Local Court to develop its own rules regarding criminal proceedings, and amend the *Justices Act* 1902 to 'reflect the modern approach to judicial management within the Local Court and simplify procedures'.⁶⁸

6.3.2 *Early disclosure*

It is argued that current arrangements for pre-trial exchange of information in civil cases do not sufficiently focus the attention of parties on identifying the issues and settlement possibilities. For example, the traditional formal pleadings are often standardised and not very useful in discovering the real points of contention between the parties.

Commentators have recommended that where desirable the parties to civil litigation should be required to prepare comprehensive case statements before trial, to be provided to the court and to the other side. The defendant would be required to prepare a written response specifically addressing the allegations in the plaintiff's case statement. For example, it is suggested that if a party does not admit an allegation, it must state positively in its formal response that the allegation is untrue or that it does not know whether it is true or not.⁶⁹ Under the current system a party may simply deny or not admit the allegations of the other.

In criminal matters it has also been recommended that in suitable cases the prosecution could be required to prepare a case statement, and the defence could be required to submit a defence response, with the defence to address specifically the matters raised in the prosecution case statement, including disclosure of expert evidence (see page 27).⁷⁰

It has been proposed that the courts should require written submissions outlining arguments in civil cases to be exchanged before trial, in order to reduce the time required for oral argument.⁷¹ It has also been recommended that in complex cases the parties should be

⁶⁷ Lord Woolf, *Access to Justice: Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London 1996.

⁶⁸ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, Submission of Chief Magistrate, p 14,

⁶⁹ G Davies, "Justice Reform: A Personal Perspective", Paper presented at the 1996 Legal Convention, 1/11/96.

⁷⁰ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993

⁷¹ Access to Justice Advisory Committee, *Access to Justice: An Action Plan* AGPS 1994 ¶17.37-40.

required to agree upon a statement of issues,⁷² and to exchange statements of witnesses' evidence in chief.

6.3.3 *Listing procedures*

The delays caused by under-listing and over-listing demonstrate the importance of the courts developing accurate listing procedures that ensure that as many cases as possible proceed on the day fixed for hearing. The courts are developing and fine-tuning their listing procedures for various jurisdictions to achieve this end.⁷³

6.3.4 *Special schemes*

Special legislative schemes have been created to handle some high-volume areas of civil claims as efficiently as possible. For example, the Motor Accidents Act 1988 sets out a tight, streamlined litigation schedule.

The courts have also developed special schemes and lists to deal with certain kinds of litigation, such as the GIO Tail Project in the District Court to process longstanding motor accident claims.

6.3.5 *Greater uniformity between courts*

Greater uniformity between the courts in New South Wales (and for all Australian courts) has been recommended. It is argued that common forms and procedures should be introduced all courts, and unnecessary formalities should be removed, since the existing differences introduce needless complexity that takes up the time and effort of practitioners.⁷⁴

6.3.6 *Reforms to committal proceedings*

In recent years there have been several reforms to committal proceedings to make them as short as possible and avoid mini-trials. For example, some limitations have been placed on oral examination of victims of violence at committals, and much of the evidence is provided in written statements. Further modifications, or even abolition, of committals have been recommended. The New South Government has proposed substantial reforms to committal

⁷² G Davies, "Justice Reform: A Personal Perspective", Paper presented at the 1996 Legal Convention, 1/11/96.

⁷³ For example Supreme Court *Annual Review 1995*, District Court *Annual Review 1995*, Chief Magistrate's *Annual Review 1995*.

⁷⁴ Law Society of New South Wales, *Access to the Civil Courts*, Discussion Paper, July 1992 p 8.

proceedings in the Justices Amendment (Committals) Bill 1996.⁷⁵

It has also been said that many accused persons seek judicial review of committal proceedings without good reason, simply to delay the final trial. To prevent these baseless applications, it is argued that judicial review should not be available unless the case is exceptional.⁷⁶

6.3.7 *Limiting discovery and interrogatories*

Discovery and interrogatories are pre-trial processes in civil litigation by which one party requires another to disclose information or documents (see Appendix A).

Interrogatories have been identified as a potential cause of delay in proceedings, as the questions are often unnecessary or oppressive, and responses are often 'standardised and prolix'.⁷⁷ Discovery has also been criticised as open to misuse:

Discovery is said to enable parties to make a more accurate evaluation of the strengths and weaknesses of a case, with the result that the issues are narrowed or the case settled. Time and costs are therefore saved. Surprise at trial is also supposed to be reduced in that discovery exposes false or misleading evidence. Finally, evidence is said to be uncovered which, if not revealed until trial, would lead to delay as counsel sought to assess it. But if discovery reduces delays and inefficiencies in these ways, it can be argued that it increases them by other means. The process itself can be time-consuming and costly and discovery can be used as a tactic to delay, obfuscate and harass.⁷⁸

In New South Wales the parties' right to require discovery has been limited by the courts.⁷⁹ Further suggestions to reduce the use of discovery and interrogatories include:

- Requiring leave of the court before interrogatories and discovery notices may be

⁷⁵ For more information about committals and the Bill, see H Figgis, Briefing Paper No 23/96, *Reform of the Committal Process in New South Wales and the Justices Amendment (Committals) Bill 1996*.

⁷⁶ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992 p 112. See also B Naylor, "Justiciability of decisions in the criminal process: review of committal proceedings in the Federal Court", (1990) 19 *Federal Law Review* 352.

⁷⁷ R Cranston, P Haynes, J Pullen and I Scott, *Delays & Efficiency in Civil Litigation*, Australian Institute of Judicial Administration Inc, 1985 ¶9.19.

⁷⁸ *Ibid* ¶9.1.

⁷⁹ Supreme Court Rules Part 23.

issued.⁸⁰

- Limiting discovery to documents on which a party relies or which to a material extent undermine his or her case or support another party's case.
- Limiting discovery to documents directly relevant to an issue in the proceedings.⁸¹
- Providing that interrogatories be at the expense of the party (or the party's lawyer) that administers them unless the court certifies at the hearing that the interrogatories were proper.
- Tightening time limits within which notices for discovery and interrogatories must be served after close of pleadings.⁸²

6.3.8 *Fewer adjournments*

Conscious of the burden that adjournments place on the court system, judges are becoming more reluctant to agree to adjournments. The High Court recently indicated that factors other than the interests of litigants should be taken into account in exercising the discretion to grant an adjournment:

In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties.⁸³

Measures to reduce demand for adjournments include:

- Limit or abolish the practice of over-listing (see page 11).
- Discouraging judge-shopping. Accused persons may contrive adjournments until

⁸⁰ For example, the Queensland Supreme Court Rules Order 35 r 21 provides that interrogatories may only be granted by leave of the court, and only if the court is satisfied that there is not likely to be available to the applicant at the trial any other reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory.

⁸¹ For example, Queensland Supreme Court Rules, Order 35.

⁸² Victorian Law Reform Commission, *Delays in Supreme Court Actions*, Melbourne 1976 pp 18-19.

⁸³ *Sali v SPC Ltd* (1993) 116 ALR 625 at 629; M Howell, "Your Time is Up": The Imposition of Time Limits for the Presentation of Cases at Hearings", (1996) 5 *Journal of Judicial Administration* 170 p 174.

they are listed before a lenient judge. Judge-shopping could be avoided by listing matters before the same judge, regardless of any adjournments, or by addressing the problem of sentencing disparity between judges.⁸⁴

6.3.9 *Mandatory time limits for the disposal of cases*

Some commentators have suggested legislating mandatory time limits for the courts to dispose of criminal cases, setting maximum time limits for the period between charge and committal, and between committal and trial. Similar rules exist in some states in the United States.⁸⁵ Others argue that such time limits are not effective.⁸⁶ Legislative deadlines for the disposal of civil cases have also been suggested.⁸⁷

6.3.10 *Time limits on evidence and submissions*

Several commentators have suggested that judges should be expressly empowered to curtail or to impose time limits on examination and cross-examination and oral submissions.⁸⁸ Another proposal is to permit or require civil trials, particularly appeals, without little or no oral evidence and argument. The parties would submit their evidence, including witness statements, in writing. If the court considered that a witness should be called it could give leave for the parties to examine and cross-examine in the ordinary way.⁸⁹

⁸⁴ D Weatherburn, "Sentence Disparity, Judge Shopping and Trial Court Delay", (1996) 29 *Australian and New Zealand Journal of Criminology* p 147.

⁸⁵ D Brebner and R Foster, "The Development of National Objectives or Goals for the Disposition of Cases in the Higher Courts", (1994) 4 *Journal of Judicial Administration* 100 p 109.

⁸⁶ J Dowd, "Delays in Criminal Trials" (1989) 21 *Australian Journal of Forensic Sciences* 91 p 101; Royal Commission on Criminal Procedure *Report* (UK) (Chairman: Sir Cyril Philips) 1981 Cmnd 8092 ¶8.35.

⁸⁷ D Brebner and R Foster, "The Development of National Objectives or Goals for the Disposition of Cases in the Higher Courts", (1994) 4 *Journal of Judicial Administration* 100 p 110.

⁸⁸ M Moynihan, "Towards a More Efficient Trial Process", *Papers Presented at the Tenth Annual AIJA Conference*, Australian Institute of Judicial Administration Inc, 1992 p 13; G Samuels, "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114 p 123; M Howell, "Your Time is Up': The Imposition of Time Limits for the Presentation of Cases at Hearings", (1996) 5 *Journal of Judicial Administration* 170 p 180.

⁸⁹ A Ligertwood, "Commentary on 'Towards a More Efficient Trial Process'", *Papers Presented at the Tenth Annual AIJA Conference*, Australian Institute of Judicial Administration Inc, 1992 p 37.

Limits on the length of certain civil trials have also been recommended. For example, recently in the United Kingdom the Woolf Report⁹⁰ recommended that a fast-track system for small civil claims should be established with a time limit of 3 hours for hearing each matter.

6.3.11 *Defence disclosure in criminal matters*

In the criminal jurisdiction, the prosecution is required to fully disclose the case against the defendant to the defence before trial. The defendant is not required to disclose his or her defence (except where the defence involves an alibi).⁹¹ A defendant cannot be compelled to disclose his or her defence due to the principles of criminal law that the prosecution at all times bears the onus of proving the guilt of the accused person, and that an accused person has a right to remain silent and has no obligation to provide the prosecution with any material which might assist it.

The absence of any defence disclosure obligations has been criticised as unfairly burdening the prosecution and the courts. It is argued that the prosecution may be put to a good deal of time and effort to prove facts which the defendant does not actually dispute. Several reports have recommended imposing requirements or incentives for the defendant to disclose some aspects of the defence before trial.⁹² It has been recommended that the defence be required to disclose:

- material which is necessary to allow the prosecution to avoid addressing areas not disputed by the defence;
- the nature of any defences which will be raised.

It is also suggested that there should be mandatory mutual disclosure by the prosecution and the defence of proposed expert evidence.⁹³ Similarly, in the United Kingdom it was proposed to require a defendant to disclose before trial defences which, if they take the prosecution

⁹⁰ Lord Woolf, *Access to Justice: Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London 1996

⁹¹ A person charged with an indictable offence may call alibi evidence as of right if he or she has served an alibi notice within 10 days of the date of committal: *Crimes Act 1900* (NSW) s 405A.

⁹² J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 pp 31-32, 40-41; New South Wales Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals*, DP14/1, 1987, Vol 1 ¶ 5.1 ff; M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992 p 42.

⁹³ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992.

by surprise, could cause the trial to be adjourned while investigation is carried out to confirm or disprove them.⁹⁴

Legislation or rules of court in some jurisdictions provide for some disclosure by the accused of the extent to which the Crown case is to be contested and of the nature of the defence (for example, the *Criminal Justice Act 1987* (UK) (limited to serious and complex fraud) and the *Crimes (Criminal Trials) Act 1993* (Vic)).⁹⁵

The *Evidence Act 1929* (SA) s 59j empowers a judge in a criminal or civil matter to dispense with the rules of evidence if the judge thinks that an issue is not genuinely in dispute. In New South Wales in civil matters the courts may dispense with the rules of evidence for proving any matter which is not bona fide in dispute, and with such rules as might cause expense and delay.⁹⁶ In civil and criminal matters in New South Wales the courts may, if the parties consent, dispense with the application of certain rules of evidence.⁹⁷

Although the New South Wales courts are limited in their power to control criminal cases (see page 20), the Supreme Court has introduced Standard Directions for pre-trial defence disclosure at callover in criminal cases.⁹⁸ The directions do not have statutory force and are not part of the court rules or regulations and there is no statutory penalty for failure to disclose. Under the standard directions, the prosecution prepares a case statement, and the solicitor for the accused serves a written statement responding to the Crown case statement. The details which the solicitor for the accused is invited to supply include:

- (1) which, if any, of the facts stated in the Crown case statement will not be in dispute at the trial;
- (2) which, if any, of the facts the accused is prepared to admit;
- (3) which, if any, of the facts may be proved informally;

⁹⁴ Royal Commission on Criminal Procedure *Report* (UK) (Chairman: Sir Cyril Philips) 1981 Cmnd 8092 ¶8.20-22.

⁹⁵ The Act lays down formal pre-trial procedures to narrow issues and resolve disputes. The legislation provides that if the Crown files and serves a copy of the indictment specifying the charge within a prescribed period before the commencement of the trial, the accused must indicate before trial what elements of the offence charged are admitted. After receiving the prosecution case statement, the accused must file a defence response, which indicates the facts, inferences, points of law and evidence in the Crown case with which issue is taken. It must also contain statements of any expert witnesses the accused intends to call.

⁹⁶ *Supreme Court Act 1970* s 82.

⁹⁷ *Evidence Act 1995* s 190.

⁹⁸ Standard Directions dated 25 March 1994.

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- (4) any document or exhibit the tender of which the accused will oppose, with a brief note of the ground of rejection;
 - (5) any question of law relating to the admissibility of evidence that appears likely to arise at the trial and that is out of the ordinary, so as to be likely to require the Crown and the trial judge to research the relevant law; and
 - (6) any facts which the accused will seek to prove at trial, which in the submission of the accused ought to be admitted by the Crown, or which might be proved informally.

The main problem with requiring the defendant to disclose aspects of his or her defence is the difficulty of finding an acceptable sanction for non-compliance, one that does not overly infringe the rights of an accused person. Some of the sanctions that have been proposed include:

- Empowering a judge to exclude at trial evidence of a defence which the accused did not disclose.⁹⁹
- Empowering a judge to order costs against an accused or legal representative who does not comply with disclosure requirements or departs from the disclosed defence.
- Empowering a judge or the prosecution to comment on an accused's failure to disclose a defence at the proper stage, or the accused's departure from the defence disclosed, and to invite the jury to draw inferences from the accused's conduct.¹⁰⁰
- If the accused is ultimately found guilty, empowering a judge to take the accused's obstructiveness into account when sentencing him or her.
- If the accused departs from the disclosed defence, the court should readily allow the prosecution to adjourn the case, call evidence in reply, recall witnesses, make a supplementary opening address, or re-open its case.

A recent report commented that:

In the light of other coercive pressures which are embedded in the structure of the adversarial criminal process as it presently exists, and the importance which is placed on the accused's right to silence and privilege against self-incrimination, we would recommend ... that the current status of defence disclosure be maintained and that

⁹⁹ J Wood, "A Time for Change - But How Much?" in National Crime Authority, *National Complex White Collar Crime Conference*, AGPS, 1993.

¹⁰⁰ *Criminal Justice Act 1987* (UK) s 10; *Crimes (Criminal Justice) Act 1993* (Vic) s 15.

no additional obligations be placed on the defence, at least in ordinary criminal matters. There may be very different needs in complex white collar or financial cases, where the accused is not suffering from many of the disadvantages which confront most criminal defendants.¹⁰¹

Others have suggested that incentives for defence disclosure and co-operation should be established, rather than sanctions for non-disclosure. It is said that experience with Victorian and UK legislation indicates that without real incentives, defence disclosure is unlikely to occur.¹⁰² Some possible incentives for defence disclosure and co-operation falling short of a guilty plea are a sentence discount if the defendant is ultimately found guilty,¹⁰³ or a reduction in the charge.

6.3.12 *Limit or alter trial by jury*

Trial by jury, particularly in civil cases, has been criticised as much more time consuming than trial by judge alone.¹⁰⁴ In New South Wales, trial by judge alone for some indictable offences has been introduced. Normally a person accused of an indictable offence is tried by a jury before a judge. However, under the *Criminal Procedure Act 1986* a person accused of an indictable offence may elect to be tried by a judge alone. An election may only be made with the consent of the prosecutor.

Further proposals to reduce court delay include limiting or varying the role of the jury. For example:

- Introducing majority jury verdicts. It has been argued that the current requirement in New South Wales for unanimous jury verdicts leads to more mistrials and hung juries, and therefore imposes additional burdens of cost and delay on the court system.¹⁰⁵

¹⁰¹ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 p 125.

¹⁰² K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 pp 124-125.

¹⁰³ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 p 46. The Nader Report pointed out that s 442B of the *Crimes Act 1900* (NSW) permits a court to reduce the sentence for a person convicted of an offences where the person has assisted law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence.

¹⁰⁴ G Samuels, "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114 p 122. See also *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 408.

¹⁰⁵ See G Griffith, *Majority Jury Verdicts*, Briefing Paper No 6/96 p 7.

- Abolishing or restricting the use of juries in civil cases. The Coopers & Lybrand Report recommended that consideration be given to providing that all civil matters should be heard without a jury, except that the court should be given a discretion to use a jury on the application of a party, where a matter involves a question of fraud or reputation.¹⁰⁶ In New South Wales the courts may order that all or any issues of fact be tried without a jury.¹⁰⁷ However, these provisions have been narrowly interpreted in a manner that does not permit a court to systematically order non-jury trials in order to speed up the disposal of cases.¹⁰⁸
- Increasing the number of indictable offences that may be heard summarily (that is, without a jury) with or without the accused's consent.

6.3.13 Reform of law of evidence

It has been argued that the trials would be shorter if complex evidence could be presented in a form that aided understanding, where suitable.¹⁰⁹ These suggestions were taken up in the *Evidence Act* 1995 which provides that evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

The *Evidence Act* 1995 also simplified some of the complex rules of evidence, such as the rule against hearsay, and the 'best evidence' rule requiring the production of original documents to the court.

Another proposed reform to the law of evidence is to allow oral evidence to be received by video-link or telephone.¹¹⁰ Delays occasioned by difficulty in arranging for all necessary witnesses to be presented in court could be reduced if more use was made of video-link and telephone evidence. Currently video-link may be used by consent in civil cases, but in criminal cases limited to child witnesses in certain cases.¹¹¹ Telephone evidence is often received in the Commonwealth Administrative Appeals Tribunal.

¹⁰⁶ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1153,

¹⁰⁷ *Supreme Court Act* 1970 s 89; *District Court Act* 1973 s 79.

¹⁰⁸ *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387

¹⁰⁹ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992 p 77.

¹¹⁰ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992 p 114.

¹¹¹ D Byrne and JD Heydon, *Cross on Evidence* ¶ 13267.

6.3.14 *Tape recording police interviews*

It has been argued that tape recording or video-taping police interviews can help to prevent protracted disputation over confessional evidence and therefore reduce the length of trials.¹¹² In 1995 a new section was added to the *Crimes Act* 1900, s 424A, providing that evidence of an admission is not admissible in a trial unless there is a tape recording of the interview during which the admission was made, or there was a reasonable excuse as to why a tape recording could not be made.

6.3.15 *Changes to multiple related trials*

Changes to the handling of multiple related trials to reduce repetition have been recommended:¹¹³

- Jury findings of fact in one trial should bind the Crown and defence in related trials.
- The same judge should be allowed to try subsequent related trials despite having made findings or expressed views in an earlier trial.

6.4 **Reducing the number of cases**

6.4.1 *User-pays civil litigation*

It has been argued that the most economically efficient way to reduce demand for court services in civil matters is to increase court fees. It is also suggested that parties who wish to have their cases heard more expeditiously could pay a surcharge. It is argued that those who cannot afford full court fees would not be excluded because others, such as legal aid agencies, may finance litigation. A full filing fee approach would, it is said, provide an incentive to those who in fact pay the fees to compare the full social costs of the proceeding with the benefits to the litigant.¹¹⁴

Large increases in court fees have not been generally regarded as an acceptable solution to delay, particularly in a time of decreasing funding for legal aid. The Public Accounts Committee has raised the possibility of lower fees for some litigants, subject to a means

¹¹² Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1038.

¹¹³ M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Inc, 1992

¹¹⁴ R Posner, *Economic Analysis of the Law* (3rd ed, 1986) pp 545-548, as explained by G Samuels in "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114.

test.¹¹⁵ However, some commentators have seen merit in the suggestion that a fee system to recover the full costs of the court be introduced for lengthy multi-million dollar commercial disputes.¹¹⁶ Another proposal is to encourage shorter trials by imposing a daily court fee, instead of, or in addition to, the initial filing fee.

6.4.2 *Encouraging civil litigants to settle*

The State government has adopted several initiatives designed to encourage parties to civil cases to resolve their disputes outside of the courts. For example:

- Several tribunals have been set up to handle civil disputes, such as the Consumer Claims Tribunal and the Residential Tenancies Tribunal.
- Courts have some powers to refer parties to neutral evaluation, mediation or arbitration.
- Community Justice Centres have been introduced. In 1989 the Coopers & Lybrand Report recommended that consideration be given to increasing the number of Community Justice Centres progressively, to cover appropriate major population centres.¹¹⁷

The courts encourage the parties to explore settlement options as early as possible as part of the case management process, and they promote the use of alternative dispute resolution. The Chief Justice has recognised the importance of lawyers encouraging parties to use alternative dispute resolution:

Lawyers brought up in the adversary system would be expected to temper adversarial zeal with the sweetness of compromise; litigants claiming an entitlement to their rights will be sent on a detour on arrival at the courthouse; solutions reached by diversionary procedures may deliver cheaper but also a less satisfying form of

¹¹⁵ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996 p 51.

¹¹⁶ G Samuels, "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114 p 121; Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989, ¶1220; Attorney-General's Discussion Paper, *The Higher Court System in Victoria*, May 1989 p 33.

¹¹⁷ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1132. At the time of the report there were five Community Justice Centres. There are now six - Bankstown, Campbelltown, Hunter Region, Penrith, Sydney City and Wollongong

justice.¹¹⁸

The courts have also established 'Offer of Compromise' procedures which provide inducements and sanctions designed to encourage the parties to reach a fair and reasonable compromise.¹¹⁹ It has been suggested that the courts should impose procedures requiring each party to exchange a bona fide offer of settlement once the relevant evidence has been disclosed before trial. Another proposal is to empower judges to compel litigants to undertake mediation or arbitration as precondition to a court hearing.

Some further proposals to divert civil cases from the courts are:

- Increasing the jurisdiction of tribunals to hear civil disputes.
- Encouraging industries to develop private ombudsman schemes to cover consumer complaints.¹²⁰
- Enabling courts to refer issues to a relevant ombudsman or to a Community Justice Centre.
- Increasing the role of Masters and Registrars in determining applications.

6.4.3 *Diverting minor criminal matters from the courts*

A computerised Self Enforcing Infringement Notice System (SEINS) has been operating for a number of years to handle minor traffic, parking and other penalty matters which previously came before the Local Court. Under the system, matters are only listed before the court at the request of the defendant. The scheme has significantly reduced the workload in many Local Courts.¹²¹ The Coopers & Lybrand Report recommended widening SEINS to include some high volume offences normally subject to fines, such as prescribed concentration of alcohol offences.¹²²

¹¹⁸ Hon Sir Gerard Brennan, *Key Issues in Judicial Administration*, Address delivered at the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington 20-22 September 1996.

¹¹⁹ Supreme Court Rules Part 22; District Court Rules Part 19A; Local Court Rules Part 17A.

¹²⁰ Lord Woolf, *Access to Justice: Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London 1996.

¹²¹ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1051.

¹²² Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶ 1057. For more information on SEINS, see G Griffith, *The Fine Default System in NSW: Background and Proposed Legislative Changes*, Briefing Paper No 30/96.

The recently developed Community Youth Conferencing program for juvenile offenders diverts some young people from court and reduces court time spent hearing minor offences.¹²³

6.4.4 *Transfer of cases to lower courts*

Some proposals for increasing the use of the lower courts to reduce pressure on the Supreme Court include:

- Raising the monetary limit on civil claims in the Local and District Court.
- Permitting the District Court to deal with Equity matters, a jurisdiction previously reserved to the Supreme Court.¹²⁴
- Increasing the number of indictable offences that can be tried summarily.¹²⁵
- Conferring a power on the judges of the Supreme Court to remit a matter commenced in the Supreme Court to the District Court where the matter may appropriately be tried in the District Court.¹²⁶

It has been argued that transferring cases to the lower courts may not have a major impact on court delay: 'The Australian experience of trying to cure court delays by forcing small claims to inferior courts has been that lower courts just get further delayed'.¹²⁷ It is also said that where more work is completed in the lower courts, the cases that proceed to the higher courts tend to be of a more complex nature, possibly leading to increased length of trials in the higher courts.¹²⁸

¹²³ For more information see F Manning, *Juvenile Justice in NSW: Overview and Current Issues*, Briefing Paper No 9/96 pp 20-23.

¹²⁴ There is currently a proposal to give the District Court an Equity jurisdiction: Sydney Morning Herald 10/10/96.

¹²⁵ For example, the *Criminal Procedure (Indictable Offences) Amendment Act 1995* significantly increased the range of offences which can be dealt with before a magistrate.

¹²⁶ J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* 1993 p 23.

¹²⁷ P Young, "Current Issues - The Woolf Report", (1996) 70 *Australian Law Journal* 786 p 788.

¹²⁸ L Dessau, "Speedy Trials and a Speedier Criminal Justice System: Recent Observations in Overseas Jurisdictions" (1995) 5 *Journal of Judicial Administration* 43 p 47.

6.4.5 *Reducing number of offences or rights of action*

Another means of reducing the workload of the courts is to reduce the number of offences (in the criminal jurisdiction) or rights of action (in the civil jurisdiction). Existing criminal offences could be legalised, or decriminalised. For example, it is argued in favour of decriminalisation of personal cannabis use that the prohibition takes up a significant amount of court time, diverting resources from more pressing areas of the law.¹²⁹

6.4.6 *Simplifying legislation*

It is argued that clarifying and simplifying legislation could prevent some litigation arising, by reducing ambiguity and making the rights and obligations of persons easily comprehensible.

The effects of legislation on litigation rates should be carefully considered. The Chief Justice of New South Wales has suggested that proposals for enactment of legislation that will increase the volume of litigation should be accompanied by an estimate of the extent of the increase and the likely consequences on the capacity of the court system to deal with its existing workload.¹³⁰

6.4.7 *Encouraging defendants to criminal charges to plead guilty early*

Some measures aimed at obtaining higher rates of guilty pleas have been criticised as placing unacceptable pressures on defendants to forgo their right to a trial. Commentators have been careful to point out that defendants should not be coerced into pleading guilty or punished for choosing to stand trial, and that measures to encourage guilty pleas should focus on persuading persons who intend to plead guilty to do so as soon as possible.¹³¹ Methods to obtain early guilty pleas include:

(1) Encouraging early discussions between defence and prosecution

It is argued that early communication between defence and prosecution leads to guilty pleas at an earlier stage than if discussion is left to the door of the court. Suggested strategies to promote early discussions include early involvement of the Office of the Director of Public Prosecutions in the preparation of the prosecution, early legal representation for the defence,

¹²⁹ See G Griffith and R Jenkin, *Cannabis: The Contemporary Debate*, Current Issues Background Paper, 1994, Vol 1 p 46.

¹³⁰ Hon Mr Justice Gleeson, 'Access to Justice', (1992) 66 *Australian Law Journal* 270 p 271.

¹³¹ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 p 15.

and court-ordered meetings between the defence and the DPP.¹³²

(2) Formalised plea bargaining

Plea bargaining is an agreement by the accused to plead guilty in return for the promise of some concession. In New South Wales the defence and prosecution commonly discuss charges to which the accused would be prepared to plead guilty (referred to as ‘charge bargaining’). The court is not involved and there is no bargaining as to the ultimate sentence. Prosecution guidelines require prosecutors to actively pursue the possibility of appropriate charge bargaining and summary disposal, considering constructively approaches by the accused in that regard.¹³³

A 1995 report on guilty pleas concluded that plea bargaining was a useful and unavoidable part of the criminal justice process in Australia, but that there is considerable inefficiency in the plea discussion system. The report recommended that the plea discussion process be improved to focus on ensuring open and properly structured discussions held at an early stage in the proceedings. The report’s recommendations to increase the efficacy of plea discussions include.¹³⁴

- Ensuring prompt, thorough evaluation of the merits of a criminal charge by prosecution and defence.
- Holding a pre-trial status conference to support appropriate plea discussions and to improve trial preparation.¹³⁵
- Providing information the accused needs to make an informed decision as soon as possible.
- Providing an opportunity for the accused to be heard.
- Protecting the confidentiality of defence disclosures during plea discussions, to

¹³² Pegasus Taskforce Report, *Reducing Delays in Criminal Cases*, 1992.

¹³³ Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, December 1995 p 3.

¹³⁴ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 pp 14-15.

¹³⁵ The possibility of ready resolution should be an explicit focus of such conferences. In South Australia, for example, the judge asks whether the accused intends to maintain a not guilty plea, whether the prosecution is prepared to accept any pleas offered by the defendant, and ensures the accused is aware of any sentence discount which might be available: *ibid* pp 132- 133.

encourage open discussion.¹³⁶

- Making available non-judicial moderators to assist plea discussions.¹³⁷

(3) Sentence discounts

In New South Wales sentence discounts for guilty pleas are established by s 439 of the *Crimes Act* 1900, which requires a court when passing sentence to take into account: (a) the fact that the person pleaded guilty; and (b) when the person pleaded guilty. The court may accordingly reduce the sentence that it would otherwise have passed.

Sentencing discounts have been criticised as an unacceptable pressure to plead guilty, and inconsistent with the principle that sentencing should be based on the accused's conduct and personal characteristics.¹³⁸ A recent study of guilty pleas recommended that there should be no formal sentence discount for a plea of guilty. As an alternative the report recommended that any reduction in sentence for a guilty plea should be no more than 10%, and that the court should state explicitly the amount of reduction attributable to the guilty plea.¹³⁹

Others have also recommended an open, structured sentence discount. It has been proposed that in cases involving a custodial sentence, a specified discount on a plea of guilty should generally be given (subject to the court's discretion in sentencing), such as a 30% reduction for a guilty plea at or before committal; a 20% reduction for a guilty plea at arraignment; and a 10% reduction for guilty plea after arraignment.¹⁴⁰

(4) Sentence indication

In 1992 the NSW Parliament enacted temporary legislation allowing the Chief Judge of the NSW District Court to introduce a sentence indication scheme.¹⁴¹ The scheme provided for an accused person committed for trial in the NSW District Court to seek an indication of the sentence that would be imposed if a guilty plea were entered. The aim of the scheme was

¹³⁶ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 p 126.

¹³⁷ *Ibid* p 140.

¹³⁸ Royal Commission on Criminal Procedure *Report* (UK) (Chairman: Sir Cyril Philips) 1981 Cmnd 8092 ¶8.36; K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 p 166.

¹³⁹ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 pp 172-173.

¹⁴⁰ Pegasus Taskforce Report, *Reducing Delays in Criminal Cases*, 1992 p 25.

¹⁴¹ *Criminal Procedure (Sentence Indication) Amendment Act* 1992

‘to obtain earlier pleas of guilty and more pleas of guilty’.¹⁴²

However, an evaluation of the scheme led to the conclusion that it had no effect on the proportion of defendants proceeding to trial and that it was not responsible for the reduction in delay between committal and case finalisation.¹⁴³ The scheme lapsed at the end of 1995.

(5) Restricting or increasing availability of legal aid

It has been suggested that ‘because there is no consistent merit testing for legal aid in criminal matters, some habitual offenders may be pleading not guilty as a matter of course, when they have no real prospect of acquittal’.¹⁴⁴

However, the presumption of innocence makes problematic the pre-judging of the merits of an accused’s case by legal aid authorities. Further, it is argued that the absence of legal representation for an accused may delay or prevent a guilty plea: ‘One of the main barriers to effective plea discussions is delay in getting the file into the hands of a legal representative who can make a realistic evaluation of the strength of the case.’¹⁴⁵

There have also been warnings that reductions in legal aid may lead to fewer guilty pleas, as accused persons may opt for a trial in the hope that shortages of legal aid funding will lead to the trial being stayed on the ground that the accused is not legally represented.¹⁴⁶

6.5 Increasing the resources available to the courts

Increased court resources could be used in several ways to reduce court delay:

6.5.1 *Appoint more judges*

For example, the State government has recently appointed 56 additional acting judges to deal with backlog cases in the Supreme Court, Compensation Court, Land and Environment Courts and the District Court, and there are proposals to appoint a further 10 acting

¹⁴² Attorney-General, Press Release, 27/7/92. For more information see M Swain, *Sentence Indication Hearings Pilot Scheme*, Briefing Paper 30/94.

¹⁴³ D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation*, NSW Bureau of Crime Statistics and Research, October 1995 p 29.

¹⁴⁴ Coopers & Lybrand, *Report on a Review of the New South Wales Court System*, 1989 ¶1021.

¹⁴⁵ K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration Inc, 1995 p 13.

¹⁴⁶ N Cowdery, Director of Public Prosecutions (NSW), quoted in B Lagan, ‘Legal aid cuts: DPP warns of jury tampering’, *Sydney Morning Herald* 12/11/96.

judges.¹⁴⁷

6.5.2 *Employ more administrative staff*

A lack of administrative staff has been said to adversely affect the efficiency of the courts, and increase the amount of time spent by judges on administrative matters.

6.5.3 *Better computer facilities and information technology*

The Public Accounts Committee found that the level of information technology in the courts is not acceptable, and that the poor level of technology exacerbates the delays already inherent in the system. The Committee recommended that the Attorney-General's Department proceed swiftly with the implementation of its Information Technology Strategic Plan, particularly in regard to management information systems.¹⁴⁸

The Chief Justice has emphasised the usefulness of court-room technology in complex cases:

Technology ... offers the prospect of recapturing and analysing evidence simply and speedily. These facilities are of great utility during a trial as well as on appeal. Indeed, information technology has proved to be useful from the stage of filing originating process to the stage of final appellate judgment. We have barely begun to discover the benefits which information technology can provide in litigation: filing documents, preparing and transmitting proofs of evidence, plans, photographs and videos, cross-referencing of subject matter, searching for authorities, citation, principles and annotations and even the statistical analysis of prospects of success or failure.¹⁴⁹

6.6 General reforms

6.6.1 *Judge time*

Proposals to make the most use of existing judge time include:

- Extending the sitting hours of courts and court registry hours. For example, some courts have introduced extended registry hours, and the Local Courts are

¹⁴⁷ Sydney Morning Herald 10/10/1996

¹⁴⁸ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996 p 47.

¹⁴⁹ Hon Sir Gerard Brennan, *Key Issues in Judicial Administration*, Paper presented at the 15th Annual Conference of the Australian Institute of Judicial Administration, 20-22 September 1996.

- experimenting with night court sittings.¹⁵⁰
- Cancelling or limiting court vacations;
- Restricting the use of judges on Royal Commissions, inquiries and other non-judicial activities.

6.6.2 *Charging practice*

Prosecution guidelines by the Director of Public Prosecutions emphasise that prosecutors must guard against the risk of hearings becoming unduly complex or lengthy. The guidelines provide that charges are to be selected that are appropriate to the criminality alleged and enable the matter to be dealt with expeditiously. Substantive charges are to be preferred to conspiracy charges.¹⁵¹

6.6.3 *Legal costs*

It is the view of many that the existing system for payment of lawyers according to the amount of work done encourages lawyers to over-service clients and spend as much time as possible on a case. Suggestions have been made to re-structure the costs system in both the civil and criminal jurisdictions to encourage lawyers to hasten resolution of matters. Proposals include prescribing fixed fees according to a scale (with provision for costs assessment),¹⁵² and restricting legal aid funding to a maximum lump sum amount for each trial.

Other commentators reject lump sum fees as unsuitable and potentially unfair to one side or another.¹⁵³ Instead, it has been proposed that at the end of a hearing, committal or trial, the court should have the discretion to disallow fees and expenses payable in cases of clearly unjustifiable waste. A formal mechanism allowing the court to pass adverse comment on the conduct of counsel or a solicitor which led to the waste of public monies is also suggested.¹⁵⁴

¹⁵⁰ *The Model Court Project: a joint project by the Attorney General's Department (NSW) and the Law Foundation of New South Wales 1990*; Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 53.

¹⁵¹ Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, December 1995 p 2.

¹⁵² G Davies, "Justice Reform: A Personal Perspective", Paper presented at the 1996 Legal Convention, 1/11/96.

¹⁵³ Pegasus Taskforce Report, *Reducing Delays in Criminal Cases*, 1992.

¹⁵⁴ *Ibid* ¶54-55.

6.6.4 *Class actions*

It has proposed that a class action procedure in civil cases should be introduced in New South Wales. It is argued that class actions are a more efficient use of court resources than the existing representative procedures, where several plaintiffs have similar causes of action against a defendant.¹⁵⁵

6.6.5 *Detailed monitoring of delay indicators*

The need for accurate and consistent information about the operation of the courts and disposal of cases has been emphasised:

Court administrators and judicial officers who do not know why courts are failing to ensure the expeditious passage of trial cases through the court system can hardly be expected to agree upon, let alone implement, effective strategies for dealing with the problem. In order to understand why trial courts are failing to achieve the goal of expeditious case processing it is as vital to monitor factors which influence trial hearing delay as it is to measure trial hearing delay itself.¹⁵⁶

7. CONCLUSION

There are no easy solutions to undue court delay, although a large number of reforms have already been implemented, and declines in court delay in recent years have been observed as result. However, there remain troublesome areas, and there is potential for delays to increase as a result of factors such as increases in the crime rate or decreases in legal aid funding. There is also the possibility that shorter delays will encourage some people to go to court who at the moment are deterred by delay from pursuing a hearing.

It is clear that co-operation between Parliament, the executive, the judiciary and legal practitioners is required for significant reductions in delay to occur. The issue that all these bodies face is how to balance the protection of individual rights against the interest of the community in speedy justice:

The challenge for those who advocate the introduction of such measures, for those who legislate to introduce them and for judges, court administrators and legal practitioners who put them into effect is to ensure that nothing done in the name of

¹⁵⁵ See M Swain, *Class Actions in New South Wales*, Briefing Paper No 22/96.

¹⁵⁶ D Weatherburn, *Measuring Court Performance: Indicators for Trial Case Processing*, Crime and Justice Bulletin No. 30, June 1996, NSW Bureau of Crime Statistics and Research p 10.

efficiency leads to injustice.¹⁵⁷

The court system of the future may well be significantly different, and significantly more demanding on the parties and their representatives, than the familiar adversarial system.

¹⁵⁷

J Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism - Part II', (1995) 4 *Journal of Judicial Administration* 193 p 218.

APPENDIX A
DEFINITIONS

Arraignment: a procedure taking place after an accused person has been committed for trial at a committal hearing. When the indictment has been prepared, the accused is called to the bar, the indictment is read aloud, and the accused is asked whether he or she pleads guilty or not guilty to each charge.

Committal proceedings: proceedings held at the Local Court before a magistrate to determine whether there is sufficient evidence to put a person on trial for an indictable offence.

Default judgment: a judgment in favour of a plaintiff that a court may give where the defendant does not provide a defence;

Discovery: a procedure in civil litigation that requires the parties to disclose all documents relevant to the issues in the litigation.

Interrogatories: a list of questions from one party to civil litigation to another, relating to the matters in issue of the proceedings.

Interlocutory proceeding: proceeding to obtain a provisional order or decree from the court in the course of a legal action.

Judicial review: a legal challenge to the validity of an administrative decision.

Pleadings: formal statements of the cause of an action or the defence.

Summary judgment: a judgment in favour of a plaintiff that a court may give where evidence shows that the defendant has no defence.

Voir dire: an investigation into the truth or admissibility of evidence, held during a trial.

APPENDIX B

DELAY FIGURES - NEW SOUTH WALES

CRIMINAL JURISDICTION

Local Court

Median Length of Time from First Appearance to Determination (days)¹

Outcome of Appearances	1995		1994		1993		1992	
	Bail	Custody	Bail	Custody	Bail	Custody	Bail	Custody
Proceeded to Defended Hearing								
All charges dismissed	83	42	89	30.5	96	42	98	66

District Court

Median Length of Time from Arrest to Committal (days)² - Sydney Registry

Outcome of Appearances	1995		1994		1993		1992	
	Bail	Custody	Bail	Custody	Bail	Custody	Bail	Custody
Proceeded to Defended Hearing								
Acquitted of all charges	159	74.5	191	202	181	174	165.5	51
Guilty of at least 1 charge	200	77.5	208	50	169	106.5	181	134

Median Length of Time from Committal to Outcome (days)³ - Sydney Registry

Outcome of Appearances	1995		1994		1993		1992	
	Bail	Custody	Bail	Custody	Bail	Custody	Bail	Custody
Proceeded to Defended Hearing								
Acquitted of all charges	519.5	200.5	427	200	482	203	611.1	275
Guilty of at least 1 charge	494	251	504	206	556	217	649	350.5

¹ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995* Table 1.13.

² New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995* Table 3.14e.

³ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995* Table 3.14e.

Supreme Court

Median Length of Time from Arrest to Committal (days)⁴

Outcome of Appearances	1995		1994		1993		1992	
	Bail	Custody	Bail	Custody	Bail	Custody	Bail	Custody
Proceeded to Defended Hearing								
Acquitted of all charges	168	192	148	167	169	149.5	155	180
Guilty of at least 1 charge	172	182	165	135	140.5	135	153	111

Median Length of Time from Committal to Outcome (days)⁵

Outcome of Appearances	1995		1994		1993		1992	
	Bail	Custody	Bail	Custody	Bail	Custody	Bail	Custody
Proceeded to Defended Hearing								
Acquitted of all charges	371	484	441	154	509	365	381	344
Guilty of at least 1 charge	457	243.5	389	314	605	304	450	372

CIVIL JURISDICTION

Supreme Court

Delay from commencement to finalisation (months)⁶

Division	Duration	1994/95	1993/94	1992/93	1991/92
Equity - General list	Readiness for hearing to hearing	15	18	24-30	27.3
Equity - Short matters	Readiness for hearing to hearing	1-3	3	3	3
Commercial	Registration to finalisation	9	9	8-12	8
Court of Appeal	Registration to finalisation	35	24	15	13

⁴ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995* Table 3.14a.

⁵ New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1992, 1993, 1994, 1995* Table 3.14e.

⁶ New South Wales Attorney General's Department, *Annual Report 1994/95* pp 24-25.

District Court

Median time from filing a praecipe (to set down an action for trial) to finalisation (months)⁷

Period	At Hearing	At Arbitration	By settlement
1991	50.2	47.5	45.4
1992	50.8	41.4	39.0
1993	43.9	24.9	22.3
Jan-Jun 1994	32.2	15.0	16.7
Jul-Dec 1994	37.1	14.0	16.1
Jan-Jun 1995	31.4	8.6	8.2

The Public Accounts Committee Report on *Customer Service in Courts Administration: The Missing Dimension* did not contain a table for disposal times for Local Court civil matters.

⁷ Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996 p 25.

APPENDIX C
CASELOAD FIGURES

CIVIL AND CRIMINAL JURISDICTIONS

Supreme Court

Cases commenced¹

Division	Case commencement	1994/95	1993/94	1992/93	1991/92
Common Law	Statements of claim filed	3 336	9 297*	5 373	6 929
Criminal	Matters registered	107	147	130	196
Equity	New filings	4 252	4 311	5067	5 607
Commercial	New filings	275	361	549	636
Court of Criminal Appeal	Appeals lodged	758	879	870	848
Court of Appeal	Appeals lodged	780	634	760	803

* In September 1993 approximately 3000 breast implant cases were filed

District Court

Cases commenced (Statewide)²

Jurisdiction	Case commencement	1994/95	1993/94	1992/93	1991/92
Criminal	Trials registered	3 318	3 105	2 980	3 238
Civil	Statements of claim filed	16 402	13 401	10 552	16 883

Local Court

Cases commenced (Statewide)³

Jurisdiction	Case commencement	1995	1994	1993	1992
Criminal	New matters	197 623	201 438	220 470	224 853
Civil claims	New matters	22 125	28 708	26 878	25 965
Family Law	New matters	13 346	13 486	14 806	13 701

¹ New South Wales Attorney General's Department, *Annual Report 1994/95*, pp 23-25.

² New South Wales Attorney General's Department, *Annual Report 1994/95*, pp 27-28.

³ *Chief Magistrate's Review 1992, 1993, 1994, 1995*.

Criminal Jurisdiction - analysis

In the criminal jurisdiction, there has been an overall decline in the number of cases registered. The Supreme Court from 1990 to 1995 showed a significant downward trend in the number of criminal cases registered. The District Court from 1990 to 1995 showed a significant downward trend in the number of criminal cases registered for trial or sentence. The Local Court has shown a downward trend in the number of criminal cases registered from 1990 to 1995.⁴

⁴ New South Wales Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice: New South Wales 1995*. No similar statistical analysis is available for civil matters.

APPENDIX D

OVERVIEW OF COURT ADMINISTRATION REVIEWS

From Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996 pp 12 and 46, and Audit Office submission p 28.

Overview of review process in NSW concerning courts administration

Name and Producer of Report/Consultants review:	Sponsoring Department:	Timing of Report:	Major Recommendations of the Report:	Implementation Status as of May 1996:
<p><i>Review of the NSW Court System</i> Coopers & Lybrand</p>	<p>Attorney General's Department and the Premier's Office</p>	<p>October 1988 - May 1989</p>	<ul style="list-style-type: none"> • Improve the adequacy and quality of management information. (Improve data collection) • Create the DOCA • Introduce case management techniques • Develop alternative dispute resolution techniques 	<ul style="list-style-type: none"> • Still in planning phase/beginning implementation • Implemented (since reversed) • Implemented • Implemented
<p><i>Court Services Review</i> Anderson Consulting</p>	<p>Department of Courts Administration (DOCA)</p>	<p>Completed in January 1994</p>	<ul style="list-style-type: none"> • Implement case management system (this included information technology needs) • 32 major recommendations 	<ul style="list-style-type: none"> • Superseded by the ITSP (see below) • Implementation ranges from complete to not at all
<p><i>Performance Audit of DOCA</i></p>	<p>Audit Office</p>	<p>February 1994 - January 1995</p>	<ul style="list-style-type: none"> • 6 major recommendations 	<ul style="list-style-type: none"> • All partially implemented
<p><i>Information Technology Strategic Plan (ITSP)</i> KPMG Management Consulting</p>	<p>Attorney General's Department</p>	<p>January 1996 - May 1996</p>	<ul style="list-style-type: none"> • Implement Information Technology Strategic Plan 	<ul style="list-style-type: none"> • Implementation has commenced for the first phase of the Plan

APPENDIX E

LOCAL COURT CRIMINAL TIME STANDARDS

4. Indictable Offences - committal proceedings

(a)	arrest or issue of summons to first appearance.	21 days	21 days
(b)	prosecution will be permitted maximum period of 21 days within which to prepare and serve a brief.	21 days	42 days
(c)	defence will have 7 days within which to reply.	7 days	49 days
(d)	parties must be in a position to accept a hearing date within 56 days of the defence reply.	56 days	105 days
(e)	in those matters committed for trial the papers will leave the Local Court within 6 days after date of committal.	6 days	111 days

NOTE:

Custody matters: The time standards for indictable committal hearings will be the same whether the defendant is in custody or released on bail. The current practice of giving priority to those in custody will continue. Those in custody will have priority within the enunciated time standards.



I H PIKE
CHIEF MAGISTRATE

2. Summary Summons - plea of not guilty

- | | | | |
|-----|---|---------|---------|
| (a) | issue of summons to first appearance | 28 days | 28 days |
| (b) | an adjournment not exceeding 21 days will be permitted to allow a decision to be made as to whether the matter is to be a plea of guilty or not guilty. | 21 days | 49 days |

Upon the adjourned date the defence must indicate a plea. If the matter is to be defended, all parties must be in a position to advise the Court of the number of witnesses, the anticipated length of hearing, and must be prepared to take a hearing date within a period not exceeding 63 days.

- | | | | |
|-----|----------|---------|----------|
| (c) | Hearing. | 63 days | 112 days |
|-----|----------|---------|----------|

3. Indictable Charges - plea of guilty - s.51A

- | | | | |
|-----|--|---------|---------|
| (a) | arrest to first Court appearance. | 21 days | 21 days |
| (b) | prosecution will be permitted a maximum period of 21 days within which to prepare and serve a brief. | 21 days | 42 days |
| (c) | plea will be dealt with on the return date or within 7 days thereafter. | 7 days | 49 days |

PRACTICE NOTE NO. 1/1995

TIME STANDARDS

The Chief Judge of the District Court has convened a Committee to recommend time standards to assist in the more expeditious disposal of criminal trials. The Chief Judge and the Chief Magistrate have agreed that their Courts will co-operate with a view to achieving the time standard goals set out hereunder.

The Chief Magistrate has varied the time standards published in Practice Note 1/92, to commence from 1 April 1995 expiring on 31 March 1996. At the expiration of this period, time standards will be reviewed.

1. <u>Summary Charges - Plea of not guilty</u>		Progressive Times
(a) arrest to first appearance.	21 days	21 days
(b) an adjournment not exceeding 21 days will be permitted to allow a decision to be made as to whether the matter is to be a plea of guilty or not guilty.	21 days	42 days
<p>Upon the adjourned date the defence must indicate a plea. If the matter is to be defended, all parties must be in a position to advise the Court of the number of witnesses, the anticipated length of hearing, and must be prepared to take a hearing date within a period not exceeding 63 days.</p>		
(c) Hearing.	63 days	105 days

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<i>Gregory Wayne Kable: A Criminal and Constitutional Hard Case</i> by Gareth Griffith	No 3 / May 1996
<i>Electoral Systems and MMP in New Zealand</i> by Gareth Griffith	No 4 / September 1996

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